

Before the Building Practitioners Board

BPB Complaint No. CB25800
Licensed Building Practitioner: Hayden Macfarlane (the Respondent)
Licence Number: BP 122370
Licence(s) Held: Carpentry

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: Auckland
Hearing Type: In Person
Hearing Date: 3 November 2022
Decision Date: 25 November 2022

Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs F Pearson-Green, LBP, Design AoP 2
Mrs K Reynolds, Construction Manager

Appearances:

Mr Ollie Sutton, Counsel 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 Finding:

The Respondent **has** committed disciplinary offences under section 317(1)(b) and (d) of the Act. The Respondent **has not** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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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 censured and ordered to pay costs of \$3,000. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

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 Regulations¹ to hold a hearing in relation to building work at [OMITTED], Auckland. 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);
 - (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
 - (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)

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

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).

Function of Disciplinary Action

[3] 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.

[4] 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.”

[5] 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 persons⁵:

... 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.

[6] 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.

[7] The above commentary on the limitations of the disciplinary process are 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

[8] 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

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

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.

- [9] 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.

Preliminary Matters

- [10] At the commencement of the hearing, a few preliminary matters were dealt with:

- (a) The matters set down for hearing included an alleged failure to provide a record of work under section 317(1)(da)(ii) of the Act. Prior to the commencement of this hearing the Respondent and the Territorial Authority provided further information to the Board. This consisted of a record of work dated 10 August 2019 from the Respondent which was acknowledged as received by the Territorial Authority between 4 and 12 September 2019 . (Document 8.2.1, Page 1652 of the Board's file; Document 8.8, Pages 1875 – 1877 of the Board's file). The evidence before the Board established that the Respondent's restricted building work was completed on or about July 2019, given that the final inspection occurred on 29 July 2019 (Document 4.4, Page 990 of the Board's file).
- (b) On the basis of that further additional information the Board advised the Respondent at the commencement of the hearing that it was no longer investigating the ground for discipline under section 317(1)(da)(ii) of the Act.
- (c) Further documents were filed with the Board Officer by the Complainant on 20 October 2022. The Board issued a minute which stated that it would decide, at the commencement of the hearing, whether the new evidence would be admitted. The Respondent was able to make submissions at the hearing as to whether he objected to the new evidence being admitted. The evidence consisted of 3 categories.
 - (i) a table created by the Respondent in response to the [OMITTED] report;
 - (ii) a Master Painter's report; and
 - (iii) additional photographs supplied by [OMITTED].
- (d) The Board decided that in respect of category (i) this document had already been put before the Board by the Respondent in any event and was therefore admitted into the evidence. For category (ii), painting did not form part of the grounds that the Board was investigating as set out in the Notice of Proceeding and, therefore, this report was irrelevant and was not considered by the Board. In respect of category (iii), with the Respondent's agreement, these photographs

were admitted to the extent that they were relevant to the notified grounds in the Notice of Proceeding.

- (e) The Complainant raised at the hearing the product warranties, guarantees and maintenance instructions which he alleged the Respondent failed to provide. The alleged failure to provide these documents was not included in the Notice of Proceeding and, therefore, the Board did not address it in the hearing.
- (f) The Board noted that unlike the record of work, which is covered by a specific ground of discipline, the alleged failure to provide product warranties and other such documents will only come within the Board's grounds for discipline if their non-production either amounted to bringing the regime into disrepute under section 317(1)(i) of the Act or for conduct after 25 October 2022 were considered to be a breach of the Code of Ethics.
- (g) The Complainant raised this point again in a post-hearing email dated 5 November 2022. The matter having been addressed at the hearing, this post-hearing submission is not relevant to the issues and will not be considered by the Board.

