

## Before the Building Practitioners Board

	BPB Complaint No. C2-01749
Licensed Building Practitioner:	Andrew Musson (the Respondent)
Licence Number:	BP 101339
Licence(s) Held:	Carpentry

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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	Auckland
Hearing Type:	In Person
Hearing Date:	28 March 2018
Decision Date:	16 April 2018

#### Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)  
Mel Orange, Legal Member  
David Fabish, LBP, Carpentry Site AOP 2  
Robin Dunlop, Retired Professional Engineer  
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 disciplinary offences under sections 317(1)(b), 317(1)(d), 317(1)(da)(ii) and 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<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section

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<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and

- (d) 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [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*<sup>4</sup> 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.”*

- [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<sup>5</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.

- [6] In addition to the documentation before the Board it heard evidence at the hearing from:

Andrew Musson	Respondent
[Omitted]	Complainant, Owner
[Omitted]	Co Complainant and Owner
[Omitted]	Witness, [Omitted], Licensed Building Practitioner –

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

## Carpentry

[Omitted]

Witness, Engineer

- [7] The Respondent was engaged to carry out a new build by the Complainants. The Respondent worked on the build between April 2016 and June 2017 but did not complete the build.
- [8] The Complainants alleged the Respondent:
- (a) failed to carry out the foundation work correctly and in accordance with the building consent and engineer's design and in particular three foundation piles were not installed under the laundry and main bathroom;
  - (b) had completed other building work in a non-compliant manner as identified by the Auckland Council;
  - (c) had stolen cedar cladding from the property;
  - (d) left the site vacant for a period of time causing deterioration of building materials; and
  - (e) failed to provide a record of work.
- [9] The Respondent provided a written response to the Complaint. In summary he stated:
- (a) the complainant has refused to make payments which has caused financial hardship on his company and himself;
  - (b) the theft of the cedar is not correct as this was unpaid for by the Complainant and was removed from the site as it was owned by him until payment was made;
  - (c) in regards to the piles missing it was discussed between himself, the project structural engineer and the earthworks contractor that the physical act of drilling was not possible so an alternative solution would need to be found;
  - (d) they stopped work on site during the RAB board installation stage of the project. The correct PVC Flashings were used as far as he has seen for inter sheet and all edges of sheets were primed as per specification;
  - (e) he did not withhold the records of work. He had been struggling to keep trading due to the vast amount of money owed to him and has only recently been able to renew his LBP license. He will supply the records of work produced under his license.
- [10] The complainant provided a copy of a High Court judgment in relation to the cedar board. The Judge has directed the Respondent to return the cedar cladding to the complainants as it was found they had in fact paid for it.

- [11] At the hearing the Complainant confirmed that a record of work had still not been provided and that the Respondent was in contempt of court for not complying with the Court Order to return the cedar weatherboards. The Complainant confirmed that a new builder had been engaged to complete the home and that more issues have since been identified and that they have or incurred considerable costs as a result of the Respondent's conduct.
- [12] Included in the documentation before the Board was evidence of a notice to the Council dated 31 July 2017 advising of a change of licensed building practitioner.
- [13] The Respondent gave evidence that he was on site 1 to 2 times a week and that he had a qualified unlicensed foreman who was on site 70% of the time as well as 2 third year apprentices.

#### Foundations

- [14] The Respondent gave evidence that it was a difficult site and that the piles in question could not be installed due to site issues. He stated that the drilling rig could not access the area where the piles were to be installed and that he believed an alternative solution was required. His evidence was that he raised it with the Engineer and that he believed he had the Engineer's site approval to continue with the construction of the foundation and the floor. The Respondent noted that structural support was provided as a temporary solution when constructing the floor. The Respondent stated he had emails which would support his contention that the Engineer had approved the pour of the floor.
- [15] The Engineer' evidence was that the foundation and floor should not have been poured until such time as a redesign was completed and that his site instruction only related to additional reinforcing steel to allow for a cantilever of the floor and that he recommended a partial pour of the floor. No site instructions were given as regards the missing piles. His opinion was that no further vertical construction should have taken place prior to a remedial solution having been constructed. Photographs showed that vertical construction had occurred including over the area where the piles should have been.
- [16] The Engineer also gave evidence that a subsequent contractor had managed to drill piles outside of the line of the foundation to remediate the issue by way of a beam tied into the floor structure.

#### Rigid Air Barrier

- [17] The Complainant gave evidence that the Respondent requested the change in rigid air barrier product from that which was consented so as to allow interior work to progress. The Respondent accepted that this was the reason for the change.
- [18] The Respondent gave evidence that he had discussed the change with the architect who was working on updating the drawings.

