

Before the Building Practitioners Board

	BPB Complaint No. CB25810
Licensed Building Practitioner:	William Adams (the Respondent)
Licence Number:	BP119177
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	Oamaru
Hearing Type:	In Person
Hearing Date:	2 August 2022
Decision Date:	12 August 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mrs F Pearson-Green, LBP, Design AOP 2
Ms K Reynolds, Construction Manager

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.

Disciplinary Finding:

The Respondent **has** committed disciplinary offence under sections 317(1)(b) and (d) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent carried out building work in a negligent manner and in a manner that was contrary to a building consent. The Respondent is fined \$3,500 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be maintained on the Public Register of Licensed Building Practitioners for a period of three years.
- [2] The Respondent has not brought the licensing regime into disrepute. Whilst the Respondent’s interactions with the building consent authority were not acceptable, the Board found, in the particular circumstances of the case, that the conduct did not reach the threshold required for a finding of disrepute.

The Board

- [3] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into

¹ Section 341 of the Act.

the conduct of, and discipline, Licensed Building Practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

- [4] The hearing resulted from a complaint from the building consent authority about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at three separate addresses:
- (a) [Omitted];
 - (b) [Omitted]; and
 - (c) [Omitted].
- [5] The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and/or
 - (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 contrary to section 317(1)(i) of the Act.
- [6] The Board gave notice that the specific matters it would further investigate at a hearing under sections 317(1)(b) and 317(1)(d) of the Act were those identified by the Complainant and which relate to the building work carried out or supervised by the Respondent at the identified addresses and as set out on pages 59 to 64 of the Board's files (complaint documents 2.1.41 to 2.1.46) and the supporting documentation. The Board noted that it would not be investigating building work carried out or supervised by other licensed persons or trades.
- [7] The Board also gave notice that in further investigating the Respondent's conduct under section 317(1)(i) of the Act, it would be investigating the Respondent's approach to and compliance with regulatory requirements and whether he has shown contempt or flagrant disregard for building consent and regulatory requirements whilst undertaking building work at the identified addresses.

Function of Disciplinary Action

- [8] 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

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [9] 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*,⁵ 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.”

- [10] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [11] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [12] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [13] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

- [14] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.

- [16] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

William Adams	Respondent
[Omitted]	Architect, [Omitted], witness for the Respondent
Joshua Dooley	Complainant, Building Control Officer, Waitaki District Council, summoned witness
Gordon Innes	Building Control Officer, Waitaki District Council, summoned witness
Brent Cunningham	Building Control Officer, Waitaki District Council
[Omitted]	Designer (no longer licensed), summoned witness

- [18] The Respondent was assisted by [Omitted].
- [19] The Board also summoned [Omitted], a Licensed Building Practitioner, to the hearing. Further action will be taken as regards his failure to appear when summoned to do so.
- [20] Prior to the hearing, the Respondent did not engage in the complaint or investigation process. He did not provide a response to the allegations made.
- [21] Mr Dooley, on behalf of the Complainant, made an opening statement. He noted that the Council, as the Building Consent Authority (BCA), does not make complaints lightly but that it felt that it had exhausted all other avenues with the Respondent and that the only path left to ensure compliance was to make a complaint.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [22] [Omitted], on behalf of the Respondent, made an opening statement. He noted the Respondent's good reputation and history as a builder, and he provided an unsigned testimonial from a former Building Control Officer who had dealt with the Respondent. The testimonial noted the quality of his work but that the Respondent was not a good communicator and that he did, at times, get frustrated with compliance requirements and delays that could result from them. The testimonial also noted that the Respondent would often make on-site changes that the inspector would pick up and "okay" at later inspections and that the Respondent was not familiar with new regulatory provisions that did not allow unapproved changes to be undertaken.
- [23] [Omitted] reiterated the same points; that the Respondent was not a good communicator and that he gets frustrated with delays that can arise from Building Control Officers not attending in a timely manner. [Omitted] noted that the Respondent "knows what will work" when it comes to building work.
- [24] The Board questioned the Respondent about his staff. He stated he had two tradesmen and two apprentices on wages. The staff had worked with him for some time. The Respondent organised the work and engaged with the BCA. The Respondent's life partner dealt with administrative matters, including any written communication with the BCA.

