

Before the Building Practitioners Board

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| | BPB Complaint No. CB25637 |
| Licensed Building Practitioner: | Michael Weaver (the Respondent) |
| Licence Number: | BP 107392 |
| Licence(s) Held: | Design AoP 3 |

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

Under section 315 of the Building Act 2004

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| Complaint or Board Inquiry | Board Inquiry |
| Hearing Location | Wellington |
| Hearing Type: | In Person |
| Hearing Date: | 6 July 2021 |
| Decision Date: | 19 July 2021 |

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent has carried out design work in a negligent manner. He is fined the sum of \$2,000 and ordered to pay costs of \$4,500.

The Charges

- [2] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [3] The Board decided that it would appoint a Special Adviser under section 322(1)(d) of the Act to assist the Board with its investigations. The Board gave notice that the issues that would be further investigated at a hearing would be those that were identified by the Special Adviser. Mr Keith Huntington was appointed. He was directed to detail instances where, in his opinion:
- (a) the building consent would not, on reasonable grounds, have satisfied the provisions of the building code if the building work was properly completed

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

in accordance with the plans and specifications that accompanied the application; and/or

- (b) the responses to the requests for information were dealt with appropriately and adequately; and/or
- (c) a section 37 Building Act notice were not dealt with appropriately and adequately; and/or
- (d) the Respondent's design work was substandard; and/or
- (e) the Respondent's drawings and/or specifications were incomplete and/or did not relate to the specific building consent application.

Function of Disciplinary Action

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

Inquiry Process

- [5] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. The Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

Background to the Board Inquiry

- [6] The Board Inquiry arose out of the Board's consideration of a complaint made by the Respondent about building work carried out by Mr Halamalu Tualupe, a Licensed Building Practitioner with a Carpentry Licence, at [Omitted] (complaint number CB25428). The Respondent was the owner of the property in question and the Licensed Building Practitioner who developed the design and submitted the building consent application, including the required Certificate of Work⁴ for the design work. The Board, on reviewing the complaint file in CB52428, decided that it would investigate the Respondent's conduct as it related to the Respondent's design work. A Board Inquiry was initiated.

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 A Certificate of Work for design work is required under section 45(3) of the Act.

Consolidation

- [7] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [8] The Board sought agreement for consolidation of this matter with complaint number CB25428. The Respondent did not consent. The two matters were not consolidated.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [10] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [11] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Respondent and from Mr Keith Huntingdon, the Board appointed Special Adviser.
- [12] At the commencement of the hearing, the Respondent stated that he did not know why the hearing was being held, except that there were a number of requests for information (RFI) that were made by the Building Consent Authority (BCA) during the consenting process. The Respondent was questioned about his receipt of the Board's resolution to proceed to a hearing and the hearing documentation. It was explained that the focus of the hearing would be the opinions expressed in the Special Advisers report. The Respondent sought a hard copy of the report⁶. A copy was provided, and a short adjournment was taken to allow the Respondent to review it.
- [13] Mr Huntingdon established his credentials as an expert. He confirmed his report which was based on the design work submitted with the application for a building consent and not on the documents that were, following the issue of RFIs, consented.
- [14] The Respondent noted that he had been working on the design for some 15 years, and that the design he submitted for a building consent, was done so in a hurry so as to get the consenting process underway. The Respondent also outlined that he is no longer actively running a design practice but that he does do design work on his own

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ The Respondent had previously been provided with an electronic copy of the report together with copies of all other documents obtained as part of the Board's investigations.

properties and projects. In the Respondent's initial response to the Board Inquiry dated 26 November 2020, he stated:

Since setting up Zeal Design Ltd I have been self-employed for over 30 years. Being semi retired now due to a successful business career. I'm not consulting therefore I have removed my website but maintain my LBP because I'm undertaking my own projects for the future.

With [Omitted] job I was keen to do only the minimum amount of design work to achieve the building consent since this is my project, on my house.

- [15] The Respondent reiterated this at the hearing. He stated that the level of care and attention he gave to the design work reflected the fact that it was his own property, he was the main contractor and project manager, and that the design work was not representative of the design work he would do for a client where he would provide more detail. He stated he was doing just enough to get a consent and that he had been working through the design for the past 15 years.
- [16] Mr Huntington's report provided a high-level summary as regards the Board's query on whether the building consent would have satisfied the provisions of the building code. He noted:

5.2.1 It is my opinion that if the Work as shown and described in the Drawings and Specification, and as submitted with the Building Consent Application, was properly completed in accordance with these documents then the work would not comply with the NZ Building Code and would not have received a Code Compliance Certificate.

