Before the Building Practitioners Board

	BPB Complaint No. C2-01745
Licensed Building Practitioner:	Misi Sau Evile (the Respondent)
Licence Number:	BP 116267
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	21 February 2018
Decision Date:	20 March 2018

Board Members Present:

Chris Preston (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(i) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Function of Disciplinary Action

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

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

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are*

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

maintained in order to protect clients, the profession and the broader community."

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[6] The Board heard evidence from:

Misi Sau Evile	Respondent
[Omitted]	Complainant

[7] The Complainants provided an opening statement where they set out that they had trusted the Respondent to both undertake the work in accordance with the agreement between the parties and had paid the Respondent a total of $123,468.00 as a deposit and first payment for an extensive renovation and prior to work starting.

[8] The Respondent accepted that late 2016 he was aware that he was under investigation for failing to pay the required Tax to IRD and that this lead in the new year of 2017 to IRD taking action to recover the Tax and this resulted in the Respondent being declared bankrupt.

[9] The Respondent accepted that he was declared bankrupt but continued to seek payments from the Complainants but claims he was not aware this was illegal until it was pointed out to him and at that time he stopped trading and began to work for another builder.

[10] He also accepted that some of the monies he took from the Complainants were used to pay past Tax debt.

Board's Conclusion and Reasoning

[11] The Board has decided that the Respondent **has** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act) and should be disciplined.

[12] 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

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

Board considered the disrepute provisions in Board Decision C2-01111[6] and discussed the legal principles that apply.

[13] 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*[7] 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.

[14] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute *of Chartered Accountants*[8], 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.

[15] 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"[9] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[10] 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*.[11]

[16] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[12];
- honest mistakes without deliberate wrongdoing[13];

[6] Board decision dated 2 July 2015.
[7] [2013] NZAR 1519
[8] 24 September 2014
[9] 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
[10] [2012] NZCA 401
[11] [2012] NZAR 1071 page 1072
[12] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

- provision of false undertakings[14]; and
- conduct resulting in an unethical financial gain[15].

[17] 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.

[18] The Courts have also 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.*

[19] The Respondent should have known that he was no longer able to trade while bankrupt and in the Boards view is likely to have known that he was trading while insolvent yet continued to take significant payments from the complainants, some of which were used to pay Tax debt.

[20] That the value of the work completed does not come close to the amounts paid to the Respondent and further given the low contract price quoted by the Respondent it is very likely that the cost to complete will be well in excess of the original quoted figure.

[21] While the Board has no jurisdiction over contractual matters it expects LBP's to conduct their business in an ethical and professional manner. In this case whether it is in ignorance or deliberate the Respondent has continued to take significant amounts of money for a job while under investigation for tax debt and then when put into bankruptcy.

Penalty, Costs and Publication

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

[23] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

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[13] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[14] *Slack, Re* [2012] NZLCDT 40
[15] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

Penalty

[24] 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*[16] 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.*

[25] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[17] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[26] Based on the above the Board's penalty decision is that the Respondents Licence be cancelled for a period of two years.

Costs

[27] 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."

[28] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[18].

[29] In *Collie v Nursing Council of New Zealand*[19] 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.*

[30] Based on the above the Board's costs order is that the Respondent is pay the sum of $1000 toward the costs of and incidental to the Board's inquiry.

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[16] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[17] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[18] *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.
[19] [2001] NZAR 74

Publication

[31] 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[20]. 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.*

[32] 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.

[33] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[21]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[22]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[23]. 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*[24].

[34] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[25]. 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.

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

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(a)(i) and (ii) of the Building Act 2004, the Respondents Licence is to be cancelled and directs the Registrar to remove the person's name from the register: and order that the person may not apply to be relicensed before the expiry of two years from the date of this decision.**

[20] Refer sections 298, 299 and 301 of the Act
[21] Section 14 of the Act
[22] Refer sections 200 and 202 of the Criminal Procedure Act
[23] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[24] ibid
[25] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $1000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.**

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

[37] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

[38] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 April 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 20th day of March 2018



Chris Preston
Presiding Member

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[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any

case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.