

## Before the Building Practitioners Board

	BPB Complaint No. C2-01688
Licensed Building Practitioner:	Ronald Carmichael (the Respondent)
Licence Number:	BP 114008
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:	Christchurch
Hearing Type:	In Person
Hearing Date:	23 January 2018
Decision Date:	1 March 2018
Board Members Present:	Chris Preston (Presiding) Mel Orange, Legal Member Brian Nightingale, Registered Quantity Surveyor and Registered Construction Manager Catherine Taylor Faye Pearson-Green, LBP Design AOP 2

#### Procedure:

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

#### Board Decision:

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

## Contents

<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Background to the Complaint</b> .....	3
<b>Evidence</b> .....	3
<b>Board’s Conclusion and Reasoning</b> .....	6
Negligence and/or Incompetence .....	7
Record of Work.....	10
Disrepute.....	11
<b>Penalty, Costs and Publication</b> .....	13
Penalty .....	14
Costs.....	15
Publication .....	16
<b>Section 318 Order</b> .....	17
<b>Submissions on Penalty, Costs and Publication</b> .....	17
<b>Right of Appeal</b> .....	17

## Introduction

- [1] The hearing resulted from a complaint 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]. 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) 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
  - (c) 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).

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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.

### Function of Disciplinary Action

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

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a Complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<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.”*

[4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters. It can, however, inquire into the conduct of a Respondent in respect of contractual matters where the conduct relates to “building work” as defined in the Act or where the conduct comes within the provisions of Part 4A of the Act (consumer rights and remedies in relation to residential building work). The Board can also inquire into contractual matters if it considers the conduct may have brought the licensed building regime into disrepute.

### Background to the Complaint

[5] The Respondent was engaged by the Complainant to build a new dwelling. The Complainant alleged the Respondent made in error in quoting for the build which meant that the build costs were \$100,000 above the contract price of \$286,000 and an error in quoting for the build of an associated garage.

[6] The Complainant also alleged the Respondent failed to provide a record of work on completion of restricted building work.

### Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.

[8] The Board heard evidence from:

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

Ronald Carmichael	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Complainant
[Omitted]	Witness for the Respondent

- [9] The Complainant entered into a contractual arrangement with the Respondent's company for the removal of an existing earthquake damaged home and the construction of a new home and garage.
- [10] The Respondent engaged his designer [Omitted] to develop designs for the project. The Respondent gave evidence that the brief was that a replacement dwelling covering 137m<sup>2</sup> (excluding garaging) be designed. The Respondent priced the project on the basis of \$2,000 inclusive of GST per square metre. He arrived at the calculation on the basis of his experience with previous projects.
- [11] The Respondent produced an unsigned contract which he stated was consistent with a contract that was presented and signed by the contracting parties prior to the work commencing (the Contract). Neither the Complainant nor the Respondent were able to locate the signed contract but the evidence was that it was signed in or about March 2016. The contract provided for a Contract Price which was defined as:
- "Contract Price" means the total price to be paid by the Client to the Builder for the Work and, where appropriate, shall be the price increased to take account of any Extras. The base Contract Price is set in the Schedule.*
- [12] The Contract Price in the Schedule notated the sum of \$286,000 including GST. The Contract Price contained the following note:
- (Note – This is the base price and does not include any Extras or any other amounts which may be payable to the Builder. For the avoidance of doubt, the contract price does not include any costs related to obtaining consents (including PIM and Building Consent), design fees, costs for enhanced foundations, demolition and removal of existing dwelling or the building of the garage.*
- The Builder agrees to build a standard single garage for a fixed costs of \$25,000 to be added to the Contract price and treated as an Extra.*
- [13] The term Extra was also defined:
- "Extra" means the cost of any additional work or materials required to complete the Work, not due to a default by the Builder, the assigns or representatives of the Builder, or subcontractors contracted by the Builder, and shall be added to and form part of the Contract Price.*
- [14] The evidence at the hearing was that the Contract Price included subcontractors, kitchen cabinetry, white wear and carpets. No specifications for those items were

provided to the Board and no evidence was heard that those items had been specified or amounts set for them prior to the build commencing.

