

Ok at the Before the Building Practitioners Board

	BPB Complaint No. CB25894
Licensed Building Practitioner:	Desmond Allen (the Respondent)
Licence Number:	BP116359
Licence(s) Held:	Design AoP 2

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	Napier
Hearing Type:	In Person
Hearing and Decision Date:	12 July 2022

Board Members Present:

Ms J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mr C Preston, Chair
Mr M Orange, Deputy Chair, Barrister
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 offences under sections 317(1)(b) and (i) of the Act.

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

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Summary of the Board’s Decision

[1] The Respondent carried out building work (design work) in a negligent manner contrary to section 317(1)(b) of the Act, and he brought the licensing regime into disrepute contrary to section 317(1)(i) of the Act. His licence is suspended for a period of 9 months, and he is ordered to pay costs of \$3,500. The Board’s disciplinary findings will be published in Code Words and will be recorded on the Public Register for a period of three years.

The Board

[2] 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 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.

¹ Section 341 of the Act.

The Charges

- [3] The hearing resulted from a complaint 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 [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 contrary to section 317(1)(b) of the Act, IN THAT, he may have failed to consider and correctly advise the owner on, the planning, resource consent and building consent process for the proposed change of use;
 - (b) breached section 314B of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have supervised building work which was not within his competency; 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, IN THAT, he may have misrepresented to the owner that a building consent had been or was being applied for, and he may have ceased communication with the owner in circumstances where the job was incomplete and a significant amount of the contract price had been paid.

Function of Disciplinary Action

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

- [5] 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.”

- [6] 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

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

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

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.

- [7] 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.
- [8] The above commentary on the limitations of the disciplinary process are 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

- [9] 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 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.

Notice of the Complaint

- [10] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it.
- [11] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent. Similarly, under regulation 12, if the complaint is to proceed to a hearing, the Board must give notice of the hearing to the Respondent.
- [12] The Register of Licensed Building Practitioners must contain certain information, including under section 301(1)(d), an "address for communications under this Act". Under section 302 of the Act, the licensed building practitioner must keep their details up to date:

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

302 Obligation to notify Registrar of change in circumstances

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
 - (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
 - (b) *includes any change that may be prescribed (if any).*

[13] As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.

[14] Section 314 of the Act makes it an offence for a licensed building practitioner to fail to update the Register:

314 Offences relating to licensing

- (1) *A person commits an offence if the person holds himself or herself out as a person who is licensed to carry out or supervise building work or building inspection work, or building work or building inspection work of a certain type, while not being so licensed.*
- (2) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$20,000.*
- (3) *A person commits an offence if the person—*
 - (a) *fails to produce evidence of being licensed as required by section 289; or*
 - (b) *fails to give written notice of a change in circumstances in accordance with section 302.*
- (4) *A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$5,000.*

[15] The Act also provides for the service of notices in section 394 of the Act. It provides that:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
 - (a) *delivered personally to the person; or*
 - (b) *delivered to the person at the person's usual or last known place of residence or business; or*

- (c) *sent by fax or email to the person's fax number or email address;*
or
- (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*

(5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

- [16] The Respondent was sent a copy of the complaint at the address he maintained on the Register and was asked to provide a response. He did not respond. The Respondent was also sent a Notice of Proceeding and a Notice of Hearing, giving him full details of the allegations the Board would investigate at a hearing and of the hearing itself. He did not respond or engage. The Respondent was also contacted to participate in a prehearing conference, and one was scheduled. The Respondent did not attend. He was sent a prehearing document which summarised what would have been discussed at the conference.
- [17] Given the above provisions and the attempts to engage with the Respondent, the Board finds that the required notices under the Regulations have been provided to the Respondent.
- [18] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not maintaining up-to-date contact details as per the requirements of the Act.
- [19] Finally, with regard to notice being given, the Respondent was called at the commencement of the hearing to ascertain if he would be attending. The phone rang twice before it went to voice mail. The Respondent did not attend.
- [20] The Board decided, on the basis of the above, that it was appropriate that the matter proceeded and that it considered the complaint.

