Before the Building Practitioners Board

	BPB Complaint No. CB25092
Licensed Building Practitioner:	Niall Tierney (the Respondent)
Licence Number:	BP 122075
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:	6 November 2019
Decision Date:	17 December 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Rob Shao, LBP, Carpentry 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 317(1)(d) of the Act.

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

Contents

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] 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 (s 317(1)(b) of the Act);

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

<u>Evidentiary Requirements</u>

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[6] 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 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.

[7] The Respondent was served with the required notice of the hearing. On 2 October 2019 the Respondent emailed the Board Officer advising that he would not be attending the hearing. He did provide written submissions.

[8] The Board had directed that two witnesses were required for the hearing. Given that the Respondent did not appear only one of them, [omitted] an engineer, was required to give evidence.

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[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

The Facts

[9] The Respondent was engaged to construct a new two-bedroom dwelling under a building consent. The Respondent started construction in December 2017. The Respondent's building work did not progress past the sub floor. His building work came to an end on or about 28 February 2018. The building work was carried on and completed by other contractors.

[10] The Complainants raised various allegations including that the initial set-out was incorrect in that the foundations were situated 600mm to the north of the correct position, piles were incorrectly positioned and installed, packers used between piles and floor joists were not the correct type, fixings between piles and joists were incorrect and the general workmanship was unsatisfactory. The Complainants noted that the building work failed seven engineers' site visits and that the Engineer had stated that the work was not in accordance with NZS3604:2011.

[11] The Complainant's also stated that they had not received a record of work from the Respondent for the restricted building work that he completed.

[12] The complaint was accompanied with the Engineer's notes and Site/Contract Instructions which directed remedial work that was required. Also included was a report from a [omitted], a Building Surveyor. Both the Engineer's notes and the report from [omitted] were supported with photographs of the building work that was noted as noncompliant and/or substandard.

[13] The Engineer's Site/Contract Instructions noted a continued failure to deal with the issues noted. Instruction No 3 of 17 January 2018, issued after a site visit which was also attended by the Respondent, noted the following items:

> 1. *Two piles were identified as being particularly out of plumb (as marked on site). These are to have a pair of nail-on plates connecting the bearer to the pile, chamfering the top of the pile to suit.*
> 2. *Two additional piles at the deck-to-house interface are to have similar nail-on plates.*
> 3. *All double bearers are to be nailed together with pairs of nails at 800c/c along the length of the bearers.*
> 4. *All bearer to pile connections (other than anchor piles) are to consist of 4 skew nails and 2 wire dogs.*
> 5. *Anchor pile connections (12kN) are required at 16 locations as noted on the previous site note SI-02 dated 16/1/18. However alternative locations are required if the nominated pile is not reasonably centered in the post-hole concrete, or if the pile is significantly out of plumb. The Mitek detail for 12kN anchor piles is the most practical option, in lieu of NZS 3604.*

6. *All joist to bearer connections are to consist of 2 skew nails.*

7. *Blocking between joists is to be installed as per NZS 3604 fig. 7.2.*

8. *Generally, the nailing of subfloor items is to be in accordance with NZS 3604 table 7.5.*

9. *Provide double joists at all internal load bearing walls.*

10. *Where bearers are not in direct contact with the top of the pile, solid uncompressible (plastic) shims or packers are required.*

11. *Fix packing to the face of piles where the bearer overhangs by 10mm or more, and also fix nail-on plates from bearer to pile.*

12. *Overall dimensions are to be corrected where necessary, checked and verified as consistent with the Consented drawings. It is understood that the roof trusses and wall framing have now been manufactured to the dimensions shown on the drawings, and thus there is no tolerance whatsoever for accommodating dimensional errors in the construction of the floor plan. For example, the 60mm oversize in the width of the floor at one location identified today is to be corrected. Other similar dimensions are to be checked for errors also.*

13. *AII hardware is to be stainless steel.*

14. *AII workmanship and details (unless otherwise specified) are to be in accordance with NZS 3604.*

The above items will be inspected by the Engineer and must be approved before any further work is carried out. This includes prior to any insulation or flooring being installed.

Once approved, the flooring may be installed. The sheets are to be arranged and nailed as per NZS 3604, ref Table 7.5.

The overall position of the house has moved 600mm towards the North, resulting in a large overhang of the deck area over an existing septic tank. As discussed on site, the best options for minimising the deflections of the cantilever corner of the deck are to :-

a) *Use a steel edge beam to stiffen the structure.*

b) *Enlarge the deck to span right across the septic tank, thus eliminating any cantilever.*

Both options with involve some design, detailing and additional cost. The owner is to consider these options and advise the Engineer/Architect as to which option is preferred.

