

## Before the Building Practitioners Board

	BPB Complaint No. CB 25794
Licensed Building Practitioner:	Robert Liddle (the Respondent)
Licence Number:	BP 110396
Licence(s) Held:	Carpentry

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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

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Complaint or Board Inquiry	Complaint
Hearing Location	Napier
Hearing Type:	In Person
Hearing Date:	24 May 2022
Decision Date:	13 June 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mrs F Pearson-Green, LBP, Design AoP 2  
Mr R Shao, LBP, Carpentry and Site AoP 1  
Ms J Clark, Barrister and Solicitor, Legal Member  
Mr G Anderson, LBP, Carpentry and Site AoP 2

#### Appearances:

Mr Jonathan Kaye for the Respondent

#### 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 Findings:

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

The Respondent **has not** committed disciplinary offences under sections 317(1)(i) or 317(1)(da)(ii) of the Act.

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### Summary of the Board’s Decision

- [1] The Respondent has carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He is fined \$4,000 and ordered to pay costs of \$5,000. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.
- [2] The Respondent has not failed to provide a record of work or conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute.

### The Charges

- [3] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [OMITTED] Hastings. 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) as set out in the first

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<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- and second reports of [OMITTED] Consultants dated May 2021 (Documents 2.1.20 and 2.1.14, Pages 34 and 249 1 of the Board's file);
- (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), in that:
- i. he may have failed before the floor was poured to provide a PS4 geotechnical review and a surveyor's certificate confirming finished floor level of RL 19.5, as required by the consented plans (Inspection Outcome Report dated 18 February 2020 (Document 4.3, Page 3786 of the Board file), Site Notice dated 17 January 2020 (Document 4.3, Page 3784 of the Board file), Notice to Fix dated 8 July 2020 (Document 2.1.9, Page 1913 of the Board's file), and
  - ii. further, the areas listed in the [OMITTED] Consultant's report referred in paragraph (i) above, as not complying with the building consent.
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act), in that, he may have failed, contrary to representations he may have made to the Complainant, to have ensured a Master Build Guarantee and appropriate insurance were in place.

### 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [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*,<sup>4</sup> 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*

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<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

*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<sup>5</sup>:

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

### **Evidence**

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. 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.

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<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [12] 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 evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [13] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:
- Robert Liddle, Respondent
- [OMITTED]
- [OMITTED], Complainant
- [OMITTED], [OMITTED], [OMITTED]
- Scott Treneman, Hastings District Council
- Adam Emerson, Hastings District Council
- [OMITTED], BP [OMITTED], [OMITTED]
- [OMITTED], BP [OMITTED], [OMITTED]
- [OMITTED], [OMITTED]
- [14] The Respondent was contracted to build a new residential dwelling for the Complainant. The building site was a large rural section in a flood-risk area. The foundations were constructed, and frames and trusses were erected. It was then ascertained that the finished floor level of the foundations did not accord with the building consent, which required a specific finished floor level with reference to a RL 19.5m in terms of Hawkes Bay datum 1972. The structural connections between the frames and the foundation were cut, the frames lifted, and the floor level was raised to the required height. The frames were then lowered, reconnected to the floor, and the build continued. The foregoing sequence of events was not disputed.
- [15] The Complainant did raise issues with how the remedial work was carried out, the quality and compliance of the build, and the failure to initially construct the foundation at the correct finished floor level as per the requirements set out in the building consent. The Complainant had engaged Mr [OMITTED], a Licensed Building Practitioner with Carpentry and Site AoP 2 Licenses of [OMITTED] Consultants Limited, to review the building work. He completed two reports which were provided to the Board (Documents 2.1.20 and 2.1.2477). The reports raised various matters which the Complainant included in his complaint and which Board resolved to further investigate.
- [16] The Respondent gave evidence that he had carried out projects of this scale before but mostly on hill sites. He had never constructed a dwelling on a flood plain and he had never had to engage a surveyor for set out. He did not use a surveyor to assist with set out on this project. He had two full-time workers assisting him – a qualified

carpenter with 4 years' experience, a senior apprentice with 2.5 years' experience, and 1 part-time worker. The Respondent was on site most days, carrying out and supervising work. He did not have any other significant projects on at the same time as this one.

