

## Before the Building Practitioners Board

	BPB Complaint No. CB25492
Licensed Building Practitioner:	Samuel Skinner (the Respondent)
Licence Number:	BP 122030
Licence(s) Held:	Carpentry and Site AoP 1

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

#### Under section 315 of the Building Act 2004

#### Recalled and Reissued

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Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	26 January 2021
Decision Date:	4 February 2021
Recall and Reissue Date:	1 April 2021
Board Members Present:	

Mr M Orange, Deputy Chair, Legal Member (Presiding)  
Mr R Dunlop, Retired Professional Engineer  
Mrs F Pearson-Green, LBP, Design AOP 2  
Mr F Thomas, LBP, Roofing, Registered Plumber

#### 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)(d) of the Act.

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### Summary of the Board’s Decision

- [1] The Respondent has carried out or supervised building work in a manner that was contrary to the building consent issued for that work. He is fined \$2,000 and ordered to pay costs of \$3,500.

### Recall and Reissue

- [2] The Board’s decision of 4 February 2021 was issued on 16 February 2021. The decision recorded that further evidence that the Respondent had indicated he would provide had not been received. Subsequent to the decision being issued, the Board was made aware that attachments to an email received within time had been rejected by the Ministry of Business Innovation and Employment email system. As such, the Board made its decision without the knowledge that the Respondent had attempted to provide further evidence.
- [3] On 1 April 2021, the Board met to receive and review the further evidence received. It also received an email from the Complainant, which raised an issue with the date a foundation was poured. The Board decided that it would recall and reissue its decision so as to correct the omissions.
- [4] The Board notes that, in its original decision, it called for submissions on penalty, costs and publication. The date for those submissions has passed. This reissued decision provides for an extension to the date on which submissions are to be provided.

## The Charges

- [5] 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 may have:
- (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; 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.
- [6] The Board notified the Respondent that in further investigating the conduct, the Board would be inquiring into the following:
- (a) the issues noted by the building consent authority in a Site Notice of 14 February 2020 (printed 17 February 2020 and at page 207 of the Board's files);
  - (b) a possible failure to obtain an amended building consent prior to building work being undertaken to a concrete floor and to floor framing;
  - (c) the installation of additional wall framing that may not have been provided for in the building consent; and
  - (d) the possible use of incorrect fixings on the exterior wall cladding which may have resulted in damage to electrical wiring.
- [7] The Complainant clarified that the Respondent was not responsible for work on a wet room. Issues with it were noted in the Site Notice referred to above. The Board did not further investigate that matter.

## 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [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*<sup>4</sup> Collins J. noted that:

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

<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

*“... 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 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.*

- [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 is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [13] 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.
- [14] 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**

- [15] 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

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

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

relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[16] 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.

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

Samuel Skinner	Respondent
[Omitted]	Complainant
Dave MacKintosh	Witness, Building Consent Officer, Wellington City Council

[18] The Board was, as part of the documentary evidence, provided with documentation from an adjudication, including the Adjudicator's decision. Both the Complainant and the Respondent consented to the Board receiving the documentation.

[19] The Respondent carried out building work on an alteration to a residential dwelling under the building consent. The Respondent's work started on or about 21 October 2019. The intended scope of work was not completed when the contract was brought to an end on or about 30 January 2020. Following the termination, the Complainant noted:

*The level of non-compliance has meant that the Council has had to step in to find a "pathway forward" and the architectural draughtsman ([Omitted]) has had to return to provide design advice for the reframing of the Northern wall and the non-compliant wetroom door. The LPB's non compliant work has resulted in additional inspections, repairs and delays, and costs have been severely impacted.*

[20] The Respondent was the sole Licensed Building Practitioner during the period of his build. Other carpenters and apprentices carried out the building work under his supervision. The Respondent was on site toward the end of the build. He stated he attended the site every day or two.

