

**BPB Complaint No. C2-01312**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

Rex Wood, Licensed Building Practitioner No. BP 102304

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] The Complainant lodged a complaint with the Building Practitioners' Board (the Board) on 26 November 2015 in respect of Rex Wood, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 28 September 2010.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- |                    |                             |  |
|--------------------|-----------------------------|--|
| Richard Merrifield | Deputy Chair<br>(Presiding) | Licensed in Carpentry and Site Area<br>of Practice 2 |
| Mel Orange         | Board Member                | Legal Member appointed under s<br>345(3) of the Act  |
| Robin Dunlop       | Board Member                | Retired Professional Engineer                        |
| Catherine Taylor   | Board Member                | Layperson  |

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[6] The matter was considered by the Board in Auckland on 1 February 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Sarah Romanos	Board Secretary
Leia McEvoy	Board Secretary
Rex Wood	Respondent
John Rennie	Technical Assessor for the Board
Rob Davis	Technical Assessor for the Board

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### **Board Procedure**

[9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[10] On 5 April 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

[11] On 28 April 2016 the Board considered the Registrar's report and resolved that a Technical Assessor be engaged to carry out further investigations.

[12] On 10 October 2016 the Registrar produced an Addendum Report which included a report dated 28 July 2016 from John Rennie as the Board's Technical Assessor.

[13] On 3 November 2016 the Board considered the Registrar's report and Addendum and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:

- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (a) has conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[14] On 18 January 2017 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present. The hearing procedures were explained and his attendance at the substantive hearing was confirmed.

### **Function of Disciplinary Action**

[15] The common understanding of the purposes 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<sup>1</sup>.

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

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[16] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>2</sup>:

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[17] In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>3</sup> Collins J. noted that:

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

[18] The same applies as regards the disciplinary provisions in the Building Act.

[19] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

### **The Hearing**

[20] The hearing commenced at 10.05 a.m.

[21] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

### **Substance of the Complaint**

[22] The allegations related to the removal of existing decks and the construction of replacement decks. The complaint disclosed issues with regard to the scope of the work and the amount charged by the Respondent for it, the quality and compliance of the building work and whether it required a building consent.

### **Evidence**

[23] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>4</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists,*

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

<sup>4</sup> [2009] 1 NZLR 1

*between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[24] The Complainant set out the following:

- (a) she initially contacted the Respondent after noticing a loose nail on the frame of a glass wind break on the side of her north facing deck;
- (b) her normal builder was not available, she contacted the Respondent from a newspaper advert;
- (c) the Respondent was very charming and reassuring. He stated he specialised in working for elderly ladies;
- (d) the Respondent, on attending her property, advised that there were items that required attention and the cost would be around \$7,000. He undertook to advise of any other costs should they arise;
- (e) without further consultation both decks were removed. She described the situation as frightening as she lives on her own and is a pensioner on a fixed income;
- (f) new decks were constructed;
- (g) she felt she had been talked into the rebuild of the decks and felt at the time that she had no energy to resist. She subsequently found out that she was unwell during that time;
- (h) by the end of the construction of the first deck she had paid \$30,000;
- (i) prior to construction of the second deck starting she insisted that the Respondent advise of any additional costs;
- (j) she was advised by the Respondent that she had already paid for the materials for the second deck. The costs would be another \$30,000 which included painting;
- (k) when the work was complete the Respondent asked her for another \$3,000 in cash. He said it was owed due to a mistake on the invoicing and it was for his brother who did the painting. At the hearing it was heard that the Respondent required the cash for his brother who was travelling to Australia; and
- (l) in total the Respondent paid a total of \$64,509.96 for the rebuilding of the two decks.

