

## Before the Building Practitioners Board

	BPB Complaint No. C2-01592
Licensed Building Practitioner:	Zahid Ali (the Respondent)
Licence Number:	BP 107647
Licence(s) Held:	Carpentry

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### 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:	In Person
Hearing Date:	31 July 2018
Decision Date:	4 September 2018

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
David Fabish, LBP, Carpentry Site AOP 2  
Robin Dunlop, Retired Professional Engineer  
Bob Monteith, LBP Carpentry and Site AOP 2  
Faye Pearson-Green, LBP Design AOP 2

#### Appearances:

Faizal Abba for the Respondent

#### Procedure:

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

#### Board Decision:

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

The Respondent **has not** committed disciplinary offences under sections 317(1)(d) or 317(1)(i) of the Act.

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## Introduction

- [1] The hearing resulted from a Complaint from the Auckland Council into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at multiple addresses in [Omitted].
- [2] The Board initially resolved to proceed to a hearing on the following alleged disciplinary offences:
- (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); and
  - (c) has 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

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<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- (d) in respect to [Omitted] only, has 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); and
- [3] The matter was set down to be heard on 24 January 2018. On 22 January 2018 the Respondent's Representative filed a Memorandum with the Board challenging various aspects of the Board's procedure. The Board advised that it would deal with the matters as a prehearing application prior to the substantive matter being heard.
- [4] The hearing proceeded as scheduled. The Respondent did not appear. The Respondent's Representative advised that the Respondent would not be appearing as the intention was to judicially review any decision of the Board to proceed and hear the Complaint.
- [5] The Respondent's Representative raised the following at the 24 January 2018 hearing:
- A. *The respondent has raised the defence of Res Judicata (Already been determined) in respect of [Omitted].*
  - B. *The respondent objects to the legitimacy of the complaints raised against him by representatives of the Consent Authority (the Auckland City Council).*
  - C. *The respondent objects to the legitimacy of the prosecution of the complaints by the Building Practitioners Board.*
  - D. *The respondent has requested that board members involved in his previous disciplinary proceedings recuse themselves for fear of bias.*
  - E. *The respondent objects to William Hursthouse providing evidence at any proceedings involving him and the use of his reports in any proceedings against him.*
- [6] The Board heard the Respondent's Representative's submissions and released its decision on the prehearing matter on 12 February 2018. The Board's decision was that:
- (a) the Complaint and investigation into the Respondent's conduct at [Omitted] will not proceed any further;
  - (b) a new Special Adviser is to be appointed and is to provide his or her comment and/or opinion on the evidence received in respect of the remaining matters;

- (c) on receipt of the Special Adviser's report the Complaint (excluding [Omitted]) is to be set down for a one-day hearing before a full Board; and
  - (d) any written submissions from the Respondent or the Complainant are to be filed with the Board Secretariat at least five (5) working days prior to the scheduled hearing date.
- [7] The Board's full decision on the prehearing matter is attached as an Appendix to this decision.
- [8] A revised notice of hearing was issued. The alleged disciplinary offences that proceeded to a hearing were that the Respondent had, in respect of [Omitted], [Omitted],[Omitted] and [Omitted]:
  - (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); and
  - (c) has 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
  - (d) in respect to [Omitted] only, had 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).
- [9] A new Technical Assessor was appointed to assist the Board and his report was received.
- [10] Subsequent to the issue of the Board's Prehearing Decision the Respondent's Representative made a further submission that:
 

*It is our contention that Mr Hursthouse's opinion on the matter has exceeded the bounds as provided for in section 322 of the Building Act and was in fact a determining factor in charging our client in these proceedings.*

*It is therefore our position that, should the Board wish to pursue these charges against our client then the process would have to be initiated from the beginning. Effectively, we contend that the charges be withdrawn and the process started afresh.*
- [11] The Board issued a Minute in which it stated if the above was to be considered by the Board then a formal application together with supporting submissions would

have to be filed. An application was not received. The matter proceeded to a hearing.

- [12] The Respondent was represented by Mr Faizal Abba at the hearing. Mr Abba noted that whilst he was a practising Barrister at the time of the pre hearing application he no longer held a practising certificate.

### **Function of Disciplinary Action**

- [13] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [14] 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*<sup>4</sup> 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.”*

- [15] 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.

### **Background to the Complaint**

- [16] The Complaint was brought by the Auckland Council as a result of building work over four properties that the Respondent was involved in continuing to fail building inspections carried out by the Council.
- [17] The Council was acting as the Building Consent Authority<sup>5</sup> (BCA). A BCA has the following responsibilities:

#### **14F Responsibilities of building consent authority**

*A building consent authority is responsible for—*

- (a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that—*
  - (i) an application for a building consent complies with the building code:*

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> Refer section 12(2) of the Act

- (ii) *building work has been carried out in accordance with the building consent for that work:*
- (b) *issuing building consents and certificates in accordance with the requirements of this Act*

[18] Under section 90 of the Act the Council, as the BCA, has the entitlement to carry out inspections:

**90 Inspections by building consent authorities**

- (1) *Every building consent is subject to the condition that agents authorised by the building consent authority for the purposes of this section are entitled, at all times during normal working hours or while building work is being done, to inspect—*
  - (a) *land on which building work is being or is proposed to be carried out; and*
  - (b) *building work that has been or is being carried out on or off the building site; and*
  - (c) *any building.*
- (2) *The provisions (if any) that are endorsed on a building consent in relation to inspection during the carrying out of building work must be taken to include the provisions of this section.*
- (3) *In this section, inspection means the taking of all reasonable steps to ensure that building work is being carried out in accordance with a building consent.*

[19] The Council, as the territorial authority, also has a more general authority to carry out inspections under section 222 of the Act. Section 223 also imposes a duty for any person any person engaged in the building work give all reasonable assistance to enable an authorised officer to inspect all or part of a building or building work.

**Submissions**

[20] The Complainant noted that a Code Compliance Certificate (CCC) had not been issued for [Omitted] due to the application of section 93 of the Act in that it was more than two years since the date on which the building consent for the building work was granted.

