

Before the Building Practitioners Board

	BPB Complaint No. C2-01698
Licensed Building Practitioner:	Rizvan Saheb (the Respondent)
Licence Number:	BP 125570
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	14 March 2018
Decision Date:	7 May 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Catherine Taylor, Lay Member
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 Directions:

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

Contents

Introduction	2
Function of Disciplinary Action	3
Procedure	3
Background to the Complaint	4
Evidence	6
Evidence Received on 14 March 2018	6
Board’s Conclusion and Reasoning	7
Negligence and/or Incompetence	8
Record of Work.....	11
Disrepute.....	12
Penalty, Costs and Publication	13
Penalty	14
Costs.....	14
Publication	16
Section 318 Order	17
Submissions on Penalty, Costs and Publication	17
Right of Appeal	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 Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) 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

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

- (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).

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:
- “... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Procedure

- [5] The Respondent was sent a Notice of Proceeding on 31 January 2018 and a Notice of Hearing dated 20 February 2018 which set the matter down for a hearing on 14 March 2018. On 1 March 2018 a prehearing conference was scheduled. The Respondent did not attend. A prehearing document was issued which gave further notice of the hearing date and particulars.
- [6] On 9 March 2018 enquiries were made of the Respondent as to his attendance at the hearing. On 10 March 2018 an email response was received. The Respondent stated he was in Fiji attending to his sick mother. The Respondent did not specifically seek an adjournment. The Respondent was asked if he sought one. No response to the enquiry was received but a copy of boarding passes to Nadi were received from the Respondent.
- [7] The Board noted that the arrangements for the hearing had been made, four witnesses had been summonsed and no request for an adjournment had been made. In such circumstances the Board decided to proceed with the hearing.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

- [8] The Board received evidence from the summonsed witnesses and adjourned the matter to allow the Respondent to provide submissions and/or evidence from the Respondent. The Respondent was provided with a Record of Evidence and the Board directed:
- (a) The Respondent is to file, no later than 10 working days from the release of this Record of Evidence, either:
 - (i) submissions in response to the allegations before the Board; and/or
 - (ii) written evidence that the Respondent wants to be taken into consideration by the Board; and/or
 - (iii) an application for the Respondent to appear and be heard before the Board; and
 - (b) on receipt of any of the items in (a) above the Board will meet and decide whether it will:
 - (i) reconvene the hearing to take further evidence or cross examine the Respondent on any evidence he provides; or
 - (ii) proceed to make a decision in respect of the alleged conduct; and
 - (c) if the Respondent does not provide any form or response to the directions in (a) above then the Board will meet and make a decision in respect of the alleged conduct;
 - (d) the costs of and incidental to the hearing and the adjournment are reserved.
- [9] The date for the Respondent to file submissions, evidence or an application was 13 April 2018. Nothing was received.
- [10] The Board has proceeded to make its decision.

Background to the Complaint

- [11] The Owners of the dwelling originally complained that [Omitted] had been carrying out restricted building work when not licensed to do so. Such conduct is an offence under section 85 of the Act. The matter was investigated by the Ministry of Business Innovation and Employment (MBIE) who have jurisdiction under section 85 of the Act. The investigations carried out by MBIE led them to believe that [Omitted] was working under the supervision of the Respondent but that the Respondent had not actually provided the amount and level of supervision to be expected of a licensed building practitioner. A Complaint against the Respondent was raised as a result.
- [12] The Owners noted that they had only ever dealt with [Omitted] who was referred to them by the person who had developed the designs for an alteration they wanted carried out on their existing dwelling. At the time of entering into the agreement with [Omitted] they had asked for his licence number. [Omitted] said it had already been given to the Council. The Owners stated that they asked for the licensed building practitioner number on multiple occasions during the build but that it was

not provided. Enquiries were made with the Council as to the licensed building practitioner number on file. The Council provided the Respondent's number.

- [13] The Owners confronted [Omitted] who allegedly stated it was normal and acceptable to use someone else's number and that the Respondent was an employee of his. The Owners asked for the Respondent's identification and were provided with a photocopy of the Respondent's licence card by [Omitted]. The Owners contacted the Respondent who also stated he was an employee of [Omitted]. They arranged to meet the Respondent but he did not keep the appointment.
- [14] During the build the Owners saw [Omitted] on site from time to time carrying out some building work but noted that the build was mostly carried out by young unsupervised workers. They complained that the building work was carried out unprofessionally and that it was of poor quality. They stated they had never met the Respondent nor seen him on site.
- [15] Council documentation noted the Respondent as the licensed building practitioner for the carpentry work but [Omitted] as the site contact.
- [16] The Respondent did not respond to the Complaint. He was contacted by an Investigator as part of the preparation of the Registrar's Report. He advised, in response to questions:
- (a) he did not carry out any building work but did supervise it;
 - (b) he had worked for [Omitted] ([Omitted]'s company) before;
 - (c) he went to the property twice a week and had been there with engineers and architects.
- [17] The Respondent then modified his answers to:
- (a) he only appeared for inspections because they were using his licence number; and
 - (b) inspections were booked by [Omitted] and he was told by them to turn up.
- [18] When asked whether he was supervising [Omitted] the Respondent responded "no, I just came to the inspections. We were working together".
- [19] Other persons who were working on the site were not able to identify the Respondent as having been on site.
- [20] The Respondent's contact details in the Register of Licensed Building Practitioners contains email and physical address details that are the same as those of [Omitted].

