

Before the Building Practitioners Board

	BPB Complaint No. CB25668
Licensed Building Practitioner:	Peter Blair (the Respondent)
Licence Number:	BP 102229
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	New Plymouth
Hearing Type:	In Person
Hearing and Decision Date:	10 August 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr B Monteith, LBP, Carpentry and Site AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(1)(c) and 317(1)(i) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent carried out design work which was restricted building work that he was not licensed to carry out contrary to section 317(1)(c) of the Act, and he brought the licensing regime into disrepute when he fraudulently created and used a statement of design work and a design producer statement and used his employers’ systems and designs without authorisation. His licence is cancelled for a period of 18 months. He is ordered to pay costs of \$3,500. The Board’s decision will be published.

The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work (design work) at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT, he may have carried out design work and/or submitted design documentation for the purposes of obtaining a building consent when he was not licensed to do so; and

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

- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have submitted building false or misleading building consent documentation and/or may have fraudulently submitted building consent documentation for the purposes of obtaining a building consent.

Function of Disciplinary Action

[3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[4] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[5] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... 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.

[6] 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.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [7] 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

- [8] 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.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [11] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Peter Blair	Respondent
[Omitted]	Complainant, General Manager, Versatile Homes and Buildings (Spanbuild New Zealand Limited)
[Omitted]	Witness, Versatile Franchisee owner (Bishell Builders Limited – Versatile New Plymouth)
Damien Morrese	Witness, New Plymouth District Council
[Omitted]	Witness, Licensed Building Practitioner, Design AoP 1

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [13] The complaint arose as a result of the New Plymouth District Council contacting [Omitted] to enquire about the quality of a building consent application⁷ which the Council believed had been submitted by Versatile New Plymouth. The Council had noted that town planning issues had not been dealt with and that the building consent documentation was not up to the normal high standard of Versatile building consent applications. Mr Morresey confirmed the building consent application issues. He stated that the Council had formed the view, on the basis of what had been submitted, that it was a Versatile building consent application.
- [14] [Omitted], on making inquiries within Versatile New Plymouth, ascertained that the building consent application had not been submitted by Versatile New Plymouth but was a building consent application that had been made by the Respondent who was, at the time, an employee of Versatile New Plymouth. Further inquiries revealed that another building consent application had been made by the Respondent whilst in the employ of Versatile New Plymouth⁸.
- [15] The two building consents were applied for by the Respondent for investment dwellings that he intended to construct. The building consent applications included plans and specifications that appeared to have been developed by Versatile. The plans contained the Versatile logo and were noted as being for Peter Blair, the Respondent. The plans contained a Versatile copyright notice. The specification was labelled SPEC 2019V2.docx. [Omitted] stated it was more or less identical to the Versatile specification. The Respondent stated that he thought he should have crossed out the Versatile references prior to submission.
- [16] The building consent applications that were submitted contained a certificate of design work (CoDW) from [Omitted] and a Producer Statement Design (PS1) from [Omitted], an engineer in the employ of Mitek New Zealand Limited. [Omitted] stated that he had not produced the CoDW. The Board also received a letter from [Omitted], an engineer. He stated he did not produce the PS1.
- [17] The Respondent did not provide a response to the allegations when they were first brought to his attention as part of the initial investigation of the complaint. He simply provided detail on the construction of one of the dwellings. He did give evidence at the hearing.
- [18] The Respondent outlined that the building consent applications were developed by him in conjunction with a Versatile sales staff member, a [Omitted]. He stated that [Omitted] had informed the Respondent that he could develop the plans the Respondent would require using a Versatile CAD system (computer aided design) VRS. [Omitted] does not hold any design qualifications or licenses. The VRS system was set up to develop plans for Versatile garages and sleepouts that were IL19 risk

⁷ Building Consent BC20/127109 issued 3 September 2020

⁸ Building Consent BC19/125632 issued 11 November 2019

⁹ IL1 or level of importance 1 is defined as: Structures presenting a low degree of hazard to life or property, such as walkways, outbuildings, fences and walls.

buildings and is used by franchisees. The VRS CAD systems was not suited to the design of IL210 risk buildings. The buildings the Respondent submitted building consents for were both IL2 buildings and were residential dwellings which contained restricted building work. The design of them was also restricted building work. Under section 84 of the Act, restricted building work has to be carried out by a licensed building practitioner who is licensed to carry out or supervise the work¹¹. The Respondent holds a Carpentry Licence.

