Before the Building Practitioners Board

	BPB Complaint No. CB25632
Licensed Building Practitioner:	David Jaquiery (the Respondent)
Licence Number:	BP 109036
Licence(s) Held:	Carpentry, Site AoP 2, Design AoP 3, Roofing: Liquid Membrane Roof, Profiled Metal Roof and/or Wall Cladding, Roof Membrane, Shingle or Slate Roof, Torch on Roof Membrane

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Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	18 January 2022
Decision Date:	3 March 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.

Contents

Summary of the Board's Decision

[1] The Respondent carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He is fined $4,500 and ordered to pay costs of $8,000. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and there will be further action taken to publicly notify the Board's decision. An article in The Wrap-up will be published.

The Charges

[2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[3] The Board gave notice that in further investigating the allegations, the Board's inquiries would be into the following issues:

(a) whether building work requiring a building consent was carried out prior to one being issued;

(b) an alleged failure to have building inspections carried out in accordance with the building consent and building consent conditions;

(c) non-compliance issues set out in Council Site Notices dated 13 July 2020, 30 July 2020, 10 September 2020 (and associated Site Reports of the same dates) and any Notices to Fix or Stop Work notices issued; and

(d) any further issues noted and raised by the Special Adviser.

Function of Disciplinary Action

[4] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[5] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board,*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[6] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

> *… the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It*

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

> *includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[7] Finally, the Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[8] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

[9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Background to the Complaint

[11] The Respondent was engaged by the Body Corporate of the property (a five-storey multi-unit dwelling compromising four units) to prepare a proposal for, and then carry out remedial works. These were the waterproofing of the existing membrane flat roofs, plastered exterior cavity system walls, and membrane decks with new balustrades. The majority of the windows and door units were also being replaced.

Evidence

[12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[13] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further

[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

evidence from key witnesses. The hearing is not a review of all of the available evidence.

[14] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:

Ron Pynenburg, Special Adviser to the Board

David Jaquiery, Respondent

Michael Thomson, Complainant, Wellington City Council Building Inspector

Dave MacIntosh, Wellington City Council

Stuart Jeffs, Building Surveyor, Cove Kinloch New Zealand Limited

[15] As noted in paragraph [3] above, the Board gave notice that its investigations would include any matters raised by Mr Pynenburg in his report to the Board. At the hearing, the Respondent requested a copy of Mr Pynenburg's report. He stated he had seen it but had not studied it. He was provided with a copy and an opportunity to review it prior to the hearing proceeding. He was also offered an adjournment to further review the report, which he declined.

[16] During the hearing, the Respondent was also granted an opportunity to provide a further, post-hearing, written response to Mr Pynenburg's report. This was received on 19 January 2022 and has been taken into account by the Board in reaching its decision.

Issue One – Work Commenced prior to Building Consent being Issued

[17] The Building Consent Application was lodged on 8 January 2020, and following several Requests for Further Information, the Building Consent was issued on 1 July 2020. The Respondent accepted that work was undertaken before the Building Consent was issued but did not agree with Mr Pynenburg's view of the extent of that work.

[18] Mr Pynenburg, the Special Adviser to the Board, set out in his report (Document 5.1.2 Page 509 of the Board File, Paragraph 4.3.3) his conclusions, based on the Site Notice of 13 July 2020 and photographs, as to work done before the Building Consent was issued.

[19] Of these, the Respondent accepted – replacement tiling and membrane to decks apartments 3 and 4, replacement glazed balustrade and new concrete nib apartment 4, new concrete nib apartment 3 and under construction apartment 2, replacement joinery to apartments 3 and 4, TRITOflex membrane application completed to membrane roof of apartment 4 – as work completed prior to the Building Consent being issued.

[20] The Respondent did not accept that all of apartment 4 was complete, saying only the interior was complete, and no timber remediation work was carried out. In

respect of the TRITOflex membrane application to the walls of apartment 4 and in progress for apartment 3, he accepted this but stated this did not include the meeting of the wall and deck membrane – *"this was work still to be done or have an amended design".* (Post-hearing submission of Respondent dated 19 January 2020, Document 10.1, Page 2337 of the Board file, paragraph 4.3.3).