[21] The Respondent's Representative submitted that as the Council had passed the building work at building inspections, and that Code Compliance Certificates had been issued for all bar [Omitted], the Board could not find that the Respondent had been negligent. He stated:

*... this has always been an issue of the interpretation of the law and it's a legal question. Whether the respondent is negligent or not, it's got nothing to do with anything else because -- and it's my submission that the fact that Auckland Council has issued a CCC changes the whole perspective of this argument. Because when you look at the argument of negligence, negligence*

*as defined in the law relates to standard of a reasonable man. And so ultimately this Board will want to determine whether the applicant acted as a reasonable person. And in saying that, while the Auckland Council by consenting to issue the Code Compliance Certificate and bypassing it, actually consented that the respondent's actions were actually that of a reasonable person.*

*So, for the Auckland Council now to complain about negligence and raise issues about code compliance certificates is irrelevant. The question is the Board is charged the respondent or they've asked him to answer to a question of negligence and bringing the building regime into disrepute, and those are questions of law.*

*So, my argument has been, and still continues to be that the only way the Board can determine that the applicant was negligent is to then also hold the Auckland Council responsible, because they are contributing then to the negligence, because they have passed that building site to be compliant. And it's a situation of where the Auckland Council is trying to pass the buck on to somebody else. And that is unacceptable, actually.*

*So that's our position and that's what we're going to argue today.*

- [22] The Respondent's Representative cited the case of *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 in support of his submission. The case, an appeal to the Court of Appeal, related to a contractual claim of negligence. It did, however, involve the provision of professional services. It is to be noted that whereas the Respondent's Representative referred to the reasonable man test the Court in the case referred noted that:

*If it be found that a professional man does not use the degree of skill and care which the majority of his profession would have brought to the same task, then that is strong evidence of negligence.*

- [23] This accords with the Board's understanding of negligence in the disciplinary setting. The conduct is to be judged against those of the same profession and not against those of the reasonable man.
- [24] In *McLaren Maycroft*, the Court noted that negligence could be established by showing a failure to follow an accepted practice. It also found that even if a practitioner has followed commonly accepted practices then it still remains open for a court to find that the accepted practice falls below that required by the law.
- [25] The Respondent's Representative also referred to an appeal from the District Court against a decision of the Board. In *Ali v Kumar*<sup>6</sup> the District Court did not accept the Board's finding that the BCA should not have passed the building work and it noted that the matter at issue was easily rectifiable, the building work was not complete,

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<sup>6</sup> *Ali v Kumar et al* [2017] NZDC 23582

and that the Respondent had not been able to return to rectify it. It did not make a finding that a “pass” from a BCA or the issue of a CCC is a bar to further consideration as to whether a licensed building practitioner has been negligent. Rather it found that the Board had not correctly applied the test in considering negligence in that it had not identified what the proper response of the body of licensed building practitioners would have been in the circumstances. In this respect the District Court stated it was following *McLaren Maycroft*.

- [26] On the question of the interrelationship between inspections, certificates of compliance and negligence the Board notes the comments of the High Court in *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 that:

*[64] ... it is not part of the statutory scheme that by issuing a code compliance certificate the council was guaranteeing the motel was free from defects which might otherwise cause eco-nomic loss to an owner.*

- [27] There have been numerous instances in New Zealand of buildings that have been granted code compliance certificates but which, over time, have proven not to be compliant with the Building Code<sup>7</sup>. The requirement for a Weathertight Homes Tribunal is testament to this as are the number of cases where territorial authorities, builders and others have been found to have been negligent and liable for losses notwithstanding passed inspections and issued code of compliance certificates<sup>8</sup>.

- [28] In *Reeves v Lakes Environmental Ltd* [2014] NZHC 2760 the High Court stated, as regards inspections under section 90 of the Act:

*[64] It is clear from s 90 that the express purpose of an inspection is to ensure that the building work being inspected complies with the building consent. That ensures that, at each stage of the building process, the building consent has been implemented, allowing a code compliance certificate to issue when the work is completed.*

*[65] Given the clear purpose of an inspection, it is difficult to imagine circumstances where a failure to pick up a material departure from the consented plans would not be negligent. If the works do not comply with the building consent, the Act expects steps to be taken to draw that to the builder and the owner's attention, and that the consent authority will require either rectification of the work, or an application for an amended building consent. Despite the recent introduction of provision for "minor variations to building consents" under s 45A of the Act, it remains the position that a change to any significant element of the building pre-scribed by the building consent, such as the foundations, needs to be authorised by an amendment to the building consent.*

<sup>7</sup> Under section 17 of the Act all building work must comply with the Building Code.

<sup>8</sup> Refer for example to *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68 and *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*]



*[66] In the Reeves' case the building inspector failed to perform the most basic duty of his inspection, which was to ensure the work inspected complied with the building consent. The inspection was, therefore, negligent.*

- [29] Code compliance certificates are issued under section 94 of the Act. A BCA must issue a CCC if it is satisfied, on reasonable grounds, that the building work complies with the building consent. It follows from the above that a BCA, in passing building work at inspections and in issuing code of compliance certificates, can incorrectly assess the building work as meeting the Building Code when it does not. It also follows that the building work may not necessarily meet the requirements of the Building Code if it is passed at an inspection.
- [30] The Board does, therefore, consider that the Auckland Council having assessed work at inspections as meeting the requirements of the building consent and Building Code or the issue of code compliance certificates as a bar from the Board inquiring further into the conduct of the Respondent.
- [31] It should also be noted that whether codes of compliance were correctly issued or not was not, however, the issue before the Board. What was in question was the path to achieving passes at inspections certificate.
- [32] It was not argued that inspections had not been passed or that code compliance certificates had not issued for all bar one of the properties. What the Complainant did allege was that the Respondent had been negligent in calling for inspections when the building work was not ready, that inspections were repeatedly failed because the building work did not comply with the building consents issued, that non-compliance issues raised by inspectors were often not attended to between inspections and that, on occasions, it required the intervention of Council inspectors to obtain compliance and an inspection pass. It is in this context that the Board considered whether the Respondent was negligent or not.

### **Evidence**

- [33] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>9</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [34] 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.
- [35] In addition to the documentary evidence before the Board heard evidence at the hearing from:

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<sup>9</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<b>Name</b>	<b>Role</b>
Zahid Ali	Respondent
Denise Whelan	For the Complainant
Jock Hyde	For the Complainant
[Omitted]	Licensed Building Practitioner, Carpentry.
[Omitted]	Superior Waterproofing
John Rennie	Technical Assessor

- [36] The following summaries of the allegations with respect to each of the properties were provided by the Technical Assessor.

[Omitted]

**Description:**

Building works were undertaken to partially demolish an existing building and construct a new two-storey addition.

The construction of the new two storey extension comprises concrete foundations, with concrete masonry retaining walls and ground bearing slabs, timber framed walls clad with either brick veneer, or fibre-cement weatherboards. A first floor enclosed balcony has been constructed with a plywood deck having a torch applied membrane. The roof is a simple mono-pitch timber rafter structure with steel beams, and is clad with profiled metal roofing.

The majority of the works can be described as simple in that they all fall within the scope of the acceptable solutions contained within the Building Code. Specific details have been provided for the retaining wall designs, balconies, and non-standard engineering connections.

**Technical Assessor Observations:**

The complainant has provided details of the number of inspections undertaken on site. A total of 34 inspections were booked, of which 19 resulted in failed inspections requiring re-inspection.

The photographs provided by the complainant demonstrate works that falls below what would be considered to be an acceptable level of workmanship. Simple items such as joints in weatherboards have been filled with sealant and not properly flashed, structural beams have been left with sub-standard cladding, junctions in weatherboards have been constructed out of alignment, and it is suggested that internal skirtings have been substituted for appropriately treated exterior cladding timbers.

