Before the Building Practitioners Board
At Auckland

BPB Complaint No. C2-01361

	Under the Building Act 2004 (the Act)
IN THE MATTER OF	A complaint to the Building Practitioners' Board under section 315 of the Act
AGAINST	Dion Kerr, Licensed Building Practitioner No. BP 119964

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] The Complainant lodged a complaint with the Building Practitioners' Board (the Board) on 25 February 2016 in respect of Dion Kerr, Licensed Building Practitioner (the Respondent).

[2] The complaint alleged the Respondent has, in relation to building work at [omitted] carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[3] The Respondent is a Licensed Building Practitioner with a Roofing (Profiled Metal Roof and/or Wall Cladding) Licence issued 3 August 2012.

[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:

Chris Preston	Chair(Presiding)
Brian Nightingale	Board Member
Robin Dunlop	Board Member
Bob Monteith	Board Member

[6] The matter was considered by the Board in Auckland on 20 September 2016 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
William Hursthouse	Special Adviser to the Board

Members of the public were not present.

[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 14 June 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. It included a report from William Hursthouse as a Special Advisor to the Board.

[11] On 14 July 2016 the Board considered the Registrar's report 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).

[12] On 2 September 2016 a pre-hearing teleconference was scheduled. Mr Kerr could not be contacted. The Presiding Member directed that a letter containing the information covered in a pre-hearing conference be sent to the Respondent.

[13] Prior to the hearing attempts were made to contact the Respondent to see if he would attend the hearing. No contact was made. The Board Secretary also phoned and sent a text to the Respondent on the day of the hearing but again he could not be contacted.

[14] All communications to the Respondent in relation to the investigation and hearing were sent in accordance with the provision in the Act to the address provided by the Respondent and recorded as his address for communication under s 301(1)(c) in the Register of Licensed Building Practitioners. Under s 302 of the Act the Respondent has an obligation to notify the Registrar of any changes in the details on the Register within 10 working days of them occurring. No such advice of any change had been received.

[15] The Board decided the Respondent had been given adequate notice of the hearing and sufficient opportunity to respond. It decided to proceed with the hearing without the Respondent being present.

Function of Disciplinary Action

[16] 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[1].

[17] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]:

---

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

[2] [1992] 1 NZLR 720 at p 724

> *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.*

[18] It must also be noted that the Board has jurisdiction only 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

[19] The hearing commenced at 1.30 p.m.

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

Substance of the Complaint

[21] The complaint relates to multiple issues to do with the installation of a replacement roof. The Special Adviser's report set out the following issues in summary:

(a) the use of sealant as the primary form of weather tight protection;

(b) roofing underlay that does not extend out to the fascia and in some cases there was no sign of it;

(c) a reverse lap which is an example of poor workmanship;

(d) a valley flashing (very old and in poor condition) was not replaced;

(e) three of four "apron" flashings around the chimney were replaced but not chased in, rusty flashing left in place, reliance on sealant, iron run too far into gutter and fixings through the bottom of the flashings;

(f) incorrect profile for the replacement material used on the flat area of the roof;

(g) apron flashing not replaced and one sheet is reverse lapped meaning water running down the slope will go between the sheets and may track under the lower sheet ; and

(h) the 4 degree pitched small roof was simply covered over the (really) old roof without roofing underlay; and

(i) as a result there is a very weak structural connection to the underlying roof structure and likely failure of B1 Structure and B2 Durability of the New Zealand Building Code.

Evidence

[22] 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[3] 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, 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.*

[23] The Board received the Special Adviser's report and he answered questions from the Board. His concluding comments highlighted the very poor workmanship of the Respondent and the very real risk of water ingress and of durability issues with the roof as constructed. His report was comprehensive and detailed and listed numerous failings. The Special Adviser noted:

> *The significance is that the owner is faced with more work to be done: the valley and chimney flashings need replacing and considerable work is required on the flat roof. This will involve, at the very least, removing the recently installed new flat roof, removing the original roof, replacing any decayed framing and installing new roofing which has a profile suitable for the pitch, complete with all associated fixings and flashings.*

[24] The Respondent did not provide any response to the complaint.

