

Before the Building Practitioners Board

	BPB Complaint No. CB25201
Licensed Building Practitioner:	Hamish Crego-Bourne (the Respondent)
Licence Number:	BP 132624
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 Date:	27 August 2020
Decision Date:	7 September 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
Bob Monteith, LBP, Carpentry and Site AOP 2

Procedure:

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

Board Decision:

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

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Summary of the Board's Decision

[1] The Respondent has been found to have committed criminal offences which reflect adversely on his fitness to carry out or supervise building work, to have brought the licensing regime into disrepute through his interactions with the Complainant and to have failed to have provided a record of work on completion of restricted building work. The Respondent's licence is suspended for a period of 12 months, and he is ordered to pay costs of \$2,000. A summary of the matter will be published in Code Words.

Introduction

[2] On 15 October 2019, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.

- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [5] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate at a hearing was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
 - (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

The Hearing

- [6] The matter was originally set down for a hearing on 19 May 2020 in Rotorua.
- [7] As a result of the COVID-19 Alert and Level 4 lockdown the hearing was adjourned. A notice was sent to the Respondent on 31 March 2020 advising that further notices would be sent once the COVID 19 situation changed.
- [8] The Board reviewed the complaint file and decided to deal with the matter by way of a Draft Decision. At that stage, the Respondent had not engaged in the investigation process.
- [9] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled. The hearing proceeded as a video conference hearing as a result of COVID restrictions.

Additional Charge

- [10] The Board, when making its regulation 10 decision, advised that whilst the above grounds of discipline have been identified the Board's jurisdiction and procedure is inquisitorial, not adversarial. As such, if evidence of further or different disciplinary offending is identified as part of the Board's inquiries, it may resolve to further investigate that conduct.

- [11] The Board had noted, when reviewing the complaint file, a reference to the Respondent appearing before the courts on a driving with excess alcohol charge. As a result, it made enquiries with the Ministry of Justice to ascertain the Respondent's criminal history. Following receipt of that history the Board resolved on 7 April 2020 to further investigate whether the Respondent had been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work contrary to section 317(1)(a) of the Act.

Function of Disciplinary Action

- [12] 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*¹ and in New Zealand in *Dentice v Valuers Registration Board*².
- [13] 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*³ 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."

- [14] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁴:

... 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.

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

⁴ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Evidence

- [15] 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.
- [16] The Respondent was engaged to carry out building work on a renovation to an existing dwelling under a building consent. The full scope of the work was not completed. The Complainant raised various matters with respect to the Respondent's conduct whilst he was carrying out or supervising the work.

Record of Work

- [17] The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in January 2019 and came to an end in or about March 2019. A record of work had not, at the time of the complaint been provided to the owner or to the territorial authority.
- [18] The Board was provided with a copy of email correspondence from the Respondent to the Complainant dated 12 April 2019. It stated, in relation to a record of work:

... also for the work I am required to do in regards to the "restricted building works ... "form 6a etc" you have blown it now I will not assist anyone with your job further (trust me they will need me lol).

I have in my possession very very important documents of yours and until ALL MONEY is paid along with my gear collected I will return them along with the doors ...

- [19] Form 6A is a licensed building practitioner's record of work.
- [20] Following the issue of the Draft Decision, the Respondent advised that on or about 2 June 2020 he had taken steps to provide a record of work to the Council. The Respondent confirmed the same at the hearing. He did not provide a record of work to the owner.

Negligence or Incompetence and Contrary to a Building Consent

- [21] The Complainant alleged that the Respondent had installed a new roof incorrectly, that it leaked following its installation, and that it had to be removed and reinstalled by a subsequent builder. Photographs were supplied by the Complainant of the underside of the roof where she stated the roof leaked. The photographs showed an area of roofing iron that had been installed without a roofing underlay having been installed under the iron. The Complainant reported that this was where leaks occurred.
- [22] That photo and others of the roofing work were reviewed at the hearing. The Respondent gave evidence that the roofing work was subcontracted to *[Omitted]*

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

and that they had a licensed building work practitioner who carried out the work, including the install of the underlay. Evidence was also received that the area of roofing where there was no underlay was part of the existing roof. It did not form part of the building work under the building consent. The Respondent noted that the leak occurred after his involvement in the building work had finished.

