

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01143

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. [omitted]

COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 2 February 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent had, in relation to building work at [omitted], 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 Respondent is a Licensed Building Practitioner with a Foundations – Concrete or Timber Pile Foundations, Walls and Concrete Slab-on-ground Licence issued 7 August 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|-------------------|
| Chris Preston | Chair (Presiding) |
| Richard Merrifield | Deputy Chair |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in [omitted] on 15 March 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|----------------|---------------------------|
| Terri Thompson | Counsel for the Registrar |
| Sarah Romanos | Board Secretary |

[Omitted]
[Omitted]

Respondent
Support Person

Members of the public were not present.

- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 29 May 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint. Included was a report from Warren Nevill, Special Adviser Technical to the Board.
- [11] On 1 July 2015 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint 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
 - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [12] The Board requested a Special Adviser be appointed to prepare a report. Special Adviser Legal Paul Chisnall report dated 29 October 2015 was received and circulated to the Respondent and Complainant. An addendum to Warren Nevill’s report was also received and circulated.
- [13] On 16 February 2016 a pre-hearing teleconference was called. The Respondent advised he did not want to attend. An information pack detailing the hearing procedures was sent in substitution.

The Hearing

- [14] The hearing commenced at 1.10 p.m.
- [15] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [16] The Respondent was sworn in, his evidence was presented and he answered questions from the Board.
- [17] The Respondent chose to leave the hearing prior to its completion and before the Board had finished questioning him on his evidence.

Substance of the Complaint

- [18] The Complainant engaged the Respondent’s company [omitted] (in liquidation since 18 May 2015) [omitted] to complete floor and sub floor repair and replacement work at her home. The Complainant alleged the work was not done to an acceptable standard and was carried out by unqualified and inexperienced persons who were not supervised.

Evidence

[19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

[20] The Complainant in her complaint outlined that:

- (a) the work commenced on 1 December 2014;
- (b) it ended abruptly on 19 December 2014;
- (c) as of 19 December 2014 the work was unfinished in that there were unfixed joists, bearers and piles as well as damage to walls and skirting boards;
- (d) a manhole was created which was not in a work area making access to the work area difficult; and
- (e) a second opinion was sought from [omitted] who considered the work was not consistent with modern day standards. A copy of the report was included with the complaint

[21] The Complainant provided a number of photographs in support of her allegations.

[22] The complaint originally identified [omitted], an unlicensed employee of [omitted]. The Respondent responded stating that all work undertaken by [omitted] is overseen by himself as director and he would sort out any issues under a guarantee.

[23] The Respondent was then formally notified that the complaint was being pursued against him. He responded to the complaint:

- (a) stating three quotes were provided to the Complainant regarding estimates of the work to be carried out including sketch plans for the work;

¹ [2009] 1 NZLR 1

- (b) providing a memorandum dated 14 March 2015 from [omitted] the person who carried out the work;
- (c) providing a contractor's producer statement (PS3) for construction signed by the Respondent; and
- (d) a letter from [omitted].

[24] The letter from [omitted] dated 18 March 2015 stated:

- (a) [Omitted] was engaged in December 2014 to complete sub-flooring on the dwelling;
- (b) he worked under the supervision of the Respondent;
- (c) the works performed by staff member, [omitted], were in compliance with the Building Code;
- (d) if the Complainant felt unsatisfied then he would have appreciated being informed so he could have the opportunity to rectify the problems under their ([omitted]) guarantee;
- (e) the works were completed and he gave the complainant continuous updates of the progress. They also completed extra work over and above what was required or charged for;
- (f) he revised the quotes on two occasions to reflect the work that didn't need to be carried out and believes the Complainant has not understood they were only getting charged for the work completed; and
- (g) they were unaware the customer was unsatisfied.

