**Before the Building Practitioners Board**

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| | BPB Complaint No. CB 24860 |
| Licensed Building Practitioner: | Andrew Giles (the Respondent) |
| Licence Number: | BP 101555 |
| Licence(s) Held: | Carpentry |

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**Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner**

**Under section 315 of the Building Act 2004**

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Queenstown |
| Hearing Type: | In Person |
| Hearing Date: | 7 May 2019 |
| Decision Date: | 18 June 2019 |

Board Members Present:

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

**Appearances:**

Sophie Diedrichs, Barrister and Solicitor, for the Respondent

**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 317(1)(da)(ii) of the Act.

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

## Contents



## Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] 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

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

(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).

**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.

**Evidence**

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

[7] In addition to the documentary evidence before the Board heard evidence at the hearing from:

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| Andrew Giles | Respondent |
| [Omitted] | Complainant |

[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

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| Gareth Swan | Witness, Building Control Officer, Queenstown Lakes Council |

[8] The Respondent was engaged to carry out a new residential build under a building consent by the Complainants. The consented build was priced by the Respondent at circa $750,000. The price was greater than the Complainants financial capability. Savings were sought. A reduced price of $503,698 was provided with significant savings being made by changing the specification and removing a margin on materials. The Respondent, in his response to the Board, stated that the reduced price was necessary to allow the Complainant to obtain bank finance. On the basis that the reduced price was not the actual price and that it may have been provided for the purposes of misleading the bank the Board resolved to further investigate that matter as a possible ground for discipline under section 317(1)(i) of the Act which relates to bringing the licensing regime into disrepute. At the hearing the Respondent gave evidence that the price in the contract dated 26 March 2015 was only one price and that the build could be completed for the stated amount. The Complainant confirmed this.

[9] The Complainant also made the following allegations as regards the building work that was carried out by the Respondent:

(a) an issue with the fixings on cedar cladding being at 800mm centres which was contrary to the building consent which required 480mm centres which was preventing the issue of a code compliance certificate;

(b) a failure to install cedar capping which, it was claimed, affected weathertightness;

(c) a failure to provide the required amount of packing on deck connections; and

(d) a failure to provide a record of work on completion of restricted building work.

[10] The Respondent accepted that the cedar had not been affixed at the correct centres. He noted that he was relying on outdated compliance requirements in that 800mm centres had previously been acceptable. He had not noted the requirement for 480mm centres on the consented plans but rather relied on his own knowledge and experience in determining the centres. The frames that had been cut and nailed on site had been built to accommodate 800mm centres. Additional dwangs would have to be installed to accommodate for 480mm centres. The Respondent, in a brief of evidence filed with the Board, stated:

> *The incorrect cedar fixing intervals was a mistake on my part. 800 centres was the old standard as per the old code, and was what had been done on our jobs in the past. I missed the 480 centre detail on the plans and didn't know that the standard had changed, so at the time of installing the cladding at 800 centres I thought I was building to code and to the plans.*

[11] It is to be noted that E2/AS1, an acceptable solution for compliance with clause E2 of the Building Code, requires that wall framing be at a maximum of 480mm centres for weatherboards and that weatherboards be fixed at 480mm centres. The building consent relied on E2/AS1 for compliance with clause E2 of the Building Code. Those requirements have been in place since December 2011.

[12] The Respondent stated he had taken responsibility for the error, had looked at options to have the work signed off as compliant and had engaged with his insurer.

[13] The Respondent stated cappings had not been installed as the work was not complete and that they were to be run from left over cedar blanks. The building work had not been completed as the contractual relationship came to an end.

[14] With respect to deck connections the Board heard evidence that the building method had been changed from that which was consented, but that the Council would accept the change as meeting building code compliance requirements provided that an application for a minor variation was received in respect of it.

[15] In reviewing the building work that had been carried out the Board heard evidence of various changes that had been made to the consented plans. Specifically:

(a) the amalgamation of two decks into one and the method of connection of the deck to the dwelling including the means of managing water at the juncture between the deck and the dwelling;

(b) the substitution of external corrugated iron cladding with vertical cedar cladding including a change from top hat system;

(c) the substitution of thermal insulation with a higher R value insulation; and

(d) the installation of an additional window in the kitchen and larger windows elsewhere which impacted on bracing elements that were removed or reduced in size.

[16] The Respondent was questioned as regards the processes used to manage the changes to the building consent. No formal applications were made for minor variations or building amendments. The Respondent stated he spoke with the building inspector who was carrying out inspections under the building consent about the changes and that the inspector had not objected[6]. The Respondent's intention was to deal with all of the changes at the end of the project by way of "as built" changes to the building consent. He stated that this was the common practice in the region at that time and that the designer would produce the "as built" designs.