- [23] The Complainant also raised issues with work noted in various council inspections. The Board was provided with copies of inspection notes. They included the following:

Date	Note
21 February 2019	<ol style="list-style-type: none"> 1. Amendment required urgently for: <ol style="list-style-type: none"> (a) Change to flooring (b) Proposed beam and truss changes to side addition (c) Changes to brace sizes and lintels 2. Okay to temporarily wrap building only.
15 March 2019	<ol style="list-style-type: none"> 1. Fixings for braced walls to be fitted. 2. Confirmation required for BLP braces (variation required). 3. Double sill plates required for openings @ 2.4m 4. Confirmation required for lintel sizes.
21 March 2019	<ol style="list-style-type: none"> 1. Variation required for change in direction of cladding. 2. Apron flashing on roof to comply with NZBC E2 or metal code of practice. Current flashing does not comply. Meter box flashing to be fitted. 3. Screws to be fitted @300 centres to WANZ bars 4. Cavity/cladding/framing to finish below H1.2 bearer.

- [24] The Respondent's mother replied to the complaint stating that the Complainant did not question the quality of the workmanship during the build and that an outstanding balance owed was written off in an attempt to resolve the matter. She also noted that if there was an issue with the roof then this should be raised with the roofing contractor.
- [25] At the hearing, the Board questioned the Respondent and a witness from the Council who noted that he had only had limited involvement with the project having carried out the first inspection and the inspections after the Respondent's engagement.
- [26] The Respondent noted that there were design issues which resulted in the need for minor variations and amendments and that the work was in progress and was not complete.

Disrepute

- [27] The complaint included evidence of interactions between the Complainant and her sister and the Respondent. The Complainant outlined a confrontation at the property between her sister and the Respondent where the Respondent became angry and abusive prior to leaving the property. The Complainant alleged the Respondent was, from that point on, abusive and threatening toward her and her sister over the phone and in text messages. The Complainant provided copies of text and email messages to and from the Respondent in support of the allegation. The Complainant noted in an email to the Board on 10 May 2019 that the Respondent had threatened her brother with gang violence and that she had made a complaint to the police about the harassment that she and her family were experiencing.
- [28] The text correspondence recorded an escalating dispute between the Complainant and the Respondent.
- [29] The Respondent's mother noted that the Respondent had suffered mentally and physically from the complaint and that the Respondent was regretful for his words and actions.
- [30] At the hearing, the Complainant noted the impact the Respondent's conduct and his building work had had on her and her family. The Respondent, in turn apologised to the Complainant and stated that he took responsibility for his actions. He accepted that his conduct was not appropriate.

Criminal History

- [31] The Board obtained a copy of the Respondent's Criminal and Traffic History from the Ministry of Justice. It disclosed an extensive history of criminal offending in relation to, amongst other things, crimes of violence, firearms charges and driving charges including multiple offences of driving with excess alcohol. It was noted that the Respondent had recently been sentenced to periods of imprisonment for serious offending including unlawfully carry possessing firearms.
- [32] The Respondent gave evidence at the hearing that he had made silly mistakes in the past and that the stress of running a business resulted in his most recent offending. He noted that he has been penalised and has paid his debt to society.
- [33] The Respondent also spoke of programmes that he undertook whilst in prison and of his ongoing treatment and that he was no longer drinking or taking drugs. The Board sought independent verification of the courses and treatment. This was provided.

Draft Conclusion and Reasoning

- [34] The Board has decided that the Respondent **has:**
- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects

adversely on the person's fitness to carry out or supervise building work or building inspection work;

- (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); and
- (c) 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

and **should** be disciplined

[35] The Board has also decided that the Respondent **has not**:

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

[36] The decisions differ from those made in the Draft Decision. The reasons for the Board's decisions follow.

Criminal Offending

[37] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more.

[38] The Criminal and Traffic Conviction History disclosed a long history of serious criminal offending. Multiple of the Respondent's convictions met the above test. The first element of the disciplinary provision is, therefore, satisfied.

[39] The second element of the disciplinary charge is whether the commission of the offending reflects adversely on the person's fitness to carry out or supervise building work. This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person.

[40] Unlike other licensing regimes, the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply⁶. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of section

⁶ Compare with the licensing provisions in section 91(d) of the Electricity Act 1992 and section 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

317(1)(a), and it does not matter that the criminal offending predated the person being licensed.

[41] Other licensing regimes have similar post-licensing provisions as regards fitness to be a licensee. For example, the misconduct provisions in section 73(d) of the Real Estate Agents Act under which a ground of misconduct is where conduct "*constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee*" and section 100(1)(c) of the Health Practitioners Competence Assurance Act 2003 where "*the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise*".

[42] Decisions from within those jurisdictions are of assistance in determining the matter before the Board. In *Professional Conduct Committee v Martin*⁷ the Court stated:

"Fitness' often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession

[43] In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*⁸, the High Court stated:

[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.

[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.

[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that

⁷ High Court WN 2007

⁸ [2013] 3 NZLR 103

the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.

