

## Before the Building Practitioners Board

	BPB Complaint No. CB25040
Licensed Building Practitioner:	Benjamin Graham (the Respondent)
Licence Number:	BP 108663
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	Tauranga
Hearing Type:	In Person
Hearing Date:	31 July 2019
Decision Date:	12 September 2019

#### Board Members Present:

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

#### Appearances:

E Boshier, Duncan Cotterill, for the Respondent  
M H Hill, Cooney Lees Morgan, 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 a disciplinary offence under section 317(1)(b) of the Act.

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

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## 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<sup>1</sup> to hold a hearing in relation to building work at the [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); and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

## 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

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [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*<sup>4</sup> 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.

### **Background to the Complaint**

- [5] The Complaint arose out of the prosecution and conviction of Venture Developments Limited under section 40(1) of the Act for the construction of 28, 50m<sup>2</sup> semi-relocatable dwellings at [Omitted], a camping ground in [Omitted], without building consents. The Respondent is a director and shareholder of Venture Developments Limited.
- [6] The Complaint was made by an officer of the Tauranga City Council with the knowledge and consent of the Council. Counsel for the Respondent raised an issue with the complaint not meeting the requirements of regulation 5 of the Complaints Regulations<sup>5</sup> and he submitted that there had been a breach of natural justice. The submission related to the complaint not identifying who the Complainant was or the true nature of the complaint. Counsel submitted that it was not until documents were filed by the Council with the Board in the lead up to the hearing, that the Respondent was not fully apprised of what the complaint was about or who the Complainant was. Counsel for the Respondent reiterated this submission, in a post hearing written submission, dated 8 August 2019.
- [7] The Board does not accept that there has been any breach of natural justice or that regulation 5 has not been complied with. The complaint received by the Board, which was provided to the Respondent, set out who the Complainant was. The Registrar’s Report also correctly identified that the Complainant can only act through its employees.
- [8] As for the matters complained about, the Respondent, by way of his directorship of Venture Developments Limited would have been aware of the issues which lead to

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<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> Regulation 5 Form of Complaint sets out items that are required in a complaint made to the Board.

the complaint. The Registrar's Report and the Board's Decision to proceed also made it clear what the matters were that the Board would be investigating.

- [9] Counsel for the Respondent also submitted that the Respondent had been disadvantaged in his defence by the late submission of the additional evidence provided in affidavits filed by the Complainant. Those affidavits covered issues that had previously been disclosed but went on to raise additional issues with regard to the quality and compliance of the building work that had been discovered when the complaint was made.
- [10] At the commencement of the hearing the Board stipulated that:
- (a) the hearing, and the Board's investigation, would be focused on the failure to obtain building consents and whether those failings amounted to negligence and/or incompetence and whether the Respondent's conduct had brought the regime into disrepute; and
  - (b) it would not be taking the new evidence or allegations into consideration on the basis that the Respondent had not been given adequate time to respond. The Board considered that this was consistent with the principles of natural justice which require that hearings are conducted in a manner that ensures that the Respondent is given a fair opportunity to be heard and to contradict evidence against them.
- [11] With regard to the above it is important to note that the complaint process set out in the Complaints Regulations involves an initial investigation of the complaint by the Registrar which is limited in its scope. Regulation 7 only requires that the complaint be put to the licensed building practitioner and that the Registrar prepare a report considering whether regulation 9 applies. Regulation 9 deals with reasons why a complaint might not proceed to a hearing. The Registrar's Report need only contain the details of the complaint, the response, any additional information and a special advisor's response if one has been sought. As such it is not a full investigation.
- [12] If regulation 9 does not apply, then the Board must hold a hearing. The Board's process is inquisitorial<sup>6</sup>. Complaints are not prosecuted by an opposing party. The Board determines the witnesses that are required. The hearing is, in essence, the substantive investigation into the allegations.
- [13] Given the above factors the Board considers the legislative framework for complaints envisages the evidence relating to a complaint will develop in the lead up to the hearing as well as at the hearing. Given this the Board does not consider that the principles of natural justice have been breached.

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<sup>6</sup> *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 at [31]

## Evidence

- [14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. 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.
- [15] As noted above 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.

