

Before the Building Practitioners Board

	BPB Complaint No. CB25375
Licensed Building Practitioner:	Alan Reid (the Respondent)
Licence Number:	BP 102942
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 Type:	On the Papers
Draft Decision Date:	5 May 2020
Final Decision Date:	31 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
David Fabish, LBP, Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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.

Board Decision:

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

Contents

Introduction	2
Disciplinary Offences Under Consideration	3
Function of Disciplinary Action	3
Background to the Complaint and the Board’s Considerations	4
Evidence	6
Draft Conclusion and Reasoning	10
Negligence.....	10
Contrary to a Building Consent – Building Consent Changes	14
Draft Decision on Penalty, Costs and Publication	17
Penalty	17
Costs.....	18
Publication	18
Draft Section 318 Order	19
Submissions on Draft Decision	19
Request for In-Person Hearing	20
Right of Appeal	20

Introduction

- [1] On 5 May 2020 the Board received a Registrar’s Report in respect of a complaint about into the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. The Registrar, in preparing a report for the Board, must indicate whether, in his or her view, regulation 9 applies¹ and no further investigation is required. In this instance the Registrar made a recommendation that regulation 9(a), that the complaint does not come within the grounds for discipline, applied. The Board did not agree. It has decided that a hearing is required. The reasons for the decision will be traversed as part of this draft decision.
- [3] Having decided that regulation 9 did not apply the Board is required, under regulation 10 to hold a hearing.
- [4] The Board’s jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides

¹ Regulation 8(3) of the Complaints Regulations in respect of complaints and regulation 20(c) in respect of Board Inquiries.

that the Board may regulate its own procedures². It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation³. As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

- [5] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [6] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent and the Complainant will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [7] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and/or
 - (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).

Function of Disciplinary Action

- [8] 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*⁴ and in New Zealand in *Dentice v Valuers Registration Board*⁵.
- [9] 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*⁶ Collins J. noted that:

² Clause 27 of Schedule 3

³ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ [2016] HZHC 2276 at para 164

“... 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.”

- [10] 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 persons⁷:

... 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.

- [11] 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.
- [12] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Background to the Complaint and the Board’s Considerations

- [13] The Board has dealt with a previous complaint from the Complainant in respect of the same property and the same Respondent⁸. It upheld the complaint and disciplined the Respondent. Having done so the Board considered whether regulation 9(g)(ii) of the Complaints Regulations applied.

9 Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (g) its subject matter has been considered previously by the Board, and the Board—*
- (i) considered that the complaint did not warrant further investigation, because 1 or more of paragraphs (a) to (f) applied to it; or*
- (ii) otherwise made a decision on the complaint.*

- [14] In reviewing the complaint, the Board noted that the allegations raised are different to those dealt with in the earlier complaint. As such it decided that regulation 9(g)(ii) did not apply.

⁷ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁸ Reid [2020] BPB 25085

[15] The Board noted that the Complainant purchased the residential dwelling to which the complaint relates from the Respondent and that the dwelling was constructed in 2012 and 2013. Under section 401B(4) of the Act the provisions relating to restricted building work do not apply building work that was consented as at the commencement of the provisions:

*401B Order in Council declaring work to be restricted building work
(4) Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

[16] The Building (Definition of Restricted Building Work) Order 2011 provided for a commencement date of 1 March 2012.

[17] The building consent for the dwelling was, most likely, issued prior to March 2012 (the consented plans indicate a consent date of 2008). As such the building work was not restricted building work. The Respondent was first licensed on 21 January 2011 was, therefore, a licensed person during the construction of the dwelling. Under section 315 of the Act his conduct does come within the Board's jurisdiction.

[18] The Respondent has stated he did not carry out the work. It was completed whilst he was out of the country. As the building work was not restricted building work it did not have to be carried out or supervised by a licensed building practitioner. The question for the Board to consider, however, is whether the Respondent was, nevertheless supervising. If he was then he can be held accountable.

[19] Supervise is defined in the Act as:

*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.*

[20] In Board Decision C2-01143⁹ the Board found that the definition of supervise in section 7¹⁰ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation which includes the regulation and accountability of licensed building practitioners.

[21] On this basis the Board has decided, contrary to what the Registrar recommended, that the Respondent's conduct could come within the disciplinary provisions of the Act.

⁹ Board Decision dated 14 April 2016

¹⁰ 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.*

Evidence

- [22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed¹¹. 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.
- [23] The Complainant claimed the Respondent had built a deck without first obtaining a building consent, that the deck did not comply with NZ3604 in that nails were used instead of stainless-steel screws (the property is in a coastal zone) and that the deck failed and the fixings had to be replaced. The Complainant considered the failure was serious and could have been life threatening.
- [24] The Dunedin City Council issued a Notice to Fix on 5 September 2019 and a Dangerous Building Notice on 5 September 2019. The notice stated:

Particulars of contravention or non-compliance:

Non-compliance with section 40 of the Building Act 2004, 'buildings not to be constructed, altered, demolished or removed without consent'.