The example photographs provided within the complainant's documentation demonstrate details that are unlikely to meet the on-going performance

requirements of the Building Code, and in particular those that relate to B2:Durability, and E2:External Moisture.

[Omitted]

**Description:**

Building works were undertaken to raise an existing dwelling to first floor level, and to construct a new ground floor level below.

The building works involved some complexity in that the original dwelling had to be disconnected from the footings, and raised to be situated on top of a new ground floor construction.

Despite the complexities of separating the existing structure from the footings, the building works are relatively simple and consisted of concrete foundations and ground bearing slabs, timber framed walls clad with brick veneer. The original building features some re-modelling works and works to accommodate the new staircase.

The building works generally fall within the scope of the acceptable solutions contained within the Building Code. The structure also falls largely within the scope and limitations of NZS 3604:2011 Timber-Framed Buildings, and has been supplemented with specific structural engineering where necessary.

**Technical Assessor Observations:**

The complainant has provided details of the number of inspection undertaken on site. A total of 28 inspections were booked, of which 14 resulted in failed inspections requiring re-inspection.

The photographs provided by the complainant demonstrate works that falls below what would be considered an acceptable level of workmanship. Structural timbers have been substituted for rough sawn timbers, framing members have been constructed out of square (appears to be outside the tolerances within NZS 3604), key structural connections missed, joinery air seals incomplete, and incomplete cladding.

The photographs provided within the complainants documentation demonstrate details that are unlikely to meet either current or on-going performance requirements of the Building Code, and in particular those that relate to B1:Structure, B2:Durability, and E2:External Moisture.

[Omitted]

**Description:**

Building works were undertaken to construct a new two storey dwelling.

The construction of the new dwelling comprises concrete foundations, including concrete masonry retaining walls and ground bearing slabs, timber framed walls clad

with either brick veneer, or weatherboards. The roof is a simple trussed rafter structure with steel beams, and is clad with pressed metal tiles.

The building works can be described as simple in that they all fall within the scope of the acceptable solutions contained within the Building Code.

**Technical Assessor Observations:**

The complainant has provided details of the number of inspections undertaken on site. A total of 18 inspections were booked, of which 6 resulted in failed inspections requiring re-inspection.

The photographs provided by the complainant demonstrate works that falls below what would be considered an acceptable level of workmanship. In a number of instances significant structural concerns are present whereby hold down fixings for the timber superstructure have ruptured the concrete slab foundations as a result of being placed too close to the slab edge. There is also an example demonstrating a head flashing sloping back towards the building which will have the effect of directing moisture back into the cavity.

The examples provided within the complainants documentation demonstrate works that does not meet the performance requirements of the Building Code, and in particular those that relate to B1:Structure, B2:Durability, and E2:External Moisture.

[Omitted]

**Description:**

Building works were undertaken to extend and extensively alter an existing building to incorporate a minor unit on the ground floor level.

The construction comprises concrete foundations, including concrete masonry retaining walls and ground bearing slabs, timber framed walls clad with timber weatherboards. A first floor walkway has been constructed with a plywood deck having a butyl rubber membrane over. The new roof comprises a hipped trussed structure clad with concrete inter-locking tiles.

There are complexities involved with the works being formed below an existing dwelling, however the majority of the building works can be described as simple in that they all fall within the scope of the acceptable solutions contained within the Building Code. Specific details have been provided for the retaining wall designs and non-standard engineering connections.

**Technical Assessor Observations:**

The complainant has provided details of the number of inspections undertaken on site. A total of 30 inspections were booked, of which 13 resulted in a failed inspection requiring re-inspection.

The photographs provided by the complainant demonstrate works that falls below what would be considered an acceptable level of workmanship. The photographs show misaligned structural columns, and poor packing below key structural elements.

The photographs provided within the complainants documentation demonstrate works that is unlikely to meet the performance requirements of the Building Code, and in particular those that relate to B1:Structure.

- [37] The Technical Assessor provided a concluding opinion as regards compliance. He stated:

*Throughout all the projects where work has been complained about an excessive number of inspections have been carried out by Council. Whilst failed inspections are not out of the ordinary, the number on these projects demonstrates an overall lack of general care and/or attention to the details on the consented plans and/or supervision of the works being undertaken.*

*Reliance on council inspections as a primary means of quality control is not considered to be sufficient, and the respondent as an LBP ought to have been undertaking their own quality control inspections, or ensuring a greater level of care was applied at the time of undertaking the works.*

*Additionally, where inspections result in a failed inspection, further re-inspections are necessary. As a result of work requiring re-inspection the property owner will incur additional charges from the Building Consent Authority for time spent over and above the allocated amount for which a deposit is paid for prior to issue of the Building Consent.*

*It should be noted that the BCA, in undertaking inspections, are only on site to observe a sample of works considered critical to the Building Consent and not all elements of the construction works are observed or inspected. When taking this into account, it is possible that further defects may exist within all these properties despite the issue of a Code Compliance Certificate.*

- [38] The Technical Assessor also noted:

*The Building Consent Authority's role is only to check or inspect that the building work has been carried out in accordance with the building consent. As a result of the failure of the respondent to carry out the works in accordance with the Building Consent, the BCA has been forced into a position whereby its role in the inspection of building work has increased in scope to issuing instructions and direction to the respondent (builder) to have defective works resolved on site.*

*Whilst the BCA is obliged to take all reasonable steps to ensure that building works is being carried out in accordance with the consent, the costs incurred in undertaking this additional works are passed on to the property owner.*

*These costs are unlikely to be expected when considering the owner will already have a contract in place for the respondent to be building in accordance with the Building Consent.*

- [39] The Respondent provided a written response to the Complaint by way of his legal representative. The representative stated:

*We note that the Code Compliance Certificates in respect to these properties have been issued. In some instances more than 1 year ago. Further we note that the record of works for all 3 properties have also been submitted.*

- [40] Reference was made to section 94(1)(a) of the Act as regards the issuing of a code compliance certificate and that the consent authority who issued the code compliance certificates is the complainant in the matter. The representative noted:

*The content of the above stated section of the act is self-explanatory and raises the question as to why the Council would now be seeking to discipline Mr. Ali after already certifying on reasonable grounds that the work in all 3 properties comply with the consents.*

*The question of reasonableness eludes to the question of negligence, which is a point which has been raised in our Appeal and to which we reserve the right to make further submissions subsequent to the judgment of the Court in [Omitted], which we submit the Council found to be reasonable when it issued the Code Compliance Certificate.*

*They further concede that the records of work have already been submitted yet allege that the records of work were not submitted.*

*Further, we believe that, since the time period between the issue of the Code Compliance Certificate and the complaint being submitted is in most instances more than 1 year, that the Council does not have the standing to bring such a complaint and that it would be essential for you to provide us with the necessary proof that they possess such standing.*