[17] The Board had the Council building consent file before it for the hearing. There was one minor variation application in it which related to changes of roof framing from timber to steel. There were no references in the inspection records to any of the

[6] The Board was not able to receive evidence from the building inspector who carried out the inspections as had died some months prior to the hearing being held.

other changes to the building consent. The Council witness at the hearing expressed an opinion that the change of the cladding may have been a minor variation as the details for cedar were provided for in other parts of the build. He did note that the decision as to whether it was minor or if an amendment was necessary lay with the consent processing team within the Council.

[18] The Respondent gave evidence that he spoke with the designer when the designer made two site visits and that he spoke with him on at least two other occasions. He stated that he kept the designer in the loop as regards the changes. He did not make any contact with the engineer who had designed elements that were changed.

[19] A brief of evidence was also filed by the Council witness. The brief was generally supportive of the Respondent and his actions.

[20] With regard to the record of work the Respondent noted that they were normally provided upon code compliance certification and that as the contract was cancelled part way through it was not provided. A record of work has since been provided.

**Submissions**

[21] Counsel for the Respondent filed written submissions. Notably she submitted that the failures as regards the weatherboards were not, in the circumstances, sufficiently serious enough to warrant disciplinary action and that the balcony packing issue and change of cladding matter were not contrary to a building consent as they were minor variation issues which were dealt with by the Council.

[22] In respect of the record of work it was submitted that not being paid was a good reason.

[23] In terms of disrepute it was submitted that the Respondent was not a not a party to the falsification of a contract price and that, accordingly, there was no evidence of disrepute.

[24] Counsel also noted the financial losses incurred by the Respondent as a result of the contractual dispute.

**Board's Conclusion and Reasoning**

[25] The Board has decided that the 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);

(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.

[26] 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)

[27] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

[28] The Board's finding of negligence relates to the manner in which the cedar weatherboards were installed.

[29] 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 Courts[8].

[30] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[9]. 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.

[31] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[10]. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[11].

[32] The Board notes that the purposes of the Act are:

> ***3 Purposes***
> *This Act has the following purposes:*
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*

[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

*(i) people who use buildings can do so safely and without endangering their health; and*

*(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*

*(iii) people who use a building can escape from the building if it is on fire; and*

*(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

*(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[33] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[12] and be carried out in accordance with a building consent[13]. 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.

[34] In this instance the Respondent installed cedar weatherboards on all bar two of the faces of the dwelling. The framing built on site to accommodate 800mm fixing centres. The weatherboards were, in turn, affixed to the dwelling at 800mm centres. The consented plans required 480mm centres. Those requirements were in accordance with E2/AS1.

[35] The Respondent was not aware of the E2/AS1 requirements at the time the building work was carried out. He was working from a knowledge of an outdated version. He did not check the consented plans. Rather he relied on his outdated knowledge. The Board considers that a reasonable licensed building practitioner would ensure that the consented plans were consulted prior to carrying out the building work and that they would keep themselves up to date with changes in base compliance documentation such as E2/AS1. As the Respondent did not the Board finds that has was negligent.

[36] Turning to seriousness in *Collie v Nursing Council of New Zealand*[14] the Court's noted, as regards the threshold for disciplinary matters, that:

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

[37] The Respondent has submitted that the breach was not serious. The Board does not agree. The submissions on seriousness focused on the steps taken post the failure.

[12] Section 17 of the Building Act 2004
[13] Section 40(1) of the Building Act 2004
[14] [2001] NZAR 74

Those matters go to mitigation, not to the Respondent's negligent conduct. The level of negligence was, in the Board's opinion, at the higher end of the scale as the failings were fundamental.

[38] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[39] The Board's decision that the Respondent has carried out building work that is not in accordance with the building consent issued relates to the manner in which he dealt with changes to the building consent during the build.

[40] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[41] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public.

[42] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[43] In this respect section 45(4) of the Act states:

> *(4) An application for an amendment to a building consent must,—*
>
> *(a) in the case of a minor variation, be made in accordance with section 45A; and*

*(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[44] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably it states:

***45A Minor variations to building consents***

*(1) An application for a minor variation to a building consent—*

*(a) is not required to be made in the prescribed form; but*

*(b) must comply with all other applicable requirements of section 45.*

*(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*

*(3) A building consent authority that grants a minor variation—*

*(a) must record the minor variation in writing; but*

*(b) is not required to issue an amended building consent.*

[45] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

***3 Minor variation defined***

*(1) A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*

*(2) The following are examples of minor variations and do not constitute an exhaustive list:*

*(a) substituting comparable products (for example, substituting one internal lining for a similar internal lining):*

*(b) minor wall bracing changes:*

*(c) a minor construction change (for example, changing the framing method used around a window):*

*(d) changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*

*(3) The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

[46] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there remains a legislative requirement to comply with the building consent. Most importantly the building consent authority retains a discretion to refuse a minor

variation[15]. To aid the process of applying for a minor variation most building consent authorities have a minor variation application form.