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [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 the Board, it heard evidence at the hearing from:
 - The Respondent
 - [OMITTED], [OMITTED]
 - [OMITTED], the Complainant
 - [OMITTED], [OMITTED]
 - [OMITTED], [OMITTED]
- [14] In his opening statement, the Complainant told the Board that the defects in his house had not been discovered until after he took possession of the house. He then obtained a report from Mr [OMITTED] of [OMITTED] (Document 8.4, Page 1741 of the Board's file). A further report from Maynard Marks, dated January 2022, was commissioned by

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

Master Builders and provided to the Board by the Complainant. It included remedial work recommendations (Document 8.1.1, Page 1329 of the Board's file). The Complainant stated that the list of defects was given to the Respondent and that he refuted the majority of them. Substantial defects in the house remained.

- [15] Respondent's counsel's opening submission advised that there was a dispute as to the scope of the remedial works and that the Respondent had tried to resolve the issues. It was the Respondent's position that some of the defects identified in the [OMITTED] report were not items for which the Respondent had responsibility.
- [16] On this project, the Respondent was the only Licensed Building Practitioner. He worked on-site himself and supervised a qualified carpenter of 22 years of experience and 2 apprentices with 3, and 2 and a half years of experience, respectively. The Respondent's father also worked on-site, ordering materials and reading the plans. The Respondent was on site 80-90% of the time and was there every day for a certain amount of time. He was at the same time finishing up another job only 3 streets away.
- [17] Mr [OMITTED], the architect for the project, produced the concept drawings, the building consent documents, and his role then concluded when the building consent was issued. He was available as required to do minor variations during the project and recalled being called only once to the site to remedy a shower issue. Mr [OMITTED] advised that he referred the Respondent to the Complainant and had worked with the Respondent for over 15 years on about 28 projects.
- [18] Mr [OMITTED] of [OMITTED] produced a report dated 13 July 2022 for the Respondent (Document 8.2.2, Page 1658 of the Board's file), which reviewed the remedial work undertaken by the Respondent and commented on the Maynard Marks report.
- [19] Mr [OMITTED] of [OMITTED] produced a report dated 4 February 2021, which formed the basis of the Board's questioning for this investigation. Mr [OMITTED] confirmed his report. The Board then asked the Respondent questions on the issues as set out in the Notice of Proceeding. (Document 7.1.1, Page 1287 of the Board's file).

Substructure and associated structural fixings

- [20] The specific items discussed were the recess holes cut into the foundation pile or brace, pairs of braces bolted at the same position on the pile, brace members touching or buried in the ground, connection fixings missing between piles and bearers and the use of galvanised bolts instead of stainless steel bolts.
- [21] The Respondent stated that he was unaware that the recess holes were not allowed, and that the subfloor had been signed off by the Engineer.
- [22] Two braces off the same pile were on the building consent plans, and the Respondent had followed the plans. Mr [OMITTED] accepted that this issue was not the Respondent's fault and that it was later rectified.
- [23] As regards the braces touching the ground, the Respondent said that as he used H5 timber, he thought this was acceptable.

- [24] Mr [OMITTED] explained that there were 6 or 7 piles where there was no connection between the joist and bearer and then bearer to pile. These were located at the back of the house under the lounge. The Respondent agreed that some were missing and just had nails but said that the house was fully supported.
- [25] The Respondent accepted that stainless steel bolts should have been used and that this was a mistake made in 2-3 places. Mr [OMITTED] disputed the number and said it was close to 10 bolts. The Respondent advised that he had changed out all of the galvanised bolts, even though some were more than 600mm above the ground.

Subfloor ventilation and polythene sheet ground cover

- [26] Mr [OMITTED] pointed to insufficient subfloor ventilation in the original and new subfloor of the house. The Respondent accepted that even though the upgrade of the subfloor ventilation was on the consented plans, it was not done. He stated that as the back of the house was open under the deck, he did not think that the ventilation was needed and pointed out that the final inspection was passed. The Respondent further agreed that he did not put down the polythene sheeting as required on the consented plans. He said that as there was 600mm between the ground and the subfloor and it was a very dry environment, he did not think that it was needed.
- [27] The Complainant explained that there was water, damp, and mould in the basement. The Respondent countered that this was caused by the change in the landscape plan of the backyard, deletion of the proposed swimming pool and changes in level and contours creating water flow issues.
- [28] Additional subfloor ventilation and the polythene ground sheet were installed under the remediation works undertaken.