- [41] The Respondent's representative concluded:

*We submit that this complaint is without merit and an abuse of power on behalf of Ms. Whelan and the Council. The legitimacy of this complaint has to be seriously questioned considering that Auckland Council has already issued Code Compliance Certificates for 3 of these properties.*

*We submit that these complaints are an attempt by the Council to cover its own internal inadequacies.*

*We submit that our client has not breached any of the grounds under section 317 of the Building Act 2004 as alleged.*

*We therefore submit that any disciplinary process instituted against our client will be disingenuous and in bad faith.*

*We trust that the system will recognise that these complaints are nothing but a waste of resources and time and will not proceed any further.*

- [42] At the hearing the Respondent and the Respondent's Representative maintained the position that code compliance certificates had been issued for all bar one of the properties and that, as such, the Board could not find that the Respondent had committed any of the alleged disciplinary offences. In essence the submission was that the issues noted in the inspections had been put right and that code compliance certificates would not have issued had they not have been corrected. He also noted that the owners of the homes worked on were not complaining and it followed that the Council should also not complain.
- [43] The Respondent also stated that, in his estimation, 80% of the matters raised in inspections were not legitimate matters, that the Council inspectors had no idea what it was that they were looking at and that at inspections different inspectors would be sent and that they would then raise different issues. The Respondent's Representative also noted that there are no limits to the number of inspections that can be called for.
- [44] With respect to each of the properties the Respondent accepted that the building work was carried out or supervised by him except that with regard to [Omitted], [Omitted], a licensed building practitioner ([Omitted]) carried out building work together with three persons who were in the employ of and under the supervision of the Respondent. He further stated that all issues noted by the Council have been rectified.
- [45] The Respondent also provided the Board with a letter from the owner of [Omitted] stating:
- There were no issues in terms of receiving completed paper work for application of the code of compliance certificate from Zahid Ali.*
- There were some construction issues on site between the council inspectors and the builder which were resolved as the job progressed in order to allow the job to pass inspections.*
- [46] The Council stated that it had not received a record of work for [Omitted]. The Respondent stated that he gives his records of work to the owner and that:
- If it's labour only we give it to the owner, because in labour only contracts the owner collects all his paperwork and he takes it to the council.*

#### **Board's Conclusion and Reasoning**

- [47] 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);

- (b) 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);

and should be disciplined.

[48] The Board has also decided that the Respondent **has not**:

- (a) 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
- (b) 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)

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

#### Negligence and/or Incompetence

[50] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>10</sup> Judge McElrea noted:

*[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.*

[51] 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*<sup>11</sup> test of negligence which has been adopted by the New Zealand Courts<sup>12</sup>.

[52] 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*<sup>13</sup> it was stated as "*an inability to do the job*".

[53] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>14</sup>. 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.

<sup>10</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>11</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>13</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>14</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)



- [54] 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<sup>15</sup>. 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 practitioner<sup>16</sup>.
- [55] 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.*

- [56] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>17</sup> and be carried out in accordance with a building consent<sup>18</sup>. 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.

- [57] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>19</sup> 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.*

<sup>15</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>16</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>17</sup> Section 17 of the Building Act 2004

<sup>18</sup> Section 40(1) of the Building Act 2004

<sup>19</sup> [2001] NZAR 74

[58] In this instance the Board, which includes persons with extensive experience and expertise in the building industry, has found that the Respondent has been negligent in that his conduct has fallen below that to be expected of a licensed building practitioner with a carpentry licence. The Board did not accept the submission that a finding of negligence could not be made as code compliance certificates had issued. It was the conduct that lead up to the issue of code compliance certificates that was complained about and with respect to which the Board has made its findings.

[59] In this respect the Technical Assessor noted and the Board agreed that:

*The Building Consent Authority's role is only to check or inspect that the building work has been carried out in accordance with the building consent. As a result of the failure of the respondent to carry out the works in accordance with the Building Consent, the BCA has been forced into a position whereby its role in the inspection of building work has increased in scope to issuing instructions and direction to the respondent (builder) to have defective works resolved on site.*

[60] It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. The Complainant noted that in the Auckland Council area there is a 24% failure rate at inspections of new residential building work. It will, therefore, not necessarily 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) the extent and seriousness of the non-compliance;
- (b) whether there is a pattern of continued non-compliance; and
- (c) what steps are taken when non-compliance issues are raised.

[61] 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<sup>20</sup> 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.*

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<sup>20</sup> Hansard volume 669: Page 16053

- [62] 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 legislation<sup>21</sup>:

*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.*

- [63] 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.*

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<sup>21</sup> Hansard volume 669: Page 16053

- [64] 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.

The Extent and Seriousness of the Non-Compliance

- [65] In considering the extent and seriousness of the non-compliance issues the Complaint details a very high number of significant compliance failures across all of the properties complained about.
- [66] The building work undertaken was reported by the Technical Assessor as not being overly complex. Notwithstanding this the Technical Assessor noted:

Property	Non-Compliance Issues
[Omitted]	The example photographs provided within the complainants documentation demonstrate details that are unlikely to meet the on-going performance requirements of the Building Code, and in particular those that relate to B2:Durability, and E2:External Moisture.
[Omitted]	The photographs provided within the complainants documentation demonstrate details that are unlikely to meet either current or on-going performance requirements of the Building Code, and in particular those that relate to B1:Structure, B2:Durability, and E2:External Moisture.
[Omitted]	The examples provided within the complainants documentation demonstrate works that does not meet the performance requirements of the Building Code, and in particular those that relate to B1:Structure, B2:Durability, and E2:External Moisture.
[Omitted]	The photographs provided within the complainants documentation demonstrate works that is unlikely to meet the performance requirements of the Building Code, and in particular those that relate to B1:Structure.

- [67] The following photos highlight some of the more disconcerting compliance matters but are in no means the only serious non compliance issues shown in the documentation provided with the Complaint

[Omitted]



Open fascia to wall junction, moisture ingress risk

[Omitted]



No structural connections



Walls built out of square



Head flashing with slope toward building



Multiple hold downs through slab edge across tow building elevations

### A Pattern of Non-Compliance

- [68] The following table summarises the number of inspections, the number of failures and the percentage rate of failures.

Property	Number of Inspections	Number of Failed Inspections	Percentage Failure
[Omitted]	34	19	55.88
[Omitted]	28	14	50.00
[Omitted]	18	6	33.33
[Omitted]	30	13	43.33

- [69] With the exception of [Omitted] the failure rate is well above the Auckland average. The overall average failure rate was 45.63%. Put another way just less than half of the inspections failed. In this respect it should be noted that not all inspections relate to carpentry work and as such the actual failure rate for carpentry is somewhat higher. Even at 45% it is an unacceptable failure rate.