Evidence

- [21] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [22] 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.

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

- [23] In addition to the documentary evidence before it, the Board heard evidence at the hearing from the Complainant and from Mr Shane Lambert, a Town Planning Officer at the Hastings District Council. A further summonsed witness, [Omitted], a Licensed Building Practitioner, failed to appear.
- [24] The complaint related to the conversion of a standalone garage into a habitable space. The Complainant originally engaged [Omitted] to carry out the work. The Respondent was, in turn, contracted to complete the design for the conversion which he did and for which he was paid \$2,000. [Omitted] then advised that he was too busy to carry out the work. He recommended that the Respondent project manage the work. The Respondent priced the work at \$30,000 (exclusive of GST). The Respondent's quote was accepted and 50% deposit paid 26 February 2021. The price included sub-trades, kitchen cabinetry, bathroom fixtures and fittings and floor coverings. The Respondent did not provide any of the disclosure or contract documentation required under the Building (Residential Consumer Rights and Remedies) Regulations 2014. Those are not, however, matters that come within the Board's jurisdiction.
- [25] The work commenced in early March 2021. A second progress payment of 40% was requested on 15 March 2021 to secure bathroom fixtures and fittings. Work progressed to a stage where internal framing had been carried out and a prewire completed. In mid-March 2021, plumbing was to commence, but the plumbers engaged by the Respondent refused to progress the building work on the basis that a building consent was required. At that stage, the Respondent had invoiced and been paid 90% of the price. The Complainant confirmed that none of the external door units, kitchen cabinetry, bathroom fixtures and fittings or floor coverings paid for were on site. The garage door was still in place, none of the external walls had been altered, only the internal partitions were in place with some gib board fixed.
- [26] On 11 August 2021, after no progress had been made on site for four months the Complainant contacted the original builder [Omitted] for advice. [Omitted] visited the Respondent and whilst he was with the Respondent he called the Complainant and passed the phone to the Respondent. The Respondent apologised and said the plumber would be on site to look at the job the next day.
- [27] The Respondent undertook to complete the building consent application and to submit the same to the Council. The Board was provided with copies of correspondence between the Complainant and the Respondent, within which the Respondent stated he had submitted the building consent application and that it was being progressed. For example, on 30 September 2021, the Respondent emailed stating:

Hi [Omitted], I have just called one of the building inspectors and he said they are still processing the consent and said it is very rare that a consent issued before the 20 working days are up.

- [28] On 2 November 2021, the Complainant became frustrated at the delays. She contacted the Council to check on progress with the building consent and was advised that no building consent applications had been with respect to the property. On 4 November 2021, the Complainant asked the Respondent for copies of what had been submitted for a building consent. He responded with an apology and an excuse on the following day. He has not engaged with the Complainant or responded to any further requests or enquiries since.
- [29] The Complainant then contacted [Omitted] to see if he could assist in getting hold of the Respondent. [Omitted] called from his phone. The Respondent answered, and when he put the Complainant on the phone, the Respondent hung up. There has not been any further contact. The Complainant has, however, commenced proceedings in the Disputes Tribunal to attempt to recover funds as she considered she had paid for work that had not been completed.
- [30] Mr Lambert outlined his qualifications and experience, which included a Master's Degree from Bristol University and 19 years of experience in town planning within New Zealand Territorial Authorities. He gave evidence that, in his opinion, a resource consent would have been required for the building work. He noted that whilst the creation of a supplementary dwelling was a permitted activity, there were issues as regards a front yard setback and allowances for on-site parking that would have triggered the need for a resource consent. Mr Lambert confirmed there was no record of a resource consent having been applied for. He provided notes to support his opinion.
- [31] The Board also asked Mr Lambert if he considered a building consent would have been required. He stated that it was not his area of expertise but that he believed the addition of sanitary fixtures in the garage would have meant a building consent was required. He confirmed that the Council did not have any record of a building consent having been applied for by the Respondent or any other person for the conversion.
- [32] As noted, the Respondent did not respond to the complaint or appear at the hearing. He was, however, given ample opportunity to do so.