[21] The Site Notice issued on 17 February 2020 was issued after the Respondent's involvement in the building work came to an end. It was noted as being:

*Site report to summerise issues and get a compliance pathway to work towards a CCC.*

[22] The Site Notice raised various issues, including an issue with pre-pour footings:

***PRE POUR FOOTINGS***

*- Changes from suspended timber floor construction to Concrete slab on ground - amendment to be approved before proceeding.*

[23] The Respondent gave evidence that when kitchen cabinetry was removed, the flooring came up with it and that issues with the subfloor were identified. The engineer to the contract was engaged to develop a design for a replacement foundation.

[24] On 1 November 2019, the engineer, [Omitted], issue a Site Inspection Report which noted:

*Observations:*

- 1. Existing lean-to structure has half concrete and half timber floor.*
- 2. Original timber floor has been exposed and shown to be rotten and is to be replaced.*
- 3. Given the close proximity of floor level to external ground level and poor condition of numerous existing bottom plates and lower portions of studs it is considered most appropriate to construct the new floor/foundation in reinforced concrete.*
- 4. Existing concrete slab appears sufficiently sound with DPM under so we consider it acceptable that this be retained.*

*Instructions Given:*

- 1. SP to provide new floor slab/foundation detail. (Refer attached structural sketches SK1-SK2).*
- 2. Some areas of wall framing will require re-framing/reconstruction do to existing poor condition and/or non-compliant framing arrangements. Proceed with re-framing as appropriate and in accordance with any directions from WCC building inspector.*
- 3. Okay to issue PS4 – Construction Review.*

[25] The change to the foundation was carried out and completed on the basis of the engineer's design. The Respondent gave evidence that the engineer had informed him that the change was most likely a minor variation. The Respondent stated that he had a form from the engineer giving approval for the foundation to be poured. He stated he would produce the document following the hearing but did not do so.

[26] The Respondent stated that he raised the change with the Council during a damp proof membrane inspection (DPM). The Council noted a requirement for an amendment during an inspection on 21 November 2019. The same inspection contained a note, as regards DPM, that it was "being completed at this time". The same inspection contained a note, under Failed Items, that:

*Not as per plan - Relevant plans and specifications are to be submitted to wcc in a formal application for amendment to the current building consent.*

- [27] At the hearing, the Board received evidence from the Respondent that the concrete floor was poured on 10 December 2019. The Complainant provided further evidence and a copy of an invoice post the issue of the original decision to the effect that the foundation was poured on 10 November 2019. Within the documentation timesheets with notations:
- 28 November 2019 – strip boxing, box nibs pour concrete
  - 28 November 2019 – de-boxing concrete slab and box for 150mm nib
  - 6 December 2019 – a reference to breakdown of time and costs for concrete slab
- [28] A Fairway resolution noted an invoice dated 25 November 2019 for a new concrete slab. An Inspection on 16 December 2019 retained the note that an amendment was still required for the concrete foundation.
- [29] The Respondent stated that he dealt with the designer. He was the agent on the building consent file for building consent matters. He stated that he did not involve the designer in the change and that the engineer would provide the certificate of design work for the building consent amendment. The Respondent stated that he had a certificate of work in his possession and that he would provide it to the Board following the hearing.
- [30] In the Respondent's response to the complaint dated 6 June 2020, he stated:
- We proceeded with the concrete floor as per the structural engineer's design and agree we didn't that the amendment approved but it had been lodged by us although the contract had required Heather to do all the Council engagement.*
- [31] Council documentation noted an amendment was lodged by the Respondent on 13 January 2020. An Inspection of 15 January 2020 noted the amendment was with the Council and was yet to be approved. The amendment was progressed after the Respondent had ceased to be involved in the project and was noted as approved in a Site Notice dated 21 February 2020.
- [32] The Board also heard evidence as regards wall framing that, as the build progressed, the Respondent assessed the existing framing on the north wall as being inadequate and in need of replacement. A Site Notice dated 17 February 2020 noted:
- The section of North Elevation framing that has been replaced does not have the bottom plate bearing properly, with large gaps noted under the bottom plate. Also the trimming studs to the side of the single door opening are not bearing on the new plate which is required to distribute the load from the roof solution to be provided for consideration by WCC.*
- [33] The engineer's site observations of 1 November 2019 contained notes (item 4) with respect to the north wall framing. The notes directed engagement with the Council

over re-framing. The Complainant's concern was that complete re-framing was carried out rather than selective repair and replacement.

