

Before the Building Practitioners Board

	BPB Complaint No. CB25098
Licensed Building Practitioner:	Shayne Sparks (the Respondent)
Licence Number:	BP 102952
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Dunedin
Hearing Type:	In Person
Hearing Date:	6 August 2019
Decision Date:	15 August 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:

Joe O'Neill, O'Neill Devereux Lawyers, 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 a disciplinary offence under section 317(1)(d) 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 Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

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

- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (d) breached section 314B of the Act (s 317(1)(h) 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 committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [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.

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

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

Shayen Sparks

Respondent

[Omitted]

Witness for the Respondent

[Omitted]

Complainant

[8] The Respondent was engaged to carry out alterations to an existing dwelling. A building consent was issued for the intended building work which, the Complainant stated, was carried out over the period 15 January - 1 November 2018. A Code Compliance Certificate was issued on 26 November 2018 by the Dunedin City Council.

[9] The scope of work, as described in the building consent, was described as “extend bedroom, relocate laundry in ground floor, upgrade bedroom with French doors to new deck on first floor”.

[10] The Complainant raised the following issues with the building work:

- (a) the installation of a French door which leaked, and which had not been sealed and painted on the bottom edge;
- (b) failure to install a roof capping in a timely manner;
- (c) failure to supervise the installation of a membrane roof;
- (d) site health and safety concerns.

[11] The Board, in reviewing the file at the Registrar’s Report phase, also noted that:

- (a) building work may have been carried out that did not accord with the building consent; and/or
- (b) that the correct processes for making changes to a building consent may not have been followed; and/or
- (c) that restricted building work in respect of roofing membranes may have been carried out or supervised by persons not licensed to carry out such work.

French Doors

[12] The French doors were manufactured by a joiner. The consented plans showed an outward opening French door and associated flashing details. An inward opening French door was installed. The Respondent stated the change was an onsite decision which was most likely made to save space as it was a small deck. The Respondent did not consult with the designer as regards the change. The Complainant stated he was not consulted but that he did warn that there would be issues with the door leaking given that it was a high wind zone and that leaking did occur.

- [13] The painting of the door was carried out by [Omitted], a painter and decorator. He accepted that the base of the door had not been painted. He was not able to explain why it had not been done.
- [14] The leaking was remediated by the installation of a weather bead.

Building Consent Changes

- [15] In addition to the French doors' details being changed the consented building wrap for a rigid area barrier was changed as was the direct fix cladding was changed to cladding being installed over a cavity. The Respondent gave evidence that he consulted the designer prior to making the changes and that the designer agreed that they made sense. The drawings were amended.
- [16] The Council inspection notes included notations that:
- 12-10-18 Asbuilt drawings for window flashings required*
- 13-4-18 Outstanding – wrap – Rab board being used instead of Black building paper approved on site as a minor amendment manufacturers specifications required. CBF -Refers to builder Shane Sparks changing from Direct fixed to CB system. Approved on site as minor amendment as up grading to a cb system to decrease risk of leaking.*

Roof Capping

- [17] The capping was around a decorative finial that was reinstalled . The work was not part of the building consent. It was carried under Schedule 1 of the Act as like for like replacement. The Respondent gave evidence that he initially wanted to install butynol around the finial but that the subcontractor he was using for membranes was not contactable. As an alternative he had a zincalume flashing made and installed. The complaint set out that it was not capped for over three months. The Respondent accepted he could have had the flashing installed sooner but noted that there was sufficient sealing around the finial to prevent water ingress.

Membrane Roof

- [18] The butynol membrane roof was installed by a subcontractor who had previously worked with the Respondent. The subcontractor, known as either [Omitted] or [Omitted], was not a licensed building practitioner. When the Respondent had previously worked with the subcontractor, he had been in the employ of a roofing company. At the time the membrane was installed he was between jobs.
- [19] The Respondent stated that he had worked as a roofer in the mid 1990s and that he had experience in carrying out butynol application. At the time the membrane was installed he had assumed that the subcontractor was licensed but took no steps to check. The Respondent did not know if the subcontractor was an approved applicator for butynol. When it became apparent that the subcontractor was not

licensed, he provided a record of work for the restricted building work on the basis that he had supervised the work and that he was competent to do so.