- [15] The Respondent, in his response to the complaint prior to the Registrar's Report being issued, stated he mistakenly priced the project using a square metre measurement contained on draft plans of 124m<sup>2</sup>. At the hearing he referred to pricing the project on the basis of a notation on the plans which showed a "Proposed Building" and "Proposed Building" of 137m<sup>2</sup> minus the garage which was priced separately. The 137m<sup>2</sup> measurement was the site coverage or ground floor area of what was to be a two storey building. Consented plans which were admitted into evidence at the hearing contained those notations on the Site Location Plan. The consented plans also noted on the Reference Plan and Room Schedule a total Room Area of 183m<sup>2</sup> inclusive of garaging
- [16] At the hearing the Respondent gave evidence that he did not realise the mistake he had made until the roof was ready to be installed. As a result of the mistake discussions between the Complainant and the Respondent resulted in a figure of \$100,000 inclusive of GST being agreed as the amount required to complete. This was based on an additional 50m<sup>2</sup> at the same \$2,000 per square metre GST inclusive rate. No contractual or other documentation was presented in respect of this agreement.
- [17] The Respondent gave evidence that based on his experience, the foundations were always going to cost more than was allowed for in the Contract Price and that there would be a requirement for enhanced foundations. The property was in a TC3 Zone. The Christchurch City Council website notes:
- Technical Category 3 (TC3, blue) means that moderate to significant land damage from liquefaction is possible in future significant earthquakes. Site-specific geotechnical investigation and specific engineering foundation design is required. There is no one-size-fits-all solution for homes in Technical Category 3 (TC3) that require repairs to foundations or need to be rebuilt. Foundations designed for homes in TC3 will be site specific and may involve deep foundation piles.*
- [18] The Respondent's evidence was that he obtained specialist engineering advice as regards the foundation requirements and at the hearing he estimated that an additional \$60,000 inclusive of GST was the additional cost or Extra as per the contract that related to the enhanced foundations.
- [19] The contract contained a clause at 13.1 which stated that the Contract Price had been calculated on the basis of "standard foundations" and on an assumption of "normal stability and bearing capacity". The contract was silent as regards the process to be used where Extras were required other than to state at clause 16.4:

*The Builder's charge up rate for any Extra shall be charged at the rate of \$90 per hour. This fee covers the services of two men on the Worksite contemporaneously, or pro-rata if only one man is required.*

- [20] The contract also contained provisions in relation to Variations and an associated process for them. The contract was silent as to the process to be used to deal with Extras other than to say that Variations would be priced as Extras.
- [21] In questioning the Respondent gave evidence that he did not use any form of process to engage with or advise the Complainant of the foundation Extras. He considered it was an issue that did not need to be specifically brought to the Complainant's attention and that irrespective the Complainant had access to sufficient funds.
- [22] The Respondent also gave evidence as regards Variations including portal beams. He gave evidence that the electrical specification and price and the kitchen specification chosen by the Complainant were more expensive than what he had allowed for. He noted for example that there were three levels of kitchen the Complainant could have selected from the supplier and that she had chosen the most expensive.
- [23] The Board also heard considerable evidence as to payments claimed and payments made. Those matters were, in the Board's view, contractual and did not come within the Board's jurisdiction.
- [24] With regard to the record of work the Respondent gave evidence that he provided it to the Territorial Authority about two months after completion. When he was informed that the Territorial Authority had not received the record of work he immediately sent a replacement. The Complainant maintained that she had still not received a record of work from the Respondent and that he had refused to do so. She noted that she told the Respondent that he had an obligation to provide her with one and that soon thereafter she received a copy of a front page of a record of work but not the accompanying record of work detail or signature page. This was sent back with a request for a full record of work. One was not provided.

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

- [25] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building 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

- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act) and should be disciplined.

[26] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[27] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>6</sup>. Judge McElrea provided guidance on the interpretation of those terms:

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

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

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

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

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

[29] The potential negligence, in this instance, related to the Respondent's processes for pricing the building work and for dealing with the foundation Extras. In essence it was not the carpentry carried out by the Respondent that the Board was inquiring into but the pre-contractual processes. In this respect the question for the Board is whether the Respondent's processes can come within the definition of "building work" as defined by the Act as section 317(1)(b) relates to carrying out or supervising "building work".

[30] In Board decision C2-01124 the Board considered the term "building work" and decided that it did not extend to such matters. The Board did, however, note:

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<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>7</sup> [2001] NZAR 74

6.10 *The Board notes that whilst the interpretation ... is consistent with the purpose of Parliament at the time the conduct complained of occurred. However, since then the Act has been amended. Part 4A – Consumer Rights and Remedies in Relation to Building Work was introduced on 1 January 2015. With the inclusion of these provisions the interpretation of the term “building work” may well be wider and it could well include the matters in this complaint.*

[31] The Board has now considered the implications of the introduction of Part 4A of the Act and has decided that the term “building work” is now wider and does include the type of conduct complained about.

[32] The term “building work” is defined term in s 7 of the Act as follows:

*building work —*

*(a) means work—*

*(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*

*(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

*(b) includes sitework; and*

*(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and*

*(d) in Part 4, and the definition in this section of “supervise”, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.*

[33] The phrase “for, or in connection with” in the definition connotes a wide range of matters that could be brought into play and conceivably the processes and systems used to manage the construction, alteration, demolition or removal of a building.