- [17] Mr Kaye, representing the Respondent, presented a table of defects which traversed the matters that the Board was investigating (Document 9.1.2) and submitted that none of the defects showed a serious lack of care or competence. He contended that many of the defects were oversights/errors which would have been picked up during the build, and there was no sign of deliberate, careless choices being made. He noted the Respondent had offered to fix the issues at his own cost and submitted that the issues before the Board did not reach the threshold for disciplinary action. A report from Mr [OMITTED], a Building Surveyor, was also provided to support the submissions (Document 2.2.74).
- [18] In respect of the incorrect finished floor level Mr Kaye submitted that the foundation work had been subcontracted to an expert, and whilst acknowledging that the Respondent did not pick up the change to the finished floor level in the approved consented plan, he submitted that the Respondent left that to the foundation Licensed Building Practitioner to do.
- [19] When questioned on the site set out, the Respondent stated that he had used an early version of the Engineer's plan, being Revision D and that he had given this information to the excavator subcontractor (Document 8.2.1.8:7). The Respondent acknowledged that this was not the consented plan but was rather an earlier version. Revision E (Document 2.1.1276) required a height of 500 - 750mm and this became the stamped consented plan (Document 4.4). This stated, *"Building to be located by survey to confirm Floor height is 19.5. A Surveyor's Certificate confirming the siting must be made available to Hastings District Council prior to the first inspection or to the inspecting officer at the time of the first inspection."* The Respondent acknowledged that he missed the consented plan requiring the 19.5 finished floor level. He also agreed that it was his responsibility to have an up-to-date building consent pack on site, which included the consent drawings and plans.
- [20] The Respondent gave evidence that he was on site for the setout and the excavation. The Respondent had set-up the profile lines for the excavation sub-contractor to excavate the site and prepare the compacted base course for the rib-raft slab. He stated that he did not get a surveyor's report and did not ascertain the location of the datum peg as it *"didn't cross my mind"*.
- [21] The Respondent then left the subcontractor to do the foundations. When he returned to the site after the concrete slab pour, the Respondent acknowledged that, at this stage, he was unaware of the three previous council inspections, the surveyor certificate requirement, and that the house was sited in a flood plain.
- [22] Mr Emerson and Mr Treneman for the Hastings District Council gave evidence that on the 17 January 2020 and the 18 February 2020 inspections (Document 4.3), no datum peg was sighted. At the 17 January inspection, Mr Emerson made a worker

for the foundation subcontractor aware that they were not to pour the concrete slab before obtaining a surveyor's certificate, as required by the inspection report. Mr Emerson asked the worker to inform the Respondent of this. Both Council representatives said that no inspection reports were left on site but that there was an on-site document which listed the required inspections and detailed those that had occurred and whether they had passed or failed. The Board was provided with a report completed by the Council, which investigated that on-site document as there was evidence that it had been altered by unknown persons to change failed foundations inspections to passed inspections.