[25] The memorandum from [omitted] stated:

- (a) he started the work at the dwelling in the first week of December and finished around 19 December 2014;
- (b) all of the wood placed on the concrete ring foundation and piles did have DPM installed correctly and was placed where required. Building paper was not installed as this is no longer used;
- (c) there were new joists placed throughout the hallway to stop the bouncing. The complainant was pleased with this at the time of installation. There were no loose floors boards as they were fixed with 90 mm nails;
- (d) the manhole created in the back bedroom was for inspecting the sub-floor. This was not created to access the other works as suggested by the complainant. The old floor was removed in the other works areas at the time so access was not an issue;
- (e) after an inspection was conducted it was found the rear bedroom did not need replacing as with the bathroom. The complainant was informed of this at the time;
- (f) there was a drop on the outside ring foundation and the complainant was advised that underpinning was recommended however they did not want this. The flooring was therefore packed to obtain an acceptable level;
- (g) some damage was caused to the skirting board due to its age but it was repaired and the complainant was happy;

- (h) there was a considerable amount of rot and borer in the joists and floorboards which contributed significantly to the drop, originally in the bedroom floors, particularly against the south facing walls; and
 - (i) he did have assistance during the majority of the time the work was completed. His supervisor conducted regular visits to the site.
- [26] Warren Nevill, Special Adviser Technical, provided the Board with a report. He summarised that the building work did not require a Building Consent and as such did not require the involvement of a licensed building practitioner. He went on to state that the work still had to conform to the Building Code and in an addendum to his report stated the repair work undertaken to the dwelling could and should have complied with NZS 3604 Timber Framed Buildings and that considerable aspects of the repair work failed to satisfy the expectations defined in the standard and the workmanship was not of an acceptable trade practice level. His report contained detail of the areas of non-conformity and poor workmanship.
- [27] At the hearing the Respondent gave evidence as to a reduced scope of works from that originally priced which the Complainant wanted completed and of a commercial dispute which resulted in the works being left incomplete. He stated that he was not going to do work that he was not going to be paid for, that he left the works in a safe condition and that in doing so he completed work he was not paid for.
- [28] At the time the Respondent's business was completing 300-400 foundation jobs per annum nationwide. He was based in Hamilton but had local teams undertaking the work. He often travelled to site to view the works and normally viewed the completed work. He was the only licensed person in the business at the time the work was carried out.
- [29] In Christchurch, [omitted], an ex-policeman with no building experience, was the operations manager and he quoted for jobs, liaised with clients and oversaw the work. He was responsible for the job to which the complaint related. [Omitted] undertook the actual work. The Respondent stated [omitted] had approximately 10 years' experience.
- [30] The Respondent gave evidence that he had viewed the site in question prior to the works being undertaken and at least once during the works, at which time he did not see any problems. He did not see the finished works as the contract came to an end. He did view some photographs of the work. He understood that at this time the Complainant would be happy with what was done so long as a PS3 was provided. This advice came by way of [omitted] who was dealing with the client. He gave evidence that [omitted] no longer works for him and that there are employment issues between them.
- [31] A PS3 was provided. The Respondent accepted it was incorrect in that it should have only covered items which had been done. When questioned about the PS3 he stated he provided a signed PS3 which [omitted] then filled out and gave to the Complainant. He accepted that there were aspects of non-compliance with the work. He has since changed the internal processes for issuing producer statements.

Board's Conclusion and Reasoning

Section 317(1)(b): Negligence or Incompetence

- [32] The Respondent did not carry out any physical building works. The disciplinary provisions in s 317(1)(b), however, relate to a licensed building practitioner carrying

out or supervising building work. The question for the Board is whether the conduct of the Respondent falls within either “carrying out” or “supervising”.

[33] Ordinarily carrying out refers to the physical completion of building work. Recently, however, the High Court, in *Tan v Auckland Council*² extended the meaning of carrying out within the context of an appeal against a conviction under s 40 of the Act.

[34] In the case the appellant did not carry out any physical work. His role was instructing and supervising. The High Court decided that the term "carry out any building work" in s 40 of the Act was not limited to the physical carrying out of building work but included the supervision or instruction of those who physically carry out building work. In doing so the court was avoiding an absurdity or injustice stating:

It would indeed be nonsensical and "savagely unfair" on those "wielding the hammers and shovels" to expose them, and not those who supervise or instruct them, to prosecution.³

[35] When looking at carrying out versus supervision the court took a purposive approach to the interpretation of provisions under the Building Act.

[36] Justice Brewer also commented with regard to the licensed building practitioner scheme:

[48] I acknowledge, as Mr Price points out, that the BA04 does draw a distinction between the words "carry out" and "supervision". "Supervise" is defined in the Act as meaning "to provide control or direction or oversight of the building work to ensure that the building work meets a certain standard".