### Steps Taken Post Failure

- [70] Moreover an analysis of the inspection records provided shows that many failings were repeated across jobs and that many of the failings were not attended to in a timely manner. As the Technical Assessor noted that Council has, in many instances, ended up having to issue instructions to allow the work to meet compliance standards. Such instructions should not be required on relatively simple building projects where the work is being carried out or supervised by a licensed building practitioner.
- [71] Given the above the Board found that there was a pattern of serious non-compliance that was not attended to in an appropriate manner.
- [72] The Board does note, however, that the building work was supervised by the Respondent. Had he carried it out the Board would have found him to have been incompetent. As he was supervising it has found that he has been negligent in that supervision.
- [73] Supervise is defined in section 7 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.*

- [74] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligation noting that the level of supervision required will depend on a number of circumstances but that ultimately the Board needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.
- [75] 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 1992<sup>22</sup>. 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."*
- [76] If the Respondent had carried out his duties as the supervisor in the manner to be expected of a licensed building practitioner then the matters which were noted by the building consent authority during inspections should have been identified, or at least the bulk of them should have been, and they should have been rectified prior to an inspection being called. As can be seen from the history of inspections this did not occur. Rather than the Respondent checking that the building work was completed to an acceptable standard he has, in effect, left it to the building consent authority to assess and determine compliance.
- [77] In considering the above, and looking at the building work in question the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent departed from what the Board considers to be an accepted standard of conduct as regards his supervision and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.
- [78] The Board considers that had the Respondent carried out his responsibilities as the supervisor in the manner expected of a licensed building practitioner then the high number of non-compliance issues would not have occurred.

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<sup>22</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

## Record of Work

- [79] 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 work<sup>23</sup>. It is a mandatory requirement whenever restricted building work under a building consent is carried 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.
- [80] 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.
- [81] 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 ...”.
- [82] The allegation with regard to a failure to provide a record of work related to [Omitted]. The Respondent provided evidence that the record of work had been provided to the owner. The Complainant, the Territorial Authority stated that it had not received one. The Respondent noted that a code compliance certificate had been issued for the property. A record of work is not required for the issue of a code compliance certificate<sup>24</sup>. The two are not linked.
- [83] The Board noted that the Respondent stated, as regards records of work:
- If it's labour only we give it to the owner, because in labour only contracts the owner collects all his paperwork and he takes it to the council.*
- [84] Whilst this may be pragmatic it does not satisfy the requirements of section 88 of the Act. It places reliance on third parties to meet the Respondent’s obligations.
- [85] The Respondent should also note that the record of work provisions are designed to create a documented record of who did what in the way of restricted building work under a building consent. A record of work avoids uncertainty in situations where a single lead contractor (who may or may not be licensed) has engaged with the owner and/or territorial authority by going beyond those persons to all those that are carrying out restricted building work. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out. Not providing a record of work to the territorial authority defeats this purpose.

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<sup>23</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>24</sup> Refer Determination 2013/030, 28 May 2013



- [86] 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 were advanced.

#### Contrary to a Building Consent

- [87] Section 40 of the Act states that all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [88] In the present case there were multiple instances of non-compliance with building consents. These were, with the intervention of the building consent authority, eventually rectified and code compliance certificates have been issued for all bar one of the properties complained about.
- [89] The Board has made a finding of negligence in relation to non-compliant building work and the building inspections. Given this the Board does not consider it is necessary to also make a finding under section 317(1)(d) of the Act.

#### Disrepute

- [90] The Board has decided that the Respondent has not brought the regime into disrepute.
- [91] 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 C2-01111<sup>25</sup> and discussed the legal principles that apply.
- [92] The Act does not provide guidance as to what sort of conduct brings or is likely to bring the regime into disrepute is disrepute. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>26</sup> 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*<sup>27</sup> 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*

<sup>25</sup> Board decision dated 2 July 2015.

<sup>26</sup> 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

<sup>27</sup> [2012] NZCA 401

*the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>28</sup>

[93] 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 convictions<sup>29</sup>;
- honest mistakes without deliberate wrongdoing<sup>30</sup>;
- provision of false undertakings<sup>31</sup>; and
- conduct resulting in an unethical financial gain<sup>32</sup>.

[94] 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.

[95] In this instance the conduct in question did relate to an important task a licensed building practitioner is expected to carry out. The Courts have, however, 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.*

[96] In this instance the Board did not consider that the conduct reached the threshold required for a finding of disrepute. This does not mean that the Board condones the behaviour. Rather the Board considers that the finding of negligence is the correct disciplinary offence under which to make a finding. Continued failure to supervise hereafter could, however, lead to a finding of disrepute.

### **Penalty, Costs and Publication**

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

<sup>28</sup> [2012] NZAR 1071 page 1072

<sup>29</sup> *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

<sup>30</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>31</sup> *Slack, Re* [2012] NZLCDT 40

<sup>32</sup> *ColliervNursing Council of New Zealand* [2000] NZAR 7

- [98] 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

- [99] 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*<sup>33</sup> 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.*

- [100] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>34</sup> 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.
- [101] The supervision failing was serious. It is an aggravating factor that there was a pattern over four properties.
- [102] 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*<sup>35</sup> 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.
- [103] The Respondent's approach to the Complaint has been belligerent and he has refused to accept that the manner in which the building work was carried out was anything other than acceptable.
- [104] Given the above factors the Board initially considered suspension or cancellation of the Respondent's licence. The level of negligence gave rise to this consideration. Had the Board made a finding that he had also been incompetent it would have ordered a suspension or cancellation. As it has not a fine will be sufficient penalty. The Board therefore considers, taking into account the above factors, a fine of \$5,000 is appropriate and this is in line with other similar cases.

<sup>33</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>34</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>35</sup> [2011] 3 NZLR 850.

## Costs

- [105] 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.”
- [106] 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<sup>36</sup>.
- [107] In *Collie v Nursing Council of New Zealand*<sup>37</sup> 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.*

- [108] The investigation and hearing of the matter has required two hearings. The second hearing was necessary as a result of the Respondent refusing to appear at the first. As a result the costs have been higher than would normally be the case. The Board does, however, acknowledge that the Respondent was partially successful at the prehearing and, as such, it has taken this into account in setting the level of costs.
- [109] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board’s inquiry.

## Publication

- [110] 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 Act<sup>38</sup>. 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.*

- [111] 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.
- [112] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>39</sup>. The Criminal Procedure Act 2011 sets out

<sup>36</sup> *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.

<sup>37</sup> [2001] NZAR 74

<sup>38</sup> Refer sections 298, 299 and 301 of the Act

<sup>39</sup> Section 14 of the Act

grounds for suppression within the criminal jurisdiction<sup>40</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>41</sup>. 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*<sup>42</sup>.

- [113] 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 interest<sup>43</sup>. 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.
- [114] Based on the above the Board will order further publication. The Board considers that further publication is required to ensure that other licensed building practitioners learn from the matter. The publication will be by way of an article in Code Words and on the Board's website.

