

Before the Building Practitioners Board

	BPB Complaint No. C2-01919
Licensed Building Practitioner:	Allan Kershaw (the Respondent)
Licence Number:	BP 104100
Licence(s) Held:	Carpentry

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	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	9 April 2019
Decision Date:	15 May 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Andrew Richards, Barrister and Solicitor, Saunders and Co, for the Respondent
Glenn Jones, Barrister, Bridgeside Chambers, for the Complainant

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), 317(1)(d) and section 317(1)(da)(ii) of the Act.

The Respondent **has not** committed disciplinary offence under section 317(1)(i) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	3
Consolidation	3
Evidence	3
Board’s Conclusion and Reasoning	9
Negligence.....	10
Contrary to a Building Consent.....	13
Record of Work.....	14
Disrepute.....	15
Penalty, Costs and Publication	16
Penalty.....	17
Costs.....	17
Publication.....	18
Section 318 Order	19
Submissions on Penalty, Costs and Publication	19
Right of Appeal	20

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*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 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.

Consolidation

- [5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [6] The Board sought agreement for consolidation of this matter with Board Inquiry number CB24101. The consent of all those involved was not forthcoming. The two matters were not consolidated.

Evidence

- [7] 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.
- [8] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [9] In addition to the documentary evidence before the Board heard evidence at the hearing from:

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

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

Allan Kershaw	Respondent
[Omitted]	Witness for the Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Complainant
[Omitted]	Summoned Witness, Maynard Marks, Registered Building Surveyor
[Omitted]	Summoned Witness, James Hardie
Kevin Thompson	Summoned Witness, Christchurch City Council, Building Inspector

[10] The building work to which the complaint related came about as a result of earthquake damage to the subject property. The Complainant engaged the Respondent to undertake repairs as well as alterations to the dwelling and a reroof. A building consent was obtained. The consent included a re-clad but excluded a reroof. The consent did cover junctions and flashings between building work under the consent and the reroof. Building work on a deck was excluded from the work to be undertaken by the Respondent.

[11] The building work started in January 2015. In early August 2015 the Respondent considered practical completion had been achieved. A final inspection was called. It took place on 11 August 2015. It was attended by [Omitted] and was carried out by Kevin Thompson. It was noted as a failed inspection. A number of directives were issued in it. The Respondent submitted the outstanding items were minor in nature and that the Complainant's delay in deciding what product would be used for a balustrade delayed the completion of the outstanding items.

[12] On 21 October 2016 the Complainant obtained a review of the building work completed under the building consent by the Christchurch City Council. Kevin Thompson, a Building Inspector, carried out the review. The Respondent was not present. It was noted on the Site Notice issued that:

This is a review of previous non compliant issues plus inclusion of identified issues with recent work since a previous inspection 11/08/2015.

The Owner has called for this inspection due to a breakdown in communication with the builder.

[13] The Site Notice included references to observations made by the Complainant as regards the cladding.

[14] A commercial dispute between the Complainant and the Respondent ensued.

[15] The Complainant commissioned a report from [Omitted] of Maynard Marks. The report identified the following issues and was supported by photographs of the noted items which were:

- A. Incorrect roof construction;
- B. Incorrectly installed roof flashings;

- C. Inadequate installation / design of rain water goods drainage system;
- D. Inadequate timber protection;
- E. Poor installation of weatherboards;
- F. Inadequate cladding clearance between hard landscaping (Garage);
- G. Inadequate flashing of meter box;
- H. Incorrect installation of pipe penetration;
- I. Incorrect installation of mechanical services;
- J. Inconsistent level of window and door joinery;
- K. Poor installation of timber deck;
- L. Walls have a vertical deviation away from plumb;
- M. Inconsistent internal decoration;
- N. Internal floor not level; and
- O. Poor installation of internal doors and associated hardware.

[16] The Maynard Marks report noted:

We have not observed water entry into the building, however, we believe the construction defects that have been observed mean that the building is at risk of future failure and will fail to satisfy the requirements of Clause E2: External Moisture and B2: Durability of the Building Code

[17] At the hearing [Omitted] noted that he had not identified any building code breaches and that there were no structural failures or leaks but that there was building work that was not in accordance with the building consent or good trade practice.