[Omitted]

- [25] The building work related to a renovation of an existing dwelling that the Respondent had built some 40 years earlier. The building work that was to be undertaken required a building consent and one was being developed by [Omitted]. There were delays with it. The complaint set out that a building consent was applied for on 28 August 2019, that it was extremely poor and that there were 48 requests for information (RFIs) over a time period of 8 months before it was refused. The Complainant noted that on the third round of RFI's it became apparent that building work had already started and was well progressed. The complaint set out the extent of the building work that had been completed, which was substantial.
- [26] On 2 July 2020, a Building Consent Officer visited the site to undertake a site assessment and produce a report of whether or not building work has been undertaken without building consent. The following was noted:
- (a) Oamaru stone cladding surrounding the garage doors has been removed, and new cedar cladding installed. All junctions, including windows/doors and cladding junction details installed without input from a designer.
 - (b) Garage doors removed, and new ranch sliders installed.
 - (c) New raised timber floor installed to the garage area.
 - (d) New bathrooms were being installed both up and downstairs.

- (e) Exterior wall linings had been removed, and all new wall insulation had been installed (the complaint noted that a building consent was required for the insulation).
 - (f) Internal access stairwell had been removed and new floor joists and flooring was being installed to the stair void.
 - (g) Small area of James Hardie cladding had been removed to the basement level and new cedar cladding installed.
 - (h) Deck subfloor completely replaced and extended, apart from existing stringers left in place.
 - (i) Deck area had been increased. Deck height of 2.9 metres noted. Decking subfloor has been completely replaced such that it was not within Schedule 1 in that it was “substantial or complete” work that required a building consent. New deck posts installed. No deck bracing fitted.
- [27] The complaint also noted that because the internal access between upper and lower level had been removed, the building work had turned a single dwelling into a multi-unit dwelling as there was now a kitchen, laundering, bathroom, sleeping and living areas on both levels. It was noted that this would most likely have required some form of fire-rating to either the ceiling or floor between the two units. At the hearing, it was clarified that the stairs are going to be reinstated, so there would no longer be a fire rating issue.
- [28] The BCA witnesses accepted that the issues were not with the quality of the work but the compliance process or lack thereof.
- [29] The Respondent stated that he was asked to start the work, so he did. He also noted that he was advised by the designer, [Omitted], that it would be okay to get the building work underway and that the work could “fly under the radar”. [Omitted] clarified that his comments were in relation to work on the deck. The Board was provided with an email from the owner to [Omitted], which stated:
- [Omitted] is the person who told bill to go ahead his words we will fly under the umbrella I will speak to our lawyer on Tuesday regarding this as [Omitted] told us no further fees would be expected this has taken over 2 years to resolve so I do not accept the excuses given [Omitted] made that statement and he should be held to it regardless of selling the business*
- [30] The Respondent considered that he was doing building work that came within Schedule 1 of the Building Act. When the Respondent was asked why he had continued with the building work when he knew a building consent was being sought, he reiterated that he thought it was repair and maintenance. When it was put to him that he had continued with the well beyond what may have been repair and maintenance, the Respondent did not answer other than to refer to limited

work relating to the removal and replacement of a pinex ceiling and new internal doors that might have come within Schedule 1.

- [31] The Respondent's [Omitted], [Omitted], was engaged on 28 September 2021 to apply for a certificate of acceptance for the work that had been carried out and a building consent for work still to be completed. One had, at the time of the hearing, been applied for but had not been issued.
- [32] The Respondent will be returning to complete the building work once consenting issues have been resolved.