[21] In addition, the Respondent stated – *"The work progress on the 13th of July was about 50% of the contract works was done."* (Post-hearing submission of Respondent dated 19 January 2020, Document 10.1, Page 2337 of the Board file, paragraph 4.4.1).

[22] The Respondent put forward several justifications for commencing the work prior to the Building Consent being issued. These were that:

(a) Section 41(1)(c) of the Act applied as the work had to be carried out urgently to protect the mental health of the dwelling occupiers;

(b) The Council took over their initial 20 Working Day statutory period (section 48(1) of the Act) to consider the application and, as such, the Council was in breach of the Act;

(c) The principles of Section 4(2) of the Act apply to direct a Licensed Building Practitioner and require cost over the whole life or a building to be taken into account;

(d) Section 40 of the Act allows for work to commence once a Building Consent has been applied for. A Building Consent does not have to have been issued, particularly in this situation where the work was being done exactly as per the building consent application; and

(e) Building Consent was only applied for because the clients asked for it. A Building Consent was not necessary as the work was building work for which a consent is not required as it came within Schedule 1 of the Act.

[23] The evidence to support the effect on the mental health of the dwelling occupants was provided by the Respondent only. He spoke of *"extremely distressed"* occupants, phone calls every month chasing him to start work, and buckets of water in the lounge rooms every time it rained.

[24] On the issue of the urgency of the work, the Respondent's view was that if the Building Consent had taken 1-2 weeks, there would have been no extra damage. However, he stated that with the 7-month delay, there was carpet and wall damage to a value of a *"few thousand, maybe $10,000",* but that the main issue was the mental stress on the occupants.

[25] Mr Pynenburg's view of the urgency of the work was that *"the additional damage that might occur over the period within which a building consent could have been obtained is unlikely to meet the test of being "serious damage". Therefore,*

commencing without the building consent was also unlikely to "prevent serious damage"" (Document 5.1.2, Page 513 of Board File, paragraph 4.3.15).

[26] Mr Jeff's opinion was that the property would not have gotten worse over the time period it took to get the Building Consent. It was a matter of inconvenience only.

[27] It was put to the Respondent that as the Building Consent application was lodged on 8 January 2020, and work commenced on the roof on 20 January 2020, this was within the 20 working days the Council had by statute to consider the application. This implied, therefore, that the timeframe it took the Council to issue the Building Consent was not the reason he commenced work prior to its issue. The Respondent replied that he believed he could start under section 41 (1) (c), and if *"worst comes to worst he will apply for a Certificate of Acceptance".*

[28] The Respondent was of the view that section 40 of the Act provided that the trigger point for work being able to be commenced was an application for building consent and not the issuance of one. The only arguments he put forward to support this point were that the work he undertook complied with and did not change from the building consent application and *"It does not say that work cannot start until the building consent is granted"* (Document 2.2, Page 498 of the Board File, Paragraph 7).

[29] This is a point with which Mr Pynenburg disagreed. He stated that even if the consented documents were exactly the same as those submitted without any changes, this was not *"of itself…a reason to commence building work without the consent being issued."* Furthermore, Mr Pynenburg was of the view that the documents consented were different from those submitted, based on the RFIs and the responses to them. (Document 5.1.2, Page 514 of the Board File, Paragraphs 4.3.19-4.3.22).

[30] The Respondent was asked by the Board what would happen, having started the work consequent upon an application only, if the consent was not granted. The response was that he did not require a building consent for this work in any event, so that even if he had applied for a consent, he could do the work before receiving it.

[31] Again, this view was not accepted by Mr Pyenburg, who stated – "*If you seek a Building Consent, even though you don't need one, then you are required to comply with the Building Consent provisions and that includes no work before the Building Consent".*

[32] The Respondent expressed the view that this work did not need a Building Consent in any event as it came under the Schedule 1 exemption in the Act. Mr Pynenburg stated that the concrete nibs and balustrades were not able to be done under Schedule 1.