5.2.2 The fact that such an extensive list of 'Requests for Information' over a wide range of topics was delivered to the submitter at the beginning of the Consent process indicates that the documentation, as presented, was insufficient to obtain a Building Consent and hence would be insufficient construction purposes.

- [17] At the hearing, Mr Huntington provided his opinion that he did not perceive any issues with aesthetic aspects of the design work. Rather it was the technical aspects of the design work that he considered did not meet an acceptable standard.
- [18] Examples of the Respondent's design work were explored in the order the Special Adviser's comments were provided.

Site and Location Plans

- [19] The Special Adviser noted:

Drawing 1 has the 1:200 Site Plan and the 1:500 Location Plan which show the existing house in different positions on each, and the North direction is to the bottom of the sheet instead of to the top as would normally be expected for a building of this orientation. There are no site boundary dimensions or

orientations for the irregularly shaped site and the distances of the house from the boundaries are not given. Also there are no contour lines, spot heights along the boundaries nor at the building footprint, and no Datum Point defined. Existing and new connection to public utility services are not shown.

The street address, legal description and various design parameters are listed. There is a Drawing Schedule.

[20] The Respondent stated, “north is north”, the drawings were at an early stage, the larger scale drawing is the one that takes precedence, and that the house was shown on the plans. He questioned why the house’s location relevant to boundaries was required. The Respondent further stated that the house was existing and was surveyed in 1996 as part of previous alterations carried out, that it was not necessary to once again ascertain boundaries as the council had the information on file.

[21] With regard to boundaries, the Board asked questions on how building recession planes would be determined and how the location of the garage relative to the boundary would be determined by the BCA. In this respect, it was noted that the BCA sent the Respondent email correspondence on 25 January 2018 noting that a resource consent would be required with regard to encroachment on a legal road and with respect to recession planes. The Respondent provided an email response on 29 January 2018 to which the BCA replied on the same date, which stated:

Please still provide a cross-section showing the ground levels at each of the boundaries to support the Building Recession Planes shown on your elevations.

We are happy to assist you existing use rights for the structure on legal road. However, please provide an overlay to demonstrate the replace retaining wall will be same scale of effects.

[22] The BCA also gave notice on 2 February 2018 under section 37 of the Building Act 2004, that a resource consent was required as the proposed building work did not comply with the Council’s District Plan. Two issues were noted. The section 37 notice stated:

Your application does not comply with all of the rules of the District Plan and resource consent is required for structure on a legal road. Possible non-compliance with building recession planes.

[23] The Respondent noted that recession plane information had been provided with plans submitted in 1996 for a previous addition to the property. The Respondent stated that, as far as he knew, town planning rules as regards recession planes had not changed since 1996.

[24] The Board also questioned the Respondent as regards how the location of the garage relative to the boundary would be determined by the BCA on the basis of the

consent document submitted. The Respondent stated that survey information was part of the 1996 building permit application, his documents related to that information, and that further survey information was provided as part of the RFI process. He did not consider that survey information was necessary and submitted that the BCA would have been able to determine boundaries from the additional survey information provided. His position was that the proposed building work was within the boundaries and, as such, there were no boundary issues. He noted that the design work was passed by the Council (BCA).

- [25] Mr Huntington noted, from his review of the building consent documentation submitted, that no survey drawings were provided and that no length of boundaries, distances to boundaries, or site or datum levels were shown on the drawings. It was also noted that the smaller scale drawing submitted by the Respondent showed the garage encroaching over a legal road and that the SAP was very close to the building.

Existing and Proposed Floor Plans

- [26] The Special Adviser's report noted:

Drawings 2 to 6 inclusive do not include a specific Demolition Plan or alternatively clearly identifying the demolition work on each of the plans and sections. There is no Legend or Key to the various colours and line types on the various plans except for new wall hatching, and existing poly block walls at the basement. The distinction is lost if the drawing is printed in monochrome. There is no cross-references to the location of construction details, and the 'A' & 'B' section line indicators are reversed between plans.

These are construction drawings so extraneous items of loose furniture etc can be confusing, unless of course they are part of the Building Consent work.