Board's Conclusion and Reasoning

- [33] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in an incompetent manner (s 317(1)(b) of the Act); and
 - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and **should** be disciplined.
- [34] The reasons for the Board's decisions follow.

Incompetence

- [35] The Board's considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent and to advise that a resource consent was required for the change of use.

Building Consent

- [36] 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).

- [37] 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.*

- [38] 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.*

- [39] 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.*

[40] 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.

[41] 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.

[42] 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.

[43] 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.

[44] 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

⁸ [2015] NZHC 3299 [18 December 2015]

do so can fall below the standards of care expected of a licensed building practitioner.

- [45] 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.
- [46] The building work to convert a garage into a supplementary dwelling included the provision of a kitchen and a bathroom. Both required sanitary fixings. Furthermore, to be a habitable space, the garage would have had to meet building code requirements as regards thermal insulation.
- [47] Under Schedule 1, certain aspects of the building work could have been carried out without a building consent. For example, under clause 11, work on internal walls and doorways that are not load bearing, bracing or part of a fire separation wall can be worked on without a building consent, as can work on internal linings under clause 12. However, under clause 13, thermal insulation that is installed in an external wall requires a building consent. A building consent is also required where additional sanitary fixings are installed. This is because of the provisions of clause 35 of Schedule 1, which states:
- 35 Alteration to existing sanitary plumbing (excluding water heaters)**
- (1) Alteration to existing sanitary plumbing in a building, provided that—
- (a) the total number of sanitary fixtures in the building is not increased by the alteration; and
- (b) the alteration does not modify or affect any specified system.
- (2) Subclause (1) does not include an alteration to a water heater.
- [48] The Respondent holds a Design Area of Practice 2 license. He should be familiar with building consent requirements. Applying for and knowing when to apply for a building consent is a fundamental design competence. He should have taken the building consent considerations into account when carrying out the initial design.
- [49] The Board also notes that section 362F of the Act imposes minimum requirements for contracts for residential building work over \$30,000 in value. It also imposes an obligation for the contract to be in writing and for the contract to comply with any regulations.
- [50] The Board heard evidence that a written contract had not been entered into. Contravention of the requirement for a contract is an infringement offence, but the Board does not have any jurisdiction over infringement offences⁹.

⁹ Infringement offences fall within the Jurisdiction of the Ministry of Business Innovation and Employment.

[51] Notwithstanding the lack of a written contract, the minimum requirements for residential building contracts, which are implemented by way of the Building (Residential Consumer Rights and Remedies) Regulations 2014, are deemed to be part of an oral contract for residential building work. This is by way of Regulation 7, which states:

7 Prescribed clauses deemed to be included in oral residential building contracts for prescribed minimum price or more

- (1) *This regulation applies to a residential building contract where the price for the building work is not less than the prescribed minimum price if there is no written contract as required under section 362F of the Act.*
- (2) *The contract is deemed to include the terms prescribed in Schedule 3.*

[52] Within Schedule 3 clause 1 states:

1 Building consents

- 1.1 *The building contractor undertakes to obtain all necessary approvals, including building consents, before commencing the building work.*

[53] Given this provision, it is clear that there was, in addition to the obligations outlined in the *Tan* decision, a contractual obligation on the Respondent to obtain any required consents or at least to ensure they were obtained before the building work was started.

Resource Consent

[54] In a similar vein, the Respondent should, as a Design practitioner be aware of town planning requirements or at least of the need to carry out an assessment of the resource consent implications of the envisaged building work. He should also be aware that building work should not progress until such time as a resource consent is issued.¹⁰ Again, knowledge and application of resource consent matters is a competence expected of a Design practitioner. For example, the Licensed Building Practitioners Rules 2007, which detail the expected competencies for each class of licence state, for design:

Competency 1: Comprehend and apply knowledge of the regulatory environment of the building construction industry.

- 1.2.4 *Demonstrate knowledge of the Building Act and Resource Management Act consent processes.*

Includes knowledge of when consent is required, and knowledge of the application, inspection and compliance processes relevant to the design process.

