

## Before the Building Practitioners Board

	BPB Complaint No. CB26235
Licensed Building Practitioner:	Matthew Biddle (the Respondent)
Licence Number:	BP118856
Licence(s) Held:	Design Area of Practice 1 (AoP 1)

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing and Decision Date:	2 August 2023

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Ms J Clark, Barrister and Solicitor, Legal Member  
Ms K Reynolds, Construction Manager  
Mr G Anderson, LBP, Carpentry and Site AoP 2  
Mr P Thompson, LBP, Carpentry, Quantity Surveyor

#### Appearances:

M Denyer for the Complainant  
S Carter as Special Advisor to the Board

#### 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 Board finds that the Respondent **has** breached section 317(1)(a) of the Act. The Respondent's licence is cancelled. He may not apply to be relicensed for a period of two years.

The interim suppression order is lifted.

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## Summary

- [1] The Respondent was granted a Design AoP 1 Licence by the Registrar. A complaint was then made by the Ministry of Business, Innovation and Employment (MBIE) that the Respondent had been convicted, before he was licensed, by a court in New Zealand of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on his fitness to carry out or supervise building work (section 317(1)(a) of the Act).
- [2] Consideration of the alleged disciplinary offence required that the Board consider two elements. The first was whether the Respondent had been convicted of a criminal offence that met the 6-month imprisonment threshold. The Board found that it had, as, at a hearing in the District Court on 21 February 2022, the Respondent pleaded guilty to two charges of using a forged document laid under section 257(1) of the Crimes Act 1961. That crime carries a maximum penalty of 10 years imprisonment.
- [3] The second element required a forward-looking assessment of the Respondent’s fitness. The Board found that the criminal offending was serious and was directly related to the work for which the Respondent holds a licence, that the Respondent lacked insight into his offending and the impact it had had on others, was not taking responsibility for it and had not taken adequate steps to address the conduct that

led to it. On the basis of those factors, the Board decided that there was an unacceptable risk of future offending or conduct that would be outside of the Licensed Building Practitioner Code of Ethics Licensed and that he was not a fit person.

- [4] As a result of the finding, the Board decided that it would cancel the Respondent's licence and order that he may not reapply to be licensed for a period of two years.

### **The Charges**

- [5] The Board's investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [6] The Complainant in this matter was the Manager, Registration and Licensing in the Occupational Regulation team at MBIE. Two allegations were made. The first was that the Respondent had breached section 317(1)(a) of the Act, and the second was that he had breached section 317(1)(i) of the Act. The Board did not pursue the second allegation (that the Respondent may have conducted himself in a disreputable manner) because the alleged offending did not occur when the Respondent was licensed, which is a requirement of offence.
- [7] The allegation that the Board resolved to consider was that the Respondent may have been convicted, whether before or after he was licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on his fitness to carry out or supervise building work (section 317(1)(a) of the Act).
- [8] The section 317(1)(a) allegation differs from the section 317(1)(i) allegation because section 317(1)(a) uses the wording "whether before or after he or she was licensed". That means that the Respondent did not have to be licensed at the time of the offending for the Board to inquire into his conduct.

### **Background to the Hearing**

- [9] In his initial response to the complaint, the Respondent submitted that the matters complained about were known to the Ministry and the Board when the Registrar granted him a Design Area of Practice 1 Licence on and that the Board should not further investigate the complaint. The Board, on the basis of that submission, considered whether the complaint was vexatious or an abuse of process and decided that it was not. The reasons why were outlined in its Notice of Proceeding. The Board noted that the Respondent could make further submissions at the hearing on the matter.

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

[10] The Board also sought the opinion of a Special Advisor. Ms S Carter, a Barrister and Solicitor from Luke Cunningham Clere, was appointed. She was asked to provide a legal opinion as to whether the complaint might be an abuse of process and the matters the Board should take into consideration in assessing whether an offence reflects adversely on a person's fitness. The Board provided a copy of the opinion to the Respondent, which was that the complaint was not an abuse of process. The opinion concluded:

3.1 *In our view, the complaint is not an abuse of process. Where the matter complained of, if substantiated, raises disciplinary concerns about the licensed building practitioner, it is unlikely that the complaint is frivolous, vexatious, or not made in good faith so as to justify dismissal without further inquiry.*

[11] The Board agrees with the Special Advisor's opinion and reasoning.

