

## Before the Building Practitioners Board

|                                 |                                 |
|---------------------------------|---------------------------------|
|                                 | BPB Complaint No. C2-01854      |
| Licensed Building Practitioner: | Misi Sau Evile (the Respondent) |
| Licence Number:                 | BP 116267                       |
| 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:              | 5 September 2018  |
| Decision Date:             | 28 September 2018 |

#### Board Members Present:

Chris Preston (Presiding)  
Richard Merrifield, LBP, Carpentry Site AOP 2  
Mel Orange, Legal Member  
Robin Dunlop, Retired Professional Engineer

#### 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)(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) 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
- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

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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.

### 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] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

[7] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and the Complainant.

[8] The Complaint related to an agreement between the Respondent and the Complainant whereby the Respondent would build a new residential dwelling for the Complainant. The terms of the quote dated 28 September 2016 were that the Respondent would construct a 462m<sup>2</sup> for \$617,000 including GST. The total price included design fees provided by a third party at \$45,150 including GST leaving a total build cost of \$517,850 including GST. Included in the build price was:

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<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

- All Council and compliance fees, building consents and approvals etc
- All necessary and required insurances to cover and protect this project. Client to arrange own insurances
- New Power Connection.
- New water and waste water connection
- All earth works, cut and fill, site clearance including driveway and vehicle access
- All building and construction including all wood and steel construction work.
- New central heating
- New gas fire place
- All gas services
- Kitchen fixtures & fittings including benchtops & cupboards
- All appliances including kitchen and laundry
- All floor coverings including all tiles and carpet
- Feature foyer entry
- All ensuite including all fittings
- All window coverings and curtains - owners' choice all finishing work
- All landscape and concrete, paths and driveway
- All aluminium double glaze windows and doors and cedar louvres
- Colour steel iron roof
- All painting exterior and interior as per plan
- All lighting and main entry feature chandelier
- All drainage and plumbing
- All cedar and schist stone cladding as per plan

- [9] The build was on a semi-rural lifestyle site well set back from the road. It was a high spec two story home. It was not a simple design. The designer was contracted by and instructed by the Respondent.
- [10] The terms of the quote provided by the Respondent and signed by both parties on 28 September 2016 were that a 25% deposit would be paid on signing followed by progress payments with the first being 20% on floor and framing completion. Completion was to be in six months.
- [11] The quote was in the name of [Omitted]. A limited liability company of that name and belonging to the Respondent's son had been removed from the register on 22 February 2016. The Respondent accepted that he was contracting under a trading name.
- [12] The quote was the only contractual documentation provided. No disclosure or contractual documentation as per the requirements of the Building (Residential Rights and Remedies) Regulations 2014 were provided by the Respondent. The Respondent was asked if he was aware of his obligations under Part 4A of the Building Act and the aforementioned regulations. He stated he was but was not able to articulate what those obligations were.

- [13] The Complainant stated that prior to signing the quote \$10,000 was paid for the building consent, \$6,500 to connect the power to the site and \$9,575.57 for the excavation of the site to begin. He further stated:

*In total we released \$26,075.57 to [the Respondent]. As soon as the agreement was signed we released a further \$145,962.50 to [the Respondent] and within a week [the Respondent] requested a further \$45,000 to be advanced from the Stage 2 payments to pre-purchase materials. In total we released \$217,038.07 to [the Respondent].*

- [14] The total amount paid of \$217,038 amounted to approximately 35% of the total build value. The Respondent stated that he always sought a 25% deposit as he had been caught in the past having done work for which he was not paid.

- [15] The Respondent was questioned as to how he arrived at the quoted amount. His answers were vague and inconsistent but in summary he stated that he prices all of his jobs on the basis of \$1,500 per square metre plus GST. For this job the initial discussions were for a house of 400m<sup>2</sup> and he knew what the client's budget was. When the design was presented at 462m<sup>2</sup> he believed he could still deliver the build for the clients budgeted amount. The complainant noted that they had the drawings and the price before agreeing to the quote as they needed them to get bank approval for the lending they would take out for the build.

- [16] The build commenced on or about 30 September 2016. The Complainant had concerns about the Respondent and progress early on in the project. The Complainant noted:

- (a) after the payments had been made the Respondent turned up in a new Nissan Navara utility. The Respondent stated this was obtained on a no deposit hire purchase arrangement;
- (b) the contractor who carried out the excavations contacted him noting that he was having difficulty getting paid by the Respondent; and
- (c) the power connection that had been paid for was not carried out and was only progressed in 2017 after the Complainant informed the Respondent that the contract would be brought to an end if it was not attended to.