### Section 318 Order

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

<b>Penalty:</b>	<b>Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$5,000.</b>
<b>Costs:</b>	<b>Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.</b>
<b>Publication:</b>	<b>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.</b>  <b>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.</b>

- [116] 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

- [117] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **26 September 2018**. 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

<sup>40</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>41</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>42</sup> *ibid*

<sup>43</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### Right of Appeal

[118] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 4<sup>th</sup> day of September 2018



**Chris Preston**  
Presiding Member

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#### <sup>i</sup> **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."*

#### <sup>ii</sup> **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.*

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**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.*

## **Before the Building Practitioners Board**

	BPB Complaint No. C2-01592
Licensed Building Practitioner:	Zahid Ali (the Respondent)
Licence Number:	BP 107647
Licence(s) Held:	Carpentry July 2011

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### **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:	In Person
Hearing Date:	24 January 2018
Pre Hearing Decision Date:	12 February 2018

#### **Board Members Present:**

Chris Preston (Presiding)  
Richard Merrifield, LBP, Carpentry Site AOP 2  
Mel Orange, Legal Member  
Brian Nightingale, Registered Quantity Surveyor and Registered Construction Manager  
Robin Dunlop, Retired Professional Engineer  
Bob Monteith, LBP Carpentry and Site AOP 2  
Faye Pearson-Green, LBP Design AOP 2

#### **Appearances:**

Faizal Abba, Barrister for the Respondent

#### **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.



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## Introduction and Background

- [1] The hearing resulted from a Complaint from the Auckland Council into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted],[Omitted], [Omitted],[Omitted] and [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); and
  - (c) has 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
  - (d) in respect of [Omitted] only 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).
- [2] The Respondent was sent a Notice of Proceeding dated 18 October 2017 and a Notice of Hearing on 24 October 2017.

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<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- [3] On 27 October 2017 the Respondent's solicitor wrote to the Board. He noted an appeal against a Board decision from another complaint in respect of the Respondent's conduct at [Omitted]. He submitted that, in light of the District Court's decision, which reversed the Board's decision, that the complaint should be withdrawn.
- [4] On 6 November 2017 errors in the notices sent were identified. A new Notice of Hearing dated 15 November 2017 setting the matter down for a hearing on 24 January 2018 was issued.
- [5] On 13 December 2017 a pre-hearing teleconference to discuss the hearing and procedural matters was convened. Counsel for the Respondent was present. The hearing procedures were outlined. Counsel for the Respondent confirmed the Respondent would be attending the hearing. He also noted an objection to the Special Adviser to the Board on the grounds that he had appeared as a witness in the disciplinary matter that was appealed.

### **The Hearing**

- [6] On 22 January 2018 Counsel for the Respondent filed a Memorandum with the Board. The Memorandum set out various submissions as regards the Board's jurisdiction and the hearing. Counsel sought the following:
  - (a) *That these charges be withdrawn; failing which we seek;*
  - (b) *Proof of the legitimacy of the complaints;*
  - (c) *Proof that the board considered the merits of the charges against before proceeding against the respondent;*
  - (d) *Recusal of the board;*
  - (e) *Recusal of Mr a resolution to the above stated issues before proceeding to any substantive hearing on the matter.<sup>2</sup>*
- [7] The hearing proceeded as scheduled. The Complainant appeared as did Counsel for the Respondent. The Respondent did not appear. Counsel for the Respondent advised that the Respondent would not be appearing as their intention was to judicially review any decision of the Board to proceed and hear the Complaint. The nonappearance was not noted in the Memorandum filed.

### **The Pre Hearing Application**

- [8] Counsel for the Respondent's submissions raised the following:
  - A. *The respondent has raised the defence of Res Judicata (Already been determined) in respect of [Omitted].*

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<sup>2</sup> This submission is as written in Counsel's submissions and is taken to mean the recusal of Board Members and/or the Special Adviser.

- B. *The respondent objects to the legitimacy of the complaints raised against him by representatives of the Consent Authority (the Auckland City Council).*
- C. *The respondent objects to the legitimacy of the prosecution of the complaints by the Building Practitioners Board.*
- D. *The respondent has requested that board members involved in his previous disciplinary proceedings recuse themselves for fear of bias.*
- E. *The respondent objects to William Hursthouse providing evidence at any proceedings involving him and the use of his reports in any proceedings against him.*

[9] Each item will be dealt with in the above sequence.

#### Res Judicata

- [10] Counsel for the Respondent has submitted that res judicata applies as regards the disciplinary charges that relate to [Omitted] as a result of District Court decision in *Ali v Kumar and others*<sup>3</sup> which quashed a decision of the Board that the Respondent had carried out or supervised building work in a negligent manner. That District Court decision was issued on 24 October 2017. The Board's resolution to proceed to a hearing in respect of the current disciplinary charges was made on 20 September 2017, i.e., prior to the appeal being decided.
- [11] Res judicata is the principle that a cause of action may not be re-litigated once it has been judged on the merits. It brings finality to matters and it applies to the parties to the matter. It does not mean the new causes of action cannot be litigated between the same parties. The Auckland Council, the complainant in the present matter, was not a party to the earlier complaint. The Board was the tribunal that heard and made a decision on the earlier complaint and as such was not a party to it.
- [12] A similar legal principle is the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court<sup>4</sup>.
- [13] The Board has reviewed the allegations made in the present complaint vis-à-vis [Omitted]. It considers that the allegations are substantially similar to those made in the complaint that lead to the *Ali v Kumar* appeal and that issue estoppel applies. The Board will not inquire any further into the Respondent's conduct at 1[Omitted] in the present complaint.
- [14] The Board does not, however, consider it is estopped from future consideration of new or fresh allegations that do not relate to the matters previously determined by the court.

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<sup>3</sup> [2017] NZDC 23582

<sup>4</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

### Legitimacy of the Complaints

- [15] Counsel for the Respondent notes that code compliance certificates have been issued in respect of the properties to which the complaints relate. He made submissions as regards the application of section 94 of the Act and in particular that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds he building work complies with the building consent and submissions to the effect that if the work did not comply then code compliance certificates should not have issued. He further submitted:

*The actions of the Auckland Council are preposterous and these disciplinary proceedings are nothing short of a complete abuse of power and absolute waste of time.*

- [16] The Board is a statutory body established under the Building Act<sup>5</sup> and its capacity and powers are set out in section 342 and its functions in section 343 of the Act. Included is the function:

*... to receive, investigate, and hear complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2<sup>6</sup>;*

- [17] Complaints about licensed building practitioners can be made under section 315 of the Act. Under s 316 the Board is required to investigate complaints:

**316 Board must investigate complaints**

- (1) *The Board must, as soon as practicable after receiving a complaint, investigate the complaint and determine whether or not to proceed with it.*

- [18] Further legislative directions are provided in the Complaints Regulations made under the authority of the Building Act<sup>7</sup>. The Complaints Regulations establish a process for dealing with complaints following their receipt. The stipulated process involves:

- (a) the preparation of a report by the Registrar;
- (b) consideration of the report by the Board to assess if regulation 9 applies; and
- (c) if regulation 9 does not apply to hold a hearing on disciplinary charges.