[18] The Maynard Marks report included a Table of Construction Defects and Damage. The Board's investigations focused on the issues identified in the Defects Table that the Respondent was associated with. The Board had been informed that the roofing had been carried out by another licensed building practitioner and as such it did not further investigate items A to C with respect to the Respondent as the Board had initiated an inquiry into the conduct of the identified licensed building practitioner⁶.

[19] The following were the items identified in the Maynard Marks report that the Board further investigated as regards the Respondent. The Respondent was questioned as regards whether he carried out or supervised the building work. He gave evidence that the majority of the work, and in particular the work on the cladding, was carried out by two non-licensed staff members, one of whom had 20 years' experience who had been working for him for two years. The other was an apprentice. The Respondent stated he was on site daily to give instructions and advice and to carry out visual checks of the work.

Inadequate timber protection

Timber fascia board cut edge has not been primed & painted. Barge Board fixing has not been filled or painted, corroding, evidence that water is entering into the timber causing damage.

⁶ Refer Board hearing and decision CB24101.

- [20] The associated photograph showed a bare timber cut and rust from a nail hole that had not been filled or painted. The Respondent noted that it was the painter's role to carrying out paint finishes and that the work was incomplete but that it would normally be primed by the builders.

Poor installation of fibre cement and cedar weatherboards, flashings and penetrations

The gap between timber barge board and weatherboards on the east gable has been filled. The weatherboards have therefore been installed abutting the filled area and is already showing signs of differential movement with paint cracking at the junctions.
The weatherboards that have been cut around the head flashings to windows and doors have been poorly formed and not in accordance with good trade practice.
Weatherboard end joints have been jointed and filled but have not been adequately sanded back giving a raised noticeable hump in the weatherboards throughout. Some of the joints are now cracking.
A weatherboard has been drilled through and left, potentially allowing water to enter into the cavity potentially causing damage to the internal construction components.
Miss alignment of weatherboards on the north west corner of 3a and 3b Longhurst Terrace (Note: this is a separate dwelling)
Inconsistent widths measured to weatherboard overlaps – no evidence of a story rod being used to install the weatherboards as per good trade practice.
Minor hammer impact damages evident on the surface of the painted fibre cement weatherboards.
There is a crack in the cedar cladding from the cut made for the window head flashing to the south dormer. The crack will eventually suffer from movement and allow water to penetrate into the construction causing damage to internal components. Note, pencil marking still evident from construction measurements taken upon installation.
There is a lack of fixing to bottom cedar board on the south elevation.
Cedar weatherboard on the east elevation of the south dormer window has a significant colour differential between the boards. This is likely due to different quantities of oils being applied to different boards prior to the installation of the cladding. (It is unknown if this was factory applied or completed on site). Conversely it is unlikely to have been caused by weathering as only 6 of the 12 boards are affected.
We believe that the wall cladding would not be warrantied under the manufactures guarantees in its current condition and would likely not achieve code compliance from the Christchurch City Council.
The meter box has been installed without the provision of a head flashing. Water allowed to accumulate onto of the meter box surround will pool and enter behind the cladding by capillary transfer potentially causing damage to internal construction components.
The soil vent pipe penetration through the cladding is not sealed between the UPVC pipe and the cladding. Additionally the hole that has been formed in the cladding to allow the pipe penetration is not in accordance to good trade practice.
The mechanical air extract vent on the east & south elevations from the first

floor shower room and ground floor shower room have not been installed with a head flashing potentially allowing water to enter into the cavity. Additionally no ducting has been installed between the internal fan unit and the external louvered vent, this is allowing all moisture rich air (that is intended to be expelled to the external) to enter into the cavity potentially causing damage to the internal construction components.
Mechanical extract on the south elevation also lack the provision of a head flashing.