[34] The Board, in interpreting the phrase, is required to do so in such a way as to give effect to the purpose of Parliament<sup>8</sup>. The Board may, if necessary in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 Purposes of the Act, section 14E Responsibilities of the Builder, section 282A Purposes of Licensing Building Practitioners and Part 4A Consumer Rights and Remedies in Relation to Residential Building Work are relevant.

[35] The provisions, other than Part 4A, use similar references to the systems and process used to achieve the resulting object of building work and of its compliance with a building consent and the building code.

[36] Part 4A, however, introduces contractual and other provisions that must be adhered to in respect of residential building work. Section 362A sets out:

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<sup>8</sup> Refer s 5 of the Interpretation Act 1999



**362A Outline of this Part**

*This Part protects consumers (referred to in this Part as clients) in relation to residential building work by—*

- (a) requiring certain information to be provided before a residential building contract is entered into; and*
- (b) prescribing minimum requirements for residential building contracts over a certain value; and*
- (c) implying warranties into residential building contracts; and*
- (d) providing remedies for breach of the implied warranties; and*
- (e) requiring defective building work under a residential building contract to be remedied if notified within 1 year of completion; and*
- (f) requiring certain information and documentation to be provided on completion of building work under a residential building contract.]*

[37] In addition to Part 4A of the Act the Building (Residential Consumer Rights and Remedies) Regulations 2014 were introduced. Those regulations include specific detail and requirements for disclosure and checklists as well as prescribed contractual clauses. The prescribed contractual clauses include requirements “for negotiating and agreeing on variations to the building work”.

[38] The Board has also considered the Licensed Building Practitioners Rules 2007 (the Rules). Rule 4 states:

**4 Minimum standard of competence for each class of licence**

- (1) The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[39] Within the Carpentry class of licence and relevant to the present conduct Schedule 1 Competency 3: Carry out planning and scheduling for carpentry work states:

- 3.1 Read and interpret working drawings, specifications, programme schedules and quantity lists.*
- 3.2 Order and coordinate material supply.*  
*May include but not limited to - ability to measure, calculate and estimate quantities, order and coordinate material supply.*

[40] The Board has considered the significance of the introduction of Part 4A and has decided that Parliament’s intention was to extend the meaning of “building work” when it relates to residential building work so as to include the associated contractual processes. The Board also considers that the conduct in question comes within the parameters of the Rules which supports the conclusion that, in this instance, the conduct in question falls within the definition of “building work”. The

Board also notes that the conduct in C2-01124 related to invoicing practices as opposed to reading and interpreting plans.

- [41] Having made this decision the Board needs to consider the evidence to assess whether the Respondent's conduct falls within the definitions of negligence as outlined above.
- [42] The Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent displayed a lack of reasonably expected care in pricing the project. The Respondent was negligent in failing to correctly read and interpret the plans and to price the project based on the actual size of the dwelling and the materials required. The actual size of the dwelling was manifestly obvious from the plans and the Respondent should have realised the mistake when completing the initial set out of the dwelling given the ground floor of a two storey dwelling was more or less the same size as what had been priced. The Respondent should have also realised his error when ordering materials but failed to do so.
- [43] The Board also considers the Respondent was negligent in how he dealt with the Extras for the foundation and in particular in not notifying the Complainant of the Extra and seeking express instructions with regard to it. The residence was in a TC3 zone and as such the foundations were also going to have to be enhanced. More importantly the total amount of what became an Extra was approximately 25% of the total contract price. In proceeding without notifying the Complainant, and in taking the approach that she had sufficient funds anyway, the Respondent denied her the opportunity to seek alternatives or to reassess the project.
- [44] In respect of the Extra the Board considers, as regards Part 4A, that the Extra fell within the parameters of a "variation" and that his contract failed to provide for provisions on how it would be dealt with. Had it done so then the complaint may not have arisen.

#### Record of Work

- [45] 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>9</sup>.
- [46] 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.
- [47] The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup> and gave guidelines to the profession as to who must provide a record of work, what

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<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [48] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried 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.
- [49] 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 ...”.
- [50] The Respondent’s evidence was that he provided a record of work to the Territorial Authority in a timely manner but that they did not receive it.
- [51] The Complainant’s evidence was that she had only received an incomplete record of work and then only after demands for one had been ignored. The Respondent did not produce any evidence to show that he had provided a record of work to the Complainant.
- [52] As noted above the Act provides that a record of work must be provided to both the owner and the Territorial Authority<sup>11</sup>. Providing a record of work to one but not the other will not satisfy the requirements of the Act. Both must be provided with a correctly completed record of work.
- [53] On this basis even if the Respondent provided a record of work to the Territorial Authority in a timely manner he did not provide one to the Complainant (the owner). On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [54] 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. There were no good reasons present.