- [23] Mr [OMITTED] of [OMITTED], the foundation subcontractor, said that he based the foundations on the cross-sections in the consented plans. However, on being shown the consented plan (including Revision E) (Document 2.1.1276) he confirmed that this was not what he had used. Mr [OMITTED], an employee of Mr [OMITTED]'s, could not confirm that the consented Revision E plan had been used. Mr [OMITTED] stated that the Respondent had shown him what they believed to be the datum peg, and this was supported by Mr [OMITTED] (another employee) in his written statement (Document 8.2.1.8:7). Neither Mr [OMITTED] nor Mr [OMITTED] confirmed that it was a datum peg, and they described it as a peg near the builder's power supply.
- [24] Mr [OMITTED]'s first report identified that the approved building consent for the remediation of the incorrect finished floor level required the superstructure to be craned off to allow for the floor height to be remediated (Document 2.1.14). Contrary to this, the Respondent jacked the superstructure up by 420mm, set masonry blocks at 400mm above the original slab, lowered the superstructure down on to the masonry blocks and then placed a concrete topper slab on. The Respondent stated that he only raised it by 420mm because he thought the higher he went, the more the risk of damage was created, and he considered it was high enough to allow for vertical starter bars to be inserted under the framing.
- [25] The Respondent stated he got advice on his methodology from a house moving company and from local farmers. He did not obtain any engineering input or advice on how to brace the superstructure when it was jacked up.
- [26] The Board then turned to discuss the remedial work with the Respondent. On the issue of the vertical starter bars, Mr [OMITTED], after carrying out investigations which included invasive testing in selected locations, stated in his report that they were not installed to the required depth of 175 mm (Document 2.1.2). The Respondent said he was on site for the drilling of the holes but did not check the depth. He trusted his workers, and the drill used had a depth marker on it. Mr [OMITTED], for the Respondent, accepted Mr [OMITTED]'s conclusion (Document 2.2.93).
- [27] The Engineer's amended drawing required M12 bolts (Document 2.1.9). The Respondent said he was aware of the Engineer's drawing but did not install M12 bolts. Rather he installed new bolts which were shorter than specified into the

existing bottom plate holes, which differed from the engineer's details. He stated his solution was based on his own knowledge and experience.

- [28] The Respondent acknowledged that the bottom plates were embedded into concrete but stated that there was a Malthoid DPC under the plate. He stated that this could be dealt with by grinding the edge of the concrete pad away from the bottom plate. The Board queried how this addressed durability issues, and he stated: *"well it won't get wet"*. Mr [OMITTED] for the Respondent said there was *"superficial damage"*, and it is unlikely to affect the framing's durability (Document 2.2.102).
- [29] The Respondent acknowledged that the framed structure had not lifted vertically straight-up during the jacking process and remained out of plumb and square when lowered 20mm onto the new raised floor level. He also stated that there was a lot of pressure behind the concrete pump, and it had moved some of the frames. In answering the Board's question, the Respondent stated his process for checking plumb and squareness when he dropped the frames back down was to check this by checking the internal doors to ascertain if they were plumb and square. He stated he did not ascertain that there were any issues but acknowledged that he could only do a certain amount of straightening after the frames were lowered, given that the frames and trusses were tied together. He did not check the roof ridge to see if it was level or had moved in any way.
- [30] The Board discussed with the Respondent the product substitutions which were done without a minor variation or an amendment to the building consent. In respect of the roofing underlay, the Respondent said the substitution was a superior product. He was not aware of the change to the membrane roofing product. The Respondent said he discussed a change of the gib board thickness (13mm down to 10mm) with the Complainant and different architects. The Respondent acknowledged that he did not consider any ceiling diaphragm or H1 and sound implications when he decided to change to the gib board thickness. Mr [OMITTED], in his report, accepted that these were changes made which were contrary to the consent and/or specifications (Documents 2.2.141, 2.2.143 and 2.2.125).
- [31] The Complainant had raised an issue with the insurance cover that was in place for the build and the provision of a Master Build Guarantee.
- [32] The Respondent gave evidence that the appropriate insurance was in place (Document 2.1.2474). Whilst the document submitted in evidence expired on 3 June 2020, Mrs Liddle told the Board it had been renewed. This was also stated in an email from the Respondent to the Complainant on 25 July 2019, together with a copy of the Certificate of Insurance (Document 2.5.392). The Respondent and Mrs Liddle advised that it was the homeowners' responsibility to take out contract works insurance, and this was recorded in the contract (Document 2.1.2460).
- [33] The Respondent and Complainant gave conflicting evidence on the issue of the Master Build Guarantee. The Complainant stated that he was told by the Respondent that they had joined Master Builders and a Master Build Guarantee



would be available and *“We specified this, paid for it within the deposit as part of our fixed price contract and they misled us and didn’t establish the Guarantee”* (Document 2.5.67).

