Before the Building Practitioners Board

	BPB Complaint No. C2-01777
Licensed Building Practitioner:	Bradley Gallagher (the Respondent)
Licence Number:	BP 126575
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:	24 April 2018
Decision Date:	7 May 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Catherine Taylor, Lay Member

Appearances:

Pierce Bedogni, Lawyer, Martelli McKegg

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 a disciplinary offence under section 317(1)(i) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] 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); 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).

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].

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

[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."*

Evidence

[4] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[5] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Bradley Gallagher	Respondent
[Omitted]	Witness for the Respondent, electrician
[Omitted]	Witness for the Respondent, plumber
[Omitted]	Complainant
[Omitted]	Complainant

[6] The Complainant's engaged the Respondent to carry out extensive building works at the property which included demolition of a garage, renovations and the construction of an extension.

[7] The engagement came about after the Complainant's were presented with a quote from BDG Buildings, the Respondent's company, dated 18 July 2016 for $292,917. A Cost & Margin Building Contract was entered into on 8 August 2016 referencing the quote and an Agreed Builder's Margin of 12%. Specific trade rates were also stipulated and were stated to be inclusive of GST. A $70,000 deposit was provided for.

[8] The final amount invoiced was $454,753 although this amount has varied slightly on more than one occasion since with adjustments having been made. The Complainant's submitted that had they simply paid what was presented the amount would total $517,175.

[9] The contract required monthly invoices together with supporting documentation. It also required that the deposit be applied as part of the final invoice. The Respondent

[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

stated that he applied the deposit to invoicing in two halves during the course of the project.

[10] The work progressed and the Complainants were invoiced. The Complainant's raised various allegations with respect to the invoicing including:

(a) overcharging including incorrect margins being applied to supplier invoices. The Complainants alleged there were some 27 overcharges amounting to $55,482.87. They noted, as an example, a margin of 39.88% was applied to Carters supplier invoices as opposed to the agreed 12% margin. When they brought this to the Respondent's attention he denied any knowledge as to why the costs relating to Carters supplier's invoices had significantly increased;

(b) charging for items not related to the building work such as a Makita circular saw, a Makita radio, a cutter re-bar bender, gumboots and a garden shed;

(c) variations between the time sheets supplied and control time sheets with variances between them resulting in higher charges. They also noted that they had been charged GST on labour rates;

(d) the manner in which the Respondent responded to concerns about overruns including the refusal to provide a final invoice with a payment claim on request to establish the amount in dispute. He also placed a caveat on their title. They noted that without a final invoice they cannot use legislative process to resolve payment issues and they have not been able to agree practical completion so that they can move into the alteration; and

(e) ambiguous communication as to paying the plasterer cash to save money.

[11] The Complainants noted that they started querying invoices and requesting supplier invoices on 5 October 2016. They stated the Respondent refused to provide supplier invoices stating that they were not entitled to see them. On 2 February 2017, having made inquiries with Certified Builders, they notified the Respondent that they would not be making any further payments unless they were provided with a payment claim and supporting invoices. On 3 March 2017 invoices were presented but were not complete and included items that did not relate to their job. On 14 August 2017 the Complainant's received the missing invoices at which time they ascertained that more unrelated items had been charged to them.

[12] The Complainants alleged that the above matters brought the regime into disrepute. They also submitted that if the matters taken by themselves did not amount to disrepute then the combined effect of the Respondent's behaviour did.

[13] The Complainant's also raised issues with the build itself. The allegations included that:

(a) the bathroom has not been built square;

(b) tiles were over ordered for the bathroom by 16 square metres and tiles of a different batch were installed;

(c) the bath was installed in the wrong position and had to be removed from its fixings and repositioned so the tiles would fit;

(d) the intake vent was not moved over and the fixtures and fittings were not positioned as per the bathroom plan;

(e) the Respondent forgot to install the window in bedroom four. The deletion of the window was put in as a minor variation. The window is yet to be installed;

(f) two Velux roof windows with the wrong slate and shingle flashing kits for the roof were ordered and installed;

(g) the front door was ordered hinged left instead of right and the door had to be returned with subsequent labour and material costs;

(h) the wrong height doors for bedroom wardrobes were ordered and installed and there was an issue with the fit of the doors in the bi-fold system ordered where there were unacceptably wide gaps;

(i) a new top architrave had to be replaced and repainted and there is now a much wider gap resulting in two sizes of architrave around the wardrobe;

(j) the electricians left a visible hole in the Rimu floor as the Respondent was imprecise as to where to drill the hole for the cabling;

(k) the painter painted all doors despite being told to only paint one door;

(l) The Respondent had the bedroom Rimu flooring laid in the incorrect direction East/West. The plans clearly show that the Rimu flooring was set up on the joists to run North /South;

(m) the Respondent directed that the new water main was joined to the old one where it had been broken during the footing excavations. The new main was joined up to the existing at that join in an area that was covered in concrete;

(n) the Respondent has not replaced all of the stainless steel bolts with galvanised ones as a result of a Council inspection.