Weatherboard cladding installation

- [29] Initially, Mr [OMITTED] believed the cladding had been direct fixed on the south wall of the laundry without the required cavity. The Respondent and Mr [OMITTED] were definite that there was a cavity. Mr [OMITTED] agreed at the hearing that when the remedial works were being undertaken, he saw that there was a cavity.
- [30] However, Mr [OMITTED] said that there was still an issue that the cavity was reduced at floor level. He pointed to a photograph as evidence (Document 8.4, Page 1767 of the Board's file). The Respondent accepted there was a slight restriction at floor level as the slab was too wide and accepted that he should have chased it out. The Respondent also accepted head flashings on three windows were installed in keeping with the old head flashing detail, and the installation was non-compliant and contrary to the details on the consented plans.
- [31] The Respondent also accepted the parapet cap flashing was not installed as per the consented documents and was not extended over the weatherboards on the north wall, and the wall cladding cavity base closers were missing in some locations.
- [32] Mr [OMITTED] accepted that there were no issues with the floor level relative to the concrete or the ground.

Window and door unit installation

- [33] Mr [OMITTED] had identified in his report a number of defects, but at the hearing, he agreed that on opening up the house for the remedial work, the window and door flashings had been correctly installed. Some extra blocking was installed during the remedial works.

Roofing installation

- [34] The replacement of the existing 1910's villa roof and veranda with new metal roofing was included as part of the approved building consent.
- [35] Mr [OMITTED]'s report identified a number of issues with the roof, including that the chimney back flashing had no diverter cricket behind the chimney upstand, chimney flashing did not cover the flashing below and should have been wider, a reliance on poor application of sealant, the roof apron flashings did not extend up behind the weatherboards or the soffit and spoutings generally having no fall, or back-fall.
- [36] The Respondent stated that he and his apprentice did the roof, and he left his apprentice to do the flashings. The apprentice had been in the metal roofing industry for approximately 10 years. He accepted that he should have measured the falls, and this was an "oversight on my part of things". The Respondent stated that whilst he had replaced like for like and followed the consented plan, he accepted that he should have done a cricket flashing. He stated that he had "learnt in hindsight".
- [37] On the issue of the fall for the verandah roof, Mr [OMITTED] stated that the roof had new corrugated metal sheets at 1.5 degrees, when the minimum fall for the product was 8 degrees. He accepted, however, that the verandah roof had been consented with an existing 1.5-degree fall and that the Respondent had installed the verandah roof in accordance with the consented plans.
- [38] The Respondent accepted that the finished pitch over the laundry roof was below the minimum 3-degree pitch on the consented plans and was mainly caused by the installation of the eaves flashing. The low-pitch laundry roof has been re-pitched to 3.6 degrees under the remedial works.
- [39] Two further issues canvassed at the hearing – the membrane roofing product and the leak in the internal fascia board on the balustrade side – were agreed by all parties not to be within the Respondent's responsibility as they were undertaken by different contractors.

Shower cubicle window installation and waterproofing

- [40] Mr [OMITTED] identified that the timber reveals of the aluminium window inside the shower cubicle did not have a membrane and tiles applied in accordance with the building consent. There was a further issue discussed with the lack of fall in the shower cubicle and windowsill.
- [41] The Respondent stated that he had recessed the shower area down 50mm as per the consented plans but had not done the work around the window or the fall for the shower. This was done by the tiling contractor. The tiler had formed the falls to the

shower base. The consent plans detailed a slope to the sill of wet area windowsills. (Document 4.5, Page 1030 of the Board’s file). The showers were totally reformed, waterproofed and re-tiled as part of the remedial works.