[12] The crux of the Respondent's argument, which he also pursued in his opening address to the Board at the hearing, was that the complaint was vexatious and that MBIE had a vendetta against him. His submission was based on the Respondent's view that he had been assessed by MBIE, who knew of his conviction, as being competent to hold a Design AoP 1 Licence and that in the short time that he had been relicensed, he had not had an opportunity to prove his fitness. Consideration of that submission requires a review of the licensing process.

### **Entitlement to be Licensed**

[13] The Licensed Building Practitioner regime is a statutory scheme established by Part 4 of the Building Act. Section 282A states the purpose of the licensing regime, which includes:

(a) *to assess and record building practitioners as having certain skills and knowledge relevant to building work; and*

[14] Section 286 sets out the entitlement to be licenced. It states:

#### **286 Entitlement to be licensed**

*An individual is entitled to be licensed as a building practitioner if the individual satisfies the Registrar—*

(a) *that he or she meets the applicable minimum standards for licensing; and*

(b) *that he or she is not precluded from being licensed because of any action taken by the Board under section 318; and*

(c) *that his or her registration, licence, or other recognition under another enactment in respect of any substantially equivalent occupation has not been suspended or cancelled in respect of a disciplinary matter at any time within the last 5 years; and*

(d) *that he or she has paid the prescribed fee.*

- [15] A person who applies for a licence must meet each of the above criteria. It is to be noted that “fitness” or being a “fit and proper person” is not a factor that the Registrar can take into consideration.<sup>2</sup>
- [16] This compares with other licensing regimes that have fit and proper person licensing preconditions. For example, the Electricity Act 1992, in its entitlement to be registered and licensed provisions,<sup>3</sup> includes the requirement to be a “fit and proper person”.<sup>4</sup> Under that regime, a person can be precluded from being licensed if they are not “fit and proper”. Because the Building Act does not contain similar provisions, fitness is not a factor that can be considered as part of the licensing process. Rather, the focus is on whether the applicant meets the minimum standards for licensing. That term is defined in section 282 of the Act, which contains definitions for Part 4 of the Act. The definition is:

***applicable minimum standards for licensing means the minimum standards for licensing that—***

- (a) apply to the licensing class in question; and*
- (b) are contained in the rules*

- [17] The rules are established under section 353 of the Act:

**353 Rules relating to licensed building practitioners**

- (1) There must be made, and there must always be, rules containing the following minimum standards (LBP standards):*
  - (a) minimum standards of competence (including standards relating to knowledge and skills) that must be met for each licensing class; and*
  - (b) minimum standards for demonstrating current competence for each licensing class that must be met for continued licensing, and for the frequency at which assessments of current competence must be carried out.*
- (2) There must be made, and there must always be, rules that govern all of the following matters:*
  - (a) the information that must be provided by an applicant for licensing, and the way in which this information must be evaluated and decisions on the information must be made and implemented; and*
  - (b) the information that must be provided by a licensed building practitioner to demonstrate his or her current competence, and the way in which this information must be evaluated and*

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<sup>2</sup> Under section 311(b) of the Act, licensing is a Registrar function. The Board’s only function with respect to licensing is to hear appeals from a Registrar’s decision under section 330(1) of the Act.

<sup>3</sup> Section 91 of the Electricity Act 1992 for registration, section 99 for licensing and section 106 for renewal.

<sup>4</sup> Similar provisions are included in section 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006.