> *We await the builder's notification of the next inspection to check and approve the above items 1 - 12, and the owner's advice regarding the preferred deck design.*

[14] Subsequent Site/Contract Instructions issued noted that not all of the items had been addressed. Instruction No 6, dated 10 February 2018, noted:

> *The following items have not been satisfactorily completed. The comments noted relate to the general defects observed and while some fixing locations are acceptable, many (if not most) are not. The locations of unacceptable work are generally too numerous to list and identify specifically.*
>
> - *Fixing of some nail on plates at anchor pile locations have not been carried out in accordance with the Mitek details. In some cases there is an insufficient number of nails, not to mention warped or bent plates.*
> - *Wire dog fixings of bearers to piles are not straight, not tight, and in a few cases not fully driven into the timber.*
> - *There are several instances of the double bearers being nailed together at intervals greater than the required 800mmc/c. Generally the bearers are nailed together from one side only which is less than ideal, allowing the timbers to separate.*
> - *The fixings of joists to bearers are frequently inadequate and poorly installed. Some fixings have been made with bronzed screws, fixings have been made too close to the bottom edge of the joist thus splitting the timber, some nails have been bent over rather than completely and cleanly driven, and several locations have no fixings whatsoever.*
> - *The packing of bearers to piles and joists to bearers is unsatisfactory. Packers are frequently multi-layered, loose, unsecured, and sometimes do not cover the full bearing area. There are several instances of air gaps under joists or under bearers where no packing has been installed at all.*
> - *Where bearers overhang the out of plumb and misplaced pile heads, there are cases where additional packing has not been installed. As a flow-on consequence, the wire dogs are often bent or installed on an angle instead of vertical.*
> - *The above items have all been noted in previous site notes and/or discussed on site.*

[15] On 22 March 2018, following the termination of the Respondent's contract, the Engineer expressed his opinion on how the project should move forward as follows:

> *There are some significant areas of unsatisfactory structural work such as misplaced and out of plumb piles, inadequate boundary joist to bearer connections, inadequately packed bearer to pile connections (though most have been remedied now) as examples. However there are also a large*

> *number of items relating to NZS 3604 which vary in adequacy from being unacceptable to poor workmanship and being somewhat marginal in acceptability. The overall dimensions of the platform and the true-to-level issues have also been raised. However, ss a structural consultant it is not my role to comment on those NZS 3604 or dimensional matters. In addition, as time goes on, the timber is beginning to warp and twist, creating further difficulties in achieving a final compliant result.*
>
> *Thus in conclusion, I believe the most satisfactory way forward would be to dismantle the bearers and joists entirely. The misplaced piles can then be substituted with new piles in between the existing where necessary (cutting off the defective piles at ground level), and thereby providing a correct foundation structure on which to proceed with the build. In my opinion any other solution would end up only as a "patch up" and still carries some risk of uncaptured defects and non-compliance.*

[16] The Board asked the Engineer for further detail on his opinion that the best course of action was to start over in the correct position on the site. He stated that the level of remediation required, and the compromises posed by the Respondent's work, was such that it would be simpler to start over and that this would provide more confidence in the build thereafter. This was the course of action that was followed.

[17] The report from [omitted] corroborated the matters raised by the Engineer. The Board also received the Building Consent Authority's building consent documentation. Included in this were site notices which also noted the items referred to above.

[18] The Respondent provided a written response to the complaint. He stated that whilst there was a siting issue it was noted prior to the substructure going onto the pile. He noted that he had a surveyor assess it and provide a location certificate and that there were no issues as a result. He also noted that the clients did not have an issue with the solution arrived at and that it would have resulted in a larger deck at the Respondent's cost. He went on to note that the decking to the north was designed to have a cantilever and that it was "completely disingenuous" for the engineer to put on his report that it would require extra steel to stiffen it.

[19] The Respondent further noted that:

(a) the piles were set out 60mm wider than the building but that it was an easy fix as the trusses had not been ordered and the frames could be adjusted on site and that 60mm over the building does not have an overall effect;

(b) the architect had omitted brace pile connections from the original drawings and consent and the he was not paid for the extra work required;

(c) he disputed the site instruction of 23 January 2018 that anchor piles were incomplete or missing as there were never any anchor piles;

(d) it was a blatant lie about no stainless fixings used;

(e) a first inspection failed due to a lack of documentation but that a second inspection was a pass which was reversed after the inspector was contacted by the Engineer;

(f) issues with respect to the Engineer instruction to replace malthoid packing with plastic shims noting that malthoid had been acceptable on another site.

