

Before the Building Practitioners Board

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| | BPB Complaint No. CB24092 |
| Licensed Building Practitioner: | Ali Kahdim (the Respondent) |
| Licence Number: | BP 107841 |
| Licence(s) Held (at time of conduct): | Carpentry and Site AOP 1 |

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 | Complaint |
| Hearing Location | Auckland |
| Hearing Type: | On the Papers |
| Hearing Date: | 26 March 2019 |
| Decision Date: | 16 April 2019 |

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Procedure:

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

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), 317(1)(d), 317(1)(da)(ii) and 317(1)(i) of the Act.

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Introduction

- [1] The hearing resulted from a Complaint 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 offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

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

- (d) 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).

Function of Disciplinary Action

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

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

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

[4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁶ [1992] 1 NZLR 720 at p 724

⁷ [2016] HZHC 2276 at para 164

- [7] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Notices to the Respondent

- [8] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it.
- [9] Under regulation 7(2) of the Complaints Regulations the Registrar must, when compiling the Registrar’s Report, provide a copy of the complaint to the Respondent. Similarly, under regulation 12 if the complaint is to proceed to a hearing the Board must give notice of the hearing to the Respondent.
- [10] On 20 November 2017 the Respondent was served in person with the complaint. He signed to acknowledge service. The Respondent has not provided any form of a response to the complaint. That is his choice.
- [11] On 25 January 2019 the Respondent was also served, in accordance with the requirements of the Act, with a Notice of Hearing. Again, no response has been received.
- [12] Given the above the Board finds that it is appropriate that it considers the complaint.
- [13] The Respondent was engaged to build an extension to an existing dwelling. The building work was done under a building consent. It included restricted building work and commenced in or about November 2014. The Respondent’s involvement in the build came to an end on 14 November 2016 when the contract to build was cancelled by the Complainant.
- [14] The Complainant set out that

I gave a lump sum contract to Kahdim Ali (operating as A1 Projects), licensed MBIE approved LBP to construct dwelling house extension for my family.

I have been going in circles between Auckland Council (AC) and Kahdim Ali since 11 July 2016 in obtaining certificate of code compliance (CCC) from AC.

Each time building control officer came to recheck works as confirmed by Kahdim to be fully complete and in compliance, the officers came with the list of non-complying items. After length of time and out of frustration in July 2016, I took over and engaged trades people to complete works that eventually got approved by AC.

- [15] The Complainant included copies of relevant Building Consent Authority documentation including inspections records. The records showed that the Respondent called for a final inspection five times between 11 July 2016 and 2 December 2016. The first inspection failed for a variety of non-compliance reasons:
- (a) MV's (minor variations) to be signed off on site;

- (b) Close gap 45 degree roof above entrance;
- (c) Close vermin holes garage door;
- (d) ORG lid to be able to pop up;
- (e) Seal garage kitchen bench;
- (f) Safety stays to toilets and bathrooms
- (g) 5 degree fall in deck baluster required;
- (h) MV (minor variation) required for two bathroom layout changes;
- (i) Paint and seal and cover weatherboards (deck baluster near MHHU);
- (j) Fix internal gutter above entrance so no water can go behind weatherboards (This can cause a serious leak if not done properly); and
- (k) Flange 100mm pvc pipe through soffit.

[16] The fourth inspection noted the following issues carried over from previous inspections due to them not being adequately addressed:

- (a) MV's (minor variations) to be signed off on site;
- (b) 5 degree fall on deck baluster required; and
- (c) Fix internal gutter above entrance so no water can go behind weatherboards.

[17] All three items are serious matters and the last two impact on the weathertightness of the dwelling.

[18] The third and fifth inspections were cancelled by the Respondent who then stopped engaging with the Building Consent Authority.

[19] The Building Consent Authority also required a producer statement from an engineer in respect of the foundations. One was submitted by the Respondent. The Building Consent Authority required more information from the engineer. The author of the producer statement presented denied having issued it. The author stated in an email to the Complainant, in respect of the authenticity of the producer statement:

I waited the site manager whole day. But he did not appear.

I think the PS4 was a fraud one. It might be revised from one of the PS4s of ours for the other sites. The reasons are:

1. *There were many changes on the PS4 which have not been initially signed by myself. There was some important information missing on the PS4.*
2. *My records do not show that I went to the site on those two days (29 August 2015 and 10 September 2015).*
3. *I drove to the site address recently. But I could not remember that I went to the site before.*

4. *As a general practice, I could not just check the reinforcement of block foundation wall without checking the site soil and/or granular fill compaction.*

[20] The Complainant also complained that the Respondent had not provided a record of work on completion of his restricted building work.

Board's Conclusion and Reasoning

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

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

and should be disciplined.

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

Negligence and/or Incompetence

[23] The Board has found that the Respondent was negligent in failing to deal with failed building inspection items in an acceptable manner.