*decisions on the information must be made and implemented;  
and*

- (c) *the way in which a proposed cancellation or suspension of licensing (that does not relate to a disciplinary matter) is to be considered, decided on, and implemented, and any minimum and maximum periods for suspension.*

- [18] Of note is the focus on “competence” and the lack of a reference to “fitness”.
- [19] In terms of the rules, they were promulgated in the Licensed Building Practitioners Rules 2007 (the Rules). Under the Rules to become licensed, an applicant must satisfy the Registrar that they meet the applicable minimum standard for the class or classes of licence applied for. <sup>5</sup>The minimum standard is prescribed by rule 4, which states:

**4 MINIMUM STANDARD OF COMPETENCE FOR EACH CLASS OF LICENCE**

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

- [20] Under rule 12, the Registrar must make a decision on the application. The Registrar’s decision to grant or decline a licence must be informed by an assessor’s recommendation. <sup>6</sup> That assessment is to determine if the applicant meets the minimum standard of competence.
- [21] Again, under the Rules, there is no reference to “fitness” and no ability for the Registrar to consider “fitness” in determining whether a person should or should not be licensed. The only functional factor for consideration is competence. Competence is what the Respondent was assessed against, and on that basis, he was granted a Design AoP 1 Licence.
- [22] Fitness can, however, be considered by the Board under section 317(1)(a) of the Act, but only once the person has been granted a licence and only when the specified elements of section 317(1)(a) apply.
- [23] Given the statutory framework, consideration of “fitness” can only arise after a person has been licensed. As such, the Registrar could not consider the Respondent’s conviction when deciding whether the Respondent should be licensed. Knowing that the Respondent did have a conviction that came within the provisions of section 317(1)(a) of the Act, MBIE was right to bring the matter to the Board’s attention by laying a complaint so that the Board could consider his fitness post-licensing.

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<sup>5</sup> Refer rule 9(1)(a) of the Rules

<sup>6</sup> Rules 10 and 11 of the Rules

## The Conviction

- [24] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent has been convicted, whether before or after he is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more.
- [25] At a hearing in the District Court on 21 February 2022, the Respondent pleaded guilty to two charges of using a forged document laid under section 257(1) of the Crimes Act 1961. The plea came at the conclusion of the prosecution case. On 25 February 2022, in a reserved judgement, the Respondent was also convicted of two charges of holding himself out to be a Licensed Building Practitioner when he was not contrary to section 314 of the Building Act and one charge of carrying out restricted building work when he was not licensed to carry out that work.
- [26] The forgery convictions carry a maximum penalty of 10 years imprisonment. As such, they come within the parameters of section 317(1)(a)(i) of the Act, and the first element of the disciplinary provision is satisfied.
- [27] It is to be noted that the Building Act convictions do not meet the threshold for consideration under section 317(1)(a) as the penalty provisions do not include imprisonment. The Board may, however, take those convictions along with other past conduct into consideration if the Board determines that there has been a breach of section 317(1)(a) of the Act when it considers the appropriate action to take as a result.

## Fitness

- [28] The second element of the disciplinary charge is whether the commission of that offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work. This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person. The Board was assisted in this by the Special Advisor's opinion.
- [29] The Special Advisor brought the Supreme Court decision of *New Zealand Law Society v Stanley*<sup>7</sup> to the Board's attention. The case involved a person seeking to be admitted as a barrister and solicitor who had previous convictions and consideration of whether he was a fit and proper person. Whilst the case related to someone seeking a licence as opposed to a person who is now licensed, the principles and approach outlined in the decision are instructive and binding on the Board. In the Supreme Court decision, it noted:
- [35] *The first point to note is the obvious one. That is, the fit and proper person standard has to be interpreted in light of the purposes of the Act.*
- [30] The purposes of the Building Act include providing for the establishment of a licensing regime for building practitioners, and to promote the accountability of

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<sup>7</sup> [2020] NZSC 83

owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.<sup>8</sup> In furthering those purposes, the disciplinary regime was established, and more recently, a Code of Ethics has been introduced by Order in Council.<sup>9</sup>

[31] The Supreme Court also noted that the fit and proper person evaluation is a forward-looking exercise and that it is a matter of undertaking an “evaluation as to the risks to the public or of damage to the reputation of the profession” if, in the Respondent’s case, he was to retain his licence.<sup>10</sup> The evaluation is an objective exercise in that the Board should not be influenced by sympathy for the Respondent<sup>11</sup> and it is a protective exercise, not a punitive one.<sup>12</sup>