[14] The Respondent provided a written response through his solicitor. It stated that the Complaint arose from action taken by the Respondent to recover payments and the matters complained of did not meet the legal test for negligence or incompetence or disrepute. The response further noted:

(a) the Respondent went above and beyond to ensure that the Complainants had a renovation that they were happy with;

(b) the Respondent has been honest and upfront with the Complainant in respect of a renovation project that turned out to be more complicated than initially envisaged. There were various complications that were unforeseen by any party which meant that the costs of the renovations had to increase many of which related to design flaws with the plans and remedial solutions;

(c) on receiving legal advice the Respondent presented collated supplier invoices to the Complainant and that prior to that he was not aware of the obligation

to do so and that the Respondent worked expeditiously to get those supplier invoices and collate them to the relevant invoice;

(d) the first spreadsheet was incorrect and a correct one was subsequently presented; and

(e) some of the margins in invoices were incorrectly calculated but a final invoice included a $16,000 credit towards the final invoice for this error and the Complainant was never disadvantaged in any of the invoicing he provided.

[15] The response noted that in December 2016 the Respondent asked the Complainants if they wanted him to stop because of their cost concerns relating to the project but was told to carry on.

[16] The Respondent also addressed specific issues relating to the build raised in the complaint including that:

(a) the issues with the bathroom wall, tile laying, bath, duct and skylight placement arise from the design;

(b) he does not accept he over ordered the tiles;

(c) changes to placement of bathroom fixtures and duct, a delay in installing a window and skylight and changes to door hanging were agreed;

(d) the labour to replace the wardrobe doors was not charged and he gave the complainant cash compensation;

(e) the hole in the rimu flooring has been patched;

(f) the Complainant attempted to paint the MOF doors which complicated the process;

(g) the Complainant agreed to the laying of the floor boards in the other direction;

(h) the water main was outside the scope of works; and

(i) the bolts were replaced.

[17] At the hearing the Complainants provided a detailed opening which addressed the various aspects of their Complaint noting that whilst the building issues were minor their cumulative impact was not. The submissions also noted that the Respondent had not communicated with them about cost overruns from the original quote and that, from an analysis of supplier invoices and the Respondent's invoices, margins applied to supplier invoices included 20.56% on an electrician's invoice, 254.05% on a plumbing invoice, 32.25% on a joinery invoice and 179.73% on a Carter's invoice.

[18] Counsel for the Respondent also provided an opening which expanded on the Respondent's response and the relevant legal test for negligence, incompetence and disrepute. Submissions were also made to the effect that the Complainant's remaining in residence had not been taken into account in establishing a price and that this complicated the build.

[19] The Board questioned the Respondent as regards his pricing and invoicing processes. He stated he had priced off the consented plans and had obtained sub-trade pricing but that he did not use any pricing software or tools. He did not record variations in writing but his Counsel noted that the form of contract used allowed for variations to be dealt with in such a manner. He used the accounting software package Zero to do his invoicing. He stated he kept the Complainant's informed.

[20] With respect to Carter's invoices the Respondent stated that he was not familiar with their systems and had difficulty matching jobs to invoices. Some items from a previous job were lumped in with those for the Complainant's build. He stated he checked deliveries for accuracy but did not reconcile invoices or back check them. They were simply bundled together for the job.

[21] The Respondent was questioned as to why there were varying margins applied and why Zero was not able to apply a constant 12% margin. He initially stated it was just a clerical error and then accepted that he had altered the margins on certain items and whilst he was evasive on the point he indicated that he was maintaining cash flow in doing so.

[22] The Respondent was also questioned about cost escalations. He gave evidence that there were increased demolition costs, increased costs with the Complainant's staying in residence, additional costs in recycling roof tiles and bricks and some $30,000 in extra work and materials relating to a ramp, deck and fencing. He was not able to explain why the overall costs had increased from $292,917 to $454,753.

[23] The Respondent accepted that he had made an error in charging GST on what where stated to be GST inclusive rates. The Respondent presented a final spreadsheet of costs. GST of $18,033 had been charged on labour.

[24] The spreadsheet contained various charges and reconciled them. It recorded a total amount including GST of $451,605 for the job. Most of the totals in the spreadsheet exceeded those set out in the quote.

[25] Evidence was heard that the Respondent, by his lawyers, attempted to provide a package of invoicing materials to the Complainant's on 29 March 2017 but that it was refused. The Complainants stated that they did not want to go through another exercise of trying to make sense of the Respondent's spreadsheets and that they were requiring a payment claim.

[26] The Board also heard evidence from the Respondent as regards various defects some which were accepted in a letter of 14 August 2017. Those that were not accepted related to a roof leak, a skylight, the bathroom not being square, stainless steel bolts, a hole in the floor and a water connection. The evidence of the Respondent and the Complainant differed on most aspects and in particular as to whether the Complainants had agreed to various changes.

[27] The Respondent called evidence from an electrician and a plumber who clarified matters with regard to allegations that related to a hole in the floor and a water connection.

Board's Conclusion and Reasoning

[28] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner.

[29] The Board has also decided that the Respondent **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 should be disciplined.

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

Negligence and/or Incompetence

[31] 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.*

[32] 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 Courts[8].

