

## Before the Building Practitioners Board

	BPB Complaint No. CB25534
Licensed Building Practitioner:	Yenkanna Naidu (the Respondent)
Licence Number:	BP 130861
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:	4 May 2021
Decision Date:	8 June 2021

#### Board Members Present:

Mr C Preston, Chair (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mr B Monteith, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2

#### 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 a disciplinary offence under section 317(1)(b) and section 317(1)(d) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(c) and section 314B(b) of the Act.

## Contents

<b>Summary of the Board's Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Evidence</b> .....	4
<b>Board's Conclusion and Reasoning</b> .....	12
Incompetence .....	13
Contrary to a Building Consent .....	16
Not Licensed to Carry Out or Supervise Restricted Building Work.....	16
Misrepresentation or Outside of Competence .....	17
<b>Penalty, Costs and Publication</b> .....	17
Penalty .....	17
Costs.....	18
Publication .....	19
<b>Section 318 Order</b> .....	20
<b>Submissions on Penalty, Costs and Publication</b> .....	20
<b>Right of Appeal</b> .....	21

## Summary of the Board's Decision

- [1] The Respondent has been incompetent in his supervision of unlicensed persons and has carried out or supervised building work that did not comply with a building consent. The offending was serious. The Respondent's licence is cancelled for a period of three years. He is ordered to pay costs of \$3,500. The Board's findings 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<sup>1</sup> 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 contrary to section 317(1)(b) of the Act;
  - (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to

---

<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.

carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT he may have carried out or supervised brick or block work which he was not licensed to carry out;

- (c) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
- (d) breached section 314B(b) of the Act, IN THAT, he may have carried out or supervised brick work or block work outside of his competency contrary to section 317(1)(h) of the Act.

[3] The Board notified the Respondent that, at the hearing, the Board would, in respect of sections 317(1)(b) and 317(1)(d) of the Act, further investigate whether the Respondent may have carried out or supervised building that was not completed to an acceptable standard or in accordance with compliance requirements and, in particular, it will further investigate:

- (i) the findings noted in a Inspect House NZ report (Board Document 2.1.110) and the relevant Council inspection records; and
- (ii) the health and safety standards and compliance at the worksite.

#### **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 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

---

<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

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 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**

- [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 which 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.

---

<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

[13] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Yenkanna Naidu

Respondent

[Omitted]

Complainant

[Omitted]

Inspect House NZ Report writer

[14] The building work at [Omitted] was restricted building work as it was carried out under a building consent and the building work included structural and weather tight elements. The work included proposed alterations to Unit 1 the front main house and Unit 2 the rear minor dwelling. The proposed alterations and additions to the main house were complex as the work included digging in underneath to create a blockwork basement rumpus room and entry foyer. The building work also included the creation of a membrane roof over the rumpus room which formed the substrate for the new timber deck off the new first floor lounge addition. The building work also involved a concrete tile roof the lines of which were altered to accommodate the living room addition and to form a new feature gable over a new entry. The proposed single-story addition to the minor dwelling, extended the existing gable end roof line to form the bedroom addition. It included a trussed roof with veneer cladding and a concrete floor.

[15] The Board received a report completed by Mr [Omitted] as the basis for its further investigations. It formed the basis for the questions posed to the Respondent during the hearing.

[16] Mr [Omitted] gave an outline of his experience and confirmed his report. During his evidence the Board found Mr [Omitted] to be a very credible witness who gave clear and rational answers to the Boards questions.