- [20] Prior to providing a record of work the Respondent made inquiries with the Dunedin City Council to ascertain whether he could provide one for the membrane. He was advised that he could and, as a result, he modified his record of work to include the butynol membrane.
- [21] The Respondent did not obtain a producer statement for the membrane application. He did not know if the membrane would be covered by a manufacturer's warranty. The membrane was inspected by the Council. No quality or compliance issues were noted.

Health and Safety

- [22] The Complainant raised issues with, amongst other things, the compliance of the scaffolding used which he considered was dangerous. The Respondent gave evidence that he had borrowed the scaffolding and had erected it himself. He submitted that as the scaffold was under four metres in height he was able to erect it and that it did not have to be certified.
- [23] An issue with iron roofing being left on site for a prolonged period which was caught in the wind was also raised. The Respondent stated he removed the iron following the incident.

Record of Work

- [24] The Complainant alleged the record of work had not been provided in a timely manner. He gave evidence that it was not until after a final inspection was carried out by the Council on 12 October 2018 that a record of work turned up on his kitchen table. The Respondent maintained that it was provided prior to then.
- [25] The Board was provided with a record of work dated 5 May 2018

Submissions

- [26] The Complaint provided a comprehensive opening and submissions.
- [27] In both the complaint and in the submissions the Complainant raised issues with contractual matters outside of the Board's jurisdiction as well issues with regard to the Respondent's conduct that the Complainant considered was unethical and or brought the regime into disrepute. The Board had, however, resolved not to further investigate allegations of conduct that came within section 317(1)(i) of the Act.
- [28] The Complainant also raised issues with a failure to comply with provisions of Part 4A of the Act. The provisions in Part 4A do not come within the Board's jurisdiction. Contraventions are dealt with by way of infringement offences. Section 377 of the Act states who may file a charging document. The Board is not included as one of the entities that can.

- [29] The Complainant also took issue with the conduct of Counsel for the Respondent. Those are not matters that the Board can consider in dealing with the conduct of the Respondent.

Board's Conclusion and Reasoning

- [30] The Board has decided that the Respondent **has** 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 should be disciplined.
- [31] The Board has also decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
 - (b) 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); or
 - (c) breached section 314B of the Act (s 317(1)(h) of the Act).
- [32] The reasons for the Board's decisions follow.

Section 317(1)(d) – Contrary to a Building Consent

- [33] 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.*

- [34] 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.*

[35] 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.

[36] 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.*

[37] 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.*

[38] 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.*

[39] 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 is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly the building consent authority retains a discretion to refuse a minor variation⁶. To aid the process of applying for a minor variation most building consent authorities have a minor variation application form.

[40] 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 proceed 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 sought⁷.

⁶ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

⁷ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

[41] It must also be noted, as regards a licensed building practitioner's 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.*

[42] In *Tan v Auckland Council*⁸ 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.

[43] 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.

[44] Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established⁹. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[45] There were various items that were changed during the build from what was detailed or specified in the building consent. The Board's findings in respect of a failure to comply with the building consent relates to the French doors.

⁸ [2015] NZHC 3299 [18 December 2015]

⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

- [46] The French doors they were to be outward opening. A change to inward opening was made. No process was followed with respect to this change. Neither the designer nor the building consent authority was consulted. The change had implications for flashing details that needed to be considered, especially as the cladding system had also been changed.
- [47] With respect to the change to the rigid air barrier and the cladding system the Board accepts that changes were accepted by the Council as minor variations and were processed as such.

Negligence and/or Incompetence

- [48] Negligence and incompetence are not the same. In *Beattie v Far North Council*¹⁰ Judge McElrea noted:

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

- [49] 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*¹¹ test of negligence which has been adopted by the New Zealand Courts¹².
- [50] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*¹³ it was stated as "*an inability to do the job*".
- [51] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁴. 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.
- [52] 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 Act¹⁵. 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

¹⁰ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹¹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹⁶.

[53] 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—*
 - (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.*

[54] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁷ and be carried out in accordance with a building consent¹⁸. 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.

