

Before the Building Practitioners Board

	BPB Complaint No. 25485
Licensed Building Practitioner:	John Stride (the Respondent)
Licence Number:	BP 135333
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person (with Respondent via Zoom)
Hearing Date:	1 February 2022
Decision Date:	14 February 2022

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
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 disciplinary offences under sections 317(1)(b) and (d) of the Act.

Contents

Summary of the Board’s Decision	2
The Charges	2
Inquiry Process	4
Background to the Complaint	4
Evidence	4
Board’s Conclusion and Reasoning	10
Negligence or incompetence	10
Contrary to a Building Consent.....	16
Penalty, Costs and Publication	17
Penalty	17
Costs.....	18
Publication	19
Section 318 Order	20
Submissions on Penalty, Costs and Publication	20
Right of Appeal	21

Summary of the Board’s Decision

[1] The Respondent carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He is fined \$2,000 and ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

- [2] The hearing resulted from a Complaint about 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 offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and/or
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

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

- [3] In further investigating the Respondent’s conduct, the Board resolved to inquire into:
- (a) the matters raised in the Council Building Consent Inspection dated 7 June 2019 and a Notice to Fix dated 10 June 2019. (Documents 4.1 and 2.1, Pages 202 and 67 of the Board File);
 - (b) damage to the lead flashings; and
 - (c) whether the building work was carried out prior to building consent amendments being granted and the processes for managing changes to consented building work.

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.

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

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

[6] 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 persons⁵:

... 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.

[7] 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

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

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.

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

Inquiry Process

- [9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Background to the Complaint

- [11] The Complainant contracted the Respondent to build and supervise the remodelling and extension of the existing first-floor area over the existing single storey living area. The work involved strengthening the living area ceiling to become the new floor, taking off part of the roof, installation of a ridge beam, creating new dormer roofs, building new outside walls, installation of a new roof and building of new internal wall framing and bracing.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [13] 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.
- [14] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

John Stride, Respondent

[Omitted], Complainants

[Omitted], National Business Manager, [Omitted]

[Omitted], [Omitted]

[Omitted], [Omitted]

[Omitted], Architectural Designer, [Omitted]

[15] The Building Consent application for the work the Respondent was engaged to do was lodged with the Council in early December 2017. The consent issued on 5 March 2018. The Complainant was asked by the Board what work was done on the house before the Respondent's involvement. He initially answered "none", but then stated the following work was completed downstairs.

(a) *Walls removed in kitchen*

(b) *Storage cupboard walls and ceiling repaired and painted*

(c) *New kitchen in place*

(d) *Door removal and separate toilet and bathroom space combined into one room with bathroom fittings layout being reconfigured*

(e) *Bathroom fully tiled*

[16] The Complainant said all of this work was completed before the building consent issued. He further advised that it was carried out by him (with an electrician and plumber). There were no plans and no building consent. The building consent that was issued after the work was completed included downstairs building work on the basis that the work was to be completed as opposed to it having been completed. The Complainant confirmed that no bracing upgrade was done in this downstairs area.

[17] [Omitted] gave evidence that when he was first on-site in mid-2017 to do a measure up for the design of the upstairs work, the downstairs was in its original condition. He stated that he did not know that the downstairs work was later done and that he was not back on site again until after the Building Consent was issued and the Respondent had started the upstairs work.

[18] The Complainant and [Omitted] dispute that [Omitted] did not know about the downstairs work.

[19] [Omitted] stated that [Omitted] did its structural design for the upper floor in October 2017 based on the original layout and state of the downstairs and [Omitted] design for the upstairs.

