

Before the Building Practitioners Board

	BPB Complaint No. CB25373
Licensed Building Practitioner:	Christopher Underwood (the Respondent)
Licence Number:	BP 119859
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
Draft Decision Date:	8 April 2020
Final Decision Date:	26 May 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
Robin Dunlop, Retired Professional Engineer

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)(h) of the Act.

Contents

Introduction	2
Scheduled Hearing	3
Function of Disciplinary Action	3
Evidence	4
Draft Conclusion and Reasoning	9
Negligence – Carrying out Building Work without a Building Consent	9
Misrepresentation or Outside of Competence.....	15
Draft Decision on Penalty, Costs and Publication	16
Penalty	16
Costs.....	17
Publication	17
Draft Section 318 Order	19
Submissions on Draft Decision	19
Request for In-Person Hearing	19
Right of Appeal	20

Introduction

- [1] On 5 March 2020 the Board received a Registrar’s Report in respect of a Complaint 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.
- [3] Having received the report the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [4] On the basis of the Registrar’s Report the Respondent’s conduct that the Board resolved to investigate at a hearing was that the Respondent had:
 - (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, IN THAT, he may have carried out building work that required a building consent without first ensuring that one was in place; and
 - (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out design work that was not within his competence to carry out.

Scheduled Hearing

- [5] The matter was set down for a hearing on 30 April 2020 in Auckland.
- [1] As a result of the COVID-19 Alert and Level 4 lockdown the hearing was adjourned. A notice was sent to the Respondent on 31 March 2020 advising that further notices would be sent once the COVID 19 situation changed.
- [2] The Board has since reviewed the complaint file. It has decided that there is sufficient evidence before it to make an indicative decision on the basis of the documentary evidence before it.
- [3] In coming to the decision to deal with the matter on the papers the Board has taken into consideration that 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 that the Board may regulate its own procedures¹. 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 legislation². 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.
- [4] The Board is, however, mindful of your natural justice rights to respond to the allegations and 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. On this basis both 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.

Function of Disciplinary Action

- [5] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

- [6] 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*⁵ 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.”

- [7] 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 persons⁶:

... 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.

- [8] 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.

- [9] 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.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [11] The Respondent was contracted by the Complainant to carry out repairs to the foundations of the Complainant’s home. The work was not carried out under a building consent. The Respondent claimed that it came within the provisions of Clause 1 of Schedule 1 of the Act.
- [12] The work comprised the underpinning of an existing foundation. The Respondent developed the solution that was used and carried out the associated building work

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

to implement it. The Complainant alleged that she had originally consulted an engineer but that whilst waiting for a design and price she engaged with the Respondent who advised her that it was an easy job and that an engineering design was a waste of money. The Respondent indicated that he could design and implement a solution and that he had decades of experience.

[13] The Complainant noted that soon after the Respondent had installed four re-enforced underpin foundations (described by the Respondent in a letter dated 14 April 2018 as “fit for purpose”) the house started shaking and creaking when people were moving within it and that a drain had been damaged . She installed some acro props which reduced the shaking and creaking.

[14] The Respondent’s specification for the work was noted in a quote of 12 February 2018 as:

Under pin foundations to be concreted 600mm x 600mm wide x 1200mm deep holes

All re-enforced concrete to be mechanically vibrated to ensure a key connection to the underside of the existing foundation.

[15] A commercial dispute arose between the Complainant and Respondent about the work.

[16] The Complainant contacted the Auckland Council to enquire as to whether a building consent should have been obtained for the work. She was advised by [Omitted], manager Regulatory Engineering, at the Council that a building consent may have been required together with structural engineering input:

From the information available I would say the work that has been carried would require building consent, and as it will affect the structural behaviour of the building, will require a structural engineer’s input (when we receive building consent applications for this type of work we usually receive plans/calculations from the structural engineer involved showing how the underpinning has been designed to carry loads from the structure it is supporting, what the required depth should be, reinforcement that will be required, how it will be attached to existing foundations, etc.

[17] The Complainant then contacted a structural engineer who advised that a geotechnical investigation should be carried out to assist with the engineering assessment.

[18] [Omitted] were engaged to carry out a geotechnical investigation. Their report dated 22 June 2018 followed a site investigation where 5 hand auger boreholes to depths of between 0.5m and 4m were drilled. The report noted:

Earthworks

From the geotechnical investigation that was undertaken at the site we found unsuitable non-engineered filling to a depth of 1.4m, this is not an indication of the full extent of the material. Further investigation will need to be carried out in order to find the full extent, as there is a possibility that the non-engineered material extends beyond the area in question, possibly towards the back of the property and possibly to the north-eastern corner of the house.