[20] The Respondent referred to attempts to resolve issues with the client. He submitted that the Engineer's instructions, at times, conflicted with earlier instructions citing an instruction for a nailon plate to be fitted to the piles that were out of plumb; whereas in a later report it asks for the piles to be removed and replaced altogether.

[21] The Respondent concluded by stating:

> *In conclusion, I realize that there were a couple of errors in the construction and these were easily rectifiable on site, however I feel that the clients lost any confidence in me as a builder when the architect decided that she did not want to work on the project, her husband was to do the build originally. You can clearly see from the correspondence that every attempt was made to rectify the situation, and it was later rejected by* [omitted] *and* [omitted]. [Omitted] *and* [omitted] *removed the tarpaulin from the framing that was stacked on site, I'm not sure why you would intentionally destroy 16k worth of framing.* [Omitted] *has also spread lies about my family on social media and some of the comments on her post included death threats. The future work I had lined up in the harbour including a 780k new motel build was cancelled, I had to let go of my crew including my son who was serving his apprenticeship.*

[22] On 2 October 2019, the Respondent emailed stating that he would not attend the hearing. He submitted the following:

> *I will not be attending this hearing for the following reasons.*
>
> *The last hearing*[6] *was a complete waste of time because it is obvious that whatever goes through building consent supersedes NZ3604, I was lead to believe that NZ 3604 was the standard that designers, builders and the council must adhere too, and this is not the case. The fixings I put under the floor were exactly as per NZ 3604 for that zone. I was also fined for not supplying the final record of works, the record of works was on the LBP form in the final documents handed to the council inspector, any further documents after that could not be supplied as I was not allowed on site.*
>
> *I was not given the opportunity to question the architect about why he was allowed to cover the vents with cladding and this passed through consent,*

[6] The Respondent was previously disciplined for building work carried out at or about the same time as when this matter occurred.

> *furthermore both the metal and the timber cladding was 100mm from the ground, obviously, there was no issue with flooding in this instance.*
>
> *With regards to the* [omitted] *complaint, the subfloor had no bracing piles or bracing on the consented drawings, so nobody picked this up in the council, it was later designed by the engineer and the payment of the extra work was never made for this either. The engineer asked for the malthoid packing to be removed from the top of the piles and this was the start of misinformation and confusion about what packers were acceptable, in the meantime the subfloor was exposed to the intense Canterbury summer which caused the subfloor to twist and warp. After all this I offered to completely remove and rebuild the subfloor, and this was accepted and then later refused and 72,000 in damages were sought, this put my company into liquidation.*
>
> *As a knock-on effect, I am now bankrupt and I have no desire or wish to be involved with residential building work in New Zealand again. I realize you have to look like you are taking action against builders, but who are the councils, and the architects answerable too when they get it wrong.*

Board's Conclusion and Reasoning

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

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

and should be disciplined.

[24] The Board has also decided that the Respondent **has not** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

<u>Negligence and/or Incompetence</u>

[25] The Board has found that the Respondent was both negligent and incompetent.

[26] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] Judge McElrea noted:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[27] 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

[7] Judge McElrea, DC Whangarei, CIV-2011-088-313

those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[8] test of negligence which has been adopted by the New Zealand Courts[9].

[28] 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*[10] it was stated as *"an inability to do the job"*.

[29] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. 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.

[30] 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[12]. 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[13].

[31] 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:*

8 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
9 *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
10 Ali v Kumar and Others [2017] NZDC 23582 at [30]
11 *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
12 *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
13 *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *(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.*

[32] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[14] and be carried out in accordance with a building consent[15]. 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.

[33] Turning to seriousness in *Collie v Nursing Council of New Zealand*[16] 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.*

[34] Applying the above to the facts the Board notes that there were significant fundamental errors made by the Respondent. The set- out was incorrect and whilst the Respondent took steps to have this assessed by a surveyor the reality is that the mistake should not have occurred in the first place. It was only good luck that resulted in it not being a serious on-site issue with significant implications for the build. For example, had the distances to the boundaries of the section been tight, then, simply carrying on may not have been an option.

[35] The building work that was then carried out was not only noncompliant it was very poorly executed. The Board received evidence and photos of piles that were not plumb or square and which were out of alignment. Getting the foundations correct is fundamental to a build. Any errors made at that stage will have a flow-on effect to the remainder of the build.