[17] His main findings of the were summarised in the Registrar's report at paragraph 5.8 as follows:

- Incorrect excavations and installation of foundations, due to a failure to adhere to the consented plans, resulting in difficulties with matching floor levels. (Page 2.1.99)
- Poorly formed concrete block walls, including the omission of reinforcement, resulting in the retrospective replacement of sections of the wall. (Page 2.1.100)
- Inadequate waterproofing to the retaining walls and a failure to fill the excavations posing a health and safety risk. (Page 2.1.101)
- Severe inadequacies with the installation of the wall framing, including failing to adequately protect from the elements, inadequate

bracing, and poorly formed connections between steel structural elements. (Page 2.1.102)

- Inadequate installation of the roof trusses has resulted in the installation of additional timber framing to the roof and cutting of the trusses. (Page 2.1.102)
- Incorrect level to the concrete floor. (Page 2.1.104)
- Exposed particle board flooring requiring replacement due to water damage as failure to weatherproof the works. (Page 2.1.104)
- Incorrectly installed deck, resulting in a redesign for a new deck to be installed. (Page 2.1.104)
- Poorly detailed structural steel connections. (Page 2.1.105)
- Several incomplete areas to the roof, with a failure to adequately tie in the newly installed roof to the existing roof. (Page 2.1.105)
- Several non-compliant areas of work have been identified including – the requirement for amendments to the consented plans due to the incorrect floor levels, missing strapping connectors to bottom plates, inadequate support and fixings to roof framing elements, and generally deviating from the consented plans and subsequent amendments. (Page 2.1.108)

- [18] In addition to the report the Complainant provided a number of photos which graphically show the poor standard of workmanship.
- [19] Mr [Omitted] was of the view that this was one of the worst jobs he had seen and whoever did the work did not have the required skills to either do or supervise a complex renovation and addition of this type.
- [20] Additionally, there was an error in the setting out of the height of the new floor slab to the basement rumpus room. Overall height set out had not been checked with the implication being that the new Rumpus room did not have adequate room head height. This led to the blockwork walls being constructed too high and other issues with heights including making it difficult to tie the building work in with the existing building. It resulted in making it very hard if not impossible to achieve resulting in ad hoc and mismatched framing and exterior finishes.
- [21] In the case of the block work, the Respondent confirmed that he had set out the height of the blocks following the height provided in the plans but that the block ended up being too high due to the incorrect height of the floor slab.
- [22] An Amendment for a new deck design with reduced deck joists was applied for and approved. The amendment was required because the floor level was incorrect. This had a flow on effect to the project including a re-design by the engineer and to obtain the building consent amendment.

- [23] The Respondent accepted that he did not make allowance for the drainage in the concrete slab which had to be retro fitted. The underfloor plumbing work was not inspected and required a PS3 from the plumber as a result.
- [24] Point load support pads were missed at the pouring of the floor slab and had to be cut out, reinforced and poured later, as shown in the photograph below.



- [25] A structural column to the blockwork wall was missed, requiring the blockwork to be cut to allow the reinforcing to be placed so that the column could be formed. The engineer's pre-pour site inspection required reinforcing to be placed as per design. As this had not been done he required vertical bars to be epoxied into the concrete slab as shown in photograph below:



- [26] The concrete did not go all the way down nor was every cavity filled. The Engineer was required to re-inspect the blockwork. The blockwork wall was scanned, and the unfilled cores were re-filled under instruction. The photograph below depicts the work.



- [27] In regard to the filling of the concrete blocks the Respondent confirmed that one of his employees and the concrete pump operator did this work and that the employee was not experienced in doing so. He himself did not supervise the filling of the blocks.
- [28] In respect to the tanking of the Block wall the Respondent gave evidence that this was undertaken by a licenced water proofer and there had been a site inspection from the engineer. The Respondent stated that he would provide further evidence to show who carried out the work but did not do so.
- [29] The Complainant gave evidence that the tanking did not go all the way to the foundation, that there was no protection for the tanking, no drainage installed, and that the tanking had to be redone.
- [30] The Respondent advised that only one wall had been done and that they were going to do the rest of the tanking later on. He stated they would have dug out the required access space by hand.
- [31] Wall framing was constructed at incorrect heights and had to be re-built. A steel beam protruded past the exterior wall line. The Respondent advised that he measured the steel beams off the floor slab.