[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[44] Applying the tests and factors outlined above the Board notes:

(a) Nature of the charges:

The Respondent has numerous serious convictions, including convictions relating to violence and firearms. Carrying out or supervising building work is an undertaking which involves interactions with clients and often with their own homes. As such, there is a correlation between the nature of the charges and fitness to be licensed.

The Board notes that, at the hearing, the Respondent stated that the most recent offending arose as a result of the stresses of his business. Whilst that may be the case, it does show a link between the Respondent's license and the criminal offending.

(b) Gravity of the charges:

The Respondent has a long history of sustained serious criminal offending. It is clear to the Board, given the number of convictions and the seriousness of the criminal offending, that the offending is serious in nature.

(c) Acceptance of responsibility:

The Board noted that, at the time of the Registrar's Report, the Respondent had not engaged in the investigation. The Respondent did, at the hearing, acknowledge his offending and he has, as a result of his sentencing for his most recent criminal offending, been undergoing treatment. There is, however, a pattern of repetitive offending and a continuing risk of reoffending.

(d) Previous history:

The Respondent does not have a history with the Board. Having said this, he has only been licensed since August 2017. The Respondent does, however, have a long criminal history dating back to when he was a minor.

(e) The effect on public confidence:

The Board considers a person with a long criminal history, and a sustained pattern of violent offending and weapons-related offences would have an effect on public confidence in the licensing regime.

- [45] Given the above factors, the Board finds that the second element of section 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work.
- [46] The Board does note and acknowledge that the Respondent is undergoing treatment and that he may have turned his life around. This will be taken into consideration by the Board when it considers the appropriate penalty to impose.

Negligence and/or Incompetence

- [47] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁹ 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.

- [48] 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*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.
- [49] 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*¹² it was stated as "*an inability to do the job*".
- [50] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. 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.
- [51] 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 Act¹⁴. 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

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *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 practitioner¹⁵.

[52] 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.*

[53] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶ and be carried out in accordance with a building consent¹⁷. 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.

[54] The Board accepted that another licensed building practitioner had carried out or supervised the installation of the roof and that the issue with regard to underlay related to an existing area of roofing.

[55] Turning to the compliance issues noted in the Council inspections, at the time of the Draft Decision, the Board did not have any contradictor evidence before it. With the benefit of the Respondent's evidence at the hearing, the Board has decided that the conduct does not meet the threshold for the Board to take disciplinary action.

[56] The threshold for disciplinary action was discussed by the High Court in *Collie v Nursing Council of New Zealand*¹⁸ 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

¹⁵ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁶ Section 17 of the Building Act 2004

¹⁷ Section 40(1) of the Building Act 2004

¹⁸ [2001] NZAR 74

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.

[57] In *Pillai v Messiter (No 2)*¹⁹ 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.

[58] On the basis of the above and taking the evidence heard at the hearing into account, the Board has decided that the conduct has not met the tests required for a finding of negligence or incompetence.

[59] The Respondent is, however, cautioned to make sure that changes to a building consent are dealt with in a timely manner and appropriate manner.

Contrary to a Building Consent

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

[61] 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.

[62] 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.

[63] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.

[64] The Board heard evidence from the Council witness that the changes to the consent were either dealt with or when in the process of being dealt with by the Council as the building consent authority. On this basis, the Board has decided that the disciplinary offence has not been committed.

¹⁹ (1989) 16 NSWLR 197 (CA) at 200

Record of Work

- [65] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work²⁰.
- [66] 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.
- [67] The Board discussed issues with regard to records of work in its decision C2-01170²¹ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [68] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [69] 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 ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*²² "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [70] As to when completion will have occurred is a question of fact in each case.
- [71] In most situations' issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. That did not occur in the present case. The work came to a premature end. When it did the Respondent's involvement ceased. He would not, thereafter, be carrying out any further restricted building work. Accordingly, for the purposes of the provision of a record of work, completion had occurred.
- [72] A record of work was not, initially, provided. One has, since the complaint was made, been provided to the territorial authority. Whilst a record of work has now been provided to one of the two entities to whom it must be provided it is extremely late and, as such the requirement to provide "on completion" has not been met. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

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

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

²² [2018] NZHC 1662 at para 50

- [73] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [74] In this instance, there was an ongoing payment dispute. There was evidence that the Respondent intended to deliberately withhold the record of work. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [75] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Disrepute

- [76] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111²³ and discussed the legal principles that apply.
- [77] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above, there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*²⁴ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example, dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [78] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²⁵, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

²³ Board decision dated 2 July 2015.