#### Disrepute

- [55] 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

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<sup>11</sup> Section 88(2)

Board considered the disrepute provisions in Board Decision C2-01111<sup>12</sup> and discussed the legal principles that apply.

- [56] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*<sup>13</sup> a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [57] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of *Chartered Accountants*<sup>14</sup>, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [58] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>15</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>16</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 the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>17</sup>
- [59] 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>18</sup>;
  - honest mistakes without deliberate wrongdoing<sup>19</sup>;

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<sup>12</sup> Board decision dated 2 July 2015.

<sup>13</sup> [2013] NZAR 1519

<sup>14</sup> 24 September 2014

<sup>15</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>16</sup> [2012] NZCA 401

<sup>17</sup> [2012] NZAR 1071 page 1072

<sup>18</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

- provision of false undertakings<sup>20</sup>; and
- conduct resulting in an unethical financial gain<sup>21</sup>.

- [60] 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.
- [61] In C2-01124 the Board found that conduct similar to that in the present case had brought the regime into disrepute. The conduct in question in that case was the business process and systems used. Similar facts apply to the present case.
- [62] Looking at the actual conduct the Board notes that the Respondent's negligent error in pricing was not intentional. That said the Respondent has not adhered to the requirements of Part 4A of the Act in that there was no disclosure or signed contract and variations (described as Extra's by the Respondent) were not dealt with in accordance with the provisions in Part 4A. Moreover he has taken a cavalier approach to pricing, has failed to keep the Complainant informed and has tended to treat the Complainant's assumed ability to pay as an open cheque book as regards the foundation Extras.
- [63] As noted above the Board accepts that the Respondent's mistake in pricing was not deliberate. At the same time it notes the findings of previous courts outlined above that honest mistakes without deliberate wrongdoing can bring a regime into disrepute.
- [64] Finally the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and 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.*
- [65] On the basis of the above the Board has found that the Respondent's conduct has brought the regime into disrepute and that the conduct was serious.

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

- [66] 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.

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<sup>19</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>20</sup> *Slack, Re* [2012] NZLCDT 40

<sup>21</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

[67] 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

[68] 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>22</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.*

[69] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>23</sup>. The High Court when discussing penalty stated:

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

[70] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[71] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>24</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

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<sup>22</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>23</sup> [2012] NZAR 481

<sup>24</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [72] The Board notes that the Respondent has previously appeared before the Board and been disciplined. His disciplinary record is as follows:

<b>Complaint Number</b>	<b>Finding</b>	<b>Penalty</b>
C2-01302 June 2016	Breached sections 317(1)(b) and 317(1)(da)(ii)	Fined \$2,500
C2-01503 June 2017	Breached section 317(1)(da)(ii)	Fined \$1,000

- [73] The Board notes that notwithstanding the Board's decision and the Respondent being disciplined on similar matters he has continued to commit disciplinary offences. This is an aggravating factor.
- [74] The Board notes the Respondent's negligence has had a financial impact on him and it has taken this into account as mitigation.
- [75] Finally whilst the Board has found that the Respondent has been found to have been negligent and to have brought the regime into disrepute the two disciplinary offences arise out of the same conduct and as such, for the purposes of penalty, they will be treated as if they are a single offence.
- [76] Taking all of the above factors into account the Board's initial consideration was that a cancellation of the Respondent's licence was not only warranted to punish the Respondent but to also protect the public and to deter others.
- [77] The Board does, however, acknowledge that the Respondent did not act deliberately and that the overall cost of the dwelling, when repriced, was not excessive. Given these factors the Board has decided to reduce the penalty to a fine. The fine will, given the previous offending and continued offending, be set at \$5,000.

### Costs

- [78] 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."
- [79] 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>25</sup>.

<sup>25</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.

[80] In *Collie v Nursing Council of New Zealand*<sup>26</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.*

[81] Based on the above the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

#### Publication

[82] 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>27</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.*

[83] 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.

[84] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>28</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>29</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>30</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>31</sup>.

[85] 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>32</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.

[86] Based on the above the Board will order further publication in both Code Words and on the Board's website. The publication is to focus on the Board's interpretation of

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<sup>26</sup> [2001] NZAR 74

<sup>27</sup> Refer sections 298, 299 and 301 of the Act

<sup>28</sup> Section 14 of the Act

<sup>29</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>30</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>31</sup> *ibid*

<sup>32</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055



the term building work and its extension as a result of the introduction of Part 4A of the Act to pre contractual matters.

### Section 318 Order

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

**Penalty:** Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is ordered to pay a fine of \$5,000.

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

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

**In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action.**

[88] 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

[89] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **22 March 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 meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### Right of Appeal

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

Signed and dated this 1<sup>st</sup> day of March 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.*

**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.*