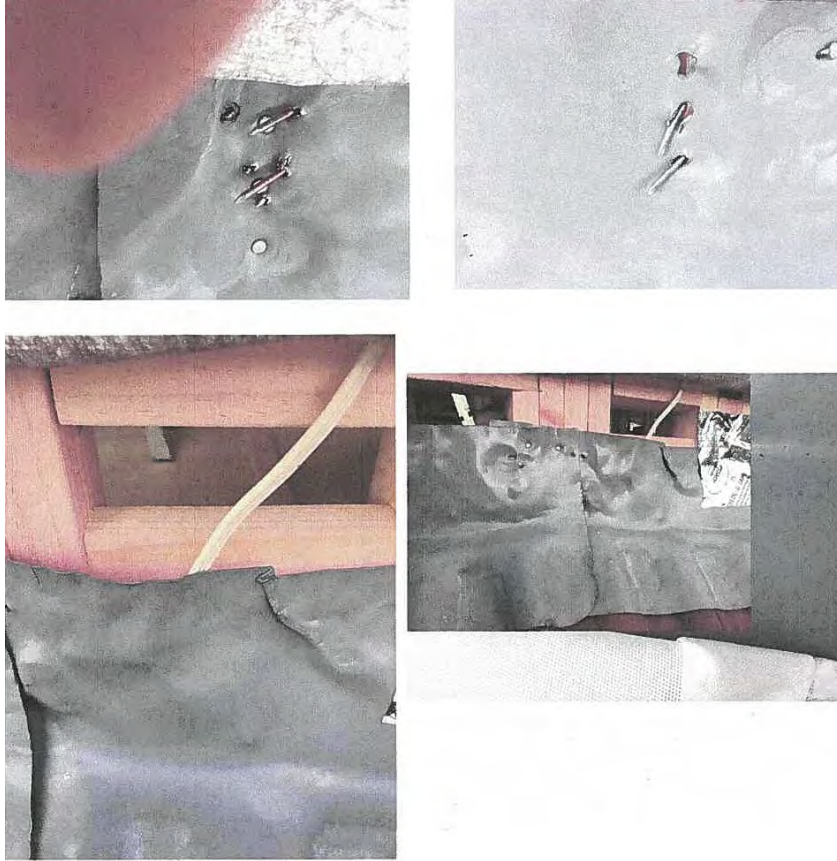
- [20] [Omitted] were asked by the Complainant in May 2018 to come to the site because of concerns over the bracing. [Omitted] stated that discussions took place, resulting in updated calculations and requirements for the downstairs bracing.
- [21] The Complainant described these calculations as “over the top”. It was not clear on the evidence before the Board whether any further work was done on the downstairs bracing as a result of the concerns.
- [22] The Respondent gave evidence that he was aware that work had been done downstairs. However, he was told by the Complainant that the bracing downstairs had been done and “not to worry about that”.
- [23] The Respondent was engaged on a labour-only contract. He gave evidence that the Complainant and [Omitted] were the project managers. [Omitted] did not agree with this evidence, stating that the Respondent was supervising and was the project manager.
- [24] The outcome of the Council framing/pre-wrap inspection on 19 March 2019 was a fail. (Document 4.1, Page 185 of the Board’s File) The inspection notice stated-
- “All first floor bracing elements location & type have changed- according to the owner there is an alternative plan designed by [Omitted]engineers that has changed the first floor bracing & removed the need for all ground floor bracing, although this plan was not available at the time of inspection. This significant structural change will require application for amendment prior to any further inspection being conducted.”*
- [25] Following this inspection and others on 4 and 7 June 2019, the Tauranga City Council issued a Notice to Fix stating *“a Load bearing beam has not been constructed in accordance with approved plans”* and requiring *“a Suitably qualified structural Engineer to review the entire upper level framing...”*.(Documents 4.1 and 2.1, Pages 194, 202 and 67 of the Board’s file).
- [26] The Complainant stated in his written complaint that – *“We engaged another builder to help us with this issue to make sure that everything that needed to be done to get the Notice to Fix removed in time, was done properly.”* (Document 2.1.14, Page 29 of the Board’s file).
- [27] The Respondent gave evidence that the first he knew of the downstairs bracing issue was when the Council inspection in March 2019 picked it up. He stated in his written response – *“We got lied to before we started works that down stairs had the correct bracing elements which it did not. [Omitted] had Stopped and Painted over the gib what was installed. I did not think to take notice as my job was upstairs. Council came for a Inspection and noticed this on the plans that no bracing was done down stairs, this what stopped the building work. We got told to stop immediately. We were not aloud to carry on with building works until [Omitted] and the [Omitted] sorted this out.”* (Document 2.2.1, Page 88 of the Board’s file).