[Omitted]

- [33] The issues raised with the build were failures to adhere to the building consent in that changes were made during the build that required amendments to the building consent issued without them being sought before the related building work was undertaken. The complaint noted the following, which required a change to the building consent:
- (a) Design solution to protect the exposed pipework and assess for any structural relevance.
 - (b) Roof design has changed from the consented design.
 - (c) Deck construction changed from what was exempt work to a single-level deck which would alter D1 access considerations without notifying the BCA.
 - (d) A change from the consented detail to join new and existing sub-floor.
 - (e) Changes to cladding types.
 - (f) Change to the location of a solid fuel burner which was not part of the consented building work.
- [34] Evidence was heard at the hearing that as the beginning of the alterations, it was decided that the complete roof structure would be totally removed and re-designed as a trussed roof. The Respondent was part of that decision. A council inspection on 12 May 2020 stated an amendment was required for the roof re-design which was already underway. The inspection noted that work relating to the required amendment was to cease until the amendment was approved. It was noted that the prefabricated trusses were hi-abed were already on-site and ready to be installed.
- [35] Further amendments were requested at inspections by the council due to changes made. The evidence heard was that the amendments followed rather than preceded the building work. Evidence was heard that the fire was moved as a result of the change to the roof design.
- [36] [Omitted] was the Architect for the project. She developed and filed the building consent amendments.

- [37] The Respondent noted that the owners wanted to stay in the house and that the change to the roof was simpler and cheaper and that other changes were client driven. The Respondent also noted that he pushed on with the work as he was trying to keep his employees in work.
- [38] [Omitted] considered that at least the sub-floor issues were a minor variation matter, but Mr Innes stated that he instructed that it be added to the amendments to make it clear as to the changes.

[Omitted]

- [39] During an inspection of the consented building work, the Building Consent Officer ascertained that there had been a cladding change on-site to south-west elevation from solid plaster to profile metal cladding and that a pre-line inspection had not been called and the associated building work that had been closed in, had not been viewed. A later inspection noted another cladding change from plaster to cedar weatherboard and another failure to obtain an inspection.
- [40] Building inspections also noted structural changes that had been made. Hyspan rafters installed to the roof were connected by multi-grips rather than the consented design of having the rafters transfer their load onto a stringer. The inspection noted that the Respondent had cut 100mm out of the rafters to create a bird's mouth detail, which was not in accordance with the consented plan details and that the Respondent had not installed solid blocking between the Hyspan rafters. The complaint noted that the original roof design was a specified engineered design and that any changes would have had to of been designed and certified by an engineer.
- [41] The complaint also noted further changes that had not been made with the appropriate approvals. These included the removal of top plates over lintels to raise window head heights. The Building Control Officer noted that he was not able to verify if there were sufficient fixings between the removed members. Internal wall and ceiling and lining changes in the bar, toilets, staffroom, dry store, dishwashing area and kitchen some of which may not have required consent changes, but which may have impacted the fire design and for which the Building Control Officer requested fire engineer input. A log burning fireplace was also re-located without any process being followed and was not installed as per consented documentation with the flue system internally and externally enclosed by timber framing and second-hand corrugate. The complaint noted that there was no ventilation to the enclosure and no details/inspections of the junctions between cladding, and that a fire in the chimney/roof area occurred, which caused minor to moderate damage.
- [42] The Complainant referred to a large amount of building work on framing not being able to be inspected as the Respondent carried on building without making the appropriate changes to the building consent or inspections and that evidence of bottom plate hold downs, lintel fixings, bracing elements and top plate fixings had to be sought as inspections had not been carried out.

- [43] Two certificates of acceptance were issued by the BCA. One for the cladding changes and the other for building work that could not be inspected due to it being closed in.
- [44] The Respondent gave evidence at the hearing that changes were made on the basis of the client's request and that the cladding changes were made to match existing claddings. He was not able to provide answers as to why the building work continued without inspections, or why changes to the building consent were not made as the build progressed other than that he wanted to keep the build moving forward.