[33] In discussion with the Board, Mr Pynenburg agreed that as the building had failed within its durability period of clause B2 (with the deck/wall threshold failure being known since 2006), the work, therefore, needed a Building Consent.

[34] The Board notes that as the building was originally constructed as a multi-unit dwelling under a single original building consent, it had previously been treated as one building.

Issue Two – Council Inspections and Notice To Fix

[35] The Building Consent issued on 1 July 2020 listed 9 required Council inspections. The first Council inspection site visit took place on 13 July 2020, and the site notice records that no inspections had been carried out to date, but work had been done (Document 2.1.21, Page 33 of the Board File). The Respondent stated that these requirements "made him laugh" as many of them were not needed.

[36] It was put to the Respondent that he was unable to know what inspections the Council may require and starting work before the Building Consent issued could cause difficulties with this. His response was that he did not believe any Council inspections were required, and the CodeMark sign off of the TRITOflex waterproofing membrane application (the compliance with which he himself determines) was sufficient.

[37] The Respondent accepted that it was open to the Council to stipulate the inspections it required and that it may have wanted more than he thought was required. His evidence was that he had *"got caught with the Council wanting to see the substrate before work started."* He said that everything he had done was quick and everything else would have been done in due course, but only if the Council required it.

[38] Site notices were issued on 13 July 2020, 30 July 2020 and 10 September 2020. (Documents 2.1.2, Pages 33,35 and 37 of the Board File). All three noted that no Council Inspections had taken place and no further work was to be carried out. A Notice to Fix was issued on 28 September 2020. (Document 8.1.6, Page 1999 of the Board File).

[39] It was the evidence of Mr Thomson on behalf of the Council that work continued between these respective stop work notices. The Respondent firstly said the only work which continued was the concrete nib but then added that the membrane was continued on level 3.

Issue Three – Building work not in accordance with the consented drawings

[40] Mr Pynenburg identified five potential issues -

(a) Membrane has been taken from deck up over the cladding preventing moisture in the cavity from escape;

(b) Insufficient upstands to joinery;

(c) Insufficient gaps between the cladding and the deck;

(d) Scupper sizes in the deck do not comply with E2; and

(e) The decks do not have the minimum fall required by E2.

[41] Mr Pynenburg concluded on the photographs and documents available to him that (a), (b), (c), and (d) set out above were not built in accordance with the consented drawings. In the absence of any measurement of the as-built decks, Mr Pynenburg was unable to reach an opinion on issue (e) above.

[42] The Respondent's evidence on the first point was contradictory. He variously claimed there were no blocked cavities, that the job was not finished, that he intended for the membrane to return up behind the cladding, and then, in contradiction, that he intended to fuse the deck and wall membrane but not remove any cladding.

[43] The evidence of Mr Thomson for the Council was that the majority of the cladding areas on the deck were blocked. On the top deck, in particular, there is a 2-3 metre stretch between the windows where the cavities are blocked.

[44] The Board put to the Respondent that the TRITOflex manual showed a detail for a cavity that required a 6mm allowance for the drained cavity but that he had done a continuous membrane with no allowance for the cavity (Document 2.1.154, Page 166 of the Board File). The Respondent said that he would have dealt with it later and done *"whatever the Council required."*

[45] Mr Pynenburg stated:

> *"In my opinion, and based on the information available to me, where the original cladding was installed over a cavity, the cladding would no longer comply with these performance criteria of Clause E2 after the application of continuous coat of Tritoflex."* (Document 5.1.2, Page 516 of the Board File, Paragraph 4.4.10)

[46] The Respondent gave evidence that the upstands were left at 80mm instead of the required 100mm because the Council had not objected. If it had, he stated he would have addressed the issue then. When it was put to him by the Board that the Building Consent drawings showed that it would be 100mm his response was – *"hadn't got round to the upstands".*

[47] He was unable, on questioning from the Board, to reconcile the requirement in the drawings for the 100mm upstand, the existing threshold of the windows and the need to create the required fall on the deck. The Respondent commented that no on-site investigation was done. Everything was off the original drawings.

