

## Before the Building Practitioners Board

	BPB Complaint No. CB25416
Licensed Building Practitioner:	Kevin Franklin (the Respondent)
Licence Number:	BP 102063
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	22 September 2020
Decision Date:	30 September 2020

#### Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)  
Robin Dunlop, Retired Professional Engineer  
Rob Shao, LBP, Carpentry and Site AOP 1  
Frank Thomas, LBP, Roofing

#### 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.

#### Disciplinary Finding:

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

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## Summary of the Board's Decision

[1] The Respondent was negligent in failing to ensure a building consent was in place for building work on a bathroom and in respect of his invoicing practices. The Respondent also failed to provide a record of work to the territorial authority on completion of restricted building work. The Respondent did not bring the regime into disrepute. He is censured, fined \$1,000 and ordered to pay costs of \$3,500.

## The Charges

[2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at 3 Spencer Street, Remuera, Auckland. 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 contrary to section 317(1)(b) of the Act, IN THAT:

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

- (i) the Respondent may have carried out building work requiring a building consent without one being in place noting that the work was alleged to have commenced in February 2018 but that a building consent was not issued until August 2018; and/or
  - (ii) the Respondent's systems and processes for accounting for an invoicing for building work may not have reached an acceptable standard; and/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) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, he may not have provided a record of work for Stage 2 of the Build;
- (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 contrary to section 317(1)(i) of the Act, IN THAT, he may have obtained an unethical financial gain by invoicing for items that did not relate to the work contracted for.

### Function of Disciplinary Action

[3] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[4] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>4</sup> Collins J. noted that:

*"... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[5] 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

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

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

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

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 persons<sup>5</sup>:

*... 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.*

- [6] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.
- [7] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [11] 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.

<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- |                  |              |
|------------------|--------------|
| Kevin Franklin   | Respondent   |
| <i>[Omitted]</i> | Complainants |
- [13] The Respondent was engaged to carry out building work on a circa 1926 residential dwelling by the Complainants. The work involved two stages. The first was the strip out of areas of the dwelling and the replacement of internal wall linings with plasterboard. A bathroom was also stripped out, and sanitary fittings were moved within the bathroom. A new tiled shower was installed. The first stage of the building work was not carried out under a building consent.
- [14] The Respondent considered that the stage one work came within the provisions of Schedule 1 of the Building Act in that it was exempt from the requirement for a building consent. The Respondent accepted, during questioning, that the creation of a tiled shower, may have required a building consent. He noted it as a 50/50 call.
- [15] Stage two of the building work involved an alteration to the existing dwelling. A building consent was sought and granted. The building consent did not include the work previously completed in the bathroom. The consent was issued on 8 August 2018.
- [16] The Complainant's sought a fixed price for the second stage of the building work. One was provided, but a contract was not. Included in the quote was an amount for P&G (preliminary and general). Some two months after the start of stage two, by agreement, the arrangements were changed, and the Respondent continued the project on a time and materials basis. Building work continued until the Respondent's services were brought to an end.
- [17] The Complainant alleged that during the period when the Respondent was working on a time and materials basis the Respondent invoiced the Complainants for capital items of plant and equipment, for personal items and for materials that did not relate to the Complainant's home. They provided copies of invoices as evidence to support their allegations and noted that it was only as a result of their inquiries that they managed to ascertain that there was an issue. Included in the invoices was a credit note issued by the Respondent which, the Complainants stated, was issued after the discrepancies in invoicing was brought to the Respondent's attention. They also noted that, following the issue of the credit note, a further invoice was issued by the Respondent for extra hours worked and for the balance of the P&G not charged out when the fixed price arrangement was in place. The Complainants submitted that there might have been additional items for which credit notes were due as they were only able to reconcile one of the supplier's invoices.
- [18] The Respondent was questioned about his invoicing processes. He stated that he received CSV files from his supplier that he copied and pasted into his invoices. He accepted that there were some clerical errors in the invoices and that there were

two jobs with similar job references being undertaken at the same time (L54 and W54). He accepted that mistakes had been made. The Respondent also accepted that he should have checked his invoices more thoroughly.