- [34] The Respondent's position was that he could not leave the framing as it was and that the new replacement framing was completed under clause 1 of Schedule 1 of the Act. When questioned about bracing, he stated that hold-downs were as per the original design and that engineer would have provided directions. He did not make enquiries as to whether clause 1 would have applied.
- [35] The Complainant stated that the Respondent was taking a similar approach to a southern wall and that he was replacing framing regardless of instructions not to. The Respondent denied the allegation and stated that the work was not complete. He referred to a photograph of the building work at the time which showed the framing work was not complete.
- [36] With regard to the final issue, the use of incorrect fixings on the cladding, the Respondent used 75mm jolt heads on rusticated weatherboards. The Respondent stated he would provide the manufacturer's specifications which allowed for 75mm fixings following the hearing. These were provided along with an email from the Respondent in which he stated:

*Clenins rusticated weatherboard spec (note we said the spec required was 75ml but the spec recommends 1 60ml nail. Quote E@AS1 page 177 requires a minimum nail embedment of 35ml to the stud).*

- [37] The manufacturer's specification provided stated that 60mm nails with a minimum penetration into the stud of 35 mm should be used for direct fix rusticated weatherboard.
- [38] The fixings had pierced at least one electrical cable. The Complainant stated that two more instances were also identified. The Respondent stated the issue would have been identified prior to the framing being lined and that the work was not complete.
- [39] Respondent outlined the background to his business and the type of work that they carry out.
- [40] The Respondent was given the opportunity to provide additional documentary evidence in support of his defence following the hearing. He provided an email chain between him and the Complainant dated 10 December 2019. The Respondent also provided, in addition to the weatherboard manufacturers specifications, engineering documentation and calculations. Included was a PS4 Construction Review dated 28 January 2020. The remaining documentation was a Site Inspection Report from the engineer dated 21 November 2019, which stated:

*Approved to pour slab on completion of the above, provided the Local Authority has carried out any inspections they require.*

- [41] Further engineering documentation provided was dated 28 May 2019 prior to the original building consent being issued, or was already within the documentation that was before the Board.

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

- [42] The Board has decided that the Respondent **has** 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.
- [43] The Board considered that a finding under section 317(1)(d) of the Act was more appropriate than a finding under section 317(1)(b) as, whilst the Respondent's conduct in respect of building consent matters fell below what is considered to be an acceptable standard, a finding of carrying out building work that does not comply with a building consent more accurately reflected the evidence and conduct.
- [44] The Board did consider whether the Respondent's use of incorrect fixings was negligent conduct. The fixings used were 75mm, whereas 60mm fixings should have been used for rusticated weatherboards. The work was not as per the manufacturer's specifications. The result was that electrical cables were pierced. The Respondent should have taken more care and is cautioned in the future to make sure that correct fixings are used. Notwithstanding, the Board decided that the conduct was not serious enough to warrant a finding of negligence. In coming to that decision, it took into account the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>7</sup> as regards the threshold for disciplinary matters:

*[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.*

### Contrary to a Building Consent – Building Consent Changes

- [45] As noted, the Board's finding was that the Respondent had carried out or supervised building work that did not comply with a building consent.
- [46] Under section 40 of the Act, all building work must 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.

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<sup>7</sup> [2001] NZAR 74

- (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.*

[47] 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.*

[48] 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.*

[49] In *Tan v Auckland Council*<sup>8</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

*[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.*

[50] 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.

[51] 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.*

[52] 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.

[53] 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.

[54] 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.

[55] 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.*

[56] 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.

- [57] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, 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.