- [32] An amendment to the Building Consent was granted for the change in deck joist size to maintain head height in the rumpus room due to constructed floor levels. A Council Framing inspection was failed due to sighted deck joist not as per approved amended plan.
- [33] Issues arose with the new roof framing tying into the existing framing, resulting in the trusses and rafters being cut and trusses being un-supported. Both required remedial work. Steel beams protruded through the roof line. New tile battens did not align with the existing to allow for a continuation of the existing tile line. The entry gable was constructed out of alignment, requiring the need for aesthetically poor additional flashings and detailing to weatherproof the gable end. The issues are shown in the following photographs:



- [34] With regards to the minor dwelling trusses have been made to the incorrect roof pitch and height setting. Truss members have been cut and altered on site to try and align with the existing roof. This has caused additional issues with the eave overhang then not lining up. The Respondent stated that he was not on site when the trusses were measured. The Complainant stated that the minor dwelling has had the

altered trusses and roofing removed, new trusses have been measured and installed at the correct pitch. The following photographs show the issues:



- [35] In regard to the accumulation of rubbish on the site that some of this was the fault of the roofing contractor. That they would use a truck on occasions to remove the rubbish. The accumulated rubbish is shown below.



- [36] In the case of the asbestos removed from the soffit the Respondent accepted that he did not follow the correct process for identification and did leave it exposed prior to disposal. The Respondent advised that he does not hold an asbestos removal licence. The photograph below shows broken asbestos on the site.



- [37] There was an allegation that there was inadequate scaffolding and edge protection. The Respondent was aware that there was no edge protection or safety nets installed for work on the minor dwelling at the rear of the property. He stated that there were ceiling battens in place.
- [38] The Respondent gave evidence that he used a mixture of staff ranging from apprentices to some experienced tradesmen. He stated that he had between four to five jobs on the go and would transfer staff from one job to another as required.
- [39] The Respondent advised that he was the only Carpentry LBP on the project. He would visit the site every second day for between thirty minutes to an hour to check on the progress and answer any questions the staff or contractors may have had. He did little work himself on the site.
- [40] The Respondent advised that there were two or three amendments to the Building Consent during construction, and he noted that he had a bit of trouble with the plans.
- [41] In respect to the grounds for discipline under s317(c) and 314B(b) of the Act, the Respondent confirmed that a block layer [Omitted] undertook and supervised the work. Mr [Omitted] works for a company [Omitted].
- [42] The Respondent stated that he had mistakenly indicated on his Record of Work that he had carried out the block work under the mistaken assumption that as the head contractor he was required to do so. Mr [Omitted] is a Licensed Building Practitioner (LBP) BP[Omitted]. A licenced building practitioner cannot supervise another LBP to supervise or undertake restricted Building work.

#### **Board's Conclusion and Reasoning**

- [43] The Board has decided that the Respondent **has**:
  - (a) carried out or supervised building work or building inspection work in an incompetent 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 contrary to section 317(1)(d) of the Act
 and **should** be disciplined.
- [44] The Board has decided that the Respondent **has not**:
  - (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); or
  - (b) breached section 314B(b) of the Act (s 317(1)(h) of the Act).
- [45] The reasons for the Board's decisions follow:

## Incompetence

- [46] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in an incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [47] The finding of incompetence relates to the Respondent's supervision of non-licensed persons.
- [48] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*<sup>7</sup> it was stated as "*an inability to do the job*".
- [49] The New Zealand Courts have stated that assessment of incompetence in a disciplinary context is a two-stage test<sup>8</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.
- [50] 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>9</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 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>10</sup>.
- [51] 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*

---

<sup>7</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<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 at p.33

<sup>10</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[52] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>11</sup> and be carried out in accordance with a building consent<sup>12</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[53] Supervise is defined in section 7<sup>13</sup> of the Act. The definition states:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[54] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

[55] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[56] 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