This non-engineered fill along with poor drainage is inferred to be the reason to why the area in question has settled/moved.

It is recommended that [Omitted] is engaged to carry out further geotechnical investigation to help understand the full extent of this material, and if it could adversely effect other parts of the building.

Underpinning

Due to the settlement under the foundation in the south-eastern corner, we understand underpinning is the most likely option in terms of remediation works.

The underpins should be founded at least 2.5m below the existing ground level. This is to ensure they are embedded into natural soils of an undrained shear strength of at least 75kPa.

There is a possibility that the existing garage will continue to settle/move. If no remedial works are to be done on the existing garage, it is important that the garage and its foundations are completely disconnected from the existing house.

It is recommended that further investigation is undertaken before design of the underpins, unless the structural engineer deems the information supplied in this report to be sufficient to continue onto the design process.

Specific Structural Design

A suitably qualified structural engineer, familiar with the contents of this report, should be engaged to design the underpinning details.

- [19] [Omitted] was then engaged by the Complainant to provide a structural investigation and assessment report including an assessment of the underpinning works carried out by the Respondent and to comment on their adequacy and efficacy. Their report of October 2018, which was based on the finding of the geotechnical assessment, noted their assessment of the property before and after Respondent's work. The report noted, from a site visit in December 2017, before any works were carried out:

It was apparent that serious movement in the form of settlement of the ground floor area had occurred, focused towards the rear of the house, and the concrete deck area. There were visible cracks in the concrete floor slab,

noticeable dislocation of the conjoined garage structure from the main house, horizontal & diagonal shear cracks in the walls, a general lack of verticality in the structures, and horizontal & vertical shear cracks in the perimeter foundations that were visible. Some primary structural vertical elements had dislocated both vertically & horizontally.

- [20] A second site visit in August 2018, after the Respondent's work had been carried out, noted:

Previously-inspected structural problems as identified above, were no better, and indeed some of them appeared to have worsened.

The worst-affected area to the rear of the house was noticeably unstable, displaying a tendency to move both laterally & vertically just with a single person moving around on top. Instability in this area was considered to be worse than was recorded during our first visit.

In 3 specific locations inspected, there were noticeable additional settlements of the house foundations, more than we would have expected had no underpinning works being carried out to the property. Due to the fact that underpinning works had been carried out, we would have expected the settlement to have been arrested. This was obviously not the case.

- [21] The [Omitted] report noted the following as regards the underpinning:

An excavation had been made adjacent to one of the underpinning works, so that this could be inspected. It was difficult to inspect without further excavation which we consider would have been dangerous to carry out at that point in time. That which we could see indicated mass concrete infill down to an approximate depth of approximately 1.0 m. Some of the concrete was broken away, there was no apparent steel reinforcement visible. The concrete used was poor quality, friable & easily broken and not consistent with an engineered concrete mix. We could see no evidence of a physical structural connection to the existing house foundation.

Externally, one of the underpinning works was inspected. This appeared to be mass concrete infill to an unknown depth. However it exhibited signs of horizontal cracking indicating separation with the main house foundation. Again it appeared to be of poor-quality, showing signs of a relatively weak concrete mix, again not consistent with an engineered concrete mix. It appeared to be friable and easily broken, and with no noticeable surface finish, hence it would be liable to rainwater ponding. In our opinion, it should have been trowelled to a slope leading away from the house to discourage ponding. Also, as with the interior underpinning, we could see no evidence of a physical connection to the existing house foundation.

- [22] The report concluded:

However, we would conclude that between visits, the house's performance due to extremely light vertical live loading (2 or 3 people walking around) had worsened considerably, and this was after underpinning works had been carried out. We can therefore conclude that they were both ineffective, and poorly located.

From what we could inspect of the underpinning works, we believe that the type of underpinning employed was unsuitable and inefficiently installed. The depth was insufficient considering the soil conditions, leading to the mass concrete actually exacerbating the problems rather than alleviating them.

[23] The report went on to provide a detail opinion as to how the underpinning could be undertaken together with recommended solutions.