[32] The Supreme Court summarised the relevant principles as follows:

*[54] From this discussion, the relevant principles can be summarised in this way:*

- (a) The purpose of the fit and proper person standard is to ensure that those admitted to the profession are persons who can be entrusted to meet the duties and obligations imposed on those who practise as lawyers.*
- (b) Reflecting the statutory scheme, the assessment focusses on the need to protect the public and to maintain public confidence in the profession.*
- (c) The evaluation of whether an applicant meets the standard is a forward looking exercise. The Court must assess at the time of the application the risk of future misconduct or of harm to the profession. The evaluation is accordingly a protective one. Punishment for past conduct has no place.*
- (d) The concept of a fit and proper person in s 55 involves consideration of whether the applicant is honest, trustworthy and a person of integrity.*
- (e) When assessing past convictions, the Court must consider whether that past conduct remains relevant. The inquiry is a fact-specific one and the Court must look at all of the evidence in the round and make a judgement as to the present ability of the applicant to meet his or her duties and obligations as a lawyer.*

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<sup>8</sup> Section 3 of the Building Act 2004.

<sup>9</sup> Building (Code of Ethics for Licensed Building Practitioners) Order 2021 which came into effect on 25 October 2022.

<sup>10</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [38]

<sup>11</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [39]

<sup>12</sup> *Ibid* [40]



- (f) *The fit and proper person standard is necessarily a high one, although the Court should not lightly deprive someone who is otherwise qualified from the opportunity to practise law.*
- (g) *Finally, the onus of showing that the standard is met is on the applicant. Applications are unlikely to turn on fine questions of onus.*

[33] The Board also notes that whilst the Supreme Court stated that the onus is on the applicant to show that the fitness standard has been met, the Board considers, within the context of a disciplinary matter, that it is for the Board to determine, on the balance of probabilities, whether the Respondent is or is not a fit person. Put another way; the Respondent does not carry the burden of proof.

### The Conduct

[34] The Crimes Act 1961 convictions related to the use of forged certificates of design work for the purposes of obtaining a building consent. The sentencing Judge noted:

*[4] It is serious because a house is usually the most expensive thing that most people buy in their lives, and if they are getting building work done and it is not up to snuff because a mistake has been made then, somebody needs to be liable for the error. And in terms of design errors, you are certifying the work as a person with the skills, background and experience to certify work. And when your licence was suspended you chose to go on when you should not have been going on doing that kind of work. Without telling your clients and using forged certificates, which fortunately the city council picked up.<sup>13</sup>*

[35] The agreed statement of facts admitted for the purposes of sentencing set out the details of the conduct that led to the convictions. It stated:

4. *On 22 May 2012, the Board granted the Defendant a design class licence under the licensed building practitioner (LBP) scheme. As a result of disciplinary proceedings, the Defendant's licence was suspended between 30 November 2017 to 26 January 2018, and 1 June 2018 to 17 September 2018.*
5. *As a result of further disciplinary proceedings, on 19 December 2018, the Board cancelled the Defendant's LBP licence and ordered that he may not reapply for a licence for 18 months.*  
  
*[Omitted]*
6. *On 5 October 2018 the Defendant submitted a Certificate of Work to the Tauranga City Council (TCC). The Certificate of Work was dated 29 September 2018 and signed by the Defendant for restricted design work carried out by the Defendant for [Omitted].*

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<sup>13</sup> *R v Matthew John Biddle* [2022] NZDC 6040 at [4]

7. *On 1 February 2019, TCC wrote to the land owner notifying them that the Defendant's LBP licence had expired and that a current LBP would need to be engaged.*
8. *On 20 February 2019, the Defendant resubmitted the Certificate of Work for [Omitted] representing that it was issued by [Omitted], a licensed LBP, for design work that is restricted building work. At this time the Defendant did not hold an LBP licence. The final page of the Certificate of Work held [Omitted]'s LBP number [Omitted], phone number, an email address, and declared [Omitted] stated*
  - ... I have applied the skill and care reasonably required of a competent design professional in carrying out or supervising the Restricted Building Work described on this form and that based on this I also state that the RBW*
  - (a) Complies with Building Code Clauses identified on this form; or*
  - (b) Complies with the building code subject to any waiver or modification of the building code recorded on this form.*
9. *The Certificate of Work purported to be signed and dated by [Omitted] on 12 February 2019.*
10. *[Omitted] did not supervise or carry out any work in relation to [Omitted], nor did he fill out or sign the Certificate of Work.*
11. *On 22 February 2019, TCC granted building consent for the design work.*