- [19] Evidence was also heard as to the manner in which the rigid air barrier was installed. [Omitted] from [Omitted] had made a site inspection and had provided a site Observation Form. It noted the use of incorrect tape, incorrect horizontal flashing and bulging boards. He noted that the cumulative effect of the issues, including prolonged exposure to the elements, was such that the barrier would have to be replaced. He stated that if it had been just one item then remediation may have been possible.
- [20] The Complainant also gave evidence that sheets of the rigid area barrier were full of holes.
- [21] The Respondent considered the tape used was acceptable and that he had photographs that would support this and that it was only in one area. He questioned [Omitted] who did not accept that the tape the Respondent stated he had used was acceptable nor that its use was isolated.
- [22] The Respondent also stated that a sheet with holes in it was only temporary and was installed to provide weather protection.

#### Cedar Weatherboards

- [23] The Complainants submitted that the main issue is that the Respondent is in contempt of the Court for not returning the weatherboards and that they had photographs which showed the Respondent tried to conceal the removal of the boards.
- [24] The Respondent gave evidence and made submissions to the effect that the cedar was in the possession of the liquidator of his company. The Complainant noted that the liquidation occurred well after the Court issued its orders.

#### Further Evidence

- [25] The Board allowed both the Complainant and the Respondent to file further evidence in relation to the allegations following hearing and it issued a minute to this effect.
- [26] Both [Omitted] and the Complainant provided photographs of the rigid air barrier which supported the evidence they had given.
- [27] The Complainant also provided photographs of stacks of cedar weather boards which also supported their evidence.
- [28] The Respondent provided a submission making reference to various photographs. The submissions generally put forward that the building work was either compliant or not complete. No further email correspondence with the Engineer was provided.

### Board's Conclusion and Reasoning

[29] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) 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.

[30] The reasons for the Board's decision follow.

### Negligence and/or Incompetence

[31] There are two aspects of the building work that the board has considered in respect of negligence. They are the failure to install piles and continuing to construct the build without dealing with the matter and the installation of the rigid air barrier. Matters relating to the deterioration of building materials have not been considered as they relate to contractual matters and not to the conduct of the Respondent in carrying out or supervising building work.

[32] In considering whether the Respondent has carried out or supervised the above items in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>6</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also*

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<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

*have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [33] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>7</sup> as regards the threshold for disciplinary matters:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

- [34] Dealing first with the piles the Board notes that the reason for not installing the piles was that the area where they were to be installed could not be accessed. The builders who took the site over did, however, manage to install piles in that area so the reason put forward is not accepted. Moreover, whilst the Respondent gave evidence that the Engineer had approved the pour of the floor the Engineer's evidence was at variance with this and the Respondent has not produced the emails he states support his contention. The Board does consider that the Engineer's notes and written instructions could have been clearer but notwithstanding this the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent displayed a lack of reasonably expected care in failing to install the piles or to ensure an alternative was developed and installed prior to pouring the floor and in continuing with the vertical build in the absence of a critical structural element.
- [35] Turning to the rigid air barrier the evidence before the Board showed that the incorrect product had been installed but this is a matter that will be dealt with under section 317(1)(d). There was also evidence from [Omitted], a licensed building practitioner with a carpentry licence, that the incorrect tape had been used, that a horizontal flashing was incorrect and that the barrier was bulging. Whilst the final item would most likely have been caused by issues with the foundation the fact is that the Respondent did not identify or deal with the issue. The same applies to the taping and installation of a flashing. The work was noncompliant, was not identified by the Respondent and was not dealt with and in this respect the Board has rejected the Respondent's submissions. Again the Board considered the Respondent, on the basis of those failings, displayed a lack of reasonably expected care and was therefore negligent.

#### Contrary to a Building Consent

- [36] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any

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<sup>7</sup> [2001] NZAR 74



departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

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

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

- [38] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [39] In this instance the engineer designed foundation was changed by way of the removal of three structural piles and the rigid air barrier product was changed. In both instances the work continued without building consent changes being dealt with. The Board considers that both of the changes were more than minor and that formal amendments to the building consent should have been sought before work proceeded. However, even if the changes were minor such that section 45A of the Act applied, there was no evidence that an acceptable process was followed to ensure that the changes were acceptable to the owners, the designer and/or engineer and the building consent authority prior to proceeding with them. The failure to follow such a process created a risk that the change will not be accepted.
- [40] Given the above the Board finds that the Respondent has carried out building work that did not comply with the building consent.