- [17] With regard to progress the build was described as start and stop with long periods of no activity. The Respondent stated that he did have two other jobs on at the time. The Complainant stated that the Respondent presented them with a number of excuses and that he sought an extension of time that was granted to October 2016. The delays in progress resulted in timber framing, which the Respondent stated was cut and nailed on site, turning black and nails rusting from exposure to the elements. Photographs produced showed this weathering to framing at the same time as new framing and steel work was being installed. The framing took over three months and was not completed.

- [18] The Respondent was questioned about what he was going to do about the blackened timber. He stated he was going to get a supplier representative to check it and that he would either spray it or replace it at his cost.
- [19] The Complainant's statements included references to communications he had with another person who had engaged the Respondent to carry out building work. He stated that in August 2017 the Complainant received a phone call from a Pastor concerning the Respondent's whereabouts as he had contracted him to renovate his house and that the Pastor made allegations that the Respondent had misappropriated some \$100,000 in funds from him.
- [20] In August 2017, the Respondent advised the Complainant that he was bankrupt and that everything was out of his control. The Complainant stated:
- He [the Respondent] advised us that he could not finish our home and that he had no money. When we asked him about the whereabouts of our money he said there was nothing. I then found out that apparently [the Respondent] had just come out of another bankruptcy just before engaging us...*
- [21] The Respondent asked the Complainant to allow him to complete the house for no payment. When the Complainant asked the Respondent to advise how much he would need to complete our house he said about \$750,000 on top of the \$217,038.07 that was already paid.
- [22] Evidence was also received and heard as regards the Respondent's insolvency history. The Respondent was discharged from bankruptcy on 16 March 2016, entered into the agreement to build the house on 28 September 2016, was being pursued by Inland Revenue for unpaid taxes in mid-November 2016 and was adjudicated as bankrupt on a creditors petition on 22 June 2017.
- [23] The Respondent blamed his accountant for the insolvency. He stated he had paid the money to his accountant who then absconded with it. He was not able to produce any evidence to substantiate this stating that he could no longer access any records. He did not make a police complaint about the accountant. The Respondent also blamed his earlier insolvency on other persons and his having to make good on a guarantee to a building supplier.
- [24] The Respondent was also unable to produce any evidence to substantiate how the funds paid to him had been expended on the build. He stated that this was because of the insolvency proceedings against him.
- [25] In December 2017 the Complainant dismantled the house. The beams and salvaged timber is now stored on the foundation.
- [26] The Respondent, at the hearing, stated that he agreed with everything that had been put forward in the complaint and that he was deeply sorry.
- [27] With regard to the record of work the Respondent stated that he has the inspection records for the foundations and that he can do a record of work.

[28] The Complainant provided a personal statement which included the impact the Respondent's conduct has had on him and his family. He noted that they have lost 20 years of their savings and that it will take them seven years to recover from their losses.

### **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 and incompetent manner (s 317(1)(b) of the Act);
- (b) 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);
- (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.

### Negligence and/or Incompetence

[30] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>6</sup> Judge McElrea noted:

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

[31] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[32] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*<sup>9</sup> it was stated as "*an inability to do the job*".

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

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

- [33] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>10</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [34] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>11</sup>. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>12</sup>.
- [35] The Board notes that the purposes of the Act are:

### **3 Purposes**

*This Act has the following purposes:*

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
  - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
  - (iii) *people who use a building can escape from the building if it is on fire; and*
  - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

- [36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>13</sup> and be carried out in accordance with a building consent<sup>14</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>13</sup> Section 17 of the Building Act 2004

<sup>14</sup> Section 40(1) of the Building Act 2004



- [37] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>15</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

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

- [38] The potential negligence and incompetence, in this instance, related to the Respondent's pricing of the building work. In essence it was not the carpentry carried out by the Respondent that the Board was inquiring into but the pre-contractual processes. In this respect the question for the Board is whether the Respondent's processes can come within the definition of "building work" as defined by the Act as section 317(1)(b) relates to carrying out or supervising "building work".

- [39] The term "building work" is defined term in s 7 of the Act as follows:

*building work —*

*(a) means work—*

*(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*

*(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

*(b) includes sitework; and*

*(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and*

*(d) in Part 4, and the definition in this section of "supervise", also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.*

- [40] The phrase "for, or in connection with" in the definition connotes a wide range of matters that could be brought into play and conceivably the processes and systems used to manage the construction, alteration, demolition or removal of a building.

- [41] The Board, in interpreting the phrase, is required to do so in such a way as to give effect to the purpose of Parliament<sup>16</sup>. The Board may, if necessary in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 Purposes of the Act, section 14E Responsibilities of the Builder, section 282A Purposes of Licensing Building Practitioners and Part 4A Consumer Rights and Remedies in Relation to Residential Building Work are relevant.

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<sup>15</sup> [2001] NZAR 74

<sup>16</sup> Refer s 5 of the Interpretation Act 1999

[42] The provisions, other than Part 4A, use similar references to the systems and process used to achieve the resulting object of building work and of its compliance with a building consent and the building code.