[48] In respect of the deck falls, Mr Thomson highlighted a photo showing ponding on a newly finished deck. (Document 2.1.468, Page 480 of the Board File). The Respondent stated that it needed remedial work and he was going to fix it.

[49] The consistent message in the Respondent's responses to all of these issues was that the job was not yet complete, what he had done was acceptable unless the Council required more, and, in that case, he would do what the Council required.

Board's Conclusion and Reasoning

[50] The Board has decided that the Respondent **has**:

(a) carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act); and

(b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act)

and **should** be disciplined.

Negligence – Carrying out building work prior to a Building Consent being issued

[51] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the Bolam[7] test of negligence which has been adopted by the New Zealand Courts[8].

[52] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[53] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[10] noted in paragraph [43] above. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[11].

[54] In relation to the failure to ensure a building consent was in place prior to the building work commencing, the Board notes, under section 40 of the Act:

[7] Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

[8] Martin v Director of Proceedings [2010] NZAR 333 (HC), F v Medical Practitioners Disciplinary Tribunal [2005] 3 NZLR 774 (CA)

[9] Martin v Director of Proceedings [2010] NZAR 333 (HC), F v Medical Practitioners Disciplinary Tribunal [2005] 3 NZLR 774 (CA)

[10] Martin v Director of Proceedings [2010] NZAR 333 at p.33

[11] McKenzie v Medical Practitioners Disciplinary Tribunal [2004] NZAR 47 at p.71

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[55] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

> ***3 Purposes***
> *This Act has the following purposes:*
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
> *(i) people who use buildings can do so safely and without endangering their health; and*
> *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
> *(iii) people who use a building can escape from the building if it is on fire; and*
> *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
> *(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[56] In *Tan v Auckland Council*[12] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes*

[12] [2015] NZHC 3299 [18 December 2015]

described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work

[57] Justice Brewer in *Tan* also noted:

[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[58] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[59] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is in place prior to building work being carried out. It follows that failing to do so can fall below the standard expected of a licensed building practitioner.

[60] The Respondent accepted that work was done prior to the Building Consent being issued. Although the extent of that work was contested, by his own evidence, the contract works were 50% complete by 13 July 2020 when the first Council site inspection occurred. Accordingly, the Board finds that substantial work was carried out before the Building Consent was issued.

[61] The Respondent advanced five justifications for commencing work before the Building Consent was issued. The Board does not accept any of these and addresses them in turn as follows.

[62] Section 41 (1) of the Act states:

41 Building consent not required in certain cases

(1) Despite section 40, a building consent is not required in relation to—

(c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently—

(i) for the purpose of saving or protecting life or health or preventing serious damage to property

[63] Justice Chisholm in *O'Byrne v Waimakariri District Council*[13] stated:

[31] Before s 41(1)(c)(i) can apply there must be such an imminent danger to life, health or property that it is impracticable to obtain a building consent

[13] BC201163848 High Court Christchurch CRI – 2011-409-000065 10,25 August 2011 Chisholm J.

> *in advance. This high threshold reflects the underlying statutory policy that in the ordinary course of events a building consent must be obtained before building work begins (ss 40 and 44) and that failure to comply with this requirement gives rise to an offence of strict liability (s 388). If this statutory purpose is to be preserved the cases in which a defence under s 41(1)(c)(i) is made out are likely to be relatively rare.*
>
> *[35] That case illustrates that whether or not the necessary imminent danger exists needs to be objectively assessed. While a defendant seeking to rely on s 41(1)(c)(i) might be subjectively sincere in his or her belief about the imminence of the danger and the absence of reasonable alternative courses of action, that is not enough. The defendant's actions must also withstand objective scrutiny.*

[64] Based on the opinion of the expert witnesses, Mr Jeffs and Mr Pynenburg, the Board considers the Respondent has not established that the building work had to be carried out urgently to prevent serious damage.