#### Record of Work

- [41] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>9</sup>.
- [42] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [43] The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup> and gave guidelines to the profession as to who must provide a record of work, what

<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [44] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [45] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [46] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred in 31 July 2017 when notice was given to the Territorial Authority of a change of builder. A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [47] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [48] The Respondent has submitted that he did not do a record of work as his licence had lapsed. Licence records that were before the Board show that the Respondent’s licence was suspended on 11 Aug 2017 soon after the work was complete. The Board does not, however, accept that this was a good reason as the Respondent was licensed when the restricted building work was carried out or supervised and as the record of work relates to that point in time.

#### Disrepute

- [49] 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 C2-01111<sup>11</sup> and discussed the legal principles that apply.
- [50] 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

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<sup>11</sup> Board decision dated 2 July 2015.

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*<sup>12</sup> 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.

- [51] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>13</sup>, 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.
- [52] 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"<sup>14</sup> 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*<sup>15</sup> 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.*<sup>16</sup>

- [53] 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<sup>17</sup>;
- honest mistakes without deliberate wrongdoing<sup>18</sup>;
- provision of false undertakings<sup>19</sup>; and
- conduct resulting in an unethical financial gain<sup>20</sup>.

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<sup>12</sup> [2013] NZAR 1519

<sup>13</sup> 24 September 2014

<sup>14</sup> 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

<sup>15</sup> [2012] NZCA 401

<sup>16</sup> [2012] NZAR 1071 page 1072

<sup>17</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>18</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>19</sup> *Slack, Re* [2012] NZLCDT 40

<sup>20</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [54] 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.
- [55] The alleged disrepute in this case relates to the removal of cedar weatherboards from site and the failure to return them. In this respect the Board was provided with documentation relating to High Court injunction proceedings. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court<sup>21</sup> and it seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding.
- [56] The Board considers, in this case, that estoppel applies as regards the findings and orders of the High Court. As such the Board need not make further inquiry with regard to the facts as they relate to the cedar weatherboards.
- [57] The High Court orders have not been complied with and the Complainant has submitted that the Respondent is now in contempt of court. The Board agrees. The Respondent has disobeyed and continues to disobey an order of the Court and the Board does not accept the Respondents reason that he cannot comply due to the litigation of his company. The litigation came after the court order and the Respondent did not produce any evidence to show that he had in any way attempted to comply or attempted to get the liquidator to comply. He has simply ignored the matter.
- [58] By being in contempt of a court order, and taking the principles relating to disrepute noted above into account, the Board finds that the Respondent has brought the regime into disrepute.
- [59] The Board also finds that the Respondent has brought the regime into disrepute by taking possession of the weatherboards when he had no entitlement to them and in the manner in which he took possession in that he tried to conceal their removal. Such conduct is not to be condoned from a licensed building practitioner.

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

- [60] Having found that one or more of the grounds in section 317 applies 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.

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<sup>21</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

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

### Penalty

- [62] 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*<sup>22</sup> 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.*

- [63] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>23</sup> 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.
- [64] The matters before the Board are serious, especially those relating to disrepute, and the Respondent's conduct has had a significant impact on the Complainants. A commensurate penalty is warranted not only to punish but to create a deterrent to others. There is little if any mitigation present other than in relation to the piles where engineer instructions were not clear and concise.
- [65] Based on the above the Board's penalty decision is that the Respondent be censured and that he pay a fine of \$4,000. The Respondent should note that a censure is a formal expression of disapproval.

### Costs

- [66] 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."
- [67] 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

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<sup>22</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>23</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>24</sup>.

- [68] In *Collie v Nursing Council of New Zealand*<sup>25</sup> 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.*

- [69] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

#### Publication

- [70] 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>26</sup>. 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.*

- [71] 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.
- [72] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>27</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>28</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>29</sup>. 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*<sup>30</sup>.
- [73] 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<sup>31</sup>. It is,

<sup>24</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>25</sup> [2001] NZAR 74

<sup>26</sup> Refer sections 298, 299 and 301 of the Act

<sup>27</sup> Section 14 of the Act

<sup>28</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>29</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>30</sup> *ibid*

<sup>31</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

- [74] Based on the above the Board will order further publication. The publication is to focus on the Board's findings as regards disrepute.

### **Section 318 Order**

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

<b>Penalty:</b>	<b>Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured; and</b>  <b>Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$4,000.</b>
<b>Costs:</b>	<b>Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.</b>
<b>Publication:</b>	<b>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.</b>  <b>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.</b>

- [76] 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.

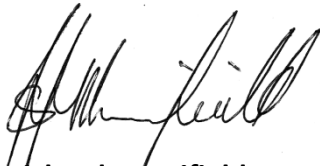
### **Submissions on Penalty, Costs and Publication**

- [77] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **9 May 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**

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

Signed and dated this 16<sup>th</sup> day of April 2018



**Richard Merrifield**  
Presiding Member

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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:*
    - (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."*

**<sup>ii</sup> 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.*