## Issue Estoppel

- [16] The Board was provided with the sentencing notes from District Court proceedings in which Venture Developments Limited was sentenced, following a guilty plea for the construction of 28, 50m<sup>2</sup> semi-relocatable dwellings at [Omitted]<sup>8</sup>. Venture Developments Limited was fined \$54,000 for the contraventions.
- [17] The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court<sup>9</sup>. The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding.
- [18] The Board considers, in this case, that estoppel applies as regards the decision made by the District Court. As such the Board need not make further inquiry with regard to the fact that Venture Developments Limited was found guilty of 28 counts of carrying out building work without a building consent.
- [19] The sentencing notes also included facts relevant to the Board's considerations including the following:
- [2] *In late 2016, Venture Developments Limited contracted with [Omitted], who operate a camping ground with cabins and caravans in [Omitted], to build 28, 50m<sup>2</sup> semi-relocatable dwellings. Venture Developments were told by [Omitted], that building consents were not required for those particular constructions.*
- [3] *The error made by Venture Developments Limited was to rely on that advice from the operator of the park, rather than to make its own independent investigations of what its obligations at law were.*

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>8</sup> *Tauranga City Council v Venture Developments Limited* [2018] NZDC 21378

<sup>9</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

- [4] *Unaware, it seems, of that requirement, Venture Developments began the construction process and between 1 October 2016 and 28 February 2018, constructed the 28 two bedroom dwellings.*
- [5] *There is no issue that the quality of the building work was fully compliant with the obligations on Venture Developments under the provisions of the Building Act and the Building Code other than issues relating to foundations.*
- [9] *I am not satisfied on the material before me that it is proper to characterise Venture Developments approach to its obligations as recklessness. Certainly, it was a grave error of judgement, falling below the standard that the company would appear to have exhibited over many years with its other work.*
- [17] *My view of the matter is as follows. The culpability of the company should be assessed at a moderate level. There was clearly a significant error of judgment by Venture Developments in failing to recognise it's obligations under the Building Act. However, I accept, with the absence of any previous matters, that this would appear to be a first such error and I take into account what Mr Coltman says on behalf of the company, that it will be a last failure as well.*
- [19] *The number of units to be constructed, 28 in all, is significant. The size of the dwellings should have put the company on notice that building consents were required. The company is experienced in building dwellings, as I have referred to in reciting Mr Coltman's opening comments. It should have been alerted to the need, or at least made enquiries. When I take those factors into account, I assess the culpability of the company as moderate.*
- [20] *The work itself, except for the foundations, has been compliant and of good quality, which is to the company's credit. Once Venture Developments became alerted to its error, it stopped work immediately and worked, with exceptional co-operation, with the Council, as has been referred to. As I have also referred to, it has undertaken to fix the foundations of the dwellings at no cost to the owners of those dwellings.*

### Summary of the Evidence

- [20] At the hearing the Respondent accepted that he was the licensed building practitioner supervising the construction of the 28 dwellings.
- [21] The Respondent provided the Board with a witness statement. In it he outlined the business operations of Venture Developments Limited including that over the past ten and a half years the company had built over 800 homes and that they typically submit three building consents per week. The Respondent set out that in 2014, [Omitted] the father of the Respondent's business partner Mark Fraser-Jones, approached Venture Developments to build a unit inside their campground. He noted that it started with one unit and that it developed gradually from there. He

also noted that there were a high number of existing dwellings at the site as well as other units of a similar kind under construction by other companies. The Respondent stated:

- 12 *During the discussions, [Omitted] advised me that there was no requirement for a normal building consent and the units were not to be fixed in any way to the ground. [Omitted] made it clear that there were to be no concrete trucks in the camp as this would breach the Campground's land use resource consent, which had been issued by the Tauranga City Council. This information was supported by the fact that other building companies and home owners were building under the same instruction. All units were to be built with a timber subfloor on blocks and were to be no larger than 90m<sup>2</sup>.*
- 13 *[Omitted] assured us he had all the necessary paperwork in order and this was how the units were required to be built. I was aware that there had been some historical issues with the Tauranga City Council and the Campground owners during a previous subdivision application and that they were operating under a unique land use resource consent. I accepted this advice as I trusted [Omitted] and I did not check his paperwork myself.*