*[Omitted]*
12. *On 12 December 2018 the Defendant submitted building consent application, which included a Certificate of Work, to the Western Bay of Plenty District Council (WBOP). The Certificate of Work was dated 15 October 2018, signed by the Defendant for restricted design work carried out by the Defendant for [Omitted].*
13. *WBOP processed the building consent application which raised issues. WBOP issued a Request for Information. On 5 March 2019 the Defendant responded to the request and resubmitted the Certificate of Work for [Omitted], containing the same final page containing [Omitted]'s details, and purported signature and declaration as in paragraph 8 of this Summary of Facts. At this time the Defendant still did not hold an LBP licence.*

14. *On 1 April 2019, [Omitted] emailed the WBOP advising that he was aware the Defendant may have been falsifying his Certificate of Work to obtain a building consent.*
15. *On 2 April 2019, the WBOP issued a request for information to the Defendant and the land owner, stating:*

*The Form 2A Design Memorandum provided cannot be accepted as the BCA have been advised that the LBP Designer referred to as the supervisor was not aware his details have been used for this consent. [Omitted] did not supervise this design work and has no knowledge of it. Please provide an authentic Design Memorandum from a LBP designer who has supervised this work.*
16. *On 22 July 2019, WBOP received a phone call from the Defendant asking for a pragmatic way to deal with the issue.*
17. *The Defendant has not held an LBP licence since it was cancelled on 18 December 2018.*

#### Consideration of Fitness

- [36] The Special Advisor expressed a view that there is a strong focus on public protection, safety, and well-being in the purposes of the Building Act and that an offence against the Act, undertaken in a professional context, will usually carry stronger weight than an unrelated offence in the assessment of fitness under section 317(1)(a) of the Act because an offence against the Act goes directly against the purpose of the Act to promote the accountability of licensed building practitioners to comply with the Act and Building Code. The Board agrees. The criminal convictions are directly relevant to the purposes of the Building Act and the licensing regime. The Respondent's conduct would have undermined the public's confidence in the Licensed Building Practitioner regime, and the forging of documents to obtain building consents put the consenting regime under the Act at risk.
- [37] As noted, however, the Board must carry out a forward-looking assessment. The conduct was in the past. It is the Respondent's future fitness that must be assessed. In *Stanley*, the Supreme Court put it as:
- [45] *... the decision maker is essentially trying to assess whether the convictions remain relevant to whether the applicant meets the fit and proper person standard and, if so, to what extent the conduct remains relevant at the time of the current inquiry. The inquiry into relevance will commonly require consideration of the circumstances of the offending and of whether the applicant can be seen to have moved on in the sense of being either reformed or having undertaken steps towards rehabilitation. Alternatively, there may be other features of character which mean that the convictions*

*should assume less relevance. That it is not always easy to draw the line emphasises the fact-specific nature of the inquiry.*<sup>14</sup>

- [38] In terms of whether the Respondent has moved on in the sense of being either reformed or having undertaken steps towards rehabilitation, the Board gave the Respondent the opportunity to outline what steps he had taken to address his past conduct. The Respondent noted that he had done a lot of self-directed learning to better understand the legal requirements of the Act and is more vigilant in how he approaches his work.
- [39] In questioning the Respondent, the Board formed the view that he was attempting to minimise his conduct and was not taking full responsibility for it. For example, he submitted that he was only trying to help his clients, and he conflated forging documents, which any right-minded person should know is unacceptable and constitutes a crime, with his lack of understanding of the specifics of the Act. Further, he did not view his offending as having had a material impact on anyone other than himself, describing the impact on his clients and the person whose details he fraudulently used as minimal. This was notwithstanding the fact that, as part of his sentencing, he was ordered to make reparation to those who had suffered a loss as a result of his actions. He made himself out as the only person who had truly suffered as a result of his conduct and submitted that what he did was commonplace in the industry. In this respect, when sentenced, the sentencing Judge noted:

*[3] You gave evidence and told me “well that is pretty much standard in the industry,” and candidly I am not terribly surprised to hear that not all the rather stringent conditions of the licensed building industry are fully observed on every occasion. But you are not 21 anymore Mr Biddle. You have been around for a long, long time and you know very well you are not allowed to forge someone else’s signature on a certificate and hand it over, and if you do it is a serious matter indeed.*<sup>15</sup>

- [40] The Board does not accept that failure to adhere to regulatory requirements is commonplace. The Board deals with hundreds of complaints each year, but those complaints represent less than one per cent of licensed persons and of those complaints, only a handful over the 15 years that the licensing regime has been in operation have related to forging documents.
- [41] The Respondent stated he would be more open and honest in the future and would work on his communication. The Respondent was not able to point to any formal training that he had undertaken since he was convicted. He did refer to counselling focused on his communication skills, and it was noted that the counselling either predated or occurred at about the same time as the offending.
- [42] In Stanley, the Supreme Court noted:

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<sup>14</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [45]

<sup>15</sup> *R v Matthew John Biddle* [2022] NZDC 6040 at [3]

*[49] It is clear from the cases both here and in the comparable jurisdictions we have discussed that a highly influential factor in determining whether a person is a fit and proper person given prior convictions is evidence as to rehabilitation and as to insight into the offending.*

- [43] The Board formed the view that the Respondent did not have sufficient insight into his offending and had not taken adequate steps to rehabilitate.
- [44] The conduct was not isolated. There was a pattern of behaviour over a period of time, and it arose after the Board had taken disciplinary action following a complaint about the Respondent, which resulted in his licence being cancelled.
- [45] The Board has also taken into consideration that the Code of Ethics for Licensed Building Practitioners has been promulgated and is now operative. The Code contains a number of principles, many of which are relevant to the Respondent's past and future conduct:
- 10 You must comply with the law;
  - 11 Your duty to report breaches of the law;
  - 14 Your duty to inform and educate client;
  - 15 You must be accountable;
  - 17 You must act in your client's interests;
  - 19 You must behave professionally; and
  - 25 You must conduct your business in a methodical and responsible manner.
- [46] In conjunction with the Code of Ethics, the Building Act contains a disciplinary provision for a breach of the Code of Ethics. The Board's view is that the Code provides guidance as to the types of conduct to be expected from Licensed Building Practitioners.
- [47] Taking the various factors above into consideration, the Board was not satisfied that the Respondent is or will be a fit person. The criminal offending was serious and was directly related to the work for which he is now licensed. The Respondent lacks insight into his offending, is not taking responsibility for it and has not taken adequate steps to address the conduct that led to it. The Board considers there is an unacceptable risk of future offending or conduct that would be outside of the Code.

#### **Board's Disciplinary Finding**

- [48] The Board finds that the Respondent has been convicted by a court in New Zealand of any offence punishable by imprisonment for a term of 6 months or more, and the commission of the offence reflects adversely on his fitness to carry out or supervise building work.

[49] The Respondent should note that the Board is not and has not made a finding as regards his competence. That was not and is not in question. The finding is solely in relation to his fitness to be a Licensed Building Practitioner.

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

[50] Having found that the Respondent has breached section 317(1)(a) of the Act, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[51] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### **Penalty**

[52] The Board has the discretion to impose a range of penalties.<sup>ii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>16</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>17</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>18</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>19</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>20</sup>
- (d) penalising wrongdoing;<sup>21</sup> and
- (e) rehabilitation (where appropriate).<sup>22</sup>

[53] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>23</sup> and applying the least restrictive penalty available for the particular offending.<sup>24</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>25</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>26</sup>

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<sup>16</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>17</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>18</sup> Section 3 Building Act

<sup>19</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>20</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>21</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>22</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