- [27] The Special Adviser provided his opinion that a demolition plan allows a BCA to ascertain the difference between the existing and the proposed work, and that a demolition plan is relevant to on-site health and safety.
- [28] The Respondent stated that the BCA did not ask for any demolition or health and safety information and that nothing has collapsed. He noted that he was on site every day and that propping was installed as required as the work progressed. The Respondent also noted demolition plans were not needed for pricing purposes as the work was going to be completed on a charge up basis.
- [29] The Respondent was questioned about two plans that had reversed orientations. In Sheet 2, the building was orientated to the left and on Sheet 5 to the right. The Respondent stated it was a mistake or oversight.
- [30] Questions were also posed about the detail provided for new foundations on the plans and, in particular, whether the existing foundations were to be kept or removed and, if they were to be removed, what the specific requirements for the new foundations were and how the old and new structures would tie in as the plans

did not contain those details. The Respondent took the position that as it was a charge up job, it did not matter. He further stated that engineering details covered it and that he would be on-site during the build and would be able to issue instructions as the work progressed. The Special Adviser observed that the engineer's details do not cover waterproofing and that there was no detail on the tanking that would be applied to exterior surfacers linking the old and the new structures. The Respondent described the methodology he would normally use for waterproofing, stated he was surprised the detail was not included and again stated he would be on-site and able to issue instructions.

- [31] The Respondent was also questioned about the quality assurance process he used prior to the building consent documentation being submitted. The Respondent stated he was sick of the design and that he submitted it prior to it being at a high level. He was again noted that he did not give the design documentation as much attention and detail as he would have for a client. The Respondent also indicated in response to questions from the Board that he expects the BCA to provide a degree of quality control for his designs.

Existing and Proposed Elevations:

- [32] The Special Adviser's report noted:

Drawings 7 & 8 provide very little information when consideration is given to what could have been usefully provided in these elevations – materials, detail cross-referencing, site.levels, labelling and dimensioning of the building recession planes, clarification of the precision of the ground line indications to name but a few. Why is it necessary to show, as dotted lines, the internal elements of the building? No explanation is given for the use of red lines around some windows, and black around others. This indication is also on the Window Schedule. Again much detail will be lost on a monochrome print.

These drawings are an appropriate place to record the NZ Building Code E2 risk matrix calculations and scores.

- [33] The Special Adviser did note that the detail referred to above is not essential but is very useful and that its absence makes it harder for a builder to find the required detail. He stated it was accepted industry practice to include it.
- [34] The Respondent stated he would not clutter the elevations with detail and that there was not a lot of clear space on the elevations to include more detail.

Sections

- [35] The Special Adviser noted:

Drawings 9 to 11. As for the elevations, there is much information that would be important for the Builder, and the consenting authorities, but is not given. This is the place for construction detail cross-referencing, labelling and dimensions and indicating materials, etc.. The building recession planes have

no meaning or credibility without accurate dimensions and levels being stated. Why populate Building Consent drawings with people and loose fittings?

- [36] The Respondent was questioned about the details he provided for cladding and, in particular, whether it was direct fix or cavity as the details showed bell casts which relate to a cavity in places where direct fix was to be used. An example was Section C which showed the garage without a bell cast, and the Proposed Elevations which showed a bell cast for the garage.
- [37] The Respondent stated the garage was direct fix and that the change to direct fix was made on-site, the detail showing a bell cast may have been a mistake, and that it was a minor point.
- [38] The Respondent was also questioned about the Roof Details plan, which showed a cavity detail. The Respondent stated that a direct fix was used and that no minor variations or amendments were obtained during the build.
- [39] The Special Adviser noted that he would have expected to have seen cross-references on the plans to other sheets, which contained related detail as per the normal industry practice. He stated that he ensures that nothing is missed. The Respondent stated that the Council (BCA) did not ask for that level of detail.

Floor and Roof Framing Plans

- [40] The Special Adviser noted:

Drawings 12 & 13. For Building Consent and construction drawings there is so much information missing from these sheets as evidenced by the RFIs. The ground floor plan shows the existing structure and has some notes regarding demolition but no drawing and detail of the proposed structure. There is no cross-referencing with the construction details. There is a note of joists running north to south but no North point on the drawing.

The roof framing plan has new framing members running through the skylight openings and no trimming framing for these openings. The roofing plan is diagrammatic without the width of valley gutters being shown which could lead to significant problems being revealed during construction. The skylights are shown as dotted. Does this mean that they do not penetrate the roof surface?