- [34] The Respondent denied that a Master Build Guarantee was offered or represented as having been obtained. The Respondent pointed out that he had only joined Master Builders a few weeks before the contract for this project was signed, and he had no knowledge of how the Master Build Guarantee operated. In addition, the Respondent’s lawyer produced a document at the hearing titled *“Disrepute”*, which detailed the negotiations between the parties’ lawyers leading to the contract being signed. It was the Respondent’s position that there was no reference during those negotiations to the Master Build Guarantee. (Document 9.1.3).
- [35] Further, the Respondent stated the Registered Master Builders contract form was offered to the Complainant during the negotiations as an alternative to the contract ultimately signed, but it was rejected by the Complainant. The Respondent’s lawyer made the submission that there was *“a lot of information and warnings for the owner about the process and timeframes for applying for Master Build Guarantee”* in the Registered Master Build contract document reviewed by the Complainant and his lawyer (Document 9.1.3). The Complainant confirmed that legal advice was obtained during the contract negotiation process.
- [36] The Complainants have not received a record of work from the Respondent. The Hastings District Council building consent file was obtained on 10 September 2021. It did not contain a record of work from the Respondent.
- [37] The Respondent’s lawyer submitted that the Respondent did not accept the cancellation of the contract by the Complainant, and the matter was still in dispute, the work was not complete, and the Respondent was willing to return to complete the work. The Respondent’s lawyer stated that either when the works were complete or when there was no possibility of returning to the site, a record of work would be done.
- [38] As regards various other matters of workmanship set out in the two reports from Mr [OMITTED], these were not canvassed in any detail at the hearing. The Board notes however, the Respondent’s written response, through his lawyer, stated, *“...[the Respondent] only became aware of the defects upon his receipt of [OMITTED]’s reports, which revealed that his workers had not done the works according to his instructions and thus exposed the lack of adequate supervision. While [the Respondent] acknowledges that evidently the extent of his supervision was inadequate, this was not deliberate and resulted from [the Respondent] having too much confidence in his carpenter and the more experienced apprentice (then reasonably based on their having done similar building works without issue) to carry out the work in accordance with [the Respondent’s] instructions, causing him to accept the carpenter’s assurances that the works had been done accordingly”* (Document 2.2.17).

### Board's Conclusion and Reasoning

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

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

and **should** be disciplined.

[40] The Board has also decided that the Respondent **has not**:

- (a) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); or
- (b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

### Negligence

[41] 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*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[42] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>9</sup>. 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 or, in other words, whether the conduct was serious enough.

[43] 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.<sup>10</sup> 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

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<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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<sup>11</sup>

[44] The Board notes that the purposes of the Act are:

### **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.*

[45] In terms of seriousness in *Collie v Nursing Council of New Zealand*,<sup>12</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[46] In *Pillai v Messiter (No 2)*<sup>13</sup> the Court of Appeal stated:

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

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<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>12</sup> [2001] NZAR 74

<sup>13</sup> (1989) 16 NSWLR 197 (CA) at 200

- [47] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992<sup>14</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

*“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

- [48] The Respondent disregarded his obligation to supervise the works in a way that ensured the work was completed in accordance with the plans and the building consent. The Respondent’s level of supervision given to the builders on site was not acceptable and this is noted particularly in regard to the vertical starter bars.
- [49] The foundation work was carried out by another Licensed Building Practitioner, and the Respondent has no supervisory responsibility for his work. However, the Respondent did the initial setout and instructed the excavation subcontractor. He was also required to be adequately familiar with the consented building plans and should have been aware of or familiar with final Rev E, which set out the finished floor level and the approved building consent, which required a Surveyor’s certificate (Document 2.1.1276). He acknowledged this mistake. This failure, together with not being aware the site was in a flood risk area and not checking Council inspection outcomes before he commenced work, led to the Notice to Fix from the Hastings District Council dated 8 July 2020 (Document 2.1.1899). The Respondent demonstrated a lack of awareness and understanding of the building consent documents and what was required to meet building consent requirements.
- [50] In jacking the frames, the Respondent failed to obtain advice, notably engineer input and bracing advice. The method of jacking up and lowering the superstructure walls was not undertaken in accordance with the approved amended building consent. Overall, the remedial work done by the Respondent did not meet the standard required of a licensed building practitioner, particularly in respect of the vertical starter bars, the timber bottom plates being embedded into and in some instances in direct contact with the concrete floor slab, the failure to use M12 bolts as specified in the approved amendment (document 2.1.) and the failure to ensure the walls and roof framing were plumb and square and within specified tolerances.