[65] Further, the evidence given by the Respondent as to the mental health impact of the issues on the dwelling inhabitants did not meet the high threshold as required by *O'Byrne v Waimakariri District Council.*

[66] The alleged breach by the Council of its obligation to consider the Building Consent application within a certain statutory time frame (and the Board makes no finding on this point) is no justification for commencing work without consent.

[67] The Respondent relied on section 4(2) of the Act as setting guiding principles for a licensed building practitioner, which justified the Respondent commencing work before the consent was issued. As pointed out to the Respondent, by the Board, during the hearing, this section (even if it were capable of the interpretation being suggested by the Respondent) applies only to the Minister, Chief Executive and territorial authorities and not to Licensed Building Practitioners due to the provisions in section 4(1) of the Act which stipulates who the provisions in section 4(2) of the Act apply to.

[68] The interpretation of section 40 advanced by the Respondent was that building work could commence upon application for the Building Consent being made and that he did not have to wait for its issuance. This was on the basis that the Respondent maintained the building work undertaken was in accordance with the Building Consent as ultimately issued.

[69] The Board agrees with Mr Pynenburg's analysis which demonstrates the work as built did not accord with the consented drawings in several respects (for example, membrane covering cavity, insufficient threshold clearance for an enclosed balcony, and base of cladding clearances). Furthermore, the Respondent's contended interpretation of section 40 does not accord with the purposes of the Act or the statutory design of the consenting provisions. Also, when applying for a

Building Consent, there are no guarantees that the Building Consent issued will be as per the original application. The process of consent clarification through requests for information and changes to the Building Consent to satisfy the Building Consent Authority that it will meet Building Code requirements can, and often does, result in changes. Proceeding on the premise that there will not be any required changes is not tenable.

[70] The final explanation offered by the Respondent was that, in any event, the work was covered by the Schedule 1 exemption under the Act, and, as such, he did not need to comply with the Building Consent provisions.

[71] The Board considers, supported by Mr Pynenburg's expert opinion, that once the consent process is chosen (in circumstances where there is a choice) and embarked upon, then that process must be respected and followed. It is not open to the Respondent to pick and choose which, if any, aspects of that statutory process he will abide by.

[72] For the sake of completeness, the Board records that it considered the work undertaken by the Respondent was not, in any event, appropriately characterised as being capable of being carried out under the Schedule 1 exemption under the Act. This view was supported by Mr Pynenburg. The Board also notes that the owners of the property had sought the assurance and protection of a Building Consent and a Code Compliance Certificate and were entitled to obtain the same by the work being carried out after a Building Consent was issued, not before.

[73] With regard to the issues before the Board, which includes persons with extensive experience and expertise in the building industry, it has decided that the Respondent departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

[74] The Board notes a prevailing attitude from the Respondent that he could undertake this work and concern himself with Council requirements (building consent and inspections) and compliance issues later and only if picked up by the Council. This approach is typified by his written submission after the hearing (Document 10.1, Page 2341 of the Board File), which sets out five ways he considers compliance could be obtained for the work after it was done. This "mop up" approach is unacceptable and contrary to the statutory process and purpose of the Act.

[75] Furthermore, the Board did not detect any understanding by the Respondent, as the hearing unfolded, of any of the difficulties with his approach to commencing work before the consent was issued.

[76] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board in *Daniels*

v Complaints Committee[14] the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.

Negligence - Building Consent inspections and Notice to Fix

[77] With respect to the remaining issues raised in the Board's Notice of Proceeding, the Board also finds that the Respondent was negligent when he failed to ensure work was inspected as it progressed and when he failed to comply with stop-work notices and a Notice to Fix.