[43] Part 4A, however, introduces contractual and other provisions that must be adhered to in respect of residential building work. Section 362A sets out:

**362A Outline of this Part**

*This Part protects consumers (referred to in this Part as clients) in relation to residential building work by—*

- (a) *requiring certain information to be provided before a residential building contract is entered into; and*
- (b) *prescribing minimum requirements for residential building contracts over a certain value; and*
- (c) *implying warranties into residential building contracts; and*
- (d) *providing remedies for breach of the implied warranties; and*
- (e) *requiring defective building work under a residential building contract to be remedied if notified within 1 year of completion; and*
- (f) *requiring certain information and documentation to be provided on completion of building work under a residential building contract.]*

[44] In addition to Part 4A of the Act the Building (Residential Consumer Rights and Remedies) Regulations 2014 were introduced. Those regulations include specific detail and requirements for disclosure and checklists as well as prescribed contractual clauses. The prescribed contractual clauses include requirements “for negotiating and agreeing on variations to the building work”.

[45] The Board notes that the requirements of Part 4A of the Act or of Building (Residential Consumer Rights and Remedies) Regulations were not met. no disclosure information was provided. A contract meeting the minimum requirements was also not provided.

[46] The Board has also considered the Licensed Building Practitioners Rules 2007 (the Rules). Rule 4 states:

**4 Minimum standard of competence for each class of licence**

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

[47] Within the Carpentry class of licence and relevant to the present conduct Schedule 1 Competency 3: Carry out planning and scheduling for carpentry work states:

- 3.1 *Read and interpret working drawings, specifications, programme schedules and quantity lists.*

### 3.2 *Order and coordinate material supply.*

*May include but not limited to - ability to measure, calculate and estimate quantities, order and coordinate material supply.*

- [48] The Board has considered the significance of the introduction of Part 4A and has decided that Parliament's intention was to extend the meaning of "building work" when it relates to residential building work so as to include the associated contractual processes. The Board also considers that the conduct in question comes within the parameters of the Rules which supports the conclusion that, in this instance, the conduct in question falls within the definition of "building work".
- [49] Having made this decision the Board needs to consider the evidence to assess whether the Respondent's conduct falls within the definitions of negligence and/or incompetence as outlined above.
- [50] Looking at the evidence the Board which includes persons with extensive experience and expertise in the building industry, considered the Respondent not only displayed a lack of reasonably expected care in pricing the project and was thus negligent but that he also displayed a lack of ability, skill or knowledge and was therefore shown to be incompetent.
- [51] The Board's decision has been based on the quotation and figures presented by the Respondent who stated that he prices his jobs at \$1,500 plus GST per square metre. Using that amount (excluding design costs which were not part of the build rate) the following are the relevant amounts:

| <b>Build Size</b> | <b>At \$1,500</b> | <b>Plus GST</b> | <b>Quoted</b> | <b>Difference</b> |
|-------------------|-------------------|-----------------|---------------|-------------------|
| 400m <sup>2</sup> | \$600,000         | \$690,000       | \$571,850     | \$118,150         |
| 462m <sup>2</sup> | \$693,000         | \$796,950       | \$571,850     | \$225,100         |

- [52] In essence the Respondent's, on the basis of his own methodology, had under-priced the job by a quarter of a million dollars or, in percentage terms, by 39.36%. His actual per square metre build rate was \$1,237/m<sup>2</sup> including GST or \$1,076/m<sup>2</sup> excluding GST.
- [53] Added to this the Respondent's price included an extensive list of items that would not normally be included in a per square metre build rate.
- [54] The Board severely doubts that the house without the additional items could have been built for a GST exclusive square metre rate of \$1,500 let alone \$1,076 which was the Respondent rate. A more realistic rate to build a home of the design and quality that was presented would have been \$3,000 per square metre excluding all the majority of extra items listed in paragraph [8]. If the items included in paragraph [8] were added in then the per square metre rate would be considerably higher.

- [55] The Board finds that it was more likely that the Respondent was simply agreeing to build for the amount the Complainant's had available and that he did not turn his mind to what the actual build costs were. A competent and reasonable builder would obtain supplier pricing for a job of this nature and would cost out the promised additional items or provide provisional sums for them. If a per square metre rate was used then they would at least use a realistic per square metre rate which reflected the building work to be undertaken.

### Record of Work

- [56] 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>17</sup>.
- [57] 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.
- [58] The Board discussed issues with regard to records of work in its decision C2-01170<sup>18</sup> and gave guidelines to the profession as to who must provide a record of work, what 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.
- [59] 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.
- [60] 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 ...".
- [61] 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 August 2017 when the Respondent abandoned the contract. A record of for the restricted building work that had been completed 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.
- [62] 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

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<sup>17</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>18</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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. No good reasons were put forward.