²⁴ [2013] NZAR 1519

²⁵ 24 September 2014

[79] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"²⁶, and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²⁷, 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.*²⁸

[80] 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 convictions²⁹;
- honest mistakes without deliberate wrongdoing³⁰;
- provision of false undertakings³¹; and
- conduct resulting in an unethical financial gain³².

[81] 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.

[82] The conduct that was of concern to the Board was that relating to the Respondent's conduct on-site when the relationship started to deteriorate and that which followed.

[83] The Board accepts that disputes will arise and that tension between parties may ensue. There are, however, acceptable and unacceptable ways in which disputes can be handled. Resorting to abusive language and threats is not acceptable.

[84] The Respondent accepted that his conduct was not appropriate.

[85] As with negligence, the extent or degree of the departure has to be considered. The Courts have stated that the threshold for disciplinary complaints of disrepute is high

²⁶ 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

²⁷ [2012] NZCA 401

²⁸ [2012] NZAR 1071 page 1072

²⁹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

³⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

³¹ *Slack, Re* [2012] NZLCDT 40

³² *Colliev Nursing Council of New Zealand* [2000] NZAR 7

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.

- [86] The Board, having reviewed the evidence, has decided that the conduct was serious enough to warrant a disciplinary finding. The abuse and threats were targeted and sustained, and whilst there was some provocation in the text correspondence, the type of language used, and the threats made went well beyond the heat of the moment. They were designed to intimidate and denigrate the target.
- [87] The Respondent has now apologised. That factor will be taken into account when considering the appropriate penalty.

Draft Decision on Penalty, Costs and Publication

- [88] 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.
- [89] 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

- [90] 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*³³ 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.

- [91] The Board, when it issued its Draft Decision, considered that the cancellation of the Respondent's licence for a period of two years was warranted. The Board has made different decisions to those it made when it issued its Draft Decision. It has not found that the Respondent was negligent nor that he had carried out building work that

³³ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

was contrary to a building consent. The Draft Decision penalty focused on deterrence.

- [92] Deterrence was noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³⁴. The High Court, when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [93] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [94] The Board notes that in *Lochhead v Ministry of Business Innovation and Employment*³⁵ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [95] The Respondent has still been found to have committed two serious disciplinary offences and to have failed to provide a record of work. The confidence of the public in the licensing regime is still at play, and the Board still considers that the Respondent has committed offences that go to his fitness to continue to be a licensed building practitioner. In this respect, the Board notes that the licensing regime exists to ensure the public can have confidence in those who carry out restricted building work.
- [96] The Respondent has, however, since the Board issued its Draft Decision, apologised for the conduct that resulted in the finding of disrepute and has provided evidence of a treatment programme in relation to his criminal offending. He has stated that he no longer drinks or takes drugs. The Board notes that drugs and alcohol have been triggers in past offending.
- [97] A significant penalty is still warranted. The penalty still needs to be one that deters others and gives the public confidence in the licensing regime.

³⁴ [2012] NZAR 481

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

- [98] On the basis of the above factors, the Board has decided that it will suspend the Respondent's licence for a period of 12 months. The primary difference between a cancellation and a suspension is that the Respondent's licence will be automatically reinstated at the end of the period of cancellation.
- [99] The Respondent should note that whilst his licence is suspended he is not restricted from carrying out residential building work that does not require a building consent, from doing non-residential building work, or from carrying out restricted building work under the supervision of a licensed person.

Costs

- [100] 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."
- [101] 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 case³⁶.
- [102] In *Collie v Nursing Council of New Zealand*³⁷ 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.

- [103] The Board notes the matter was initially dealt with on the papers. The Respondent sought a hearing. The Board's findings have changed as a result. The hearing was held by way of a video conference.
- [104] The Board's normal scale of costs for a hearing of this type is \$3,500. Having taken the above factors into account, the Board has decided that the sum of \$2,000 is a reasonable amount that the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [105] 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 Act³⁸. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

³⁶ *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.

³⁷ [2001] NZAR 74

³⁸ Refer sections 298, 299 and 301 of the Act

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.

- [106] 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.
- [107] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction⁴⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴¹. 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*⁴².
- [108] 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 interest⁴³. 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.
- [109] Based on the above, the Board will order further publication. Publication is required to ensure that other practitioners learn from the matter as well as ensuring that the public is adequately informed. Publication will be in Code Words and on the Board's website.

Draft Section 318 Order

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

- Penalty:** Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of 12 months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.
- 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.

³⁹ Section 14 of the Act

⁴⁰ Refer sections 200 and 202 of the Criminal Procedure Act

⁴¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴² *ibid*

⁴³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

[111] 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

[112] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **05 October 2020**. 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.

[113] 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/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 14th day of September 2020



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.