- [41] The Board questioned the Respondent as regards the Floor Framing Plans (Sheets 12 and 13) and in particular with regard to gutters and falls for a deck and the membrane to be used. It was noted that the plans showed rafters, but the area was actually trussed, and that the dimensions of materials intended to be used did not allow for the construction to proceed as shown. The Respondent was questioned as to how fall for drainage would be achieved and how it would actually be built.

- [42] The Respondent stated that those details were thrown out, that he has never seen a fall being provided on the plans and that the methodology was changed to one that was less problematic.
- [43] The Special Adviser also noted that on the Interior Stair Details (Sheet 10), the number of risers, if the detail provided for treads and risers was used, would have resulted in a partial riser. The Respondent stated that the plans stated “all dimensions to be verified on-site prior to construction” and that a site measure would have determined the correct riser height.
- [44] The Respondent was also questioned about the Existing and Proposed Basement Plans (Sheet 2) and why elevations were not provided. The Respondent stated that he had wanted to get the consent underway, that the detail was missing, but that the design was refined as part of the consenting process. He also stated that the design was wrong and that it was submitted in haste.

RFI Process

- [45] The Special Adviser provided a summary of the RFI process interactions between the BCA and the Respondent. He noted:

5.3.8 In my opinion there was excessive delay to the Building Consent process caused by the initial lack of response by the Submitter. The sending of Reminder letters did not seem to elicit action or acknowledgement. While there were 48 non-structural RFIs to answer as a single delivery to the electronic receiving system, and this would have taken some time, if the Building Consent Application documentation had been more comprehensive then such a large number of initial RFIs would not have been necessary. Once the RFI Responses were received it appears that the Council acted appropriately and adequately.

- [46] The Respondent noted that it was his own job and that time was not a factor. He had a lot of people to deal with and that he had submitted the building consent when he did as he was keen to get the work underway.
- [47] The correspondence from the BCA showed that the building consent was submitted on 20 December 2017 but that responses were not provided until July 2018. Prior to that, the BCA had sent a final reminder on 10 April 2018 and notice that the building consent would be refused due to a lack of response on 8 June 2018. The Respondent replied to those notices seeking more time.
- [48] The Respondent provided his opinion that the RFIs were not reasonable and that he had issues with the BCA online portal system. The Respondent provided more detail as regards his interactions in his written response to the Board Inquiry. The response included detail on specific RFI responses and a more general statement about the process:

As I worked my way through the RFI questions I attached additional documents with the reply and sent this information back to council. Where possible I would refer later questions to the earlier response where the information was already covered. As I completed the responses I waited further processing from the council. Many of the question that I had replied to came back as further RFI's. Being perplexed I phone the person processing the building consent to find there was missing attachments. Unbeknown to me the system would only take one attachment. If you add more only the final attachment remained in the system with earlier attachments being deleted.

Furthermore unlike email attachments which you can see and check the before sending. The "Go Shift" system did not allow this to happen. There was no warning about attachment limitations which is part of the reason for so many RFIs.

As for the design documents presented to the council in the first instance remained unchanged throughout the process. Which proves I was right with the submission. The person processing the consent rejected my bell cast cavity system saying it did not comply with the 4 "D" Deflection, Drainage, Drying, and Durability. My system ticked all the boxes and only after questioning the processing officer he finally agreed with me and approved this. This occurred on other instances also.

There are a number of questions following the first set issued which get repositioned later in the RFI because the question was not answered first up. It is still the same question just adding to the number of RFI's.

- [49] The Respondent was questioned about the Specifications submitted as part of the building consent application. Specifically, he was asked where the MPA details for concrete, the internal lining details, and the underlay details were contained.
- [50] The Respondent stated he used a speciation system that was new to him (Smarty Spec 2017) and that he did not go through the specification with a fine-tooth comb, there was detail that was missing, but it was added at a later point. He noted that, with regard to linings, the ceiling lining used did not matter, that brace line was noted, and that other linings could be chosen as the build was completed.
- [51] The Respondent was asked whether the ceiling linings would be 10 or 13mm, noting that the choice would determine whether battens were required. The Respondent stated it was 13mm and accepted it was not noted.
- [52] The Respondent reiterated that the final consent documents were better than those that were first submitted.