- [21] The August 2015 Final Inspection noted ground clearances, the need for further painting and vermin proofing.
- [22] The Complainant provided a table of variances in the overlaps of weatherboards and alleged that a story rod had not been used for set-out. An Observation Form completed by [Omitted] of James Hardie New Zealand Limited on 4 November 2016 was included. He had completed a site inspection and noted issues with sealing of sanitary pipe and extractor fan penetrations, ground clearances, face nailing above laps and a missing deck joist saddle flashing. He noted that there were more issues than were noted on the Observation Form including issues with the general finish but that those noted were the most serious.
- [23] Evidence was heard that the cladding on dormers had been changed from the consented linea to cedar. There was no evidence of a minor variation to the building consent for the change. The Respondent was dealing with minor variations. He noted that the Council had not raised an issue with the product substitution.
- [24] It was also noted that one dormer had been extended. There was no evidence that a change to the building consent had been processed. The Respondent considered it been dealt with as an onsite variation. [Omitted] gave his opinion that an amendment to the building consent would have been required as the change was significant.
- [25] [Omitted] gave evidence that they had records which would show that variations were dealt with. One week was given to produce the evidence. On 19 April 2019 the Respondent sent various materials to the Board being selected building inspection records with an accompanying statement to the effect that "at every step the Council was happy and approved variations on site." Council inspection records were included for onsite variations for changes to internal bracing and in relation to a tiled shower. No evidence was provided that showed the changes to cladding or to the dormer were dealt with as on-site variations.

Inadequate cladding clearance between hard landscaping (Garage)

The fibre cement cladding has not been installed as per the approved building consent drawings or to manufacturers recommendations.

- [26] The Respondent gave evidence that the clearance issue was with regard to the garage and that lifting the cladding to the required clearance height would have caused weathertightness issues.

Inconsistent level of window and door joinery

<p>Windows have been installed at inconsistent heights between within the kitchen on the east and south elevations. Two sliding ranch slider doors on the north elevation that lead onto the deck have been installed at different levels. This issue should not have happened as the walls were practically rebuilt and new construction.</p>
<p>Window sills have minor bows within the timber.</p>
<p>Window gaskets are in poor condition to kitchen windows and also have minor separation in the aluminium mitre joint on south elevation.</p>

- [27] The windows were installed into existing openings. Work was not undertaken to ensure alignment.

Poor Installation of Timber Deck

<p>The timber deck has been fixed back to the dwelling using nails only fixed to curtailed cantilevered joists. A timber ribbon board should have been fixed to the external face of the foundation to start the sub structure of the deck. The deck appears to be incomplete and the items listed below have not been installed.</p>
<p>Timber joists have been installed without the provision of engineered mechanical fixings, like joist hangers or nail plates.</p>
<p>A double joists / blocking to perimeter of the deck has not been installed.</p>
<p>Nails and fixings used are not adequate protected from corrosion. The fixings should be stainless steel</p>
<p>The structure has been nailed together rather than bolted.</p>
<p>Stair stringers have not been adequately connected back to the deck structure.</p>
<p>New posts have been installed, that are not H5 treated and appear to be fence posts.</p>

- [28] The building work on the deck was excluded from the contact. Notwithstanding some building work was carried out that related to the decks including the joist connection to the foundation. Its connections and the method used required remediation. The lowest weatherboard would have had to have been removed to install a required joist saddle flashing although the Respondent considered the flashing could have been inserted up underneath the weatherboard. The Respondent also stated, as regards the types of fittings used, that they did not have the correct fittings to hand at the time.

Walls have a vertical deviation away from plumb and internal floor not level

<p>The internal walls have a vertical deviation away from plumb measured at up to 9mm over 1.2 meters over the ground and first floor. Within the stair void the verticality was measured at 10mm over 1.2meters away from vertical. Cracking was noted to plasterboard at the first-floor dormer windows.</p>
<p>Multiple horizontal undulations in the wall structure. An instance of this can be seen clearly in the kitchen at the wall and ceiling junction above the pantry.</p>
<p>Walls have been built up adjacent to timber architraves likely to disguise the different angles between the adjacent wall and the window/door jambs. Timber skirting joints are beginning to crack and open up.</p>
<p>Floor levels measured and deduced are beyond that of criteria given for foundation damage not requiring structural repair. It is likely that localised jacking and packing</p>

of piles will be required, however, It is recommended that a structural engineer advise on a suitable repair strategy.
Stairs treads squeak as they are used, this is caused by movement between the tread and the fixing, that being loose, the treads should be glued and screwed down.
Timber chipboard chased back to allow for installation of wardrobe sliding doors.