- [22] The Respondent also stated that during the construction of the dwellings a number of inspections were carried out of the camping ground by Tauranga City Council staff and that no issue was taken with the construction that was underway. Much issue was made of this at the hearing by the Respondent and his Counsel. Witnesses for the Council gave evidence that the purpose of camping ground inspections was to establish compliance with camping ground regulations. Counsel for the Respondent noted Camping Ground Assessment forms before the board stipulated that "all relocatable homes have written consent of council". The forms were signed by the occupier of the camping ground, not by the Council, and that they were submitted by the camping ground as part of an inspection process.
- [23] The Respondent noted that once matters were brought to his attention Venture Developments set about putting matters right by applying for certificates of acceptances and building consents for foundations as well as carrying out remedial work. The work was carried out at Venture Developments cost, which was substantial.
- [24] The Respondent submitted it was a genuine mistake based on inaccurate information; that he had been fully cooperative with the investigation; and that he had taken appropriate steps once the matter came to light.
- [25] The Respondent and his Counsel also submitted that the actions taken against the Venture Developments were inconsistent with that taken against other persons or entities who had also contravened the Building Act at the camping ground. In essence they submitted that they had been singled out. The Council witnesses noted that further investigations were being undertaken and that further action may be taken as regards the other dwellings that were not consented. Council witnesses also

gave evidence that four dwellings built on the site prior to the Venture Development dwellings being constructed did have building consents.

### **Submissions**

- [26] The Board received submissions from Counsel for Tauranga City Council as the Complainant and from Counsel for the Respondent.
- [27] Counsel for the Complainant submitted that the conduct amounted to negligence, not incompetence, and that this was substantiated by the comments made by the sentencing judge that there was a grave error in judgement. She submitted that an innocent mistake can still be a negligent one and that the number of dwellings and the potential impact on the safety of the residences meant that the seriousness threshold for disciplinary negligence had been met. She also submitted that the Tauranga City Council's conduct in carrying out camping ground inspections and its actions in respect of other unconsented building work were not factors that should be taken into consideration by the Board when considering the Respondent's conduct.
- [28] Counsel for the Complainant left the question of whether the conduct also amounted to disrepute to the Board.
- [29] Counsel for the Respondent did not accept that the scale of the offending by Venture Developments was not a matter that went to seriousness. He submitted that the Respondent's actions were an innocent mistake that even a seasoned building practitioner could make, given the regulatory ambiguity of the situation. He submitted that the Respondent had not been negligent or incompetent and that he had not brought the regime into disrepute. It was submitted that, in the circumstances, it was reasonable for the Respondent to rely on the advice he was given that building consents were not required.
- [30] Counsel for the Respondent brought earlier Board decisions to the Board's attention where it had discussed the factors the Board considered were relevant when considering negligence in the context of a failure to obtain a building consent.
- [31] With regard to disrepute it was submitted that the conduct did not reach the threshold as a result of there being no intention and as a consequence of the actions taken by Venture Developments since the need for consents became clear.

### **Board's Conclusion and Reasoning**

- [32] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [33] 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).
- [34] The reasons for the Board's decisions follows.



## Negligence – Carrying out Building Work without a Building Consent

[35] The Board’s considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent.

[36] The starting point is that all building work must also be carried out in accordance with a building consent. 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.*

[37] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

**49 Grant of building consent**

(1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[38] 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 at large. This accords with the purposes of the Act as set out in section 3:

**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—*

(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.*

[39] The term “building work” is defined term in section 7 of the Act as follows:

*building work —*

(a) *means work—*

- (i) *for, or in connection with, the construction, alteration, demolition, or removal of a building; and*
- (ii) *on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

[40] The phrase “for, or in connection with” used in the definition connotes, in the Board’s view, a wide range of matters that could be brought into play.

[41] The Board is required to interpret terms in the Act from its plain text but ultimately it should be done to ensure that it gives effect to the purpose of Parliament<sup>10</sup>. The Board may, if necessary, in ascertaining the meaning of the Building Act, consider other indications as to the purpose provided in it. In this respect the provisions in section 3 Purposes of the Act noted above, section 14E Responsibilities of the Builder<sup>11</sup> and section 282A Purposes of Licensing Building Practitioners<sup>12</sup> have been taken into consideration.