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- [25] The Complainant was not provided with a contract. She included copies of the invoices received with her complaint. She also described the personal impact that the events had on her.
- [26] The Respondent initially responded to the complaint by way of a phone call on 1 December 2015 to a Board investigator. He stated he had not been able to return to the property to deal with matters raised by the Complainant as he was unwell and was having surgery.
- [27] On 14 March 2016 the Respondent was contacted as he had still not formally responded to the complaint. The Respondent then provided a written response dated 30 March 2016. He stated:
- (a) he carried out minor repairs to the glass to make it stable prior to going on holiday. On his return he encouraged the Complainant to carry out further repairs as he suspected areas were rotten;
  - (b) it was agreed that he would carry out work on a charge up basis. He denied a figure of \$7,000 was discussed;
  - (c) part way through demolition of the front deck it was agreed the best way forward was to remove all the rot from the structure and start again;
  - (d) he gave a verbal estimate of \$40,000 and it was agreed they would demolish the other deck on the north side on a charge up basis;
  - (e) the Respondent also made statements as to how he thought water ingress into the original decks was occurring and how he attempted to seal leaks in the new decks with silicon;
  - (f) he also made statements as to how the Complainant was happy with his work as it was progressing and how they had a good relationship during the build.
- [28] The Board obtained two Technical Assessor reports. The first from John Rennie was in relation to the quality and compliance of the building work and whether it required a building consent. The second from Robert Davis was from a Quantity Surveyor as regards the costs charged.
- [29] John Rennie noted:
- (a) in considering the extent of the works the scope did not fall within the definition of repairs, maintenance and replacement as defined within Schedule 1 of the Building Act;
  - (b) elements of the work have been constructed in a manner that will fail to meet the performance requirements of the Building Code and in particular the following clauses:
    - B1: Structure
    - B2: Durability
    - F2: External Moisture
    - F2: Hazardous Building Materials
  - (c) full details of the non-compliance were set out in his report; and
  - (d) the correct removal procedures for the asbestos containing wall sheeting, soffit cladding and the bituminous membrane were not followed.
- [30] In questioning the Respondent stated his role was mainly in project management and supervision. He did little in the way of actual physical work. He had a contracted

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person doing the work and that person had an apprentice with him. He had no other jobs that he or his workers were engaged in at the time.

- [31] John Rennie clarified at the hearing that as complete removal and reconstruction of the decks had taken place clause 1 of Schedule 1 did not apply. He also confirmed that had a consent been applied for and granted then the issues identified as regards compliance would most likely not have occurred.
- [32] Robert Davis's report noted:
- (a) a review of the invoices shows a total of \$70,369.11 including GST had been charged;
  - (b) the estimated total cost for demolition of the original decks and their reconstruction on a like for like basis was estimated at \$37,436.47 including GST. The estimated excluded reasonable costs associated with design and compliance;
  - (c) the cost difference was \$32,932.64; and
  - (d) the Complainant will incur further costs if a Certificate of Acceptance for unconsented works is applied for.
- [33] The Respondent gave evidence that he had contacted the Auckland Council to ascertain whether a consent was required and was informed that the work could be carried out as repair and maintenance. He accepted in questioning that he did not advise them of the full extent of the works to be undertaken and his enquiry was before he undertook the complete deconstruction and rebuilding of the decks and that he did not make further inquiries of the Auckland Council when the scope expanded.
- [34] The Complainant gave evidence that she did not see any particular safety measures put in place for asbestos removal and that lots of dust was left behind. The Respondent stated he took steps to ensure safety but did not implement a Site Specific Safety Plan, the asbestos was double bagged and he paid a person at a dump site two lots of \$400 cash to dispose of the asbestos. He did not know how it was disposed of.
- [35] The Respondent accepted the findings in quantity surveyors report and stated he wants to put it right. He was asked how he could substantiate his invoice claims. He was not able to do so. He did not produce the invoices for materials he charged for and stated his diary and iPhone which he could have used to substantiate hours worked was stolen when his car was broken into. He accepted that he had poor office processes and that these created a risk of overcharging.
- [36] The Respondent was questioned as to his charge out rates. He stated he charged himself and his qualified builder at \$70-75 per hour and his apprentice at \$55 per hour. He charged a margin on materials of 15%. Robert Davis gave evidence that the rates were high for 2014. He used market rates of \$50 per hour for qualified persons.
- [37] The Respondent expressed his remorse and stated he would like to compensate the Complainant.