- [19] The Respondent also gave evidence that the capital items acquired were for the specific job and that, as he was no longer charging for P&G as part of a fixed price, he was recovering the costs of the capital items required for the job from the Complainants as part of his invoicing. The Respondent stated that he obtains new tools and equipment for every job and that he was doing the same for this one. He considered there would be little if any residual value in the capital items once the job was complete. It was noted that the amount charged for capital items exceeded the original amount to be charged for P&G. The Respondent's submission, with respect to this, was that P&G is a percentage of the total value of a job (he gave an amount of 8-10%) and that as the scope of the job had increased the amount of P&G would have also increased.
- [20] The Respondent submitted that he did not have to credit all of the items that were credited as the capital items were purchased to use on the job and he had received legal advice that as he was not charging for P&G he could charge directly for the items.
- [21] With respect to the invoice for hours worked issued post the credit note, the Complainants noted that the timesheets supplied prior to the additional invoice did not reconcile with the invoice. In essence, they noted that the timesheets did not contain any hours worked for time periods which did have charges in the invoice. The Respondent stated that he had issues with the accuracy of his time clock system (Clock Shark) and the use of it by his staff. He also stated, with regard to his own time, that he had initially agreed not to charge for any of his time at the end of the project whilst sorting various issues but that he then decided to charge so as to recover his time as the Complainants were not paying.
- [22] The Respondent gave evidence that he completed a record of work when on-site and whilst a council Inspector was present and that he left it with the property file. He produced a photograph which showed the edge of what he stated was a record of work. The Complainants stated that the record of work was not in the property file and that they did not have a copy of it. The Respondent accepted that he had not provided the record of work to the territorial authority. He stated that he provides a record of work to the territorial authority when the job reaches the compliance stage. He provided a copy of a record of work dated 21 September 2018 to the Board as part of his response to the complaint.

### **Submissions**

- [23] The Board allowed the Respondent to file further submissions post the close of the hearing from an expert as regards P&G amounts. The Board indicated that an opinion from an expert would be taken into consideration if provided.

[24] On 28 September 2020, the Respondent filed two documents. One was an excerpt from NZS 3910:2003 – G1.2 Definitions. The other was extracts from an undated New Zealand Institute of Quantity Surveyors document entitled Elemental Analysis of Costs of Building Projects. The documents were taken into consideration.

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

[25] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- (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 **should** be disciplined.

[26] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

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

### Negligence

[28] There are two aspects to the finding of negligence. The first is that the Respondent carried out building work in stage one of the build that required a building consent without ensuring that one was in place prior to doing so. The second is with respect to his invoicing process. The Board considered that either matter, taken individually, was sufficient to make a finding of negligence. In making a decision about invoicing practices, the Board considered that it was more appropriate to make a finding with respect to negligence, as opposed to the alternative of disrepute.

### *Building Consent:*

[29] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code). All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

**40      *Buildings not to be constructed, altered, demolished, or removed without consent***

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*

- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

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

**49 Grant of building consent**

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

[31] 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.*

[32] In *Tan v Auckland Council*<sup>7</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

<sup>7</sup> [2015] NZHC 3299 [18 December 2015]

*[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.*

[33] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[34] Justice Brewer in *Tan* also noted:

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

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

[35] The *Tan* case related to the prosecution of a project manager. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[36] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[37] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

**96 Territorial authority may issue certificate of acceptance in certain circumstances**

(3) *This section—*

(a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*

(b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[38] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building

consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

- [39] The Board also notes that section 362F of the Act imposes minimum requirements for contracts for residential building work over \$30,000 in value. It also imposes an obligation for the contract to be in writing and for the contract to comply with any regulations.
- [40] The Board heard evidence that a written contract had not been entered into. Contravention of the requirement for a contract is an infringement offence, but the Board does not have any jurisdiction over infringement offences<sup>8</sup>.
- [41] Notwithstanding the lack of a written contract the minimum requirements for residential building contracts, which are implemented by way of the Building (Residential Consumer Rights and Remedies) Regulations 2014, are deemed to be part of an oral contract for residential building work. This is by way of Regulation 7, which states:

**7 Prescribed clauses deemed to be included in oral residential building contracts for prescribed minimum price or more**

- (1) *This regulation applies to a residential building contract where the price for the building work is not less than the prescribed minimum price if there is no written contract as required under section 362F of the Act.*
- (2) *The contract is deemed to include the terms prescribed in Schedule 3.*

- [42] Within Schedule 3 clause 1 states:

**1 Building consents**

- 1.1 *The building contractor undertakes to obtain all necessary approvals, including building consents, before commencing the building work.*

- [43] Given this provision, it is clear that there was, in addition to the obligations outlined in the *Tan* decision, a contractual obligation on the Respondent to obtain any required consents or at least to ensure they were obtained before the building work was started.
- [44] The building work undertaken that required a building consent was the work in the bathroom and primarily the creation of a tiled wet area shower. The relocation of other sanitary fixtures may have also required a building consent.
- [45] The Respondent stated that he relied on Schedule 1 exemptions. In this respect clause 32 of Schedule 1 allows for repair, maintenance and replacement provided it a comparable component or assembly is used, and it is in the same position. Clause

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<sup>8</sup> Infringement offences fall within the Jurisdiction of the Ministry of Business Innovation and Employment.

