

Before the Building Practitioners Board

	BPB Complaint No. CB24924
Licensed Building Practitioner:	Joseph James Ennis (the Respondent)
Licence Number:	BP 128232
Licence(s) Held:	Roofing – Metal Tile Roof

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	Board Inquiry
Hearing Location	Tauranga
Hearing Type:	On the Papers
Hearing Date:	30 January 2019
Decision Date:	8 February 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
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)(a) of the Act.

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Introduction

- [1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to the Respondent’s conduct. The alleged disciplinary offence the Board resolved to investigate was that the Respondent had been convicted by a court in New Zealand of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work.

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 committed⁵. 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.
- [7] In this case the Board decided that no further evidence was required. If a Respondent provides further evidence or submissions the Board takes them into account. If they request an in-person hearing this is given consideration.
- [8] The Respondent was convicted in the District Court in Auckland of one charge of rape⁶. The facts of the case need not be traversed. In sentencing the Judge noted a number of aggravating factors and he found that the appropriate starting point was eight years imprisonment. He then noted:
- [36] *Given your other sexual offending, your actual age at the time of this offending and your age now, your uncertain prospects of real rehabilitation, I give you a four month discount to reflect your youth. You are sentenced to seven years and eight months’ prison.*
- [9] The Board was provided with sentencing notes from the District Court. 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 court⁷.
- [10] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are that:

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

⁶ *R v Ennis* [2018] NZDC 6929

⁷ 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).

- (a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties⁸.
- (b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action⁹.
- (c) Issue estoppel can only be founded on findings which are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel, however definite the language in which they are expressed¹⁰.
- (d) The purpose of any estoppel is to work justice between the parties. It is therefore open to the courts to recognise that in special circumstances inflexible application of an estoppel may have the opposite result¹¹. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: "A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice"¹².

[11] The Board considers, in this case, that estoppel applies as regards the judgements made by the District Court. As such, given the acceptance of the facts by the Respondent and the estoppel, the Board need not make further inquiry with regard to the facts that led to the complaint.

[12] The Respondent did not engage in the investigation which was brought to his attention.

Board's Conclusion and Reasoning

[13] The Board has decided that the Respondent **has** been convicted by a court in New Zealand of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work.

[14] The disciplinary provision in s 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent "*a licensed building practitioner has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more*".

[15] The second element of the disciplinary charge is "*Does the commission of that offence(s) reflect adversely on the person's fitness to carry out or supervise building work or building inspection work*".

⁸ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352

⁹ *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41

¹⁰ *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce

¹¹ *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry

¹² *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

- [16] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person.
- [17] Unlike other licensing regimes the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply¹³. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of s 317(1)(a) and it does not matter that the criminal offending predated the person being licensed.
- [18] Other licensing regimes have similar post licensing provisions as regards fitness to be a licensee. Within the legal profession s 241(d) of the Lawyers and Conveyancers Act 2006 provides for a charge of "*has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute*". In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*¹⁴ the High Court stated:

[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.

[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.

[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the

¹³ Compare with the licensing provisions in s 91(d) of the Electricity Act 1992 and s 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

¹⁴ [2013] 3 NZLR 103

future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.

[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

- [19] Applying the tests and factors outlined above the Board finds that the second element of 317(1)(a) has been established in that the conviction reflect adversely on the Respondent's fitness to carry out or supervise building work. The crime committed was very serious and the penalty imposed reflects as much. The sentencing notes indicate that the Respondent defended the charge and that he misled the police during the investigation. The offending was noted by the Judge to have been premeditated and deliberate and that there was a lack of genuine remorse.

Penalty, Costs and Publication

- [20] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [21] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [22] 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*¹⁵ 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.

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [23] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*¹⁶. The High Court when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [24] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [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] Taking all of the above factors into account and the Judge's sentencing comments the Board considers that cancellation of the Respondent's licence is warranted.
- [27] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of 10 years.

Costs

- [28] 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."
- [29] 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 case¹⁸.

¹⁶ [2012] NZAR 481

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.

- [30] 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.

- [31] The Board notes the matter was dealt with on the papers. Ordinarily costs for a hearing would be in the order of \$1,000 but the Board has reduced this to \$500 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [32] 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 Act²⁰. 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.

- [33] 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.
- [34] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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.
- [35] 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 interest²⁵. 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.

¹⁹ [2001] NZAR 74

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

- [36] Based on the above the Board will order further publication in code words and a general media release.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 10 years.

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

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

- [38] 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

- [39] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 March 2019**. 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.
- [40] 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

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

Signed and dated this 8th day of February 2019



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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- (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.*