[49] But the distinction is made only in relation to the Licensed Building Practitioners regime found in Subpart 4 of Part 2. That subpart imposes certain requirements for "restricted building work", which is work that is critical to the structural integrity and weathertightness of a building and can only be done or supervised by trades people who are Licensed Building Practitioners.

[51] The Licensed Building Practitioner regime, and the corresponding disciplinary regime, address the purposes of the BA04 by imposing liability for inadequate supervision and therefore helps ensure that the most important parts of a building meet the relevant building standards.

[37] The key legislative provision therefore, as far as the complaint before the Board is concerned, is the definition of supervise in s 7 of the Act which 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.

Legal Submissions Received

[38] Paul Chisnall Special Adviser Legal provided an opinion that the Board may not have jurisdiction under s 317(1)(b) as the building work undertaken did not require a Building Consent and was not restricted building work. It followed, in his opinion that there was no requirement for a licensed person to supervise and as such 317(1)(b)

² CRI-20 15-404-323 [2015] NZHC 3299, Brewer J

³ Ibid para 68

did not apply. The Adviser adopted a literal interpretation to the legislative provision in stating that the work had to have been undertaken under a building consent for the supervision element in the 317(1)(b) disciplinary offence to apply.

- [39] Counsel for the Registrar provided an alternative purposive interpretation. The submission received was that s 317(1)(b) can apply where there is no building consent. Reliance was placed on *Tan v Auckland City Council*. Specific reference was made to paragraphs 51 and 53 of the judgement where Brewer J. stated:

[51] The Licensed Building Practitioner regime, and the corresponding disciplinary regime, address the purpose of the BA 04 by imposing liability for inadequate supervision and therefore helps ensure that the most important parts of a building meet the relevant building standards

[53] The reason for the licensing requirements in the Licensed Building Practitioner regime is to ensure that a minimum level of competence is achieved in relation to building work crucial to the weathertightness and/or structural integrity of the building. But there is plenty of building work outside of restricted building work which, if carried out improperly, would also jeopardise public safety, to a greater and more immediate degree than any weathertightness or structural issues, for example the faulty installation of a balustrade on a staircase or balcony. There is reason to ensure that non-restricted work is carried out properly just as there is for restricted building work.

- [40] Counsel reviewed the legislative framework for licensed building practitioners and noted the types of conduct which can be complained about are not restricted to consented work under s 315 of the Act. Counsel also highlighted that whilst some of the grounds for discipline in s 317 were directly related to building consents, such as those relating to records of work, other more general grounds were not. As such a narrow or literal interpretation of supervision under the s 317(1)(b) could be seen as being inconsistent with those other provisions.⁴
- [41] Counsel also noted that if Parliament had intended to restrict the ambit of s 317(1)(b) to only work being done under a building consent, then any negligent or incompetent supervision by a licensed building practitioner of emergency work being carried out under s 41(1)(c) would not come within the disciplinary ground. Nor, the Board notes, would negligent or incompetent non-urgent building work carried out by a licensed building practitioner without a building consent in contravention of s 41 of the Act.
- [42] Finally, Counsel noted the definition of supervise was not confined to restricted building work which would have provided a far clearer means of restricting the definition of supervise had that been Parliaments' intention.
- [43] Counsel submitted a purposive approach to the interpretation of supervise would achieve an interpretation consistent with the scheme of the Act and more likely to achieve the purposes of the licensing and disciplinary provisions. The High Court's decision in *Tan* was submitted as a supporting authority.
- [44] On this basis of this submission, Counsel submitted the word 'and' in the definition of supervise should be read in such a way that sub-para (b) only applies where building work is being done under a building consent. If there is no consent then 'supervise' means to ensure building work is performed competently as stated in sub-para (a).

⁴ Refer ss 317(1)(c), (d), (h) and (i)

- [45] In essence, Counsel was submitting a disjunctive purposive interpretation as opposed to the conjunctive literal interpretation of the Special Adviser Legal. Counsel's submission was that a literal interpretation of the definition of 'supervise' would not only restrict it to building work carried out under a building consent but it would undermine one of the purposes of the licensing regime including that of ensuring members of the public are able to choose a suitable building practitioner from a list of licensed building practitioners knowing what if any disciplinary conduct has been taken against them.