Section 37 Notice

- [53] The Special Adviser provided a summary of the correspondence with the BCA with regard to the Section 37 Notice issued on 2 February 2018 which stipulated that a

resource consent was required for aspect of the proposed building work. The Special Adviser noted:

5.4.10 It is my opinion that the section 37 Building Act notice was dealt with appropriately and adequately by the Wellington City Council. The section 37 notice was properly initiated by there being inadequate information included in the Building Consent Application.

- [54] A Section 37 Notice places restrictions on building work take place until such time as a resource consent is obtained. The requirement for a resource consent was also stipulated in the approved building consent dated 23 August 2018.
- [55] Building work started in April 2019. A resource consent had not been issued when the building work started and has still not been granted.
- [56] The Respondent submitted that the BCA had granted a waiver that allowed the building work to proceed and that he would provide the Board with a copy of it.
- [57] The BCA file contained a Site Notice dated 17 May 2019, which stated: *“No further inspection are is to proceed until Resource consent has been granted”*.
- [58] The BCA file contained correspondence dated 21 May 2019, which discussed a partial lifting of the Section 37 Notice and a letter dated 30 May 2019 granting a partial lifting of it, but only in relation to recession planes.
- [59] A further Site Notice dated 14 October 2019 stated: *“Note the R/consent is for a tree only and building work may proceed”*.
- [60] Following the hearing, the Respondent provided the waiver he referred to. It was the 30 May 2019 partial release. It stated: *“No work can commence on the additional structures on the legal road until the resource consent is approved”*.

Closing Submission

- [61] In closing, the Respondent submitted the original application was made in haste and whilst it was not the best, it was consented, and the Board should look at the consented documentation, which was an improvement. He also submitted that BCA consenting system was not good and that it caused issues with the RFI process. He stated the BCA was requiring information that was not necessary, such as existing drainage when there were no new connections. He accepted that some of the RFIs were valid, but others were not, such as the performance of direct fix cladding and ground clearances when the existing direct fix cladding has performed for the last 20 years. Other questions related to issues that, in the end, were shown to be compliant, such as the bell cast for cladding. The Respondent also noted that there were more RFI requests for the engineer than for him.
- [62] The Respondent also submitted that he had 32 years of experience and no failed projects.

[63] At the close of the hearing, the Respondent sought to submit a recent example of his design work. A direction was given that it be supplied electronically to the Board Officer by 9 July 2021 for inclusion in the Board's file. Those documents were received and were taken into consideration by the Board.

Board's Conclusion and Reasoning

[64] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.

[65] The Board's considerations as regards negligence are in respect of the Respondents design work.

[66] Under the definitions in the Building Act, design work forms part of the wider definition of building work and, as such, in respect of section 317(1)(b), it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

3 Design work declared to be building work

(1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*

(2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[67] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

[68] 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, in this case, a licensed building practitioner with a design license. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[69] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁹. The first is for the Board to consider whether the

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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.

[70] 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 Act¹⁰. 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 practitioner¹¹.

[71] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[72] The Board also notes the provisions of section 14D of the Act, which states:

14D Responsibilities of designer

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly*

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

completed in accordance with those plans and specifications or that advice.

- [73] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account.
- [74] The Board also considers that the standards expected of a Licensed Building Practitioner apply regardless of whether the Licensed Building Practitioner is doing the work for him or herself or for a client. The Board does, however, note that where the work is undertaken by a Licensed Building Practitioner for themselves, it may be a mitigating factor if they then depart from an acceptable standard of conduct.
- [75] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹² 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.

- [76] Looking at the design work, there was clear evidence in the Special Adviser's report and in the evidence received at the hearing that the design work had been carried out in a substandard manner. Specifically, the Board finds that the original application for a building consent did not meet building code requirements and that the building work would not have been able to have been completed without significant further input and instructions. A person carrying out the building work should be able to rely on the consented documentation as a completed set of details on how the build is to be completed so as to meet building code requirements. That was not the case with the original building consent documentation that was submitted by the Respondent. The types of requests for information (RFI) that were issued and the subject matter of the RFI were testament to the failure to fully develop a code-compliant building consent application. The Respondent's own statements that he was doing the bare minimum because it was his own build and that he places a degree of reliance on BCA for quality control are also indicative of a lack of care and attention to the level of detail and accuracy required.
- [77] The design work issues were compounded by a failure to correctly deal with requests for information (RFI) that were issued and with resource consent issues that were notified. Putting the significant delay in responding to RFI aside, the responses were not fully formed and did not, at times, deal specifically with the request that was made. With regard to the resource consent and the section 37 Building Act Notice, the resource consent issues were notified at the Project Information Memorandum stage but not dealt with until such time as the build was underway. Moreover, notwithstanding the Notice, the Respondent allowed the build to progress contrary