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## Boards Conclusion and Reasoning

### Negligence and Incompetence

[38] The Board has found in previous decisions<sup>5</sup> that a licenced person who commences or undertakes building work without a building consent could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct can come within the provisions of s 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068<sup>6</sup>.

[39] More recently the High Court in *Tan v Auckland Council*<sup>7</sup> the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

*[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.*

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[40] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[41] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required.

[42] The Board notes the comments of John Rennie as regards Schedule 1 not applying. It also notes the Respondent's evidence that he had called the Auckland Council customer service centre part way through the work to enquire as to whether a building consent was required, he advised them that it was an existing deck, there was a lot of rotten joists and that he was replacing the deck with the same size. He did not advise them that it was a complete deconstruction and the construction of new decks or make further enquiries when the scope of work increased.

[43] Schedule 1 clause 1 provides:

**1 General repair, maintenance, and replacement**

(1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*

(2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*

(a) *a comparable component or assembly is used; and*

<sup>5</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>6</sup> Board Decision C2-01068 dated 31 August 2015

<sup>7</sup> [2015] NZHC 3299 [18 December 2015]

- (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
  - (a) *complete or substantial replacement of a specified system; or*
  - (b) *complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or*
  - (c) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
  - (d) *sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

[44] In this instance the decks were removed and reconstructed. The Technical Assessor noted that the decks contributed to the buildings structural behaviour. As such sub clause (3)(b) comes into effect and Schedule 1 clause 1 does not apply. A building consent was required.

[45] The Board also notes the original decks failed and this was most likely as a result of water ingress. The new decks contain many of the design features that caused the original decks to fail especially as regards water ingress. Given this the Respondent should have been on notice that a design was required and that a consent process should be used. The Respondent should have also been aware of the provisions of Schedule 1 and that the work being undertaken went beyond repair and maintenance and that a building consent was required.

[46] The Board therefore finds that the Respondent has been negligent. In coming to this decision the Board has taken into consideration the tests in *Beattie v Far North Council*<sup>8</sup> and the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>9</sup> as regards the threshold for disciplinary matters.

[47] The Board also finds that the Respondent has been negligent in how the building work was carried out. The Technical Assessor identified serious issues as regards the compliance of the building work carried out. A reasonable building practitioner would have ensured the building work was carried out in accordance with the requirements of the Building Code.

[48] The negligence as regards the building work also extends to the failure to ensure correct health and safety procedures were used when dealing with asbestos. The health and safety of workers and the safety of buildings is interwoven into the Building Act, the Building Code and the competencies required of licensed building practitioners<sup>10</sup>. Ensuring the health and safety of workers and the public is essential. In this instance the Respondent did not carry out a site specific safety assessment before commencing and the evidence heard was that he failed to follow the recommended guidelines for the removal of asbestos. In doing so he put his workers, the Complainant and the general public at risk.

<sup>8</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>9</sup> [2001] NZAR 74

<sup>10</sup> Refer to the Licensed Building Practitioner Rules 2007



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## 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 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>;

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

<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

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- provision of false undertakings<sup>19</sup>; and
- conduct resulting in an unethical financial gain<sup>20</sup>.