[42] All of these provisions use similar references to the process to achieve the resulting object of building work and of its compliance with a building consent and the

<sup>10</sup> Refer s 5 of the Interpretation Act 1999

<sup>11</sup> S 14E Responsibilities of builder

- (1) In subsection (2), builder means any person who carries out building work, whether in trade or not.
- (2) A builder is responsible for—
  - (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;
  - (b) ensuring that building work not covered by a building consent complies with the building code.
- (3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—
  - (a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and
  - (b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

<sup>12</sup> S 282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

building code. On this basis the Board has formed the view that the process of obtaining a building consent is an integral part of the building process and that ensuring a building consent has been obtained naturally fits within the definition of “building work”. The words “*work, for and in connection with...*” (the construction process) is sufficiently wide to include acts (or omissions) of obtaining or ensuring a consent is present before building work commences.

- [43] This also accords with the findings in *Tan v Auckland Council*<sup>13</sup> where the High Court, which was 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.*

- [44] Justice Brewer in *Tan* went on to state:

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

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

- [45] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.
- [46] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that if a licensed building practitioner does not that then their conduct can be considered to have fallen below the standards of care expected of a licensed building practitioner.
- [47] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent or incompetent.
- [48] The Respondent submitted that he relied on advice received from the owners of the camping ground who were experienced owners of multiple camping grounds and that such reliance was, in the circumstances, reasonable. The Respondent also pointed to Council inspections carried out which did not note any noncompliance issues with buildings. It is to be noted, however, that the Respondent was not aware

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<sup>13</sup> [2015] NZHC 3299 [18 December 2015]

of those records at the time the building work was carried out and that the certification appears to be “self-certification”. As such the Board finds that it is not something the Respondent can claim to have relied on. The Board also accepts the Tauranga City Council evidence that the camping ground inspections were not for the purpose of establishing whether building work had been carried out under a building consent.

- [49] Countering the Respondent’s submissions is the fact that the Respondent is a well-established builder with over 10 years of experience and some 800 new residential dwellings behind him. The Board would expect such a highly experienced licensed building practitioner whose business files up to three consents a week to very conversant with the requirements for building consents.
- [50] The Board does accept that the Respondent was not knowledgeable of camping ground regulations. It does, however, note that the Respondent carried out no investigations nor did he make any independent enquiries to verify that consents were not required. Given the requirement that all building work requires a building consent, unless an exception can be established, the Board would expect that a licensed building practitioner would make such enquiries and it finds that the Respondent was negligent for not doing so.
- [51] In the context of disciplinary action 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*<sup>14</sup> test of negligence which has been adopted by the New Zealand Courts<sup>15</sup>.
- [52] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>16</sup>. 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.
- [53] 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 purposes of the Act<sup>17</sup> which are outlined above. 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

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<sup>14</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>15</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>16</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>17</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

case, the Board was required to take into account subjective considerations relating to the practitioner<sup>18</sup>.

- [54] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>19</sup> 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.*

- [1] In *Pillai v Messiter (No 2)*<sup>20</sup> the Court of Appeal stated it as:

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

- [55] The Board finds that the seriousness threshold has been met. As was noted by Judge Rollo the conduct of Venture Developments, and thereby the Respondent as its agent and the licensed building practitioner, *was a grave error of judgement, falling below the standard that the company would appear to have exhibited over many years with its other work.*

- [56] Judge Rollo also noted:

*[19] The number of units to be constructed, 28 in all, is significant. The size of the dwellings should have put the company on notice that building consents were required. The company is experienced in building dwellings, as I have referred to in reciting Mr Coltman's opening comments. It should have been alerted to the need, or at least made enquiries. When I take those factors into account, I assess the culpability of the company as moderate.*

- [57] 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.

### Disrepute

- [58] The Act does not provide guidance as to what amounts to "disrepute". The Oxford Dictionary defines it as "the state of being held in low esteem by the public"<sup>21</sup> and

<sup>18</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>19</sup> [2001] NZAR 74

<sup>20</sup> (1989) 16 NSWLR 197 (CA) at 200

<sup>21</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>22</sup> the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>23</sup>

[59] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions<sup>24</sup>;
- honest mistakes without deliberate wrongdoing<sup>25</sup>;
- provision of false undertakings<sup>26</sup>; and
- conduct resulting in an unethical financial gain<sup>27</sup>.