- [29] The dwelling had been relevelled by other contractors as part of earthquake remediation work. Evidence was heard that the releveling was taken to a certain point and that going beyond would have caused further issues with regard to walls being out of plumb.

Inconsistent internal decoration and poor installation of internal doors and associated hardware

Multiple areas of inconsistent paint finishes and poor workmanship cutting in at timber architraves and skirting's with small areas of plasterwork not finished or defected.
Multiple internal doors have loose or missing fixings to hinges. Hinge pins are working their way out due to lateral movement within the hinge. Timber jambs have been rebated excessively to accommodate door strikes that are smaller than the area rebated. The latch rebate behind the strike plate is messy and shows poor workmanship. Privacy lock to ground floor shower does not work. Doors are binding on the carpets, carpet space was accounted for when fitting the doors to frames. Doors have not been installed square within frames or frames are warped.
Timber architrave joints to the window and doors have cracked and are beginning to open up.

- [30] [Omitted] considered the issues reflected poor trade practice and workmanship.

Record of work

- [31] The Respondent gave evidence that a record of work had been drafted but not provided as the work was not complete and the contract had not been cancelled. The Respondent was not able to identify what restricted building work was yet to be completed. [Omitted] stated a record of work had not been requested and that their business practice was to provide a record of work only on completion of a contract.

Invoicing

- [32] Evidence was heard as regards requests for supporting invoices and detail which were refused, of cost overruns and of the estimated costs to remediate. The Respondent submitted that the matters pertaining to invoices were the subject of ongoing commercial disputes.

Board's Conclusion and Reasoning

- [33] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);

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

and should be disciplined.

[34] The Board has 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)

[35] The reasons for the Board's decisions follow.

Negligence

[36] The Board's findings as regards negligence relate to the Respondent's supervision of the building work and in particular the supervision of the installation of the cladding.

[37] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[38] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁹. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[39] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹⁰. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹¹.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [40] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.
- [41] The evidence before the Board was that the weatherboards had been installed in a manner that may have compromised weathertightness and that there were aesthetic issues which were caused by poor trade practices. The Respondent did not install the weatherboards. The install of weatherboards under a building consent is restricted building work which must be supervised by a licensed building practitioner. The Respondent was the supervisor as per the requirements of the Act.
- [42] Supervise is defined in section 7¹⁴ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

- [43] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁵. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [44] The Respondent stated that he was visiting the site daily and was carrying out visual inspections. Notwithstanding, items that would have been apparent from a visual inspection such as misalignment of weatherboards and unsealed penetrations were not identified and dealt with. A final inspection had been called for which implies

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

that the Respondent had decided that the work was complete as per the building consent. Aspects of the building work, such as unsealed penetrations were not.

- [45] There was evidence before the Board, by way of the Maynard Marks report, of multiple other instances of building work that had not been completed to an acceptable trade practice standard. The Respondent submitted that the work was not complete and that items would have been attended to if and when the work was completed.
- [46] In this respect the Board considers that licensed building practitioners should be aiming to get building work right the first time and that when failings are identified prompt action is taken. In this respect during the first reading of changes to the Act around licensing¹⁶ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [47] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁷:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [48] Given the above matters and the failings found to have occurred the Board, which includes persons with extensive experience and expertise in the building industry, was satisfied that the Respondent's supervision of the building work had fallen below that to be expected of a licensed building practitioner.

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

- [49] Having made a finding of negligence the Board must also consider the seriousness of the conduct. In *Collie v Nursing Council of New Zealand*¹⁸ Justice Gendall noted, 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.

- [50] The Board was satisfied that the issues with regard to the cladding were sufficiently serious enough and that the cumulative weight of the other failings were also sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [51] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [52] In *Tan v Auckland Council*¹⁹ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

- [53] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [54] Whilst some minor variations were agreed to by the Council as the building consent authority there was evidence before the Board of at least two changes to the building consent that had not been dealt with. The first was a product substitution which would, most likely have been a minor variation matter. The other was the extension of a dormer which was more complicated. The Board agreed with [Omitted] that this change would most likely have required an amendment to the consent which would have required that all building work stopped whilst the change was dealt with.