¹⁰ Refer section 37 of the Act.

Competency 3: Establish design briefs and scope of work and prepare preliminary design

3.2.4 Document environmental and social impacts when developing design solutions.

May include but not limited to – understanding of environmental and social impacts, context, and use of resources.

[55] From the above, it is clear that the Respondent, as a Design Practitioner, should have considered whether a resource consent was required at the design phase of the project.

Incompetence

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

[57] Negligence and incompetence are not the same. In *Beattie v Far North Council*¹¹ 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.

[58] 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*¹² test of negligence which has been adopted by the New Zealand Courts¹³.

[59] 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*,¹⁴ it was stated as “*an inability to do the job*”.

[60] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁵. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of

¹¹ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

- [61] 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 Act¹⁶, 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 practitioner¹⁷.
- [62] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁸ 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.

- [63] Given the fundamental failings demonstrated, the Board has decided that the conduct went beyond negligence and that the Respondent was incompetent. In not advising that resource and building consents were required and ensuring they were in place prior to the building work commencing, he failed to demonstrate the required knowledge and skill expected of a Design Licence holder. Further, given the gravity of the conduct, the Board finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Misrepresentation or Outside of Competence

- [64] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).
- [65] Misrepresentation under s 314(a) is not defined in the Act, so it bears the meaning it has at common law. A misrepresentation is a representation that is false. A representation is a statement that relates to a matter of present or past fact, not one which relates to the future¹⁹. It is not a statement of opinion²⁰ or puffery²¹. A misrepresentation may be express or implied and may be inferred from acts or

¹⁶ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁷ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁸ [2001] NZAR 74

¹⁹ *Ware v Johnson* [1984] 2 NZLR 518 at 537

²⁰ *David v TFAC Ltd* [2009] NZCA 44

²¹ *Dimmock v Hallett* (1866) 2 Ch App 21

conduct as much as from words. There was no evidence that there had been a misrepresentation.

- [66] As regards working outside of one's competence, section 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [67] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of licence for the building work, they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single-level dwellings unsuccessfully undertakes a complex multi-level build. Likewise, if a licensed building practitioner undertakes work outside of their licence class,²² then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is noncompliant or is in some way deficient.
- [68] The evidence did not establish that the Respondent breached the section. He was licensed at the time as a Design Licensed Building Practitioner. As such, he was deemed to be competent to do the design work. The fact that he then carried out that work in an incompetent manner has been dealt with in the Board's finding under section 317(1)(b).
- [69] Also, as noted in the incompetence finding, the building work required a building consent. Had one been issued, then the building work would have been restricted building work. The Respondent's licence allows him to carry out or supervise restricted building work that is design work but not restricted building work that relates to primary structure or external moisture management. As such, had a building consent been in place, then the Respondent may have breached section 314B of the Act. As a building consent was not in place, he has not breached it.

Disrepute

- [70] 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 C2-01111²³ and discussed the legal principles that apply.

²² Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

²³ Board decision dated 2 July 2015.

[71] The Board, in C2-011111, 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*,²⁴ 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.

[72] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²⁵, 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.

[73] 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",²⁶ 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*²⁷ 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.*²⁸

[74] 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 convictions²⁹;
- honest mistakes without deliberate wrongdoing³⁰;
- provision of false undertakings³¹; and

²⁴ [2013] NZAR 1519

²⁵ 24 September 2014

²⁶ 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

²⁷ [2012] NZCA 401

²⁸ [2012] NZAR 1071 page 1072

²⁹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

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

³¹ *Slack, Re* [2012] NZLCDT 40

- conduct resulting in an unethical financial gain³².