- [19] The threshold for a matter to proceed to a hearing is set by regulation 9. In essence a complaint must proceed to a hearing under regulation 10 unless, under regulation 9, one of the following applies:

**9 Complaint not warranting further investigation**

*A complaint does not warrant further investigation if—*

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<sup>5</sup> Section 341 of the Act.

<sup>6</sup> Section 343(1)(b)

<sup>7</sup> Pursuant to section 402(1)(f), (h) and (k) of the Act.

- (a) *it does not come within the grounds for discipline; or*
- (b) *it does not meet the requirements of regulation 5; or*
- (c) *it is frivolous, vexatious, or not made in good faith; or*
- (d) *its subject matter is [minor or] trivial, or both; or*
- (e) *there is insufficient evidence to warrant the investigation of the complaint; or*
- (f) *the investigation of it is—*
  - (i) *not practicable; or*
  - (ii) *unnecessary; or*
  - (iii) *not possible (for example, because [the licensed building practitioner] has died or cannot be located); or*
- (g) *its subject matter has been considered previously by the Board, and the Board—*
  - (i) *considered that the complaint did not warrant further investigation, because 1 or more of paragraphs (a) to (f) applied to it; or*
  - (ii) *otherwise made a decision on the complaint.*

[20] The Board also notes that the procedures laid down are those of an inquiry. Section 316 of the Act, as noted above, states the Board is to investigate and decide whether to proceed with a complaint. The Complaint Regulations, however, only require that the Board seek a Registrar's report prior to it making a decision on whether or not to proceed to a hearing. The Registrar's report must, under regulation 8, contain the following:

**8 Contents of Registrar's report to Board**

- (1) *The Registrar's report to the Board must—*
  - (a) *contain the details of the complaint, including—*
    - (i) *any information supplied under regulation 5; and*
    - (ii) *whatever [the licensed building practitioner] provides under regulation 7(2); and*
    - (iii) *whatever the complainant provides under regulation 7(3); and*
    - (iv) *the special adviser's response, if any, under regulation 7(4); and*
  - (b) *contain the Registrar's summary of the facts as agreed and as disputed between [the complainant and the licensed building practitioner]; and*
  - (c) *indicate whether, in his or her view, regulation 9 applies to the complaint.*
- (2) *The details of the complaint under subclause (1)(a) may be in summary form, either in whole or in part.*

[21] As can be seen from regulation 8 the Registrar's Report is not an in-depth or extensive investigation. The Registrar is not able to compel evidence and the only evidence over and above the complaint and a response that may be included in the

Report is a comment or opinion on the information collected by the Registrar from a Special Adviser under regulation 7(4).

- [22] In summary the complaint procedures are designed so as to make the hearing a continued and more in-depth investigation of the complaint. At a hearing those involved can be summonsed and questioned under oath and further evidence can be obtained and tested. The processes leading up to the hearing are, by design, simplified so as to expedite the consideration of complaints and to avoid undue pre-hearing investigations and processes.
- [23] Turning to the matter at hand, Counsel for the Respondent has submitted that the Complaint should not have proceeded to a hearing. As noted above the reasons why a complaint may not proceed to a hearing are those stipulated in regulation 9. The sub clauses of regulation 9 that might apply are 9(c) to (g).
- [24] Regulation 9(c) covers complaints that are frivolous, vexatious, or not made in good faith. Frivolous complaints are those that do not have any serious purpose or value. Vexatious are those which are improperly motivated such as where they lack merit or are instituted primarily to distress, annoy or embarrass. Complaints that are not made in good faith are those which lack honesty or sincerity.
- [25] There may, in any complaint made about a licensed building practitioner, be elements of regulation 9(c) or of it having those effects. That is not, of itself, enough to make the complaint frivolous, vexatious, or not made in good faith. The Board considers the complaint needs to have been made predominately for those purposes and to lack value or merit. This is not the case with the matters before the Board.
- [26] Regulation 9(d) deals with minor and/or trivial complaints. Minor or trivial complaints are those that are of little importance, significance or value. The allegations in the Complaint are about the compliance and quality of the building work. Those issues, on the face of them, are neither minor nor trivial.
- [27] Regulation 9(e) deals with the sufficiency of evidence. In this respect the commentary above as regards the complaint process is important. When the Board makes its regulation 9 and 10 decision it has limited information available to it and is cognisant of the fact that more evidence may become available at a hearing.
- [28] To test sufficiency the Board needs to inquire whether there is evidence which, if uncontradicted, would, having regard to the degree of proof demanded<sup>8</sup>, justify consideration of the complaint. In making this assessment questions of voracity need to be put aside as the evidence has not, at the Registrar Report phase, been tested and in this respect the Board notes the Court of Appeal's comments in *McLanahan v New Zealand Registered Architects Board*<sup>9</sup>

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<sup>8</sup> The burden in complaints is on the balance of probabilities per *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>9</sup> [2017] NZCA 458 at [75]

*[75] Similarly, we do not agree with the Judge's view at [127] that the purpose of r 62 includes enabling the investigating committee to reach a judgment on whether or not material before it justifies recommending an architect be referred to a disciplinary committee if that involves an evidential assessment on some basis other than provided for in r 62(b), (c) and (d).*

- [29] The Board's assessment at the regulation 9 and 10 phase was that the evidence as disclosed in the Registrar's Report was sufficient and as such that the matter should proceed to a hearing. The evidence included building consent authority records and photographs in respect of each of the properties complained of. Those records and photographs contained evidence which, if un-contradicted, could, on the balance of probabilities be sufficient to uphold complaints about the conduct of the Respondent under section 317. The response to the Complaint did not deal with the substance of the complaints.
- [30] Regulation 9(f) deals with complaints whose further investigation would not be practicable, or is unnecessary or is not possible. Questions of practicability and possibility go to the mechanics of the complaint and the ability of the Board to hold a hearing. Neither applies.
- [31] Unnecessary has a wider meaning and application. Essentially it can be interpreted as a hearing is not needed. In this respect the Board notes Counsel for the Respondent's submission as regards section 94 of the Building Act. The Board has interpreted this as a submission that the Board is precluded from inquiring further as code compliance certificates have been issued. In this respect, whilst certificates have been issued, it is the continued compliance failures prior to certificates being issued that has been complained about. A licensed building practitioner should be able to carry out building work competently and compliantly and without the assistance of a building consent authority. It is not a case of eventually getting it right nor of all past conduct being deemed acceptable as a result of a code compliance certificate issuing. As such the Board does not accept that it is precluded from further inquiring into the complaint.
- [32] Regulation 9(g) deals with matters that have been previously dealt with by the Board. In some ways it encompasses the principles of res judicata discussed above. As regards [Omitted] regulation 9(f) applies and is an additional reason why that matter should not proceed any further. It does not apply to any of the other properties complained about.
- [33] Based on the above the Board does not accept the submission that the Complaint is not legitimate.