Boards Conclusion and Reasoning

Negligence

[25] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*[4]. Judge McElrea provided guidance on the interpretation of those terms:

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

[3] [2009] 1 NZLR 1

[4] Judge McElrea, DC Whangarei, CIV-2011-088-313

> *[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*
>
> *[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[26] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[5] as regards the threshold for disciplinary matters:

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

[27] The Board finds that the Respondent was both negligent and incompetent and that the matter was sufficiently serious enough to warrant a disciplinary outcome.

[28] The quality of the work shown in the Special Adviser's report and the lack of understanding of the requirements of the building code and of ensuring weather tightness and structural integrity is concerning.

[29] The Board notes the Respondent's refusal to engage in any way with the Board and his non-attendance at the hearing of the Board. He has not provided any form of explanation or mitigation and the Board was unable to question the Respondent to determine what level of competence he has. The Board can only assess the quality and compliance of the work presented in the complaint.

Disrepute

[30] 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[6] and discussed the legal principles that apply.

[31] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*[7] a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time: however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of

[5] [2001] NZAR 74
[6] Board decision dated 2 July 2015.
[7] [2013] NZAR 1519

the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[32] Similarly in a determination of the *Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants*[8], convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[33] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[9] and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[10] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[11]

[34] 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 findings in other occupational regimes. In this respect it is noted that disrepute was upheld in circumstances involving:

- criminal convictions[12];
- honest mistakes without deliberate wrongdoing[13];
- provision of false undertakings[14]; and
- conduct resulting in an unethical financial gain[15].

[35] 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.

[36] The Board notes it has made a finding in relation to negligence and incompetence and, given this finding, does not consider it necessary to make a finding in relation to disrepute. Moreover it considers the threshold for disrepute may not have been reached.

---

[8] 24 September 2014

[9] Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus,* search settings UK English, accessed 12/05/15

[10] [2012] NZCA 401

[11] [2012] NZAR 1071 page 1072

[12] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

[13] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

[14] *Slack, Re* [2012] NZLCDT 40

[15] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

Board Decision

[37] The Board has decided that the Respondent has carried out or supervised building work in a negligent and incompetent manner (s 317(1)(b) of the Act) and should be disciplined.

[38] The Board has also decided that the Respondent has not 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).

Disciplinary Penalties

[39] 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[i].

[40] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

[41] The Respondent has not, to date, provided any submissions.

[42] Given the nature of the disciplinary offending and the non-engagement of the Respondent in the process, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and publication should he consider there a further matters which the Board should take into consideration.

[43] The Board is aware that the common understanding of 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. 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.*[16]

[44] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[17]:

> *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.*

[45] The *High Court in Patel v Complaints Assessment Committee*[18] has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

---

[16] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[17] [1992] 1 NZLR 720 at p 724
[18] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *[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.*

[46] The Board has decided that, given the high level of negligence and incompetence shown, that in accordance with s 318(1)(a)(i) and (ii) of the Act the Respondent's licence will be cancelled and that he may not apply to be relicensed for a period of three months. The Board considers this course of action is necessary to protect members of the public and to maintain the integrity of the licensing regime.

Costs

[47] 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."

[48] 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* [19] 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."*

[49] The judgment in *Macdonald v Professional Conduct Committee*[20] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[21] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[50] In *Collie v Nursing Council of New Zealand*[22] 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. 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.*

---

[19] HC, Wellington, AP23/94, 14 September 1995
[20] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[21] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[22] [2001] NZAR 74

[51] The Board has set the level of costs at $1,500 inclusive of GST.

Publication of Name

[52] 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.

[53] 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.*

[54] 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.

[55] The Board does not require the name of the respondent to be published.

Penalty, Costs and Publication Decision

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

Penalty:	**Pursuant to s 318(1)(a)(i) and (ii) of the Act, the Respondent's licence is to be cancelled and that the Registrar is to remove the person's name from the register and order that the person may not apply to be relicensed for a period of three (3) months from the date of this decision.**
Costs:	**Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of $1,500 (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 s 301(1)(iii) of the Act.** **In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the register and the Respondent being named in this decision.**

Submissions on Penalty Costs and Publication

[57] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **4pm on 16 November 2016**.

[58] If no submissions are received then this decision will become final.

[59] If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 26th day of October 2016.



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—

(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.