- [28] The council inspection of 24 June 2019 records that the Notice to Fix had been complied with. (Document 4.1, Page 223 of the Board's File).
- [29] It was undisputed that the Complainant and his wife were then away overseas for a period of time. On their return, the Respondent returned to the site and undertook some remedial work at his company's own expense. Following further contractual issues, the parties "disengaged" or "decided to discontinue", according to each party's account. (Documents 2.1.5 and 2.2.1, Pages 30 and 88 of the Board's file).
- [30] At the Complainant's request, the Council carried out an inspection on 3 December 2019 "to assess the current status of the works post remedial works being carried out..." by the Respondent. (Document 4.1, Page 233 of the Board's File)
- [31] The workmanship issues inquired about at the hearing were:
- (a) The use of coach bolts instead of engineer's bolts;
 - (b) Rafters finishing short of the fascia as shown in the following photograph;



- (c) Damage to the lead flashing as shown in the following photographs:





- (d) Studs not constructed in accordance with NZS3604:2011 The walls shown in the following photograph are braced and/or structural walls:



- (e) Master bedroom dormer roof was not constructed in accordance with the Building Consent and NZS3604:2011. Continuous rafters have been cut at the top plate line, as shown in the following photograph:



- (f) Whether the re-used existing timber was compliant.

- [32] Issue (a): This was identified in the 7 June 2019 Council inspection (Document 4.1, Pages 202 and 207 of the Board’s File.) The Respondent stated that the Complainant had put the coach bolts in on the weekend, not him and that he could not rectify this due to the Council Notice to Fix and the requirement to stop work. He agreed with the Complainant that the Complainant had then changed this to the correct engineer’s bolts.
- [33] Issue (b): The Respondent explained that the rafters were short as, on client instruction, existing timber was re-used. He intended to go back and extend the rafters later but accepted that he should have said no to the re-use of the timbers that were too short. The Respondent confirmed that this work was done by his employees. It was the Complainant’s evidence, however, that the Respondent had cut the rafters short.
- [34] Issue (c): The Complainant, in his written evidence, stated that “...while nailing the nogs in, they damaged our new lead flashing by putting at least 40 nails through it, staple tape on the lead and cut the building paper with a Stanley knife on the lead, leaving in cut in the lead.” (Document 2.1.5, Page 30 of the Board’s File.) The Respondent accepted this was done by the apprentice and stated in his written

response – *“Yes, we take full responsibility for this.... Stride Builders Acted on this situation and paid Dowling roofing in full. This is now complete.”* (Document 2.2.2, Page 89 of the Board’s File.)

- [35] Issue (d): The Respondent accepted this was not built correctly.
- [36] Issue (e): [Omitted] gave evidence that the Dormer window support was unacceptable. The Respondent agreed it was not correctly constructed and said that it was later rectified.
- [37] Issue (f): The Council inspection of 7 June 2019 (Document 4.1, Page 202 of the Board’s File.) stated – *“Have the structural integrity of the rafters that have been re-used from other areas confirmed to show compliance with NZS3604:2011 or confirm they will meet the performance criteria of B1 and B2.”* [Omitted] gave evidence that, on the Complainant’s instruction, [Omitted] checked the timber. He confirmed the original timber was rimu, and there were no structural issues from an engineer’s perspective.
- [38] The Respondent gave evidence that the workforce for this project consisted of a qualified carpenter (but not a Licensed Building Practitioner), and a third-year apprentice. He stated that this was the first project he was managing on his own after working for another company for five years. The Respondent said that he had one other medium-sized job on at the same time and was on-site at the Complainant’s project 70 % of the time. The Complainant disputed this attendance rate and said it was only 30%.
- [39] The Board put to the Respondent that if he was on site 70% of the time, how was it that incorrect work was occurring. The Respondent replied that he left his workers to it, and then he would come back to the site to see what they had done.
- [40] The Respondent’s closing comments were that he accepted responsibility for his workers and that a *“few bits and pieces that needed fixing up”* but that he did not get the chance to do that.

Board’s Conclusion and Reasoning

- [41] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)
- and **should** be disciplined.
- [42] The reasons for the Board’s decisions follow.

Negligence or incompetence

- [43] The Board’s findings relate to building work carried out or supervised by the Respondent. With regard to the allegation that building work was carried out prior to

a building consent being issued, the Board found that the Respondent did not have any involvement in that work, which was carried out by the Complainant. As such, the Board's finding of negligence only relates to the matters set out in items (b) and (c) of paragraph [3] above.

- [44] The Board accepts that the Respondent's role in the build was as the supervisor. The question for it is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.
- [45] 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 Bolam⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [46] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*,⁹ it was stated as "*an inability to do the job*".
- [47] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹⁰. 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.
- [48] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act.¹¹ 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 practitioner¹²
- [49] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

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

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[50] Supervise is defined in section 7¹³ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[51] In C2-01143¹⁴, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and

¹³ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

¹⁴ *Licensed Building Practitioner's Board Case Decision C2-01143* 14 April 2016

(e) the geographic spread of the work being supervised.