¹² [2001] NZAR 74

to it. The Respondent submitted that the Building Consent Authority (BCA) had waived the Section 37 Notice. That was not the case. The BCA did provide a partial waiver mid-project. It did not waive the issue as regards encroachment on a legal road, but the Respondent allowed the build to continue notwithstanding.

- [78] The Respondent submitted that the Board should evaluate the final consented documentation. The Respondent also implied that, as he was on-site and managing the build, he would be able to instruct changes to meet compliance requirements as the build progressed. The Board does not accept those submissions. A designer should be aiming to get it right the first time. He or she should not be relying on others to identify and fix their mistakes or issuing on-site instructions. As noted, those carrying out the build are entitled to rely on a design that has been consented and should not have to rely on or receive further detail and instructions in order to complete the build. Those requirements apply regardless of who the client is.
- [79] It should also be noted that 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 legislation¹³:

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.

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.

- [80] Furthermore, under section 45(3) of the Act, a licensed building practitioner with a design licence must submit a certificate of work with a building consent that states that the design complies with the building code:

¹³ Hansard volume 669: Page 16053

- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
- (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
 - (b) *that identifies that design work; and*
 - (c) *that states—*
 - (i) *that the design work complies with the building code; or*
 - (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[81] The Respondent, as the author of the certificates of work, gave the undertakings as to quality and compliance noted above.

[82] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

[83] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[84] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[85] 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*¹⁴ 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

¹⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [86] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*¹⁵. The High Court, when discussing penalty stated:

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

- [87] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime. Suspension is a somewhat lesser penalty. The Board, initially considered suspension as a penalty.

- [88] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*¹⁶ the High Court, in relation to the principles relating to suspension of a legal practitioner's licence stated:

[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

- [89] This was affirmed in *Jefferies v National Standards Committee*,¹⁷ where the High Court also stated:

¹⁵ [2012] NZAR 481

¹⁶ [2011] 3 NZLR 850

¹⁷ [2017] NZHC 1824

[25] *I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.*

[26] *And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*¹⁸

- [90] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁹ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [91] 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.
- [92] The Board, however, noted that the Respondent was both the designer and the client. He assured the Board that the quality of the design work did not reflect the work that he carries out for clients. He submitted design work for client projects for the Board to review. Those designs, whilst not recent, were of a higher quality. The Board accepted that the substandard design might have been a single incidence and not reflective of the Respondent's usual design work. As such, the Board accepted the Respondent's submission and decided that a suspension was not required. A penalty that does deter is required.
- [93] Taking all of the above factors into account, the Board considers that a fine is the appropriate course of action. The Board adopted a starting point of a fine of \$3,000. The amount reflects the seriousness of the conduct and is consistent with other fines imposed by the Board. The Board decided that the fine should be reduced to \$2,000 on the basis of the mitigating circumstances, including that the Respondent was working for himself.

Costs

- [94] 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."
- [95] 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 case²⁰.

¹⁸ *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

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

²⁰ *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.

[96] In *Collie v Nursing Council of New Zealand*,²¹ 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.

[97] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$4,500 toward the costs of and incidental to the Board's inquiry. The costs reflect that a Special Adviser was appointed and is the Board's scale amount of costs for a full day hearing where a Special Adviser is required. The amount is significantly less than 50% of actual costs.

Publication

[98] 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 Act²². 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.

[99] 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.

[100] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. 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*²⁶.

[101] 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 interest²⁷. 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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

Section 318 Order

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

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

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(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.

[104] 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

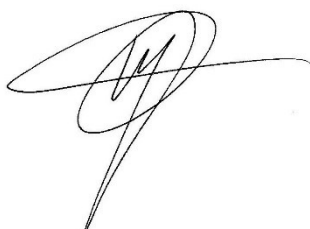
[105] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **16 September 2021**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[106] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 26th day of August 2021

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a long horizontal stroke that loops back under the 'M'.

Mr M Orange
Presiding Member

ⁱ Section 318 of the Act

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

ⁱⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*