35 does allow for the alteration to sanitary plumbing provided that the total number of sanitary fixtures in the building is not increased by the alteration.

- [46] Looking at the building work in question the creation of a wet area shower (as opposed to the replacement of an existing shower) clearly falls outside of the exemptions in Schedule 1.
- [47] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent.
- [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*<sup>9</sup> test of negligence which has been adopted by the New Zealand Courts<sup>10</sup>.
- [49] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>11</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [50] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purposes of the Act<sup>12</sup> which are outlined above. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>13</sup>.
- [51] The Respondent, at the hearing, felt it was a 50/50 call as to whether a building consent was required. If that were the case, the Board would have expected the Respondent to have made enquiries to satisfy himself that a building consent was not required. He did not make any such enquiries. The Board, which includes persons with extensive experience and expertise in the building industry, considered that a licensed building practitioner with a carpentry licence should have been aware of the need for a building consent, or at the least, would make enquiries to satisfy himself

<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

that one was not required prior to undertaking the work. As such, the Board finds that the Respondent has departed from what it considers to be an acceptable standard of conduct.

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

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

- [53] The building consent process is at the heart of the compliance regime in the Building Act. It is important, for those that use buildings, that it is adhered to. The question for the Board, as regards seriousness, is whether the Respondent's failure to ensure a building consent was in place prior to carrying out the building work, was a matter of inadvertence, oversight or carelessness. In this respect, the Board notes the positive duties on the Respondent in the Building (Residential Consumer Rights and Remedies) Regulations 2014 to ensure a building consent is in place and that the Building Act creates a presumption that a consent is required unless an exemption is available. Given those factors, the Board finds that the conduct was sufficiently serious enough.

#### *Invoicing Processes*

- [54] The negligence with regards to invoicing relates to the processes used to invoice for building work carried out. In this respect, the question for the Board is whether the Respondent's processes can come within the definition of "building work" as defined by the Act, as section 317(1)(b) relates to carrying out or supervising "building work".
- [55] The term building work is defined in the Act. Its definition has, however, been expanded by the introduction of Part 4A of the Act. The Board's view is that, with its introduction, the term includes the type of conduct complained about.
- [56] As noted, the term "building work" is a defined term. Section 7 of the Act defines it as follows:

*building work —*

*(a) means work—*

*(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*

*(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

*(b) includes sitework; and*

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<sup>14</sup> [2001] NZAR 74

- (c) *includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and*
- (d) *in Part 4, and the definition in this section of “supervise”, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.*

- [57] The phrase “for, or in connection with” in the definition connotes a wide range of matters that could be brought into play and conceivably the processes and systems used to manage the construction, alteration, demolition or removal of a building.
- [58] The Board, when interpreting the phrase, is required to do so in such a way as to give effect to the purpose of Parliament<sup>15</sup>. The Board may, if necessary, in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 Purposes of the Act, section 14E Responsibilities of the Builder, section 282A Purposes of Licensing Building Practitioners and Part 4A Consumer Rights and Remedies in Relation to Residential Building Work are relevant.
- [59] The provisions, other than Part 4A, use similar references to the systems and process used to achieve the resulting object of building work and of its compliance with a building consent and the building code.
- [60] Part 4A, however, introduces contractual and other provisions that must be adhered to in respect of residential building work. Section 362A sets out:

**362A Outline of this Part**

*This Part protects consumers (referred to in this Part as clients) in relation to residential building work by—*

- (a) *requiring certain information to be provided before a residential building contract is entered into; and*
- (b) *prescribing minimum requirements for residential building contracts over a certain value; and*
- (c) *implying warranties into residential building contracts; and*
- (d) *providing remedies for breach of the implied warranties; and*
- (e) *requiring defective building work under a residential building contract to be remedied if notified within 1 year of completion; and*
- (f) *requiring certain information and documentation to be provided on completion of building work under a residential building contract.]*

- [61] In addition to Part 4A of the Act, the Building (Residential Consumer Rights and Remedies) Regulations 2014 were introduced. Those regulations include specific detail and requirements for disclosure and checklists as well as prescribed contractual clauses. The prescribed contractual clauses include requirements “for negotiating and agreeing on variations to the building work”.