- [19] [Omitted] stated that neither the Respondent nor [Omitted] had the authority to use the VRS system for their own purposes, that there was a process for staff to use if they wanted to carry out any building work for themselves using Versatile resources, and that neither had used that process. [Omitted] noted that the usual fee charged to a franchisee for the development of a building consent would be in the range of \$2,000 to \$3,000 and that the franchisee could then add a margin onto the amount. The Respondent stated that he did not think he needed any authority to produce plans for himself and that he did not make any payments to [Omitted] for them.
- [20] The Respondent stated, that in addition to the plans produced using the VRS system, he hand drew a site plan and that he and [Omitted] hand drew a cavity cladding system onto the plans as the VRS system was not able to produce the details for a cavity system. The Respondent stated he assessed the Risk Matrix score for the dwelling and that the design was based on standard NZS3604 construction detail. His evidence was that he used design detail for a cavity cladding system from a consented design for a similar dwelling that Versatile had built and for which he was the project manager.
- [21] As the design and building work was restricted building work a certificate of work was, under section 45(3) of the Act, required as part of the building consent application. The Respondent stated that the CoDWs he submitted with the building consent applications were created by him by copying a CoDW from a previous job, removing the street address to which the certificate of design work related and the date of the original certificate, and inserting the new details. He did not engage with the original author of the CoDW, [Omitted]. The Respondent stated that it was [Omitted]'s idea to copy the CoDW.
- [22] [Omitted] stated that he carries out design work for Versatile and Versatile franchises when the design of a building falls outside of the standard design parameters of Versatile garages and sleepouts that come with the definition of IL1 buildings. When required to provide design work for Versatile, he produces a CoDW once the design is complete along with a full building consent package ready for a

¹⁰ Clause A3 of the Building Code provides for levels of importance. IL2 or level of importance 2 is defined as: Normal structures and structures not covered by other categories, such as timber-framed houses, car parking buildings or office buildings.

¹¹ A Licensed Building Practitioner, with respect to design work, includes a Registered Architect or an Engineer who have, under the Act, been deemed to be a Licensed Building Practitioners.

building consent application to be submitted. He noted that, with design work, it is not a case of “one size fits all” and that each design is unique.

- [23] The building consent application also required a PS1. A PS1 purported to be from [Omitted] was included. The VRS system can produce a PS1 for standard Versatile garages and sleepouts that are IL1 buildings and, to a limited extent, some IL2 buildings. The authority to produce a PS1 is on the basis that standard plans have been assessed for engineering performance, and further assessment is not required. A PS1 produced from the VRS system is not intended to be used for a building of the type developed by the Respondent and [Omitted].
- [24] The Respondent also stated that he copied the specification submitted from a previous Versatile job. Again he stated that this was [Omitted]’s idea.
- [25] The Respondent stated that he did obtain a genuine producer statement from Carters for the truss design.
- [26] The development of the building consent application was carried out at the Versatile New Plymouth premises. The Respondent stated that he developed it during his lunch breaks. [Omitted] gave evidence that the Respondent developed the documentation using Versatile systems and resources and then emailed the documentation created to himself at his personal email address. The Respondent confirmed this.
- [27] The Respondent was familiar with the building consent process. The Respondent had carried out other developments and builds and had used design professionals. When asked why he had not done so on these occasions, he stated that it was just quicker and that it was not so as to save money.
- [28] The Respondent did not consider that he was putting Versatile, [Omitted] or [Omitted] at risk by doing what he did as it was standard NZS3604 construction.
- [29] The first dwelling has been built. A Code Compliance Certificate has been issued. Mr Morresey stated that the New Plymouth District Council is querying with the Ministry of Business Innovation and Employment as to whether the Code Compliance Certificate can be withdrawn. He noted that there were no issues with the compliance of the construction of the dwelling but that the issue was with the validity of the design documentation. He stated that the Council would not have issued a building consent if it had been aware, at the time, of the issues raised in the complaint.
- [30] Mr Morresey expressed his disappointment with the Respondent’s action. He stated the building consent application process is a high trust environment and that if they cannot take the documentation received at face value, then it puts the current system at risk.
- [31] [Omitted] stated that the Respondent’s actions had damaged the reputation of Versatile, [Omitted], [Omitted] and Mitek.

- [32] [Omitted] did not involve the police. It was dealt with as an employment matter.
- [33] The Respondent resigned soon after the issues came to light. He had, prior to his resignation, already accepted a role at another building company.