Evidence

[21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

Evidence Received on 14 March 2018

[22] The Board heard evidence, in addition to documentary evidence received, from:

[Omitted]	Owners of the dwelling
[Omitted]	Main Contractor
[Omitted]	Engineer
[Omitted]	Welder

[23] The Owners gave evidence that they were living approximately 5 minutes away from the site and that they attended the site 2-3 times most days and that, over a period of 8 months, they did not see the Respondent. They noted that they attended some of the Council inspections and stated that the Respondent was not present for them. The Owners confirmed that they did not meet the Respondent at all before or during the build and that their efforts to make contact with him and to meet him were, other than an initial phone call, unsuccessful. When [Omitted] did advise them that the Respondent was the supervising licensed building practitioner [Omitted] described him as an employee of his. When the Owners tried to contact the Respondent to discuss the build they stated he would just hang up.

[24] The Owners provided statements from two persons who were working at the site when [Omitted] were carrying out building work. Their statements were that they did not see the Respondent at the site.

[25] The Board was provided with contract documentation and disclosure documentation in relation to the project. The Respondent was not named in any of the documentation.

[26] The Engineer gave evidence that he met the Respondent on site at the commencement of the build when carrying out an underpinning inspection at which time the Respondent told him to deal with [Omitted] during the build. He carried out two other inspections. The Respondent was not present. He considered the workmanship he saw was adequate but that some of the welding was aesthetically poor.

[27] [Omitted] gave evidence that he was trade qualified in Fiji but that he had not sought to obtain a licence in New Zealand. He stated that he had been working in New Zealand and with the Respondent since about 2013. Initially they carried out

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

jobs and shared the income. [Omitted] stated that when he decided to incorporate a company the Respondent did not want to be a business owner. [Omitted] then variously stated that the Respondent was an employee and a contractor of [Omitted] and that the job at [Omitted] was the first he had carried out using [Omitted]. [Omitted] stated that no contractual arrangements had been made with the Respondent as regards his supervision and that he was not being paid for his time or his services as the supervisor of non-licensed persons.

- [28] In relation to the building work at [Omitted], [Omitted]'s evidence was that the Respondent had a leg injury at the time and, as such, could not carry out building work. [Omitted] would talk to the Respondent every day and the Respondent would drive by from time to time to check on the work. He did, however, state in response to questions that the Respondent did go onto the top of the mid floor structure to run string lines and determine that the steel was not straight. [Omitted] noted it was a complicated build.
- [29] The Board questioned [Omitted] as to the Respondent's attendance at Council Inspections. [Omitted] maintained that the Respondent was present at inspections and in particular at foundation and framing inspections. Council records did not show him as being present and the Owners did not recall him being present.
- [30] The Board also questioned [Omitted] as to whether his health and safety documentation to record entry to the site would show the Respondent's attendance. [Omitted] stated that the site book got rain damaged and they stopped using it and as such it would not be of assistance.
- [31] [Omitted] produced a record of work at the hearing. It was dated 9 May 2016 and was signed by the Respondent. The Owners stated they had not, to date, received the record of work. A copy was provided to them.
- [32] Included in the documentation before the Board was council records of inspections carried out. They noted failed pre-wrap framing inspections on 9 May 2016 and 31 August 2016; failed cladding inspections on 31 August 2016 and 20 October 2016 and a failed pre-line inspection on 29 November 2016. At each failed inspection numerous serious failings were noted.
- [33] The Owners also stated in their Complaint that the work was not up to standard and that remedial work has cost them considerable sums of money.
- [34] The Respondent did not provide any form of response to the matters before the Board.

Board's Conclusion and Reasoning

- [35] The Board has decided that the Respondent **has**:
- (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
 - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and should be disciplined.

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

Negligence and/or Incompetence

[37] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.

[38] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[39] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*⁹ it was stated as "*an inability to do the job*".

[40] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[41] 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

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

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².

[42] 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.*

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

[44] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

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

[45] The Council inspections records and the Owners evidence was uncontested by the Respondent. [Omitted] gave evidence but his evidence was not found to be credible.

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

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

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

The evidence before the Board showed building work was carried out in a manner that was substandard. The evidence also showed that the site contained numerous serious health and safety issues that should have been dealt with.

- [46] The Respondent was the licensed building practitioner. The building work was carried out under his supervision. It is noted that supervision, under section 7 of the Act, means:

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.