#### Legitimacy of the Board and Recusal of Board Members

- [34] Counsel for the Respondent's submissions dealt with the two matters as a single submission. Counsel noted the Board's obligation to deal with disciplinary

proceedings in accordance with the rules of natural justice<sup>10</sup> and submitted that natural justice required:

*Determination of the dispute by a person independent of the parties and free from bias or influence.*

[35] Counsel for the Respondent further submitted that:

*The respondent submits that the Board is biased against him and are influenced by member of the Auckland Council.*

*This is most evident by the Boards insistence that it pursue disciplinary action against the respondent despite the matter already being determined by the Appeal Court.*

*Further, the fact that the Board seeks to discipline the respondent that have already been passed as compliant is evidence of the fact that the Board or particular members on the Board are influenced or biased against the respondent and have not applied their minds to the merits of this matter.*

[36] The test of bias is whether, on the balance of probabilities, the minds of those concerned were, in fact, not open to persuasion<sup>11</sup>. The Court of Appeal in *Casino Ltd v Moxon*<sup>12</sup> stated the test is an objective one as to whether a reasonable person who is fully informed would consider that there was a real danger of bias on the part of a member or members of the Tribunal in the sense that he, she or they might unfairly have regarded the case of one party with favour or disfavour. The Court further noted.

*... the nature of the proceeding and the forum will be relevant to an assessment of the conduct claimed to give rise to an appearance of bias.*

[37] Putting aside the matter of [Omitted] which has already been dealt with Counsel for Respondent has raised what the Board considers is an appearance of bias as opposed to evidence of actual bias.

[38] Recently the Chief District Court Judge<sup>13</sup> issued a reminder as regards judicial independence. She noted:

The mere fact a judge earlier in the same case, or in the previous case, has commented adversely on a party or a witness or has found the evidence of a party or a witness to be unreliable, would not be found to be a sustainable objection to that judge presiding.

[39] Judge Doogue referred to the Court of Appeal case *R v Cullen*<sup>14</sup>, which says:

<sup>10</sup> Refer section 283 of the Act.

<sup>11</sup> *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 194

<sup>12</sup> [2001] 2 NZLR 78

<sup>13</sup> Judge Doogue in the New Zealand Law Society LawPoints Issue 379

<sup>14</sup> [1992] NZLR 577



*“It is inevitable that defendants will appear more than once before the same judge, and the fact that something discreditable to the defendant happens on one occasion does not make it inappropriate for the same judge to deal with another matter in the future. Judges are well able to put such things out of their minds, just as juries are expected to do from time to time with proper direction”.*

- [40] Judge Doogue went on to note that the issue of recusal does not arise merely because a judge has ruled against a defendant on a pre-trial matter, even if the decision made was erroneous and adverse to the party now alleging bias. She stated:

*A judge is only disqualified if he or she has expressed views in the course of a hearing, in such extreme and unbalanced terms, as to throw doubt on his or her ability to try the issue with an objective judicial mind. The threshold for recusal is high in these types of circumstances.*

- [41] The Board considers the same applies to it and to its members. The mere fact that the Board and its members have previously dealt with complaints about the Respondent and/or complaints from the Complainant does not mean that it is biased or that either the Board or any of its members should be recused from considering the Complaint.

#### Objection to the Special Adviser

- [42] Counsel for the Respondent submitted that the Special Adviser:

*... is nothing more than paid employee of the Board. The writer has observed his attendance at a number of other disciplinary proceedings of the Board. His independence is most definitely in question.*

*... has not practiced building professionally in a number of years and has lost touch with the practices of the profession. We submit that he cannot contend to be an expert on a subject when he is not up to date with current practices.*

*... speaks of his opinion in the reports. (His) opinion on a matter is not necessarily that of the building profession.*

- [43] The appointment of a Special Adviser by the Board is provided for by section 322(1)(d) of the Act which states:

- (1) *In relation to a disciplinary matter, the Board may—*  
 (d) *appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).*

- [44] The Board considers a Special Adviser to be an expert for the purposes of giving evidence. Special Advisers as expert witness have an overriding duty to assist the Board impartially on relevant matters within their area of expertise. A high standard of objectivity is required and the Board requires that they adhere to the code of

conduct for experts in Schedule 4 of the High Court Rules. Given this the first submission is rejected.

- [45] Turning to the second and third submissions the Special Adviser submitted his qualifications and experience as part of his report. The Board notes he has 44 years of experience in the construction industry, is a Registered Building Surveyor, holds the New Zealand Institute of Building Surveyors (NZIBS) Weathertightness Certificate, is a member or associate member of numerous industry related organisations and teaches NZIBS courses. The Board does not consider his expertise to be in question.
- [46] Notwithstanding the rejection of the submissions the Board does consider that it would be prudent for a new Special Adviser to be appointed and for that person to consider the matter afresh.

#### Record of Work

- [47] Counsel for the Respondent also made a submission at the hearing as regards the obligation of the Respondent to provide a record of work. His submission relied on the findings of the District Court in the Respondent's appeal in *Ali v Kumar* as regards the application of section 87(1) of the Act. The decision in *Ali* applied the same reasoning as the decision in *Bell v Lu and others*<sup>15</sup>. That decision is being appealed to the High Court by the Ministry of Business Innovation and Employment who were a party to the appeal.
- [48] The only property to which a record of work applies is [Omitted]. The evidence before the Board is that the restricted building work was complete and that a record of work has not been provided. The Respondent has not provided any response on [Omitted] and as such there is no evidence that it was completed by another licensed building practitioner. As such there is no evidence that section 87(1) of the Act, which relates to notice being given by the owner to the building consent authority, applies. On this basis the Board does not consider that any of the grounds for the Complaint not to proceed under regulation 9 of the Complaints Regulations apply.

#### **Board Decision and Directions**

- [49] The Board directs that:
- (a) the Complaint and investigation into the Respondent's conduct at [Omitted] will not proceed any further;
  - (b) a new Special Adviser is to be appointed and is to provide his or her comment and/or opinion on the evidence received in respect of the remaining matters;
  - (c) on receipt of the Special Adviser's report the Complaint (excluding [Omitted]) is to be set down for a one day hearing before a full Board; and

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<sup>15</sup> [2017] NZDC 23847

(d) any written submissions from the Respondent or the Complainant are to be filed with the Board Secretariat at least five (5) working days prior to the scheduled hearing date.

[50] Costs of and incidental to the pre-hearing application by the Respondent will be reserved.

Signed and dated this 12<sup>th</sup> day of February 2018

A handwritten signature in cursive script that reads "Chris Preston".

**Chris Preston**  
Presiding Member