Board's Conclusion and Reasoning

- [34] The Board has decided that the Respondent **has**:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) 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.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [35] The Board's finding is that the Respondent carried out design work that he was not licensed to carry out.

- [36] Section 84 of the Act states:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [37] Section 85 makes it an offence to carry out restricted building work when not licensed to do so. The offence carries a fine of up to \$50,000.

- [38] The Building (Design Work Declared to be Building Work) Order 2007 declared design work to be building work:

3 Design work declared to be building work

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

- [39] Clause 6 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines certain design work to be restricted building work:

6 Certain design work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work

- (1) *The kinds of design work described in subclause (2) are restricted building work for the purposes of the Act.*

- (2) *The design work referred to in subclause (1) is the preparation of any drawing, specification, or other document, according to which—*
- (a) *the primary structure of a house or a small-to-medium apartment building is proposed to be constructed or altered; or*
- (b) *any external moisture-management system attached to or forming part of a house or a small-to-medium apartment building is proposed to be constructed or altered.*

[40] The Respondent is a Licensed Building Practitioner with a Carpentry Licence. He does not hold a design licence.

[41] The Act provides, in section 285, that licence classes can be designated by regulation. The current license classes were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order, the following are the types of building work each class of licence can carry out:

<i>Licensing class</i>	<i>Type of building work</i>
<i>General Licence Classes</i>	
<i>Design</i>	<i>Design work for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<i>Trade licensing classes</i>	
<i>Carpentry</i>	<i>Carpentry for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>

[42] On the basis of the above, a licensed building practitioner with a Carpentry Licence cannot carry out or supervise restricted building work that is design work.

[43] The Respondent and [Omitted] carried out the work of a designer when they used Versatile’s VRS systems to develop structural and weathertightness elements of the two buildings for which building consents were applied for. The Respondent also acted as the designer when he developed the design and details for the exterior weatherboard cladding of those dwellings. He also acted as a designer when he produced a specification for the dwellings.

[44] The Respondent clearly carried out design work that he was not licensed to carry out. It follows that he has committed the disciplinary offence under section 317(1)(c) of the Act.

[45] The Respondent submitted that, as the building work was to be based on NZS3604 and another similar building consent, there was minimal risk in what he did. Whilst

that may be the case, the licensing regime was established to create public confidence in residential building in New Zealand following significant weathertightness failures. Moreover, the Council noted the substandard nature of the building consent applications and the failure to deal with planning issues. These factors demonstrated that the Respondent simply did not know what he did not know, which is why each licensed person should stick to that which they are licensed to do.

Disrepute

- [46] The disrepute finding relates to the fraudulent creation and use of design certification, the unauthorised use of design documentation, and breaches of copyright.
- [47] 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 C2-01111¹² and discussed the legal principles that apply.
- [48] The Board, in C2-01111, considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above, there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example, in the High Court held in *Davidson v Auckland Standards Committee No 3*,¹³ 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.
- [49] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁴, 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.
- [50] 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",¹⁵ and the courts have consistently applied an objective test when considering such conduct. In

¹² Board decision dated 2 July 2015.

¹³ [2013] NZAR 1519

¹⁴ 24 September 2014

¹⁵ 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

*W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁶, 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.*¹⁷

[51] 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 convictions¹⁸;
- honest mistakes without deliberate wrongdoing¹⁹;
- provision of false undertakings²⁰; and
- conduct resulting in an unethical financial gain²¹.

[52] 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.

[53] As noted above, there were three matters which the Board found brought the regime into disrepute. The first, and most serious, was the creation and use of fraudulent design certification. Specifically, the Board finds that the Respondent fraudulently created a certificate of design work (CoDW) and a design producer statement (PS1).

[54] Looking firstly at the CoDW, section 45(3) of the Act also requires that any building consent that incorporates restricted building work must be accompanied by a certificate of work provided by a Licensed Building Practitioner with a design licence that states that the design complies with the building code:

- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
- (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
 - (b) *that identifies that design work; and*

¹⁶ [2012] NZCA 401

¹⁷ [2012] NZAR 1071 page 1072

¹⁸ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁰ *Slack, Re* [2012] NZLCDT 40

²¹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- (c) *that states—*
- (i) *that the design work complies with the building code;*
or
 - (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