Board's Conclusion and Reasoning

- [45] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- and **should** be disciplined.
- [46] The Board has also decided that the Respondent **has not** 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).

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

Negligence and Contrary to a Building Consent

- [48] The Board's findings in relation to negligence relate to carrying out building work that required a building consent at [Omitted] without one and to carrying out building work at [Omitted] and at [Omitted] that required amendments to the building consents without them first being obtained.
- [49] The findings in relation to carrying out building work that was contrary to a building consent relate to [Omitted] and at [Omitted].
- [50] There is a commonality between the findings of negligence and building contrary to a building consent in respect of the applicable law. As such, the two matters will be dealt with together. Also, given the commonality, the Board will take this into consideration when it deals with the appropriate actions for the Board to take as a result of the disciplinary offending.
- [51] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [52] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

40 *Buildings not to be constructed, altered, demolished, or removed without consent*

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

[53] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 Grant of building consent

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[54] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

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.*

[55] In *Tan v Auckland Council*⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[56] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

[57] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[58] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[59] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception. If a building consent is being sought, however, for work that could come within Schedule 1, then the related building work must wait until the building consent is granted so that it is captured under that consent.

[60] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[61] In this respect, section 45(4) of the Act states:

(4) An application for an amendment to a building consent must,—

⁸ [2015] NZHC 3299 [18 December 2015]

- (a) *in the case of a minor variation, be made in accordance with section 45A; and*
- (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[62] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[63] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

(3) *This section—*

- (a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
- (b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[64] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a Licensed Building Practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a Licensed Building Practitioner.

[65] It is also important to note, as regards building consent changes, that the Respondent had a duty under section 89 of the Act to bring changes to the building consent to the attention of the BCA. It states:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

- (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
 - (a) *the territorial authority in whose district the building is situated; and*
 - (b) *the owner.*
- (2) *The notification must—*

- (a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
- (b) *state how the building work does not so comply; and*
- (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

[66] With respect to [Omitted], a building consent was being sought but had not been granted. The Respondent was aware of this. He stated he started work on aspects of the build that might have come within Schedule 1 to appease the owner and on the basis that the designer had indicated he might, in essence, get away with it. The building work went well beyond preparation or what might have come within Schedule 1. The Respondent knowingly continued the build. Given his experience and knowledge, it was clear to the Board that he knew a building consent was required but that he chose to ignore the requirements and to do what he wanted how he wanted.

[67] This was a common theme throughout the complaint and the evidence. The Respondent approached his work with a degree of arrogance. He took the position that he knew best, and the consenting processes were either an inconvenience or simply not important. This was particularly the case with [Omitted] and [Omitted]. The Respondent pushed ahead with building work in the manner that he saw for and ignored the building consent, the requirement for amendments to the building consent prior to building work being undertaken, building consent requirements for inspections, and, more generally directions and instructions from Building Control Officer.

[68] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, the Respondent knew or ought to have known that a building consent and/or building consent amendments were required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent.

[69] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

[70] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹¹. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

[71] 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 purposes of the Act¹², which are outlined above. 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 practitioner¹³.

[72] Looking at the facts, as noted earlier, the conduct was deliberate. The Respondent knowingly proceeded with building work that he knew was being consented, and which he knew or ought to have known required a building consent with respect to [Omitted]. With regard to the other two properties, the Respondent again knowingly and somewhat recklessly continued with building work when he knew or ought to have known that amendments to the building consent were required. He also chose, on occasions, to ignore building consent requirements for building inspections as the work progressed.

[73] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴, 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.

[74] The conduct was deliberate and serious. The Respondent chose to carry out building work in contravention of building consent requirements. Given the factors discussed and the seriousness of the conduct, the Board, which includes persons with extensive experience and expertise in the building industry, has decided that the Respondent has departed from what the Board considers to be an accepted standard of conduct and that he should be disciplined.