- [75] 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.
- [76] The conduct the Board noted may have brought the regime into disrepute was a misrepresentation to the owner that a building consent had been applied for when it had not, his disengagement from the Complainant when confronted with issues that were arising and taking funds for work that had not been completed.
- [77] Dealing with each in turn, the evidence clearly showed that the Respondent did represent that a building consent had been applied for when it had not. In essence, he lied to the Complainant and continued to maintain that lie. When he was found out he disengaged. He has not communicated with the Complainant. Nor has he progressed the building consent application that was promised or the building work.
- [78] Notwithstanding the circumstances outlined above, the Respondent has taken almost all of the funds intended to complete the work but has not taken the work beyond the early stages of construction. He has not returned any funds or delivered any materials, fittings or fixtures that have been paid for. Put simply, the Respondent has taken money and has not applied it to the purposes for which it was received. The Complainant has had to resort to legal measures to try and recover the funds. Again, the Respondent is not engaging in the processes.
- [79] The Board finds that the Respondent's conduct has resulted in him obtaining a financial gain at the expense of the Complainants. Such conduct brings the regime into disrepute.
- [80] Finally, the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:
- This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*
- [81] The matters before the Board are serious, and the sums of money involved are considerable. On the basis of the above, the Board finds that the Respondent's conduct has brought the regime into disrepute.

³² *CollievNursing CouncilofNewZealand* [2000]NZAR 7

Penalty, Costs and Publication

- [82] 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.
- [83] The Board received and 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

- [84] 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*³³ 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.

- [85] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³⁴. 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.

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

³³ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³⁴ [2012] NZAR 481

- [87] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,³⁵ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [88] The Respondent has committed serious disciplinary offences. The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*³⁶ the High Court held that it was permissible to take into account as an adverse factor when determining the penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the Respondent has not engaged in the process. In this respect, a respondent may elect to not give evidence or to answer questions as part of an investigation. The courts have, however, stated that a practitioner should, in the context of disciplinary proceedings, be prepared to answer the allegations.³⁷ The Respondent has not done so.
- [89] The Respondent has demonstrated fundamental failings and has been unethical. Taking all of the above factors into account, the Board considered that a cancellation of the Respondent's licence may have been warranted to punish the Respondent and also required to deter others from such conduct.
- [90] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [91] Taking all of the above factors into account, the Board considered cancelling the Respondent's licence but stopped short of doing so. Rather it decided that a suspension of his licence was appropriate. It considered that a suspension was warranted to punish the Respondent and to deter others from such conduct. Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of nine (9) months. The Respondent should note, however, that it was by a small margin that the Board decided not to cancel his licence.

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

³⁶ [2011] 3 NZLR 850.

³⁷ *In re C. (A Solicitor)* - [1963] NZLR 259 and *Vatsyayann v Professional Conduct Committee of The New Zealand Medical Council*, HC, Priestley J CIV-2011-419-511, CIV-2011-419-968

Costs

- [92] 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.”
- [93] 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 case³⁸.
- [94] In *Collie v Nursing Council of New Zealand*,³⁹ 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.*
- [95] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,⁴⁰ 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.*
- [96] 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.
- [97] 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 for a half-day hearing. It is less than 50% of actual costs.

³⁸ *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.

³⁹ [2001] NZAR 74

⁴⁰ CIV-2011-485-000227 8 August 2011

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 Act⁴¹. 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 1990⁴². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction⁴³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴⁴. 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*⁴⁵.

[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 interest⁴⁶. 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] The nature of the conduct in this matter warrants further publication. Moreover, other Licensed Building Practitioners can learn from the matter, and publication may deter them from acting in a similar manner. As such, the Board will order further publication by way of an article in the Ministry of Business Innovation and Employment's Code Words publication.

⁴¹ Refer sections 298, 299 and 301 of the Act

⁴² Section 14 of the Act

⁴³ Refer sections 200 and 202 of the Criminal Procedure Act

⁴⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴⁵ *ibid*

⁴⁶ *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)(b) of the Act, the Respondent's licence is suspended for a period of nine [9] 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 \$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(I)(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.

[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

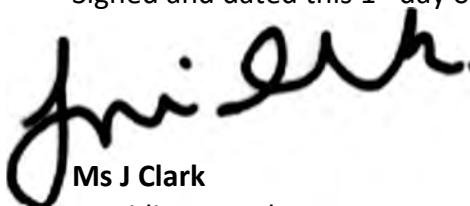
[105] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **22 August 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions 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 1st day of August 2022.



Ms J Clark
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.*