- [55] The design that was submitted by the Respondent contained a certificate that the Respondent had created by copying a previous valid CoDW, removing portions of its contents and inserting new material. The signature and name of [Omitted], the producer of the original unaltered CoDW, remained. In all intents and purposes the document purported to be a certificate from [Omitted] when it was not. He had no knowledge of the building consent application. He had not issued the CoDW nor authorised its issue or use.
- [56] The same applied to the PS1. Building Consent Authorities typically require a producer statement for specific engineering designs. The producer statement gives them confidence that the design has been carried out by a qualified design professional. A producer statement incorporates undertakings, including that suitable professional indemnity insurance is in place. The PS1 was system generated, and the authorisation to use it was for Versatile. The design work was not for Versatile and, even if it was the authority parameters that applied to its use had been exceeded.
- [57] In both instances, the Respondent, as the creator of the documents, had been fraudulent in that he had taken and used someone else's documentation without their knowledge or consent for his own gain or benefit.
- [58] Turning to the unauthorised use of design documentation, the evidence before the Board was that the VRS system and the Versatile specification were for the use of Versatile in the conduct of its business. The owner of the franchise gave evidence that the Respondent was not authorised to use it for his own purposes. The Respondent took that which belonged to his employer and emailed it to himself so that he could then use it for his own benefit. He did not pay for their use and obtained a pecuniary benefit as a result in that he avoided the cost of a design professional. The plans and specifications were also subject to copyright. The Respondent breached that copyright when he copied and used them without authorisation. His actions, as regards his employer, were deceitful.
- [59] The Respondent submitted that he used Versatile's software, plans and specifications to save time and because it was easy. Even if that was the case, the Respondent, as a Licensed Building Practitioner and a person who had previously carried out developments, should have known that he was required to use an authorised person when developing and submitting a building consents and that his

actions, both as regards his employer and the submission of the building consent, were not acceptable.

- [60] The Courts have stated that the threshold for disciplinary complaints of disrepute is high, and the Board notes that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [61] The conduct was, quite clearly, very serious. The witnesses noted the damage that the Respondent's conduct had done to their reputations. The Board agrees that the actions were injurious to those persons and also to licensing regime. As such, the Board has decided that the Respondent has brought the regime into disrepute.

Penalty, Costs and Publication

- [62] 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.
- [63] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [64] 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*²² 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.

- [65] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²³. 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

²² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²³ [2012] NZAR 481

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.

- [66] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [67] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁴ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [68] The offending was very serious. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. Both offences put that confidence at risk.
- [69] 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*²⁵ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the Respondent did not engage in the investigation process in a meaningful way and did not respond to the allegations.
- [70] The Respondent's current role is as a supervisor of restricted building work at a building company. There are other Licensed Building Practitioners in the employ of his current employer. He did not suffer any employment consequences at Versatile as he had already resigned, and his employer did not pursue the matter. The Versatile franchisor made the complaint to the Board, not the employer. The Respondent owns two properties. He did not provide any matters that he considered should be taken into account as mitigation.
- [71] The Respondent did not express any remorse at his actions. He did not appear to appreciate the seriousness of his actions or to want to take responsibility for what he did. The impression the Board gained was that the Respondent was downplaying his culpability and his motivations. The Board doubted that the Respondent was only motivated by time savings.

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

²⁵ [2011] 3 NZLR 850.

- [72] The Respondent has demonstrated a flagrant disregard for the licensing regime.
- [73] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [74] Based on the above, the Board's penalty decision is that the Respondent's licence is to be cancelled and that he not be able to reapply to be licensed for a period of not less than 18 months.

Costs

- [75] 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."
- [76] 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 case²⁶.
- [77] In *Collie v Nursing Council of New Zealand*,²⁷ 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.

- [78] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁸ 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.

- [79] 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

²⁶ *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.

²⁷ [2001] NZAR 74

²⁸ CIV-2011-485-000227 8 August 2011

current matter was moderately complex. Adjustments based on the High Court decisions above are then made.

- [80] 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.

Publication

- [81] 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 Act²⁹. 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.

- [82] 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.
- [83] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³¹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³². 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*³³.
- [84] 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 interest³⁴. 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.
- [85] Based on the above, the Board will order further publication. The case is one that others can learn from, and it is appropriate that others be fully informed of the Respondent's actions.

²⁹ Refer sections 298, 299 and 301 of the Act

³⁰ Section 14 of the Act

³¹ Refer sections 200 and 202 of the Criminal Procedure Act

³² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³³ *ibid*

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

Section 318 Order

[86] 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 18 months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will 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.

[87] 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.

Right of Appeal

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

Signed and dated this 21st day of September 2021


Mr C Preston
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.*