<sup>11</sup> Section 17 of the Building Act 2004

<sup>12</sup> Section 40(1) of the Building Act 2004

<sup>13</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

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



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.”*

- [57] The Boards view was this was a complex renovation and addition. As such, a high degree of skill, experience and supervision is required to undertake the work and make sure that all those involved understand what they are required to do and to solve issues in a way that the building work meets the building code, is safe and as best as possible meets the standards of finish expected for this type of work.
- [58] The Board accepted the evidence provided by the Respondent and the conclusions of the report done by Mr [Omitted] and as outlined in paragraphs [16] and [17] of this decision.
- [59] The Board was of the view that the Respondent did not have the required skills or experience to take on this type of complex work.
- [60] As such, the Board finds the respondent could not and did not provide the level of supervision required.
- [61] The Respondent visited the site only every other day for approximately 30 minutes to an hour. There was no evidence of sustained and concentrated supervision of staff who had mixed levels of experience, or any meaningful quality control. If there had been then the Respondent should have pick up many of the serious mistakes and poor remedial decisions that were made.
- [62] The Respondent had between four and five projects on the go at one time and the Board would have expected a far greater time spent on this type of project.
- [63] The errors made, and the solutions adopted to fix problems, were seriously deficient resulting in a build that was both unsafe but would require considerable remedial work to fix.
- [64] There was also general disregard for the health and safety of staff, contractors and people living on the property at the time. The lack of edge protection, the lack of netting, the accumulation of rubbish on site and the inappropriate handling of asbestos suggests an extremely poor even callous disregard for health and safety.
- [65] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent did

not have the required skills or knowledge to carry out or supervise the building work and that he was incompetent.

#### Contrary to a Building Consent

[66] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act 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.*

[67] 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.

[68] The most serious issues here were the incorrect floor height, the lack of drainage behind the retaining walls, incorrect construction of both roofs and a failure to follow engineering detail in the consented documentation.

[69] The consented drawings were not followed and as such the work did not comply with the building consent.

#### Not Licensed to Carry Out or Supervise Restricted Building Work

[70] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

*All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

[71] The Respondent is a licensed building practitioner with a Carpentry Licence. It was alleged that he undertook both brick and block work and water proofing that he did not have a license for. The Board received evidence that the block work was carried out by a Licensed Building Practitioner. As such the offence has not be committed.



### Misrepresentation or Outside of Competence

- [72] Given the finding made under section 317(1)(c) of the Act and the evidence received that the Respondent did not carry out block work, it follows that it is not necessary to make a finding under section 317(1)(h) of the Act.

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

- [73] 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.
- [74] 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.

### Penalty

- [75] 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>15</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.*

- [76] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>16</sup>. The High Court when discussing penalty stated:

*[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to*

<sup>15</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>16</sup> [2012] NZAR 481

*knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

- [77] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [78] 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 have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [79] The failings by the Respondent were substantial and serious. The Board has found that the Respondent was incompetent. Put simply, that means that he does not have the competencies required to carry out or supervise restricted building work. The Board must, therefore, consider whether the Respondent should retain his licence.
- [80] The level of non-compliance as regards the building work was such that the Board considers it has a responsibility to ensure that the licensing regime is upheld and that the public is protected. As such, and taking the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct. Cancellation will also ensure that the Respondent's competence is revaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [81] The Respondent's licence will be cancelled for a period of three years.

#### Costs

- [82] 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."
- [83] 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>.
- [84] 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>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

- [85] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

#### Publication

- [86] 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>20</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.*

- [87] 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.
- [88] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>21</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>22</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>23</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>24</sup>.
- [89] 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>25</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.
- [90] Based on the above, the Board will order further publication in a suitable Ministry of Business Innovation and Employment publication that goes out to all Licensed Building Practitioners.

---

<sup>20</sup> Refer sections 298, 299 and 301 of the Act

<sup>21</sup> Section 14 of the Act

<sup>22</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>23</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>24</sup> *ibid*

<sup>25</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three years.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3500 (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 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.

[92] 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**

[93] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 6 July 2021. 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.

[94] 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

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

Signed and dated this 15<sup>th</sup> day of June 2021



**Mr C Preston**  
Presiding Member

---

### <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."*

### <sup>ii</sup> **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.*