[24] The Respondent provided a written response. He refuted that he had stated that an engineering input was not required. He noted the commercial dispute and that the site investigations that he had conducted in the area of the underpinning showed virgin ground and that the geotechnical engineer had indicated on site that underpinning around the rest of the house would not have to go as deep as 2.5m. the Respondent stated:

The [Omitted] Engineer was the same company that [Omitted] had used to drill his bore way outside the building line. The results of my bore holes were, that there was no fill and that the ground was virgin from 200mm deep below the concrete floor down. [Omitted] was present at the time and asked the engineer if this would lessen the depth of the foundations that would be necessary for the rest of house and he said that they wouldn't have to go down as deep as 2.5m as the ground was virgin from 200mm below the concrete floor (instead of being happy that her house had been built of firm natural ground she was unhappy and phoned or emailed the principle of the [Omitted] company, she complained of a conflict of interest), so it is obviously clear that the cause of the foundation settlement was due to a large amount of storm water running off and tracking the ground out under the foundations for many years.

[25] The Respondent engaged [Omitted] to provide an opinion on the [Omitted] report. [Omitted] drilled tow bore holes but noted they are not been privy to the [Omitted] report. The [Omitted] report concluded:

- 1. The underpinning piles, as installed by [Omitted], have not, in any way, exacerbated the pre-existing problems associated with the dwelling.*
- 2. Further underpinning work will be required to stabilise the dwelling. The extent and nature of this work is yet to be determined.*

[26] The Respondent noted that at a Disputes Tribunal hearing a representative of [Omitted] stated that whether the work required a building consent was a grey area.

Draft Conclusion and Reasoning

[27] 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) breached section 314B(b) of the Act (s 317(1)(h) of the Act)

and **should** be disciplined

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

Negligence – Carrying out Building Work without a Building Consent

[29] The Board's considerations in relation to negligence related to the failure to obtain a building consent for the building work as well as to the manner in which the work itself was completed.

Building Consent

[30] 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).

[31] 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.*

[32] 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.*

- [33] 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.*

- [34] In *Tan v Auckland Council*⁸ 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.

- [35] 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.

- [36] 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.

⁸ [2015] NZHC 3299 [18 December 2015]

- [37] 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.
- [38] 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.
- [39] 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.

- [40] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

- [41] The Board, having reviewed the evidence before it, has decided that the building work did not come within one of the exceptions to the requirement for a building consent. The only exception the building work could have come within was clause 1 of Schedule 1 of the Act.

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.*

- [42] The exemption enables the maintenance of buildings, including carrying out any repairs or replacement, without having to get a building consent. It envisages the repair, maintenance or replacement of what already exists with comparable components or materials provided the replacement is the same position.
- [43] What was undertaken was structural work outside of an existing structural component or assembly to try and provide stability to those existing components. It was not repair, maintenance or replacement of those existing components.
- [44] The work involved structural work which was not part of the original design of the dwelling that would have impacted on its safety and performance. As such it was important that the work be checked and authorised by a building consent authority prior to it being carried out and that it was inspected by them for compliance when it was carried out and after completion.
- [45] It should be noted that the Respondent could have sought an exemption from the territorial authority under clause 2 of Schedule 1. It provides:

2 Territorial and regional authority discretionary exemptions

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- (a) *the completed building work is likely to comply with the building code;*
or
- (b) *if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.*

- [46] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent.
- [47] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [48] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.
- [49] 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 purposes of the Act¹² which are outlined above. 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 practitioner¹³.
- [50] The Board notes that the Respondent described himself to the Complainant as having had decades of experience. The Able Foundations website states "we have specialised in all aspects of foundations repairs for over 20 years". The Respondent is a licensed building practitioner with a carpentry licence. Given those factors the Board finds that the Respondent should have known that a building consent was required for the building work or, at the very least, he should have made enquiries to ensure one was not required prior to carrying out the building work. On this basis the Board finds that the Respondent was negligent in that he has departed from an accepted standard of conduct.

Building Work

- [51] Turning to the building work itself the same tests apply as regards negligence.
- [52] The Board had before it compelling evidence from the engineer retained by the Complainant that the structural problems, were no better, and in some cases appeared to have worsened. The report noted:

Due to the fact that underpinning works had been carried out, we would have expected the settlement to have been arrested. This was obviously not the case.

However, we would conclude that between visits, the house's performance due to extremely light vertical live loading (2 or 3 people walking around) had worsened considerably, and this was after underpinning works had been carried out. We can therefore conclude that they were both ineffective, and poorly located.

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

From what we could inspect of the underpinning works, we believe that the type of underpinning employed was unsuitable and inefficiently installed. The depth was insufficient considering the soil conditions, leading to the mass concrete actually exacerbating the problems rather than alleviating them.