The formed soffit to the underside of the deck was installed without building consent and has failed.

To remedy the contravention or non-compliance you must:

- 1. Engage a suitably qualified structural engineer to assess and provide a solution to this issue.*
- 2. Engage a carpenter to fix the Issue as per the suitably qualified structural engineer's instructions.*
- 3. Apply for and obtain a certificate for acceptance under sections 96-99 of the Building Act 2004 for the formed soffit to the underside of the deck and the remedial work to fix the issue.*

This notice must be compiled with by:

Monday 21 October 2019.

¹¹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[25] The Council also issued a Dangerous Building Notice on the same date. It stipulated:

Particulars of contravention or non-compliance:

A dangerous building notice under section 124 of the Building Act 2004 has been issued on this property due to the formed soffit to the underside of the deck at the front of the property which was installed without building consent has failed therefore the structure is considered dangerous.

To remedy the contravention or non-compliance you must:

1. *Ensure no-one is permitted to enter the property or occupy the area outlined on the attached plan and that the area is to be made safe, so no person can enter the affected area . The only people permitted in this area is the suitably qualified structural engineer and carpenter assessing and completing the remedial work.*
2. *Provide to the Dunedin City Council a written report from a suitably qualified structural engineer confirming that this area is now safe to occupy.*

[26] The following photograph shows the area of the building in question.



[27] The Board was provided with the consented plans. Sheet A501 contained the consented detail for the balustrade and the sill. The consented detail clearly shows that there is no provision for any extra loading to the deck joists in the form of

battens, packers, or a hardwood soffit as was constructed. This is also shown on Sheet A400 Section C and Section D and A401 Section E.

- [28] The following photograph shows the actual on-site construction detail with the soffit installed:



- [29] The Notice to Fix and the Dangerous Building Notice both raise issues with the structural integrity of the unconsented work.
- [30] The Complainant engaged [Omitted], a Structural Engineer, to review the building work. His report of 17 August 2019 provided photographs of the soffit failure. He noted:

The failure is due to the poor fixings between the 70 x 45 ceiling battens and the 190 x 45 floor joists above.

The 70 x 45 battens were fixed only by 90mm long FH nails driven through the 70 deep battens and into the joists.

With packing used between the battens and the joists the nails penetrated less than 20mm into the floor joists.

Such fixings rely only on friction between the nails and the timber and are not good practice.

The dead weight of the soffit coupled with stresses from temperature, moisture changes and wind have overcome the friction.

[31] The following photograph shows the building elements separating as a result of the fixings used.



[32] A subsequent report of 13 September 2019 noted that the deck was within 100 metres of the harbour, was in exposure one D: High as defined in NZS3604 and that all fixings must be stainless steel.

[33] The Respondent provided a written response by way of his Legal Counsel. The response set out the property transaction background. As regards specific issues Counsel set out the Respondent's responses as:

1. *The soffit was part of the deck which was included within the application for building consent of the house.*
2. *Mr Reid accepts that the wrong screws were used by an employee of Reid Projects Ltd.*
3. *Mr Reid was unaware that the incorrect screws were used because he was not present at the time the soffit was fixed as he was in Thailand when the work was carried out following the trauma of a loss of a still born child.*
4. *If Mr Reid had been aware that the wrong screws were used then he would have replaced the screws with the correct screws.*
5. *The screws in the soffit relate to a non-structural part of the deck.*

[34] The response also noted that the defective work is being attended to and that there were ongoing negotiations to settle contractual matters between the contracting parties.

Conclusion and Reasoning

[35] 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

[36] The reasons for the Board's decisions follow.

[37] The Board's finding of negligence relates to the Respondent's supervision of building work that resulted in the installed soffit failing.

[38] The Board's finding that that the Respondent supervised building work that does not comply with a building consent relates to the installation of a soffit did not form part of the building consent.

Negligence

[39] As noted in paragraphs [18] to [21] the Board's jurisdiction with respect to supervision is not limited to restricted building work. It can find that a licensed building practitioner has been negligent in his or her supervision regards of the type of building work being undertaken. The key difference between restricted building work and other building work is that restricted building work must be supervised by a licensed building practitioner.

[40] 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*¹² test of negligence which has been adopted by the New Zealand Courts¹³.

[41] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹⁴. 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.

¹² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[42] 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 Act¹⁵. 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 practitioner¹⁶.

[43] 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.*

[44] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁷ and be carried out in accordance with a building consent¹⁸. 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.

[45] Turning to supervision the term "supervise" is defined in section 7¹⁹ of the Act. The definition states:

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁶ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁷ Section 17 of the Building Act 2004

¹⁸ Section 40(1) of the Building Act 2004

¹⁹ 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.*

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.*

- [46] In C2-01143 the Board 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.
- [47] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.
- [48] 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 1992²⁰. 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.”