- [42] In his closing submission, Counsel for the Respondent submitted that the Respondent had been frank and honest and had agreed some aspects were not done in accordance with the consented plans but that it had all been signed off by the Council. He said that the issues were fairly minor and submitted they did not reach the level of negligence or incompetence.
- [43] The Respondent accepted some things had not been done properly and that he has changed his system and practices in relation to paperwork. This had been a learning curve, and he had learnt to stick to the consented plan.
- [44] In closing, Mr [OMITTED] stated that although a Code Compliance Certificate was issued for the project, his report showed up approximately 70 defective items. He acknowledged that the Respondent had done the best he could, but he had done things as he thought they should have been done without referring to the plans when he should have. The fact that the work was signed off by Council should not be enough for a Licensed Building Practitioner. He should have known what ought to have been done, been responsible for his work and not relied on others.

Board’s Conclusion and Reasoning

- [45] 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)
 - (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.

Negligence

- [46] 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 Courts⁸.
- [47] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁹. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional.

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)

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.

[48] 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 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 practitioner¹¹

[49] 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.*

[50] In terms of seriousness in *Collie v Nursing Council of New Zealand*,¹² 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.

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

¹² [2001] NZAR 74

[51] In *Pillai v Messiter (No 2)*¹³ 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.

[52] 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 1992¹⁴. 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.

[53] The Board considers that while individually, the matters raised are at the minor end of the scale, cumulatively, they reach the negligence threshold. It is noted that some matters were not the Respondent’s fault or responsibility – these included the deck and the shower. However, the issues with the subfloor, the narrowed cavity, the absence of the polythene sheet, the window head and roof flashings, and the fall to the laundry low-pitch roof were the Respondent’s responsibility. He made decisions which were not in compliance with the plans – head flashings, roof flashings, using galvanised bolts, the lack of vents, and no polythene sheet. Together these items of workmanship added up and demonstrated a lack of adequate supervision and/or negligent carrying out of the work.

[54] 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

[55] 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

¹³ (1989) 16 NSWLR 197 (CA) at 200

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

- (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.*

[56] 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.

[57] 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.

[58] 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.

[59] 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 established¹⁵.

[60] Given the above factors, and the workmanship issues discussed above (in particular, the head flashings, roof flashings and pitch, use of the wrong bolts, lack of subfloor vents and the polythene sheet), 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.

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 Actⁱ, 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.

¹⁵ *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*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.

[64] 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.

[65] Based on the above, the Board considers the Respondent’s conduct to be at the lower end of the negligence scale. Mitigating factors which the Board has taken into account are the Respondent’s acceptance of a number of the issues, his willingness to be extensively involved in the remedial work, his acknowledged learning and changed practices, and the fact that the non-existence of a cavity for the weatherboards, which was potentially a major defect, was not, in the end, an issue. The reduced cavity area was a minor issue only. Given this, the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval.

Costs

[66] 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.”

[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 case¹⁸.

[68] 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 that:

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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

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.

[69] 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.

[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. Adjustments based on the High Court decisions above are then made.

[71] Based on the above, the Board adopted a starting point for a costs order of \$3,500, which is the Board's scale costs for a half-day hearing. The Board considered that not proceeding with the record of work ground of discipline was a mitigating factor. Accordingly, the Board's costs order is that the Respondent is to pay, toward the costs of and incidental to the Board's inquiry, the sum of \$3,000.

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 Act²¹. 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.

²⁰ CIV-2011-485-000227 8 August 2011

²¹ Refer sections 298, 299 and 301 of the Act

- [74] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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.
- [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 interest²⁶. 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)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (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 **25 January 2023**. 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.

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*

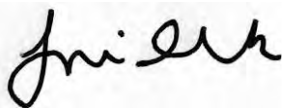
²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[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 Actⁱⁱ.

Signed and dated this 12th day of December 2022



Mrs J Clark
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.*