Board's Conclusion on Jurisdiction

- [46] The Board agrees with Counsel for the Registrar that the definition of supervise in s 7 of the Act must be interpreted in such a way as to give effect to the purpose of the legislation. In this respect the Board notes s 5 of the Interpretation Act 1999 which states:

Ascertaining meaning of legislation

- (1) *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) *Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

- [47] The purpose of the Building Act is set out in s 3:

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.*

- [48] It is clear from the stated purpose of the Act that regulation of and accountability for licensed building practitioners are fundamental aspects. Given this purpose an interpretation of supervise which resulted in a licensed building practitioner avoiding accountability because the building work they were supervising was unconsented would be contrary to it. As such the Board has adopted a disjunctive purposive interpretation of supervise in s 7 and it considers this approach is consistent with the findings of the High Court in *Tan*.

- [49] The Board's position is that under s 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out.
- [50] Having taken this interpretation the Board has jurisdiction to hear the disciplinary charge under s 317(1)(b). The question then is the level of supervision required.

The Level of Supervision

- [51] 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 1992⁵. 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."

- [52] The Board has consistently applied this reasoning in its decisions.
- [53] The Board notes the level of supervision required will depend on the circumstances under which the work is being undertaken. The supervisor needs to assess the situation and determine the level of supervision which is appropriate. Consideration must be given to factors including but not limited to:
- (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
 - (e) the geographic spread of the work being supervised.

Negligence or Incompetence in Supervision

- [54] Turning then to the conduct in question and whether the supervision was negligent or the Board has had regard to the case of *Beattie v Far North Council*⁶. Judge McElrea provided guidance on the interpretation of those terms:

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

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such

⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[55] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[56] The Board considers the conduct in question meets the seriousness threshold.

[57] In terms of the Respondent's conduct the Board notes:

- (a) the work was carried out in a non-compliant manner in that aspects did not meet the Building Code;
- (b) he was the only licensed building practitioner in a nationwide business and was supervising between 300 and 400 jobs per annum;
- (c) he was based in [omitted] whilst the building work was being completed in Christchurch;
- (d) he was using an experienced albeit unlicensed person to carry out the building work;
- (e) his local operations manager who was overseeing the job had no trade experience;
- (f) he visited the site before and during the building work and his final review was by way of photographs; and
- (g) he provided a blank signed producer statement and authorised his operations manager to complete it and state the work was compliant.

[58] It was clear from the evidence before the Board that the Respondent failed to provide a level of control and direction which would ensure the building work met the Building Code. It was also clear that the supervision processes used by the Respondent fell short of what would be expected of a licensed building practitioner supervising the work of an unlicensed person. The number and spread of jobs being supervised and the use of an inexperienced person in a critical role created a very real risk of poor or substandard work occurring.

[59] On the basis of the above, the Board finds the Respondent has displayed a lack of reasonably expected care and was negligent in his supervision.

Negligence or Incompetence – Producer Statement

[60] The Board also considers the Respondent was negligent in respect of the Producer Statement in that he displayed a serious lack of care in providing a blank producer statement to his staff member to complete.

⁷ [2001] NZAR 74

- [61] The Contractors Producer Statement for Construction had the preamble and the compliance statement pre completed and had been signed by the Respondent. The preamble stated:

This producer statement will be relied upon to confirm that the Building Works has, to the best of the Contractors knowledge, been performed in compliance with the NZ Building Code.

- [62] The compliance statement was to the effect that:

I, [the Respondent], undertook or supervised the following building work and confirm that I am satisfied on reasonable grounds that the work performed is in compliance with the NZ Building Code and, where a building consent is applicable, in compliance with the Building Consent.

- [63] The Respondent then left the staff member to complete the description of building work. The description included work that either had not been completed or which did not meet the requirements of the NZ Building Code.

- [64] The Respondent had seen the building work part way through but had not seen the completed work he was purporting to sign off. The Board has already found that his supervision was inadequate and was negligent and as such he was not in a position to have been able to sign off what was completed on site.

- [65] In essence, the Respondent provided a false Producer Statement.

- [66] In the all the circumstances the Board finds the Respondent was not in a position to be able to make a claim that the work was compliant and in allowing a staff member to complete the description without checking it reflected the actual work completed fell well short of the standards expected of a licensed building practitioner.