- [49] Looking at the building work it was completed in a manner that created a danger to persons. The type of fixings used fell well short of being adequate. Using flat head nails which only provided 20mm of penetration to a building element that was subject to gravity and failing to use stainless steel in Zone D was noted as being contrary to NZS 3604 by the Counsel and the Structural Engineer. NZS 3604 is an acceptable solution for compliance with the Building Code. The failing noted mean

²⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

that the building work would not have met clauses B1 Structure or B2 Durability of the Building Code.

- [50] The inclusion of a soffit using heavy materials (hardwood) on a veranda that was carrying a load from above could have compromised the structural performance of the structure. It was not designed with the extra load in mind. It may or may not have been able to carry the load. The issue for the Board is that no assessments were made. As noted by the Council the inclusion of a soffit of the type installed would have required a suitably qualified engineer's assessment. The Respondent, whose house it was, allowed the work to progress regardless of the risks.
- [51] The question is to what extent is the Respondent to be held accountable. He has noted that the work was carried out whilst he was out of New Zealand. It was, however, his own home that was being built and he was the in overall control of the build. Moreover a visual inspection of the work would have revealed the type of fixings used and at the very least the Board would expect that the Respondent would have made inquiries of his workers as to how they carried out the work on his return. It is not acceptable to simply say "I was not on site when it was done so I take no responsibility".
- [52] Taking the above tests into consideration the Board has decided that the Respondent's supervision fell below that which is to be expected of a licensed building practitioner and that he has therefore been negligent.
- [53] Turning to seriousness in *Collie v Nursing Council of New Zealand*²¹ 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.*
- [54] The Board considered whether the conduct could be described as inadvertent error, oversight or careless given that the work was done when the Respondent was absent. However, the Board notes that the work was a deliberate departure from the building consent, that no design or engineering input was obtained, and that the work did not meet compliance requirements. Also, and importantly, the Respondent's actions, when he returned to site, did not measure up to the expectations of a supervisor as laid out in *Gallagher*.
- [55] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has 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.

²¹ [2001] NZAR 74

Contrary to a Building Consent – Building Consent Changes

[56] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code). All building work must also be carried out in accordance with a building consent. 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.*

[57] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 Grant of building consent

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

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

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*

- (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[59] In *Tan v Auckland Council*²² the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[60] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

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

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

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

[62] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act. In this matter the Respondent was also the owner on whom the primary building consent obligation sits.

[63] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception. The building work did not come within any of the exceptions.

[64] 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

²² [2015] NZHC 3299 [18 December 2015]

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. The soffit would have required an amendment as it was not minor. It effected the structural performance of building elements and required an engineering assessment to ensure the structure was capable of sustaining the additional loads.

[65] In this respect section 45(4) of the Act states:

- (4) *An application for an amendment to a building consent must,—*
- (a) *in the case of a minor variation, be made in accordance with section 45A; and*
- (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[66] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[67] It should also be noted that whilst a certificate of acceptance can be granted, as noted by the Council in the Notice to Fix, for building work that is not carried out under a building consent it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (3) *This section—*
- (a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
- (b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[68] The Board had clear evidence before it that the Respondent had permitted, authorised, or allowed building work that did not comply with the building consent to be undertaken. It was a deliberate departure. Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established²³. On this basis the Board finds that the disciplinary offence has been committed.

²³ *Blewman v Wilkinson* [1979] 2 NZLR 208

Decision on Penalty, Costs and Publication

- [69] 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.
- [70] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [71] 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*²⁴ 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.

- [72] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁵ 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.
- [73] The Board has taken into consideration, in its deliberations on penalty, that the Respondent previously been disciplined by the Board in respect of the same property albeit for different conduct. It has approached its penalty decision by considering what its penalty decision in the first case would have been had the current offending been included. In the earlier case the Board noted that the conduct took place in 2012. At that time the scheme was new, and the Board was being more lenient toward practitioner transgressions. As with that case it is appropriate that the Respondent be dealt with consistently with how matters were dealt with at that time.
- [74] On this basis the Board has decided that the Respondent will be censured. A censure is a formal expression of disapproval.

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [75] 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.”
- [76] 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 case²⁶.
- [77] In *Collie v Nursing Council of New Zealand*²⁷ 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.*
- [78] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [79] 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 Act²⁸. 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.*
- [80] 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.
- [81] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out

²⁶ *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.

²⁷ [2001] NZAR 74

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².

[82] 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 interest³³. 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.

[83] Based on the above the Board will not order further publication.

Section 318 Order

[84] 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 \$1,000 (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(1)(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.

[85] 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 Draft Decision

[86] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[87] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **30 July 2020**.

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [88] If submissions are received, then the Board will meet and consider those submissions.
- [89] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [90] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [91] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [92] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **30 July 2020**.

Right of Appeal

- [93] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 9th day of July 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 31 July 2020 on the basis that no further submissions were received.

Signed and dated this 31st day of July 2020



Chris Preston
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.