[78] The same legal principles outlined above apply. In applying them, the Board notes that the Respondent, the holder of Design AoP 3 and Site AoP 2 licenses, should have known that compliance inspections would be required as the work progressed, irrespective of whether a Building Consent had been issued. Inspections, whether by the Building Consent Authority (BCA) or a person who could have issued a producer statement acceptable to a BCA, would have ensured that there was independent verification of compliant building work. The BCA could also have identified many of the non-compliance issues and contradictions to the approved Building Consent Documentation that were noted when inspections finally took place. In failing to obtain inspections as the work progressed, the Respondent's conduct has fallen below that expected of a Licensed Building Practitioner.

[79] The Board also finds that the Respondent was negligent when he failed to take notice of and comply with stop-work notices and a Notice to Fix. He allowed work to continue and, in doing so, continued to show contempt for the regulatory framework in the Act.

Contrary to a Building Consent

[80] Section 40 of the Act (as set out above), requires all building work to be carried out in accordance with the building consent issued.

[81] Unlike negligence, the disciplinary ground of building work carried out contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established[15].

[82] The Board, which includes persons with extensive experience and expertise in the building industry and supported by Mr Pynenburg's expert evidence, finds that the Respondent carried out building work not in accordance with the building consent issued.

[14] [2011] 3 NZLR 850.
[15] *Blewman v Wilkinson* [1979] 2 NZLR 208

[83] It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Penalty, Costs and Publication

[84] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[85] The Board heard evidence during the hearing relevant to penalty, costs, and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative

Penalty

[86] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[16] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[87] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[17] the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[88] The matter was at the higher end of seriousness, and as such, the Board considered suspension of the Respondent's licenses as a possible penalty. A mitigating factor was that the Respondent was under pressure from the dwelling occupants to start the work (although the Board's view is that it is not acceptable to succumb to this pressure). Aggravating factors were the Respondent's attitude to the allegations. The Respondent produced the consent documents and application himself and the fact that he holds multiple licences, including the highest class of Design Licence AoP 3, a Site AoP 2 Licence, and a Carpentry Licence. He should have been better informed. The Board formed the view that he chose to ignore regulatory

[16] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[17] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

requirements and to forge ahead regardless of them. The end result has been that the work is stalled, and the desired outcome of the work being progressed to alleviate the stress on the owners has not been achieved.

[89] On balance, the Board has decided that a fine is appropriate, and the Board's penalty decision is a fine of $4,500.

Costs

[90] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[91] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[18].

[92] In *Collie v Nursing Council of New Zealand,*[19] where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate*

[93] In Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society[20], the High Court noted:

> *[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
>
> *[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases, 50 per cent will be too high, in others insufficient*.

[94] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was moderate in complexity, was an in-person hearing and

[18] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.
[19] [2001] NZAR 74
[20] CIV-2011-485-000227 8 August 2011

involved a Special Advisor. Adjustments based on the High Court decisions above are then made.

[95] Based on the above, the Board's costs order is that the Respondent is to pay the sum of $8,000 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

[96] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act[21]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

> *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[97] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[98] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[22]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[23]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[24]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[25].

[99] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[26]. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[100] Based on the above, the Board **will** order further publication. Publication is appropriate so that others learn from the matter and the public is appropriately informed.

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[21] Refer sections 298, 299 and 301 of the Act
[22] Section 14 of the Act
[23] Refer sections 200 and 202 of the Criminal Procedure Act
[24] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[25] ibid
[26] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[101] For the reasons set out above, the Board directs that:

Penalty: **Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $4,500.**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $8,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.**

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

[102] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

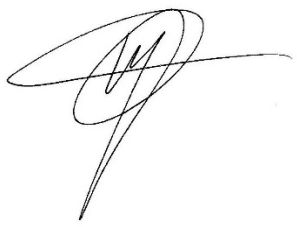
[103] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs, and publication up until close of business on 29 March 2022. The submissions should focus on mitigating matters as they relate to the penalty, costs, and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs, and publication.

[104] In calling for submissions on penalty, costs, and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

[105] The right to appeal Board decisions is provided for in section 330(2) of the Act[ii].

Signed and dated this ninth day of March 2022.



Mr M. Orange
Presiding Member

[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.