- [53] A contrary view was provided by an Engineer retained by the Respondent that the underpinning had not, in any way, exacerbated the pre-existing problems associated with the dwelling but that further underpinning work will be required to stabilise the dwelling.
- [54] The Board notes that Complainant's engineers investigations and reporting was far more thorough and that notwithstanding the Respondent's engineer's finding that the Respondent's work had not exacerbated pre-existing issues that further work was required meaning that the work that had been undertaken was not successful.
- [55] It is also concerning to the Board that the Respondent has undertaken design work which he was clearly not competent to undertake. This will, however, be dealt with under the section 317(1)(h) charge.
- [56] 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.

Seriousness

- [57] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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.

- [58] In *Pillai v Messiter (No 2)*¹⁵ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [59] The Board finds that these tests have been satisfied. The Respondent has displayed a degree of indifference as regards consenting. He should have known that a building consent was required, and he has created significant issues for the Complainant by failing to do so. In this respect it should be noted that had a consenting process been used then an engineering solution would have been called for and the adequacy of the proposed building work would have been independently assessed to ensure that

¹⁴ [2001] NZAR 74

¹⁵ (1989) 16 NSWLR 197 (CA) at 200

it would meet the requirements of the Building Code. As it was not a failed solution has been implemented.

Misrepresentation or Outside of Competence

[60] Section 314B(b) of the Act relates to working outside of one's competence. It provides:

*A licensed building practitioner must—
(b) carry out or supervise building work only within his or her competence.*

[61] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class¹⁶ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

[62] In this instance the Respondent has, by developing the solution to be used for the underpinning, carried out design work of a type that would ordinarily require a structural engineer. This was noted by the Territorial Authority in their correspondence to the Complainant. The design was not one that was covered by an acceptable solution. It required specific design to meet specific requirements.

[63] It should be noted that if the work had been carried out under a building consent, as it should have been, then the design of the solution would have been restricted building work¹⁷ and that, under section 84 of the Act, it could only have been carried out by a suitably licensed person.

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

[64] Persons who can carry out or supervise design work¹⁸ are a licensed building practitioner with a Design Licence or a registered architect or a chartered engineer. The Respondent is not one of the aforementioned.

¹⁶ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

¹⁷ Clause 6 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines design work relating to structure as restricted building work

¹⁸ The Building (Design Work Declared to be Building Work) Order 2007 declared design work to be building work.

- [65] The only reason the design work was not restricted building work was because the Respondent had failed to ensure that a building consent had been obtained.
- [66] Irrespective of the above the true test of competence is demonstrated ability, skill or knowledge to carry out or supervise building work (or design work in this instance) to an acceptable standard. *Beattie v Far North Council*¹⁹, when considering the inverse of incompetence put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*²⁰ it was stated as “*an inability to do the job*”.
- [67] The reports received from the engineers demonstrated that the Respondent did not have ability, skill or knowledge to carry out the design work. The designs were demonstrably deficient and lacked any clear methodology or calculations to prove that they would achieve the desired outcome.
- [68] The Board therefore finds that the Respondent has worked outside of his competence in designing an underpinning solution that was installed.

Draft 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 and the Complainant 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*²¹ 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.

¹⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

²⁰ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

²¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [72] 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.
- [73] The offending was at the moderate level. The Board hopes that the Respondent will learn from the complaint and the Board's decision and that he will, in future, ensure that building consents are in place when required and that he seeks the input of suitably qualified persons before embarking on work that falls outside of the scope of an acceptable solution. Given these factors the Board considers that a fine is an appropriate penalty to impose. The Board notes that there is a related commercial dispute. It has taken this into account and, based on the above, it has decided that the Respondent should pay a fine of \$3,000.

Costs

- [74] 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."
- [75] 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 case²³.
- [76] In *Collie v Nursing Council of New Zealand*²⁴ 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.*
- [77] 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

- [78] 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

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

²³ *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.

²⁴ [2001] NZAR 74

Building Practitioners' scheme as is required by the Act²⁵. 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.

- [79] 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.
- [80] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.
- [81] 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 interest³⁰. 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.
- [82] Based on the above the Board will not order further publication.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Draft Section 318 Order

[83] 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 \$3,000.

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.

[84] 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

[85] 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.

[86] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **25 May 2020**.

[87] If submissions are received, then the Board will meet and consider those submissions.

[88] 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.

[89] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[90] 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.

[91] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **25 May 2020**.

Right of Appeal

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

Signed and dated this 4th day of May 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 26 May 2020 on the basis that no further submissions were received.

Signed and dated this 26th day of May 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.*

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- (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.*