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<sup>14</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- [51] The Board did not accept the submission that the Respondent's failings were not serious enough to warrant a disciplinary outcome. The Board found that it was not inadvertence, carelessness or oversight. Rather, it was a failure to be aware of and construct in accordance with what had been specified and approved, and that failure arose as a result of the Respondent being indifferent toward the consented documents.
- [52] Given the above, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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.

#### Contrary to a Building Consent

- [53] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

**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.*

- [54] 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.
- [55] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [56] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.

- [57] Unlike negligence, 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<sup>15</sup>.
- [58] Given the above factors, and the workmanship issues discussed above (in particular, the failure to comply with the finished floor level in Rev E of the consented drawings (Document 2.1.1276), the substituted products used, and the failure to adhere to the amended building consent for the changes to the foundation and floor, the Board finds that the building consent had not been complied with. 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.

#### Record of Work

- [59] The Board accepts that the Respondent has not failed to provide a record of work on completion of restricted building work. This is on the basis that there is a genuine dispute between the parties and the prospect of the Respondent returning to the site to complete the works is still open. In this regard the Board notes the Respondent's lawyer's statement that if there is no chance of returning to complete the project, then the Respondent accepts the record of work is due at that point.

#### Disrepute

- [60] As regards the allegation of conduct bringing the Licensed Building Practitioners regime into disrepute, this involved insurance coverage and an alleged representation as to a Master Build Guarantee. The Board finds that this ground has not been established on the balance of probabilities. The evidence presented by the Respondent established that the appropriate insurance coverage was in place. Further, the evidence before the Board did not support a finding that a misrepresentation as to the existence of a Master Build Guarantee was made.

#### **Penalty, Costs and Publication**

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

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<sup>15</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

Penalty

[63] 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*<sup>16</sup> 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.*

[64] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>17</sup> 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.

[65] The Board considers that the matter was at the middle to high level of seriousness and that a fine was appropriate. It adopted a starting point of \$5,000. The Board considered that there were mitigating factors, including that others may have contributed to or had some responsibility for the issue with the finished floor level, including the Council not leaving full copies of the inspection reports on site. Taking these mitigating factors into account, the Board has set the fine at \$4,000.

Costs

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

[67] 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<sup>18</sup>.

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

*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.*

<sup>16</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>17</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>18</sup> *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.

<sup>19</sup> [2001] NZAR 74

[69] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>20</sup> 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.*

[70] 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 and involved a full-day hearing. Adjustments based on the High Court decisions above are then made.

[71] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$5,000 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a full-day hearing of this type and is significantly less than 50% of actual costs.

#### Publication

[72] 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<sup>21</sup>. 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.*

[73] 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.

[74] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>22</sup>. The Criminal Procedure Act 2011 sets out

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<sup>20</sup> CIV-2011-485-000227 8 August 2011

<sup>21</sup> Refer sections 298, 299 and 301 of the Act

<sup>22</sup> Section 14 of the Act



grounds for suppression within the criminal jurisdiction<sup>23</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>24</sup>. 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*<sup>25</sup>.

- [75] 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<sup>26</sup>. 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.
- [76] Based on the above, the Board **Will Not** order further publication.

### Section 318 Order

- [77] 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 \$4,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$5,000 (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(I)(iii) of the Act.

**In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

- [78] 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

- [79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **19 July 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.

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<sup>23</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>24</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>25</sup> *ibid*

<sup>26</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [80] 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

- [81] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>i</sup>.

Signed and dated this 28 June 2022



**Mr M Orange**  
Presiding Member

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<sup>i</sup> **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.