- [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] In the case before the Board the issue was the disparity between what was charged and what it should have cost the Complainant. Ordinarily matters as regards rates and charges are commercial in nature and the Board does not inquire into them. However, where there has been an unethical financial gain then the Board can, as outlined above, inquire into the related conduct.
- [56] The Technical Assessor evidence was that the amount charged was more or less double what should have reasonably been charged.
- [57] An analysis of the Respondent's invoices shows an amount of \$397 was charged twice, an addition error added another \$705 and GST of \$2,880 was charged twice. In total invoicing errors accounted for \$3,585. Overall the charges for all line items were very high as shown by the Quantity Surveyors report. It is also noted that the Respondent was able to identify a \$3,000 mistake with regard to not charging for painting but was unable to identify invoicing errors which disadvantaged the Complainant.
- [58] The Board considers both the systems and processes used for invoicing and the overall amount invoiced have brought the regime into disrepute.
- [59] In Board Decision C2-01124<sup>21</sup> the Board found that a licensed building practitioner could bring the regime into disrepute by way of office practices which created a risk of overcharging. The same applies here. A lack of care and attention to invoicing has resulted in numerous errors and an unethical financial gain.
- [60] More serious is the overcharging. The amount overcharged was grossly high and the Board considers the Respondent took advantage of the Complainant who was in a vulnerable position. Such behaviour reflects very poorly on the licensed building practitioner profession and cannot be condoned.

### Board Decision

- [61] The Board has decided that Respondent has:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- and should be disciplined.

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<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

<sup>21</sup> Board decision dated 31 August 2015.

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## Disciplinary Penalties

[62] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act<sup>1</sup>.

[63] The Board is aware that the common understanding of the purposes 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*<sup>22</sup>

[64] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>23</sup>:

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[65] The *High Court in Patel v Complaints Assessment Committee*<sup>24</sup> has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

*[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*

*[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.*

[66] In *Lochhead v Ministry of Business Innovation and Employment*<sup>25</sup>, an appeal from a decision of the Board, the court, in respect of penalty noted:

*[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*

<sup>22</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>23</sup> [1992] 1 NZLR 720 at p 724

<sup>24</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>25</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

*[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

- [67] The Respondent indicated at the hearing that he will compensate the Complainant. He was advised that if he does this will be taken into consideration by the Board when making its penalty decision. The Respondent will be given till the end of the period provided for him to make submissions on penalty to make arrangements with the Complainant and to provide evidence of any compensation paid to the Board. The Board will then make its penalty decision.

### Costs

- [68] Under s 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

- [69] 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. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>26</sup> included the following:

*“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”*

- [70] The judgment in *Macdonald v Professional Conduct Committee*<sup>27</sup> confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*<sup>28</sup> where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [71] In *Collie v Nursing Council of New Zealand*<sup>29</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

<sup>26</sup> HC, Wellington, AP23/94, 14 September 1995

<sup>27</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>28</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>29</sup> [2001] NZAR 74

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*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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.*

[72] The Respondent is invited to make submissions on costs prior to the Board making its decision.

### **Publication of Name**

[73] 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 Licenced Building Practitioners' scheme as is required by the Act.

[74] The Board is also able, under s 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.*

[75] 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.

[76] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>30</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>31</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>32</sup>. In *N v Professional Conduct Committee of Medical Council*<sup>33</sup> the High Court pointed to the following factors:

*The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*

- *issues around the identity of other persons such as family and employers;*
- *identity of persons involved and their privacy and the impact of publication on them; and*
- *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[77] 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>34</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.

<sup>30</sup> Section 14

<sup>31</sup> Refer ss 200 and 202 of the Criminal Procedure Act

<sup>32</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>33</sup> *ibid*

<sup>34</sup> *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

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- [78] The Respondent is invited to make submissions on publication prior to the board making its decision.

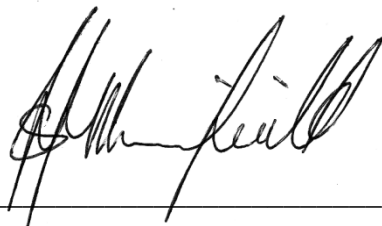
### Submissions on Penalty Costs and Publication

- [79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 14<sup>th</sup> March 2017.
- [80] If submissions are received then the Board will meet and consider those submissions prior to making a decision on penalty, costs and publication. If no submissions are received then the Board will proceed and makes its decision.

### Right of Appeal

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

Signed and dated this 20<sup>th</sup> day of February 2017



**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.

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- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

ii **Section 330 Right of appeal**

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

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*