- [47] 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 1992¹⁶. 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.”

- [48] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner’s obligations noting that the level of supervision required will depend on a number of circumstances but ultimately the Board will need to consider whether the work met the requirements of the building code and if not, the level of non-compliance.
- [49] There was clear evidence of non-compliant and substandard building work. There was no evidence that the Respondent actually supervised.
- [50] Given the above the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct by failing to supervise. The Board considers this conduct sufficiently serious to warrant a disciplinary outcome.

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Record of Work

- [51] 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 work¹⁷.
- [52] 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.
- [53] The Board discussed issues with regard to records of work in its decision C2-01170¹⁸ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [54] 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.
- [55] 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 ...”.
- [56] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.
- [57] A record of work dated 9 May 2016 was provided at the hearing. That record of work was not provided to the Owners as per the requirements of the Act. On this basis the disciplinary offence has been committed.
- [58] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons have been advanced.

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Disrepute

- [59] 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 C2-01111¹⁹ and discussed the legal principles that apply.
- [60] 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*²⁰ 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.
- [61] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²¹, 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.
- [62] 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"²² 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*²³ 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.*²⁴
- [63] 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,

¹⁹ Board decision dated 2 July 2015.

²⁰ [2013] NZAR 1519

²¹ 24 September 2014

²² 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

²³ [2012] NZCA 401

²⁴ [2012] NZAR 1071 page 1072

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

- criminal convictions²⁵;
- honest mistakes without deliberate wrongdoing²⁶;
- provision of false undertakings²⁷; and
- conduct resulting in an unethical financial gain²⁸.

- [64] 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.
- [65] The conduct which could lead to a finding of disrepute in the present case is an allegation that the Respondent has allowed his licence to be used by others to carry out restricted building work with no real intention to supervise that work as per the requirements in section 84 of the Act.
- [66] The licensed building practitioner regime was set up to improve standards and to ensure that systemic building failures of the past did reoccur. The regime relies on an assessment of the knowledge and skills of individuals prior to authorising them to carry out what are the critical elements of a build. The Respondent has circumvented that regime. He has knowingly allowed his licence to be used by persons who were engaging in restricted building work and has not supervised or shown an intention to supervise. In doing so he has brought the regime into disrepute.
- [67] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:
- This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*
- [68] The matters at hand go to the heart of the licensing regime and are therefore very serious. A disciplinary outcome is warranted.

Penalty, Costs and Publication

- [69] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should

²⁵ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

²⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁷ *Slack, Re* [2012] NZLCDT 40

²⁸ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

[70] The Board heard no evidence during the hearing relevant to penalty, costs and publication but has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[71] 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*²⁹ 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.

[72] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³⁰. 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.

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

[74] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*³¹ 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

²⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³⁰ [2012] NZAR 481

³¹ 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.

- [75] The Respondent has committed three disciplinary offences. The most serious matter before the board though is the disciplinary offence of bringing the regime into disrepute under section 317(1)(i) of the Act. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. Restricted building work in turn is that building work which is integral to the safe and healthy functioning of a home and the licensing regime was established so as to ensure persons with the requisite competencies, as set out in the Licensed Building Practitioners Rules 2007, carry out or supervise that work. The Respondent has effectively defeated the purposes of the regime by allowing others to use his licence and not supervising their restricted building work.
- [76] The Board also notes that a respondent's approach to a disciplinary complaint and how a respondent conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*³² the High Court held that it was permissible when determining penalty to take into account that the practitioner had responded to the complaints and discipline process in a belligerent way as an adverse factor. Whilst the Respondent has not been belligerent, he has not responded to the Complaint or appeared before the Board.
- [77] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [78] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of twelve (12) months.

Costs

- [79] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [80] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case³³.
- [81] In *Collie v Nursing Council of New Zealand*³⁴ 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.

³² [2011] 3 NZLR 850.

³³ *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.

³⁴ [2001] NZAR 74

[82] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry. The amount of costs the Board would normally order for a half day hearing is \$2,000. In this instance the costs have been increased given the uncooperative manner of the Respondent.

Publication

[83] 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 Act³⁵. 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.

[84] 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.

[85] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁸. 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*³⁹.

[86] 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 interest⁴⁰. 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.

[87] Based on the above the Board will order further publication. This is appropriate so that members of the public are notified of the outcome and so that an appropriate warning against such conduct can be given to other licensed building practitioners. The publication will be by way of an article in Code Words and on the Board's website and in such other publications as the Board considers appropriate.

³⁵ Refer sections 298, 299 and 301 of the Act

³⁶ Section 14 of the Act

³⁷ Refer sections 200 and 202 of the Criminal Procedure Act

³⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁹ *ibid*

⁴⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[88] 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 cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 12 months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

[89] 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

[90] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **25 May 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

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

Signed and dated this 7th day of May 2018



Richard Merrifield
Presiding Member

ⁱ Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*