[52] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[53] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁵. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the Court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[54] The Building Consent Authority’s role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

- (a) whether there is any form of system or process to identify quality and/or compliance issues;
- (b) the extent and seriousness of the non-compliance;
- (c) whether there is a pattern of continued non-compliance; and
- (d) what steps are taken when non-compliance issues are raised.

[55] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing,¹⁶ it was noted by the responsible Minister:

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁶ Hansard volume 669: Page 16053

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

- [56] 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 legislation¹⁷:

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.

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

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
- (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*

¹⁷ Hansard volume 669: Page 16053

- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
- (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[58] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[59] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁸ 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.

[60] The Respondent inherited a difficult position in respect of the downstairs work carried out by the Complainant. The Board considers that significant relevant information in relation to the bracing work downstairs was hidden from the Respondent by the Complainant. Therefore, the situation which led to the Council issuing a Notice to Fix was through no fault of the Respondent.

[61] The upstairs work, however, was reliant on the structural integrity of the downstairs work. This work formed part of the Building Consent that the Respondent was building to. The Respondent should learn from this experience and note that part of the due diligence in these circumstances is to ascertain who did the downstairs work and inspect Council records to ensure it was done in a compliant manner.

[62] In regard to the downstairs work, the Board notes that there was no owner exemption granted. Therefore, this work required a building consent, which was not obtained.

[63] The Board is of the view that the issues discussed in paragraphs 31 – 36 above (but not including issues 31(a) and (f)) are examples of poor workmanship. In particular, structural framing not being installed in accordance with the building consent and NZS3604:2011, along with rafters being cut short and fixing not being installed correctly, are basic errors.

¹⁸ [2001] NZAR 74

- [64] A Licensed Building Practitioner has a responsibility to get building work right the first time and relying on fixing up things later is not an acceptable approach.
- [65] The Board is also of the view that a substantial amount of the work may have been completed by the apprentice and the employed carpenter without supervision. This was demonstrated by the construction sequence continuing over structural framing errors.
- [66] On that basis, 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.

Contrary to a Building Consent

- [67] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 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.*
- [68] 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.
- [69] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁹.
- [70] Given the above factors, and the workmanship issues discussed above, the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Penalty, Costs and Publication

- [71] 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.
- [72] 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

- [73] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²⁰ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [74] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²¹ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [75] The Board decided that a fine of \$3,000 was the starting point and that the following mitigating factors warranted a reduction from that starting point:
- a) the project came to a premature end, and some matters may have been addressed by the Respondent in due course. This does not, however, obviate the obligation to get it right first time;
 - b) the Respondent was faced with a very difficult situation given the non-disclosure by the Complainant of important information in relation to the downstairs work; and

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- c) the Respondent acknowledged some issues and spent his money on remediating them.

[76] The Board notes that work commenced on-site, according to the Complainant, on 4 February 2019 and that the Respondent's Licensed Building Practitioner's carpentry license did not issue until 5 March 2019. There is the possibility, therefore, that in that month, the Respondent may have been supervising restricted building work when he was not licensed. The Respondent should be aware that it is an offence under section 85 of the Act for an unlicensed person to carry out restricted building work.

[77] The Board considers that the Respondent would benefit from some supervision upskilling and recommends that he investigate this and that he has recourse to the Supervision Guidance documentation available at <https://www.lbp.govt.nz/for-lbps/lbp-practice-notes/>

[78] Based on the above, the Board's penalty decision is a fine of \$2,000.

Costs

[79] 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."

[80] 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 case²².

[81] In *Collie v Nursing Council of New Zealand*,²³ 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.

[82] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*, the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its

²² *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.

²³ [2001] NZAR 74

members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [83] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate in complexity. Adjustments based on the High Court decisions above are then made.
- [84] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

- [85] 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 Act²⁴. 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.

- [86] 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.
- [87] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. 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*²⁸.
- [88] 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 interest²⁹. It is,

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁸ *ibid*

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

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

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

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

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[91] 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

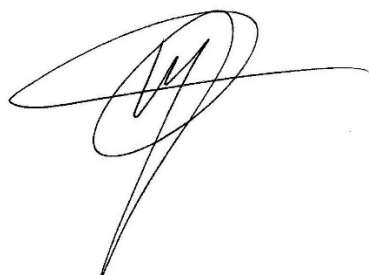
[92] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Thursday 7 April 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no 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.

[93] 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

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

Signed and dated this 17th day of March 2022



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.*