<sup>23</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>24</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>25</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>26</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [54] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>27</sup>
- [55] The Board adopted a starting of a cancellation of the Respondent's licence. It did so because of the seriousness of the criminal offending, its direct relationship to the work of a Design practitioner, the Respondent's disciplinary history, the offences under the Building Act that he was also convicted of, and the need to protect the public and uphold the purposes of the Building Act.
- [56] The Crimes Act offending has been traversed in this decision and need not be further discussed. The Building Act offences related to holding out as being licensed and carrying out restricted building work when the Respondent was not licensed. He was convicted of three offences. The Respondent's licence was cancelled as a result of disciplinary action taken by the Board. A review of the Respondent's disciplinary history is appropriate.
- [57] In March 2017, the Board made a finding that the Respondent had conducted himself in a negligent manner in relation to design work and that he had brought the licensing regime into disrepute. The Respondent did not engage in the disciplinary process and did not appear at the hearing. The Respondent did make penalty submissions after the Board had released its substantive decision. The Respondent was fined \$3,500.
- [58] In October 2018, the Board considered a further complaint. The Respondent was found to have carried out design work in an incompetent manner and that he had brought the licensing regime into disrepute. The disrepute finding related to taking of funds without an intention to complete the agreed services. The Respondent's licence was cancelled, and the Board ordered that he could not apply to be relicensed for a period of 18 months. The similarity in the conduct in the 2017 case and that in the 2018 case was taken into consideration.
- [59] The Board has noted that the criminal offending the Respondent was convicted of was also similar in nature to the Board's disrepute findings. There is a pattern to the Respondent's behaviour. He puts himself and his own needs before those of his clients.
- [60] The Board has taken into account that the Respondent was punished for his criminal offending. It does, however, note that the purpose of the penalty action it takes is, amongst those items noted above, to uphold the purposes of the Act and to protect the public. The Courts cannot take action as regards the Respondent's licence. The Board can. Moreover, in terms of double jeopardy, the Supreme Court in *Z v Dental Complaints Assessment Committee*<sup>28</sup> held that professional disciplinary proceedings

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<sup>27</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>28</sup> [2009] 1 NZLR 1, [2008] NZSC 55 at [97]

provide a different utility to criminal proceedings, and the sanctions imposed as a result of disciplinary proceedings are focused on public protection, not punishment.

- [61] The cancellation order relating to the 2018 conduct was for 18 months. This is the third time the Board has disciplined the Respondent, and the matter being considered is more serious. A longer period of cancellation is appropriate. The Board, for the reasons outlined above, adopted a starting point of three years. A three-year cancellation would give the industry a clear and strong message that such behaviour cannot be tolerated.
- [62] The Respondent submitted that he had not had the opportunity since being licensed to prove his fitness. He did not provide submissions on how, other than continuing to work, he would go about proving this. The Respondent did not provide any character references, and, as noted, he had not taken any self-improvement action since he was convicted other than his own research to brush up on his understanding of his obligations as a Licensed Building Practitioner. He noted that he was paying reparation at the minimum rate and that he was on a job seeker's benefit. He considered that publicity around the Board's disciplinary investigations was preventing him from obtaining employment. He submitted that he should be put on some form of probation. Section 318 does not provision for such action.
- [63] The Respondent's current situation has been taken into account, as has the fact that the District Court has punished him. Taking those factors into account and noting the Board's sanction should be the least required to give effect to the purposes of imposing a penalty, the cancellation has been reduced to two years.
- [64] The Respondent should note that cancellation does not mean that he cannot work in the industry, and this is a factor the Board has taken into account in arriving at its penalty decision. A licence enables the Respondent to carry out restricted building work that is design work. Restricted design work is only that which is relates to residential buildings less than 10 metres in height. As such, the Respondent can carry out design work on non-residential buildings and residential buildings that are higher than 10 metres. He can also carry out restricted design work under supervision.