Section 317(1)(i): Disrepute

- [67] The second disciplinary ground which the Respondent faces is one of bringing the regime into disrepute.

- [68] The Board considered disrepute in decision C2-01111⁸. In it the Board noted the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is disrepute. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"⁹ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁰ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹¹

- [69] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however,

⁸ Board Decision C2-0111 dated 2 July 2015.

⁹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁰ [2012] NZCA 401

¹¹ [2012] NZAR 1071 page 1072

be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions¹²;
- honest mistakes without deliberate wrongdoing¹³;
- provision of false undertakings¹⁴; and
- conduct resulting in an unethical financial gain¹⁵.

[70] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[71] In the case before the Board, the conduct which the Board considers could come within the ground of disrepute is that of providing what was in essence a false producer statement. In this respect it is similar to the provision of a false undertaking *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁶. In the case the Court of Appeal noted the importance undertakings and the ability of others to rely on them. The same applies in this instance. A producer statement is an important document and others place reliance on. In this instance it is a statement that the work meets the requirements of the NZ Building Code which in turn ensure the building work meets safety, performance and durability requirements.

[72] Providing a false Producer Statement or one that cannot be relied on by those receiving it therefore has the very real potential to undermine the credibility of the licensed building practitioner regime.

[73] The Board has already found that the Respondent was negligent with regard to the Producer Statement. The question then is whether providing what was a false Producer Statement in the circumstances under which it was provided also amounts to conduct which brings the regime into disrepute.

[74] In this respect, the Board notes comments of Randerson J. of in the Court of Appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁷:

[48] There may be cases where a breach of an undertaking may not warrant some form of disciplinary action, but such cases are likely to be rare. Usually, disciplinary action will be justified at a level appropriate to the circumstances. A deliberate breach or one involving gross carelessness may justify a charge of professional misconduct ... Other cases involving negligence to a lesser degree of seriousness may warrant a different charge... We emphasise, however, that there are no hard and fast rules and that the discretion vested in the Standards Committee to decide what action (if any) to take is to be exercised flexibly as appropriate to the circumstances.

¹² *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZAR 1071

¹⁴ *Slack, Re* [2012] NZLCDT 40

¹⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

¹⁶ [2012] NZAR 1071

¹⁷ [2012] NZAR 1071 at 1083

- [75] The Board considers the conduct in the current case falls marginally short of the gross negligence level and that the finding of negligence already made is, in this case, sufficient.

Board Decision

- [76] The Board has decided that Respondent has supervised building work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [77] The Board has also decided that the Respondent has not conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Disciplinary Penalties

- [78] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Actⁱ.
- [79] The Board is aware that the common understanding of the purposes 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*¹⁸

- [80] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*¹⁹:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [81] The High Court in *Patel v Complaints Assessment Committee*²⁰ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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

¹⁸ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹⁹ [1992] 1 NZLR 720 at p 724

²⁰ 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.

- [82] The Board will consider the question of penalty on the basis of the above principles and it invites the Respondent to make written submissions on the matter of possible disciplinary penalties. Such submissions may include any mitigating matters the Respondent considers the Board should take into consideration together with information on the Respondent's personal and financial circumstances.

Costs

- [83] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

- [84] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*²¹ included the following:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."

- [85] The judgment in *Macdonald v Professional Conduct Committee*²² confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*²³ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [86] In *Collie v Nursing Counsel of New Zealand*²⁴ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.

- [87] The Board will consider the question of costs on the basis of the above principles and it invites the Respondent to make written submissions.

²¹ HC, Wellington, AP23/94, 14 September 1995

²² HC, Auckland, CIV 2009-404-1516, 10 July 2009

²³ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

²⁴ [2001] NZAR 74

Publication of Name

- [88] As a consequence of this decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licenced Building Practitioners' scheme as is required by the Act.
- [89] The Board is also able, under s 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.*
- [90] As a general principal 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.
- [91] The Board will consider the question of publication on the basis of the above principles and it invites the Respondent to make written submissions.

Submissions

- [92] If the Respondent wishes to make written submissions in relation to penalty, costs and publication then the submissions are to be received by the board by 5 May 2016.

Right of Appeal

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

Signed and dated this 14th day of April 2016



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (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.*