### Disrepute

- [63] 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>19</sup> and discussed the legal principles that apply.
- [64] 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*<sup>20</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.
- [65] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>21</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.
- [66] 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>22</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>23</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*

<sup>19</sup> Board decision dated 2 July 2015.

<sup>20</sup> [2013] NZAR 1519

<sup>21</sup> 24 September 2014

<sup>22</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>23</sup> [2012] NZCA 401

*the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>24</sup>

- [67] 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>25</sup>;
  - honest mistakes without deliberate wrongdoing<sup>26</sup>;
  - provision of false undertakings<sup>27</sup>; and
  - conduct resulting in an unethical financial gain<sup>28</sup>.
- [68] 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.
- [69] In C2-01124 the Board found that conduct similar to that in the present case had brought the regime into disrepute. The conduct in question in that case was the business process and systems used. Similar facts apply to the present case.
- [70] In C2-01688 the respondent was found to have been negligent in his pricing but in that case the respondent was not found to have brought the regime into disrepute as the negligent error was not intentional. The same does not apply here. The Board considers the conduct was intentional and that the Respondent has brought the regime into disrepute.
- [71] In the present case the Board considered that the Respondent provided a quote with no real intention or ability to complete the work for the stated price. He was simply securing the work and a sizeable deposit which went far beyond industry standards for deposits. He then obtained other payments and failed to deliver the value of the building work that he had agreed to. It appeared to the Board that he was inducing the Complainant to enter into the financial arrangement in circumstances that bordered on, if not were actually, fraudulent.
- [72] Additionally the Respondent had only recently been discharged as a bankrupt, a fact that he did not disclose to the Complainant, and knew or ought to have known that he was once again getting into in financial difficulty but did not warn the Complainant of his impending further bankruptcy. His bankruptcy history shows that

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<sup>24</sup> [2012] NZAR 1071 page 1072

<sup>25</sup> *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

<sup>26</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>27</sup> *Slack, Re* [2012] NZLCDT 40

<sup>28</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

there is a pattern to this type of behaviour and the Respondent admitted he carried on working on the property after being adjudged bankrupt.

- [73] It should also be noted that the Respondent's conduct has also caused real financial loss and emotional harm to the Complainant and his family. It is also not the first time that the Respondent has appeared before the Board for such conduct.
- [74] The question for the Board is whether it should countenance such behaviour from a licensed building practitioner. 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.*

- [75] This is a very serious case and one in which the behaviours described above have occurred. As such the board finds that the Respondent has brought the regime into disrepute.

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

- [76] 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.
- [77] 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. Included was the Respondent's expressions of remorse.

#### Penalty

- [78] 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>29</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.*

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<sup>29</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [79] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>30</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.
- [80] The Board notes that this is the third time that it has made a disciplinary finding as regards the Respondent. The most recent<sup>31</sup> was for very similar conduct when the Respondent was again found to have brought the regime into disrepute. Whilst the conduct in that case was at or about the same time as this it does show a pattern of disciplinary offending. The Respondent's licence was cancelled for a period of two years on the disrepute finding when he last appeared before the Board.
- [81] The Respondent has expressed remorse and apologised to the Complaint. The Board questions the genuineness of that apology.
- [82] The Board considers the Respondent poses a genuine and continuing risk to the public. He is not a person who should hold a licence.
- [83] Based on the above the Board's penalty decision is that the Respondent's licence be cancelled for a period of 10 years. The cancellation period is to run concurrently with that of the cancellation ordered in C2-01745.

#### Costs

- [84] 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."
- [85] 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<sup>32</sup>.
- [86] In *Collie v Nursing Council of New Zealand*<sup>33</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.*
- [87] 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.

<sup>30</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>31</sup> C2-01745

<sup>32</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>33</sup> [2001] NZAR 74



## Publication

[88] 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>34</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.*

[89] 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.

[90] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>35</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>36</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>37</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>38</sup>.

[91] 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>39</sup>. 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.

[92] Based on the above the Board will order further publication. Publication is important so that others learn from the case and so that the public are informed of the Respondent's conduct.

[93] Publication will be by way of Code Words and the Board's website.

## **Section 318 Order**

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

**Penalty:** Pursuant to s 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 s 318(1)(a)(ii) of the Act the Board

<sup>34</sup> Refer sections 298, 299 and 301 of the Act

<sup>35</sup> Section 14 of the Act

<sup>36</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>37</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>38</sup> *ibid*

<sup>39</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**orders that the Respondent may not apply to be relicensed before the expiry of 10 years from 7 May 2018.**

**Costs:** 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.

**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 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.**

- [95] 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**

- [96] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **19 October 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.
- [97] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

#### **Right of Appeal**

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

Signed and dated this 28<sup>th</sup> day of September 2018

  
**Chris Preston**  
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.*