[55] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁹ 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.

[56] In *Pillai v Messiter (No 2)*²⁰ the Court of Appeal stated:

... 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.

¹⁶ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁷ Section 17 of the Building Act 2004

¹⁸ Section 40(1) of the Building Act 2004

¹⁹ [2001] NZAR 74

²⁰ (1989) 16 NSWLR 197 (CA) at 200

- [57] The conduct that the Board considered could come within the provisions of section 317(1)(b) were:
- (a) failure to check whether the membrane applicator was approved and licensed;
 - (b) the issues raised with regard to the French doors and the capping of the finial.
- [58] Whilst there were aspects of the above which departed from accepted standards the departures were minor and the Board decided that the conduct was not sufficiently serious enough to warrant a disciplinary outcome.
- [59] The Respondent is, however, cautioned to take more care in the future with regard to ensuring persons he engages to carry out restricted building work are licensed.

Record of Work

- [60] 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 work²¹.
- [61] 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.
- [62] Provision of a record of work 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).
- [63] 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 ...”.
- [64] On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as “immediately on completion” or “as soon as reasonably practicable”. Given this and taking into consideration the requirement to give effect to the purpose of Parliament the Board considers the use of the words “on completion” denotes a short time thereafter.
- [65] A degree of reasonableness has to be applied to this interpretation. Differing circumstances may result in longer or shorter timeframes. Generally the prescribed form for a record of work is simple and straightforward and a licensed building practitioner ought to know what they have or have not done or supervised and as such there should be few impediments to it being completed and provided in short

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

order. The situations where this is not the case will be rare and will have to be justified by the practitioner.

- [66] In this instance the Respondent completed a record of work dated 5 May 2018. The Complainant alleged it was not received until 12 October 2018 when a final inspection was being carried out. The Respondent maintained it was provided earlier than that date. The Board notes that the record of work was most likely modified sometime after 5 May 2018 when the Respondent annotated it to note the supervision of the membrane work. The actual date of provision, other than that it was available at the final inspection, was not clear. The issue of the Code Compliance Certificate was not inhibited by a failure to provide a record of work.
- [67] In this instance the Board has decided that the Respondent has provided a record of work within a reasonable time of completion and that, accordingly, the disciplinary offence has not been committed.

Misrepresentation or Outside of Competence

- [68] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)). It was with respect to the second aspect and with regard to the Butynol that the Board was carrying out its further investigations .
- [69] With regard to working outside of one's competence 314B(b) of the Act provides:
- A licensed building practitioner must—*
- (b) carry out or supervise building work only within his or her competence.*
- [70] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. The Respondent gave evidence that he had experience in roofing including experience in working with butynol. He considered he was competent. The Board agreed. He did have the personal competence.
- [71] The Respondent was not, however, licensed to carry out the butynol. Its application was restricted building work for which the appropriate licence was required. That licence is a Roofing Licence with a membrane area of practice. Had the Respondent been charged under section 317(1)(c) of the Act which covers licensed building practitioners carrying out or supervising restricted building work that they are not licensed to carry out or supervise the outcome may have been different and he is cautioned to ensure that, in the future, he only carries out restricted building work that he is licensed to carry out.

Penalty, Costs and Publication

- [72] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [73] 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

- [74] 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.

- [75] 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.
- [76] The Board considered that the disciplinary offending was at the lower end of the scale. The impact on the Complainant has been significant but the Board needs to look at the conduct objectively. As such it finds that there were no aggravating factors. There was some mitigation including financial consequences for the Respondent and the personal toll the matter has taken on him. Given this it has decided that a censure is the appropriate penalty. A censure is a formal expression of disapproval.

²² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [77] 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.”
- [78] 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 case²⁴.
- [79] 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.*
- [80] 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.

Publication

- [81] 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 Act²⁶. 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.*
- [82] 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.
- [83] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁸. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁹. The High Court provided

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

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

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*³⁰.

[84] 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 interest³¹. 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.

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

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 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.

[87] 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

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

[89] 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.

³⁰ *ibid*

³¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 15th day of August 2019



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*

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