- [58] Looking at the building work that was carried out or supervised by the Respondent, as noted above, the Respondent had a duty, if the building work could not be carried out in accordance with the consented plans, or if alternative methods of completing the work were to be pursued, to consult with the appropriate professionals and, most importantly, the Building Consent Authority (the Council) prior to undertaking the associated work. That did not happen.

- [59] The Respondent made two significant changes to the building consent. The first was with respect to a replacement foundation, the second related to replacement framing on a north-facing wall. The Respondent did consult with the engineer as regards both matters and site instructions were issued on 1 November 2019. The Respondent did not consult the designer who had developed the consented plans and specifications.

- [60] The Respondent stated he discussed the change to the foundation with the Council during a DPM inspection. It was noted that the inspection he referred to occurred on 19 November 2019. That inspection it notated that a building consent amendment was required for the foundation change. The installation of new replacement framing was not discussed.

- [61] Notwithstanding the direction from the Council as regards an amendment being required for the change to the foundation, and subsequent reminders in later inspections, one was not progressed until 13 January 2020, well after the completion of the associated building work. As noted above, this was a contravention of section 40 of the Act.

- [62] It is to be noted that whilst there was disagreement between the Respondent and the Complainant as to when the foundation was poured the key point to note is that

the work was completed prior to the required building consent amendment was issued.

[63] With regard to the framing, the Respondent submitted that clause 1 of Schedule 1 of the Act applied. It states:

**1 General repair, maintenance, and replacement**

(1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*

(2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*

(a) *a comparable component or assembly is used; and*

(b) *the replacement is in the same position.*

[64] There are, however, exceptions to clause 1, which are stipulated in subclause (3). In particular, subclause (3)(b) which states:

(3) *However, subclauses (1) and (2) do not include the following building work:*

(b) *complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties;*

[65] A complete wall was removed and replaced. In such circumstances clause 1 did not apply, as there had been a complete replacement of a component or assembly that contributed to the building's structural behaviour. A building consent amendment was required. There was no evidence of any engagement by the Respondent with the designer or the Council prior to the work being carried out. There was limited engagement with the engineer who directed that the Council should be consulted. That did not occur.

[66] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established<sup>9</sup>.

[67] Given the above, the Board finds that the Respondent has carried out or supervised building work that was contrary to a building consent and that he has, therefore, committed a disciplinary offence under section 317(1)(d) of the Act.

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<sup>9</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

## Penalty, Costs and Publication

- [68] 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.
- [69] 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

- [70] 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>10</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.*

- [71] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>11</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [72] The conduct was in the mid-range of disciplinary offending. The building consent process is an important one. It ensures that the Building Code is complied with and that the health and the safety of persons who use buildings is promoted. It is imperative that the building consent processes set out in the Act are followed. Given this, the Board needs to ensure Licensed Building Practitioners are deterred from taking short cuts and ignoring those processes. Given those factors, the Board has decided that a mid-range fine is required. It considers that the sum of \$2,000 is appropriate.

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<sup>10</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

## Costs

- [73] 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.”
- [74] 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>12</sup>.
- [75] In *Collie v Nursing Council of New Zealand*<sup>13</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.*
- [76] 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. The amount is the Board’s scale amount for an in-person half-day hearing. It is significantly less than 50% of actual costs.

## Publication

- [77] 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>14</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.*
- [78] 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.
- [79] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>15</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>16</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal

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<sup>12</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>13</sup> [2001] NZAR 74

<sup>14</sup> Refer sections 298, 299 and 301 of the Act

<sup>15</sup> Section 14 of the Act

<sup>16</sup> Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive<sup>17</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>18</sup>.

- [80] 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>19</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.
- [81] Based on the above, the Board will not order further publication.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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.**

- [83] 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**

- [84] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 28 April 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.
- [85] 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

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<sup>17</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>18</sup> *ibid*


<sup>19</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

### **Right of Appeal**

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

Signed and dated this 6<sup>th</sup> day of April 2021



**M Orange**  
Presiding Member

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#### <sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

#### <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.*