[47] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than precede the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought[16].

[48] It must also be noted, as regards a licensed building practitioners' obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of an breach of a building consent:

> ***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.*

[49] In *Tan v Auckland Council*[17] 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.*

[15] Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents
[16] Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work
[17] [2015] NZHC 3299 [18 December 2015]

[50] The same applies to the ongoing verification of building work against the requirements of the building consent. A failure to notify the Council of changes to the consented documents prior to them being carried out defeats the purpose of the process.

[51] Turning to the facts before the Board the Respondent carried out multiple significant changes to the building consent. The packing of the deck aside, the Board doubts that they would have all been minor variations. Regardless of whether they were or were not, no process was followed - other than possible (but not verified) on site discussions with a building inspector. The changes were carried out. The building consent authority was denied the opportunity to evaluate the compliance of those changes against the building code and the remainder of the consented design.

[52] The Respondent could argue that he relied on the advice received from the on-site building inspector. In this respect, whilst ignorance of the law is not a defence, ignorance based on erroneous advice from an official can be. In *Wilson v Auckland City Council (No 1)*[18] the appellant was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*[19] Holland J found that where a person committed a crime believing it to be lawful on the grounds of "officially induced error" it was in the public interest as well as being just that that person should not be held criminally liable.

[53] The level of the advice given in this case is distinguishable from that in the cases before the Courts. The Respondent knew of the minor variation process which was used for a structural change to the design. He ignored the same process when it came to other fundamental changes to the design. He did not consult with the engineer who had developed aspects of the design that he changed. The Board finds that in such circumstances the defence of officially induced error does not apply.

Record of Work

[54] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[20].

[55] 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.

[18] [2007] NZAR 705 (HC)
[19] (1994) 11 CRNZ 132
[20] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[56] The Board discussed issues with regard to records of work in its decision C2-01170[21] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[57] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[58] 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 …".

[59] 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.

[60] The Respondent submitted that he did not complete the work and that he normally provides a record of work on application for a code compliance certificate. In previous decisions the Board has stated that when the point in time arises where a licensed building practitioner is not be able to carry out any further restricted building work completion will be deemed to have occurred, irrespective of whether all of the intended restricted building work has actually been completed. The reasoning is that if completion only occurred when all of the intended work was complete there would be situations where, as a result of intervening events, a record of work would never fall due as the full scope of restricted building work is not completed. In this respect completion had occurred in August 2016 when the contractual relationship came to an end.

[61] A record of work was not provided until a complaint had been made and a hearing scheduled. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[62] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is 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.

[63] In this instance there was an ongoing payment dispute. It has been submitted that the non-payment of a significant sum of money was a good reason. 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,

[21] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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.

Disrepute

[64] The Board resolved to further investigate disrepute on the basis that there was evidence that the Respondent may have provided a false contract for the purposes of enabling the Complainant to obtain finance. In Bayley [2018] BPB 1836 the Board found that the provision of a false contract to enable finance to be obtained was conduct that brought the regime into disrepute.

[65] The evidence before the Board in this matter did not substantiate that the contract was false. As such there is no evidence of disrepute.

**Penalty, Costs and Publication**

[66] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[67] 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

[68] 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*[22] 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.*

[69] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[23] 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.

[22] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[23] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[70] The matters before the Board are serious. There are multiple disciplinary offences that have been committed. The long terms consequences for the Complainant of the Respondent's failings are significant. A code compliance certificate has still not issued as a result of the failure as regards the cedar weatherboards. The Board's starting point is a fine of $4,000. This reflects the seriousness of the matters and is in respect of all of the offences committed.

[71] The Board notes there are mitigating factors including the financial losses incurred, the failure of the building consent authority to ensure correct process as regards changes to the building consent were followed and the efforts made to try and engage to resolve the weatherboard issue. On the basis of the mitigation heard the Board has decided to reduce the fine to $3,000.

Costs

[72] 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."

[73] 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[24].

[74] In *Collie v Nursing Council of New Zealand*[25] 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.*

[75] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

Publication

[76] 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[26]. 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.*

[24] *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.
[25] [2001] NZAR 74
[26] Refer sections 298, 299 and 301 of the Act

[77] 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.

[78] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[27]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[28]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[29]. 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*[30].

[79] 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[31]. 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.

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

**Section 318 Order**

[81] 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 $3,000.** |
| **Costs:** | **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.** |
| **Publication:** | **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.**<br><br>**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.** |

[82] 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.

[27] Section 14 of the Act
[28] Refer sections 200 and 202 of the Criminal Procedure Act
[29] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[30] ibid
[31] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

**Submissions on Penalty, Costs and Publication**

[83] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **9 July 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.

[84] 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**

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

Signed and dated this 18th day of June 2019

**Chris Preston**
Presiding Member

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[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.*