[24] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

[25] The New Zealand Courts have stated that 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.

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[26] 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 Act¹¹. 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.

[27] 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.*

[28] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[29] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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

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

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [30] The evidence before the Board showed that the Respondent's building work failed multiple final inspections. Not all of the noncompliant building work that was noted in the inspections was rectified. Rather it was represented for further inspection.
- [31] 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 the extent and seriousness of the non-compliance; whether there is a pattern of continued non-compliance; and what steps are taken when non-compliance issues are raised.
- [32] 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 licensing¹⁶ it was noted by the responsible Minister:

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

- [33] 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

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

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.

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

14E Responsibilities of builder

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

[35] 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.

[36] In this instance the Respondent did not proceed on that basis. Compliance issues that most likely should not have arisen in the first place were not dealt with in a timely fashion and were represented for inspection when they had not been dealt with.

[37] 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.

Contrary to a Building Consent

[38] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the

works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in section 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under section 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

- [39] In *Tan v Auckland Council*¹⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [40] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [41] The final inspections noted matters that had been varied from the building consent and which had not been dealt with by way of minor variations. There was also evidence in the failed items of building work that did not comply with the building consent. Accordingly, the Board finds that the Disciplinary offence has been committed.

Record of Work

- [42] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁹.
- [43] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [44] The Board discussed issues with regard to records of work in its decision C2-01170²⁰ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [45] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried

¹⁸ [2015] NZHC 3299 [18 December 2015]

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

²⁰ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

- [46] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [47] Completion occurred in or November 2016. A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [48] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons have been put forward.

Disrepute

- [49] The Board also finds that the Respondent has brought the regime into disrepute by providing what was a false producer statement.
- [50] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111²¹ and discussed the legal principles that apply.
- [51] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example, in the High Court held in *Davidson v Auckland Standards Committee No 3*²² a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [52] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of *Chartered Accountants*²³, convictions for indecent assault and being found

²¹ Board decision dated 2 July 2015.

²² [2013] NZAR 1519

²³ 24 September 2014

without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[53] Turning to 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”²⁴ 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*²⁵ 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.*²⁶

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

- criminal convictions²⁷;
- honest mistakes without deliberate wrongdoing²⁸;
- provision of false undertakings²⁹; and
- conduct resulting in an unethical financial gain³⁰.

[55] 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.

[56] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

²⁴ 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

²⁵ [2012] NZCA 401

²⁶ [2012] NZAR 1071 page 1072

²⁷ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁸ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁹ *Slack, Re* [2012] NZLCDT 40

³⁰ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [57] The Respondent submitted a producer statement to attest to the compliance of a foundation. The purported author of that document denied it was his.
- [58] Producer statements are important documents. In the Auckland region they can only be issued by persons authorised by the Council. They allow the Council to rely on the statements in them without making further inquiries. They are issued by persons with insurance over. Providing a false producer statement and expecting others to rely on it is a serious matter and is certainly serious enough to warrant a disciplinary finding.

Penalty, Costs and Publication

- [59] 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.
- [60] The Board heard the matter on the basis of the documentary evidence before it. Included was information 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

- [61] 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*³¹ 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.

- [62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*³² the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

³¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [63] The Respondent has appeared before the Board on multiple occasions and on some quite serious charges. Most recently his licence was cancelled for a period of two years³³.
- [64] The matters before the Board are again very serious and the Board has seen that there has been a pattern of similar behaviour by the Respondent. The board considers that he poses a risk to the public and that a further period of licence cancellation is warranted.
- [65] As with the most recent matter in which the Respondent's conduct was considered by the Board he has again not participated in the investigations. The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*³⁴ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [66] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct and to protect the public.
- [67] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of five years from the date of this order.

Costs

- [68] 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."
- [69] 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 case³⁵.
- [70] In *Collie v Nursing Council of New Zealand*³⁶ 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.*
- [71] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

³³ Refer Kahdim [2019] BPB 1756

³⁴ [2011] 3 NZLR 850.

³⁵ *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.

³⁶ [2001] NZAR 74

Publication

[72] 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 Act³⁷. 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.

[73] 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.

[74] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴⁰. 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*⁴¹.

[75] 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 interest⁴². 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.

[76] Based on the above the Board will order further publication. It is important that the industry learns from the Respondent's conduct and that the public are advised of the cancellation. Publication will be in Code Words.

³⁷ Refer sections 298, 299 and 301 of the Act

³⁸ Section 14 of the Act

³⁹ Refer sections 200 and 202 of the Criminal Procedure Act

⁴⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴¹ *ibid*

⁴² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 60 months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

[78] 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

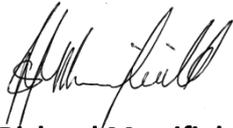
[79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 May 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions 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.

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

Right of Appeal

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

Signed and dated this 16th day of April 2019



Richard Merrifield
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.*