¹⁸ [2001] NZAR 74

¹⁹ [2015] NZHC 3299 [18 December 2015]

- [55] Neither item was, however, dealt with in an acceptable or appropriate manner. Rather the building work proceeded without notification to the building consent authority. In doing so building work was carried out that was contrary to a building consent.
- [56] The Respondent suggested that the Council passing items in inspections implies that they accepted the changes. This submission is not accepted. A licensed building practitioner has a positive duty to notify a building consent authority of changes and this should occur prior to them being carried out so that compliance issues can be assessed. In this respect the Respondent is reminded of the provisions of section 89 of the Act which states:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

- (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
- (a) *the territorial authority in whose district the building is situated; and*
 - (b) *the owner.*
- (2) *The notification must—*
- (a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
 - (b) *state how the building work does not so comply; and*
 - (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

Record of Work

- [57] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work²⁰.
- [58] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [59] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [60] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. In the present case the building work came to a premature end as a result of contractual issues. The Respondent considered the contract was ongoing and that the record of work would be provided when the work was completed.

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [61] Physical work came to end in August 2015. A record of work has still not been provided. The Respondent had called for a final inspection. It follows that the restricted building work had been completed. The Respondent was not able to identify what in the way of restricted building work had yet to be completed.
- [62] In this respect it should be noted that the requirement to provide a record of work is on completion of restricted building work, not on completion of all building work.
- [63] Given the above the Board finds that the restricted building work was complete and that a record of work has not been provided. The disciplinary offence has been committed.
- [64] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [65] In this instance there was an ongoing commercial dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.
- [66] The Respondent has also noted that he had not realised the Complainant had been requesting the record of work. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.

Disrepute

- [67] 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 C2-01111²¹ and discussed the legal principles that apply.
- [68] Conduct which brings or is likely to bring the regime into disrepute is not defined in the Act. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"²² 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*²³ the Court of Appeal held that:

²¹ Board decision dated 2 July 2015.

²² 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

²³ [2012] NZCA 401

*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.*²⁴

[69] 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 convictions²⁵;
- honest mistakes without deliberate wrongdoing²⁶;
- provision of false undertakings²⁷; and
- conduct resulting in an unethical financial gain²⁸.

[70] 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.

[71] The Board has found in previous decisions that conduct relating to pricing, invoicing and payments can come within the ambit of disrepute²⁹. The threshold, however, for a finding for such conduct is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[72] The Board must also take care to distinguish commercial matters and disputes from conduct that brings the regime into disrepute. In this respect in previous cases before it there has been an element of intention as regards the conduct that was not present in the allegations before the Board.

[73] On the basis of the above the Board has decided that the Respondent has not brought the regime into disrepute.

Penalty, Costs and Publication

[74] 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.

²⁴ [2012] NZAR 1071 page 1072

²⁵ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

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

²⁷ *Slack, Re* [2012] NZLCDT 40

²⁸ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

²⁹ *Carmichael* [2019] BPB 1901

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

Penalty

- [76] 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*³⁰ 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.

- [77] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*³¹ 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.
- [78] The conduct was serious. The licensing regime relies on effective supervision. The Respondent has been found to have committed multiple disciplinary offences.
- [79] The Board considers a fine is the appropriate penalty for the offending. The Board's starting point for a finding of negligence and for building work contrary to a consent is in the order of \$3-4,000. The starting point for a failure to provide a record of work is \$1,500.
- [80] Having taken into account the background to the matter the Board has decided that a total fine of \$3,500 will be sufficient penalty.

Costs

- [81] 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."
- [82] 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 case³².

³⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

³² *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.

[83] In *Collie v Nursing Council of New Zealand*³³ 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.

[84] The costs associated with an investigation and hearing are substantial. As such, and based on the above the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry. The Respondent should note that the sum ordered is significantly less than 50% of actual costs.

Publication

[85] 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 Act³⁴. 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.

[86] 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.

[87] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁷. 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*³⁸.

[88] 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 interest³⁹. 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.

[89] Based on the above the Board will not order further publication.

³³ [2001] NZAR 74

³⁴ Refer sections 298, 299 and 301 of the Act

³⁵ Section 14 of the Act

³⁶ Refer sections 200 and 202 of the Criminal Procedure Act

³⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁸ *ibid*

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will 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.

[91] 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

[92] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **6 June 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.

[93] 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

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

Signed and dated this 15th day of May 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—

- (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.*