[36] What was of serious concern to the Board was that the Respondent did not comprehend the full extent of the substandard or noncompliant work. Nor did he fully acknowledge the impact of it. He displayed a lack of understanding that there is a requirement to build in strict compliance with the building consent. It was somewhat telling that the Respondent submitted that all that is required is to comply with building code requirements is to follow NZS 3604. Much more than that is required. NZS 3604 is a standard which can be used as an acceptable solution. It is one means by which compliance with the structural requirements of the building code can be met. If a building consent stipulates other methods of compliance or requirements, then they must be adhered to. This is as a result of the combined effect of sections 17 and 40 of the Building Act. Section 17 requires that all building

[14] Section 17 of the Building Act 2004
[15] Section 40(1) of the Building Act 2004
[16] [2001] NZAR 74

work must comply with the building code and section 40 that a person must not carry out any building work except in accordance with a building consent.

[37] The Board does accept that from time to time compliance issues will be identified that require remediation. It will not always follow that a licensed building practitioner will be negligent because they are raised. What needs to be considered by the Board are factors such as:

(a) whether there is any form of system or process to identify quality and/or compliance issues;

(b) the extent and seriousness of the non-compliance;

(c) whether there is a pattern of continued non-compliance; and

(d) what steps are taken when non-compliance issues are raised.

[38] In this instance the issues were not identified nor acknowledged by the Respondent, they were serious, they were not dealt with in a timely manner and many remained unresolved notwithstanding repeated instructions from the Engineer.

[39] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on others to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing[17] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[40] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[18]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*

[17] Hansard volume 669: Page 16053
[18] Hansard volume 669: Page 16053

> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[41] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

> ***14E Responsibilities of builder***
>
> *(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.*
>
> *(2) A builder is responsible for—*
>
> *(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
>
> *(b) ensuring that building work not covered by a building consent complies with the building code.*
>
> *(3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
>
> *(a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
>
> *(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[42] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out, and that if there are issues that they will be dealt with and learnt from. That did not occur in the present case.

[43] 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 he lacked the knowledge and skills expected of a licensed building practitioner. Put simply he is found to have been both negligent and incompetent. The Board further finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[44] 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.*

[45] 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.

[46] There was substantial evidence in the Engineer's notes, and the building consent authority's site notes, of noncompliance with the building consent. The set-out was not as per the consent, nor were the piles or connections to the subfloor. As noted above, those are all serious matters which can have implications for the quality and compliance of the build. The Board therefore finds that the Respondent has breached section 317(1)(d) in that he has failed to build in accordance with the building consent.

Record of Work

[47] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[19].

[48] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[49] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-

[19] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[50] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …".

[51] In most situations, issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion.

[52] In this instance, the Board notes that whilst the Respondent did carry out restricted building work his work was removed following the engagement of a new contractor. The build strategy adopted was to reinstall piles and the subfloor in the correct position. As such, the Respondent's work is no longer in existence and a record of work from him is not required.

Penalty, Costs and Publication

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

[54] The Board received evidence at 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.

<u>Penalty</u>

[55] 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*[20] 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.*

[56] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[21]. 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*

[20] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[21] [2012] NZAR 481

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

[57] Cancellation of a licence is the equivalent of striking off within the licensed building practitioner regime.

[58] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[22] 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.

[59] The Respondent has committed two disciplinary offences. The Board does, however, note the commonality in the disciplinary offending in the negligence and incompetence finding and the finding as regards building contrary to consent. As such, it will treat those as a single offence when considering penalty.

[60] The most serious matter before the Board is the finding of incompetence. As noted above, incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. The licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities.

[61] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

[62] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*[23] the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent

[22] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[23] [2011] 3 NZLR 850.

way. The Respondent's failure to appear and his submissions that the hearing was a waste of time are germane in this respect.

[63] Taking all of 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.

[64] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

Costs

[65] 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".

[66] 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[24].

[67] In *Collie v Nursing Council of New Zealand*[25] 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.*

[68] 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. This is consistent with the Board's fee scale for an in person hearing.

Publication

[69] 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[26]. 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.*

[24] *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.

[25] [2001] NZAR 74

[26] Refer sections 298, 299 and 301 of the Act

[70] 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.

[71] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[27]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[28]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[29]. 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*[30].

[72] 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[31]. 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.

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

Section 318 Order

[74] 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 six [6] months.**

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(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.

[27] Section 14 of the Act
[28] Refer sections 200 and 202 of the Criminal Procedure Act
[29] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[30] ibid
[31] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[75] 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

[76] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 22 January 2020. 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.

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

Right of Appeal

[78] The right to appeal Board decisions is provided for in section 330(2) of the Act[ii].

Signed and dated 17 December 2019

Chris Preston

Chris Preston
Presiding Member

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[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.