[75] With respect to building contrary to a building consent, unlike negligence, it is a form of strict liability offence. All that has to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁵. As noted above, there was sufficient evidence to find that the building consents for [Omitted] and [Omitted] were not complied with in respect of changes that were made that

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁴ [2001] NZAR 74

¹⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

required amendments and, with [Omitted], with regard to having building work inspected in accordance with the building consent issued.

Disrepute

- [76] 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 C2-01111¹⁶ and discussed the legal principles that apply.
- [77] 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*,¹⁷ 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.
- [78] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁸, 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.
- [79] 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",¹⁹ and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²⁰, 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.*²¹

¹⁶ Board decision dated 2 July 2015.

¹⁷ [2013] NZAR 1519

¹⁸ 24 September 2014

¹⁹ 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

²⁰ [2012] NZCA 401

²¹ [2012] NZAR 1071 page 1072

[80] 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 convictions²²;
- honest mistakes without deliberate wrongdoing²³;
- provision of false undertakings²⁴; and
- conduct resulting in an unethical financial gain²⁵.

[81] 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.

[82] The Board has found in previous matters that have come before it that a deliberate and repeated failure to adhere to building consent requirements can bring the regime into disrepute. In those cases, however, there were ulterior motives or other behaviour which aggravated the conduct. With this in mind, the Board notes that 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.

[83] Given those directions, and noting that the conduct was motivated by a desire to keep the building work and, to a lesser extent, the Respondent's employees in work, the Board has decided that the conduct did not reach the threshold for disciplinary action. That said, the Board does not condone the Respondent's conduct, and it cautions him as regards future behaviour. It does consider, however, that in this instance, the findings of negligence and building contrary to a building consent will suffice.

Penalty, Costs and Publication

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

²² *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

²³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁴ *Slack, Re* [2012] NZLCDT 40

²⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [85] 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

- [86] 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*²⁶ 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.

- [87] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁷ 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [88] The Board adopted a starting point of a fine of \$3,500, which is an amount that is consistent with penalties issued by the Board for similar offending. The conduct was serious, and the Respondent’s attitude toward the matters under investigation and the BCA could be described as cavalier and arrogant. Those are aggravating factors. The manner in which the Respondent approached the investigation, and the hearing is also an aggravating factor. The aggravating factors warrant an uplift of the fine to \$4,500.
- [89] There are also mitigating factors present. The Board received evidence, albeit unsubstantiated, as to the Respondent’s state of mind. It also received character references and evidence as to the Respondent long-standing good reputation as a builder. The mitigating factors are such that a reduction of \$1,000 is warranted. In essence, this means that the aggravating and mitigating factors negate each other. The fine is set at \$3,500.
- [90] The Respondent is also advised to change his building practices. In the future, he should engage proactively with the BCA and ensure that building consent requirements are strictly adhered to.

²⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [91] 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.”
- [92] 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 case²⁸.
- [93] In *Collie v Nursing Council of New Zealand*,²⁹ 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.*
- [94] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁰ the High Court noted:
- [46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
- [47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*
- [95] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.
- [96] Based on the above, the Board’s costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board’s inquiry. This is the Board’s scale amount of costs for a half-day hearing. It is significantly less than 50% of the actual costs that have been incurred.

²⁸ *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.

²⁹ [2001] NZAR 74

³⁰ CIV-2011-485-000227 8 August 2011

[97] The Respondent should note that the Board considered a higher costs order as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*³¹ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. The Respondent was not necessarily belligerent, but his unwillingness to engage did cause additional costs. The Respondent is encouraged to engage more proactively in the future should another complaint be made.

Publication

[98] 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 Act³². 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.

[99] 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.

[100] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁵. 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.

[101] 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 interest³⁷. 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.

[102] Based on the above, the Board will not order further publication.

³¹ [2011] 3 NZLR 850.

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

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[104] 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

[105] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 September 2022**. 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.

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

Right of Appeal

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

Signed and dated this 23rd day of August 2022.



Mr M Orange
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.*