[60] 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.

[61] The conduct in question comes within the scope of honest mistakes without deliberate wrongdoing. The Board's decision to further investigate disrepute was based on the number of transgressions. Had a single residence been built without consent then it would be unlikely that, without other factors coming into play, that the Board would consider the conduct amounted to disrepute. Given that there were 28 residences and that there has been extensive negative comment as a result there is the potential for the conduct to amount to lower the public's opinion of the licensed building practitioner regime.

[62] At the same time the Board has taken into account the actions the Respondent has taken since it was brought to Venture Development's and his attention that building consents were required. The Respondent has estimated that some \$650,000 has been spent to date to address the issues and that rather than evade his responsibilities the Respondent has faced up to them in a responsible manner.

<sup>22</sup> [2012] NZCA 401

<sup>23</sup> [2012] NZAR 1071 page 1072

<sup>24</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>25</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>26</sup> *Slack, Re* [2012] NZLCDT 40

<sup>27</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [63] The Board also accepts that the issue started out with a single instance of failing to obtain a building consent and that it snowballed from there with the same failing being repeated with each dwelling that was constructed.
- [64] Finally, the Board notes that the Courts have stated that the threshold for disciplinary complaints of disrepute 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.*
- [65] Given all of the above factors the Board has decided that the Respondent has not brought the regime into 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<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [67] The Respondent made written and oral submissions as regards penalty, costs and publication. The Board also heard evidence during the hearing which was relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further mitigating 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*<sup>28</sup> 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*<sup>29</sup> 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

<sup>28</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>29</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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.

- [70] Counsel for the Respondent submitted that if the Board found that the Respondent was negligent that it should not take any action under section 318 of the Act.
- [71] The Board does accept that there is mitigation that can be taken into consideration. Notwithstanding the matter was serious and a penalty is warranted
- [72] The Board did not consider that the disciplinary offending was such that any form or suspension or cancellation of the Respondent's licence was warranted. Rather it decided that a fine was the appropriate penalty and that it had to be set at a level where it created deterrence and reflected the seriousness of the disciplinary offending. On this basis the Board adopted a starting point of a fine of \$5,000. The scale of the offending has been taken into account as an aggravating factor. The fine has been increased by \$2,500 to reflect that there were 28 dwellings that were built without a building consent bringing it to \$7,500.
- [73] Turning to mitigation the Board accepts that the Respondent's business has incurred significant expense in dealing with the consequences of the failings and that the Respondent has taken a responsible approach to the issues. Taking the mitigation into account the Board has decided to reduce the fine to \$6,000.

### Costs

- [74] 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."
- [75] 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<sup>30</sup>.
- [76] In *Collie v Nursing Council of New Zealand*<sup>31</sup> 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.*
- [77] 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.

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<sup>30</sup> *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.

<sup>31</sup> [2001] NZAR 74



## Publication

[78] 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<sup>32</sup>. 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.*

[79] 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.

[80] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>33</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>34</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>35</sup>. 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*<sup>36</sup> the High Court pointed to the following factors:

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

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

[81] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>37</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

<sup>32</sup> Refer sections 298, 299 and 301 of the Act

<sup>33</sup> Section 14 of the Act

<sup>34</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>35</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>36</sup> *ibid*

<sup>37</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [82] The Board notes that the matters are already in the public domain as a result of the District Court proceedings and media associated with it.
- [83] Based on the above the Board will order further publication. The publication will be by way of an article in Code Words. Such publication will also ensure that other licensed building practitioners learn from the matter.

### **Section 318 Order**

- [84] 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 \$6,000.

**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.

**In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

- [85] 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**

- [86] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 4 October 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.

- [87] 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**

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

Signed and dated this 13<sup>th</sup> day of September 2019



**Richard Merrifield**  
Presiding Member

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**<sup>i</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (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."*

**<sup>ii</sup> 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*

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(b) *within any further time that the appeal authority allows on application made before or after the period expires.*