#### Costs

- [65] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>29</sup>

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<sup>29</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74



- [66] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>30</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>31</sup>.
- [67] 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 complex. Adjustments are then made.
- [68] The Respondent is in a constrained financial situation, and MBIE made the complaint. He is paying reparation. Ordinarily, the Board would impose a costs order, but it considered that it was more appropriate, in the specific circumstances of this matter, that any surplus income be directed to reparation rather than to the payment of a costs order.

### Publication

- [69] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>32</sup> although, because of the way the legislative framework operates, because the Respondent will no longer be a Licensed Building Practitioner, his name will not be on the Register. The Respondent will, however, be named in this decision, which will be available on the Board's website.
- [70] The Board can, under section 318(5) of the Act, to order further publication. Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>33</sup> Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>34</sup>
- [71] The Respondent submitted that further publication should not occur, and he noted the impact media articles in relation to the present matter have had on his employment prospects.
- [72] The Respondent has been the subject of media attention as a result of his criminal offending and in relation to previous matters that have come before the Board, including his appeal against a Registrar's decision to refuse his application to be licensed as a Design Area of Practice 2 practitioner. Articles have also been published as regards an employment matter that took place during the same period as the

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<sup>30</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>31</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>32</sup> Refer sections 298, 299 and 301 of the Act

<sup>33</sup> Section 14 of the Act

<sup>34</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

matters under consideration. In that matter, the Employment Relations Authority (ERA), in November 2021, ordered the Respondent to return files he had wrongly taken from his employer after he was dismissed for serious misconduct. The ERA decision and the article noted that he had deleted the employers' files in a way that meant they could not be recovered. In July 2022, the ERA ordered that he pay his employer \$98,525.80 in damages and a penalty of \$8,000 after the Respondent failed to comply with the ERA's November 2021 orders. The article is raised as it shows that it is more than just the Board's investigation that is impacting the Respondent's employment prospects.

- [73] It is inevitable that further publication will impact the Respondent. At the same time, the public and the industry need to be informed, especially as this matter has come to the Board because the Respondent has continued to operate as if he had a license when he did not. Also, as the cancellation will not appear on the Register, some other form of notification is required. The Board, therefore, finds that further publication is required. The interim suppression order that was continued at the completion of the hearing is lifted.
- [74] The Registrar is directed to publish an article in Code Words and to release a Media Briefing in relation to the matter and the Board's decision.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of two years.

**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 be action taken to publicly notify the Board's action as set out in this decision, in addition to the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

### **Right of Appeal**

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

### Post Decision Continued Suppression Application

[77] On 23 August 2023, following the Board making its decision but prior to the release of its written reasons, the Respondent emailed the Board stating:

*To the members presiding over my complaint. I wish to respectfully request that suppression of this matter continue until the appeal is heard and decided upon. I am struggling to get a lawyer due to financial reasons to apply to the district court for suppression to continue until the appeal has been heard and decision made. As a normal practice if an appeal is not lodged within the appropriate time period then suppression would lapse Can this please be implemented as this matter if released prior to the appeal being heard will overshadow the outcome of the appeal in terms of the negative publicity.*

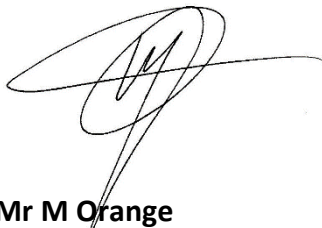
[78] The Board has dealt with the impact publication may have on the Respondent. The Respondent has not raised any new grounds.

[79] In general, suppression is granted where publication would be likely to cause extreme hardship. In *N v Professional Conduct Committee of Medical Council*,<sup>35</sup> the High Court stated the tribunal must be satisfied that suppression is desirable having regard to the public and private interests, and consideration can be given to factors such as:

- (a) issues around the identity of other persons such as family and employers;
- (b) identity of persons involved and their privacy and the impact of publication on them; and
- (c) the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

[80] None of those factors apply, and the Respondent has not satisfied the Board that he would suffer extreme hardship. The application for continued suppression is denied.

Signed and dated this 25<sup>th</sup> day of August 2023.



**Mr M Orange**  
Presiding

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<sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*

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<sup>35</sup> *ibid*

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- (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 318 Disciplinary Penalties**

- (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 1 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.*

***iii 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.*