[33] 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"*.

[34] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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.

[35] 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[11].

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[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)

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

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[12].

[36] 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.*

[37] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. 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.

[38] 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.*

[39] The potential negligence, in this instance, relates to both building work carried out and to the Respondent's processes for pricing and invoicing the building work.

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[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

[40] With respect to the building work, whilst there were elements that did not reach the required standards the Board did not consider that they met the seriousness threshold outlined above, even if viewed cumulatively.

[41] Turing to the other matters the question for the Board is whether the Respondent's conduct 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".

[42] In Board decision C2-01688 the Board considered pre-contractual processes and found that they did come within the "building work" definition and found the Respondent to have been negligent. The decision was reached based on the introduction of Part 4A of the Act which has, as regards licensed building practitioners, broadened the term "building work".

[43] The only pre contractual matter in the present case relates to the Respondent's pricing and quote which was some 35% less than the final amount. In this respect the Board notes that it was a cost and margin contract and so, even though the phrase quote was used, it was not a fixed price. Notwithstanding this, it has been held that a contractor is under a contractual duty of care and is liable to the other contracting party for damage resulting from any negligence in the giving of the estimate[16]. A low estimate or quote can also be seen as a pre-contractual misrepresentation used to induce the other party into a contract.

[44] In the present case the Respondent has also been charged with bringing the regime into disrepute. As the Board has found that he has committed that disciplinary offence the Board considers that the matters around pricing are more appropriately dealt with under that charge.

Disrepute

[45] 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[17] and discussed the legal principles that apply.

[46] 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*[18] 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

[16] *KM Young Ltd v Cosgrove* [1963] NZLR 967
[17] Board decision dated 2 July 2015.
[18] [2013] NZAR 1519

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.

[47] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute *of Chartered Accountants*[19], 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.

[48] 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"[20] 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*[21] 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*.[22]

[49] 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[23];
- honest mistakes without deliberate wrongdoing[24];
- provision of false undertakings[25]; and
- conduct resulting in an unethical financial gain[26].

[50] 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.

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[19] 24 September 2014
[20] 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
[21] [2012] NZCA 401
[22] [2012] NZAR 1071 page 1072
[23] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[24] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[25] *Slack, Re* [2012] NZLCDT 40
[26] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

[51] Similar seriousness thresholds to that those described above for negligence and incompetence also apply 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.*

[52] Turning to the conduct in question it was clear to the Board that the Respondent had been negligent in how he went about pricing and invoicing and that in terms of his invoicing the conduct has verged on fraudulent behaviour. The Respondent failed to adhere to the contractual processes set out in his contract, has claimed amounts he had not right to and has manipulated margins and invoicing to his advantage. He also failed to keep the Complainant informed of significant increases in costs. The impression the Board was left with was that the Respondent took advantage of the Complainants by using the cost and margin to charge as he pleased. He also did not provide evidence to support the value of the invoices issued to the Complainants who quite rightly withheld payment. The Respondent also expected the Complainants to try and reconcile the invoices he produced with the supplier invoices he provided and find the errors. The request that the Complainants make a further payment based on a spreadsheet with no reconciliations or supporting evidence presented in a logical way was unsatisfactory to the Board.

[53] Such conduct is not to be condoned especially in light of the increased transparency that is now required under Part 4A of the Act and by way of the Building (Consumer Rights and Remedies) Regulations. Accordingly the Board finds that the Respondent has brought the regime into disrepute.

[54] It is to be noted that the Board made a similar findings in Board Decisions C2-01124 and C2-01312 the latter of which was published in Code Words so that other practitioners would be made aware that such conduct is not acceptable.

Penalty, Costs and Publication

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

[56] 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.

<u>Penalty</u>

[57] 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[27] 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.*

[58] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[28]. 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.*

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

[60] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[29] 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.

[61] The disrepute matter before the Board is serious. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. The Respondent's conduct has diminished that confidence.

[62] Taking all of the above factors into account the Board considers that a suspension of the Respondent's licence may be warranted to not only punish the Respondent but also to deter others from such conduct. Prior to the Board making a final decision,

[27] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[28] [2012] NZAR 481
[29] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

however, it will give the Respondent an opportunity to provide submissions as to why his licence should not be suspended.

Costs

[63] 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."

[64] 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[30].

[65] In *Collie v Nursing Council of New Zealand*[31] 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.*

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

Publication

[67] 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[32]. 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.*

[68] 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.

[69] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[33]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[34]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal

[30] *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.
[31] [2001] NZAR 74
[32] Refer sections 298, 299 and 301 of the Act
[33] Section 14 of the Act
[34] Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive[35]. 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*[36].

[70] 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[37]. 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.

[71] Based on the above the Board will order further publication. This is necessary to ensure that others are made aware that such conduct is not acceptable.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(b) of the Building Act 2004, the Respondent's licence is suspended for a period of six months and the Registrar is directed to record the suspension in the register of Licensed Building Practitioners.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.** **In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

[73] 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

[74] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 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.

[35] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[36] ibid
[37] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 7th day of May 2018



Chris Preston
Presiding Member

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[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.