<sup>15</sup> Refer s 5 of the Interpretation Act 1999

[62] The Board has also considered the Licensed Building Practitioners Rules 2007 (the Rules). Rule 4 states:

**4 Minimum standard of competence for each class of licence**

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[63] Within the Carpentry class of licence and relevant to the present conduct Schedule 1 Competency 3: Carry out planning and scheduling for carpentry work states:

3.1 *Read and interpret working drawings, specifications, programme schedules and quantity lists.*

3.2 *Order and coordinate material supply.*

*May include but not limited to - ability to measure, calculate and estimate quantities, order and coordinate material supply.*

[64] The Board has considered the significance of the introduction of Part 4A and has decided that Parliament's intention was to extend the meaning of "building work" when it relates to residential building work so as to include the associated contractual processes. The Board also considers that the conduct in question comes within the parameters of the Rules which supports the conclusion that, in this instance, the conduct in question falls within the definition of "building work".<sup>16</sup>

[65] Having made this decision, the Board needs to consider the evidence to assess whether the Respondent's conduct falls within the definition of negligence as outlined above in the discussion about building consents.

[66] The Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent displayed a lack of reasonably expected care in invoicing. He invoiced for items that related to other jobs and for items that should not have been invoiced for. As such, the Respondent was negligent in failing to correctly invoice. His practices in developing and issuing invoices did not meet an acceptable standard. The Board further notes that the Respondent did not have a quality assurance or audit process in place to identify errors. It was only as a result of the Complainants vigilance that the errors were identified.

[67] As with the building consent matter, the Board considers that the conduct was sufficiently serious enough for it to make a disciplinary finding.

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<sup>16</sup> The Board made a decision in C2-01124 that invoicing did not come within section 317(1)(b) but that decision was prior to the introduction of Part 4A of the Act.

Record of Work

- [68] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>17</sup>.
- [69] 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.
- [70] The Board discussed issues with regard to records of work in its decision C2-01170<sup>18</sup> 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.
- [71] 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.
- [72] 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*<sup>19</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [73] As to when completion will have occurred is a question of fact in each case.
- [74] 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.
- [75] In this instance, the Respondent gave evidence that he left a record of work on-site for the owner. The owners stated that it was not on-site. The Respondent accepted that he did not provide it to the territorial authority. On that basis, the Board finds that the record of work was not provided on completion as required by section 88 of the Act, and the disciplinary offence has been committed.
- [76] 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

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<sup>17</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>18</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>19</sup> [2018] NZHC 1662 at para 50

case will be decided by the Board on its own merits, but the threshold for a good reason is high. No good reasons were advanced. The Board will, however, take into account as mitigation when considering penalty, that a record of work may have been provided to the owners.

- [77] 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. He should also note that completion may occur prior to a code compliance certificate being sought and that, if it does, that the requirement to provide a record of work is then triggered.

### Disrepute

- [78] 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 C2-01111<sup>20</sup> and discussed the legal principles that apply.
- [79] 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*<sup>21</sup> 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.
- [80] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>22</sup>, 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.
- [81] 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"<sup>23</sup> and the

<sup>20</sup> Board decision dated 2 July 2015.

<sup>21</sup> [2013] NZAR 1519

<sup>22</sup> 24 September 2014

<sup>23</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>24</sup> the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>25</sup>

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

- criminal convictions<sup>26</sup>;
- honest mistakes without deliberate wrongdoing<sup>27</sup>;
- provision of false undertakings<sup>28</sup>; and
- conduct resulting in an unethical financial gain<sup>29</sup>.

[83] 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.

[84] The Board noted that whilst the Respondent had been negligent in his invoicing. The question for the Board, with respect to disrepute, is whether the conduct went beyond negligence to deliberate conduct that resulted in unethical financial gain.

[85] The Board has decided that it did not. The Board did not consider that there was an intention to defraud and obtain an unethical financial gain. The processes used were open to mistakes being made and were poor. The method of and reasoning for invoicing for capital items of plant and equipment was dubious. The Respondent should have disclosed his intentions, provided alternative options to the owners, and given thought to the residual value of capital items purchased for the job.

[86] The Board has also taken into account the directions of the Courts as regards the threshold for disciplinary complaints of disrepute. The threshold is high. Furthermore, when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

<sup>24</sup> [2012] NZCA 401

<sup>25</sup> [2012] NZAR 1071 page 1072

<sup>26</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>27</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>28</sup> *Slack, Re* [2012] NZLCDT 40

<sup>29</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

*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.*

- [87] The matters before the Board, given the lack of intention, did not reach the seriousness threshold.

### **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 Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [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*<sup>30</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [91] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>31</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do 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.
- [92] The Respondent has been found to have committed two disciplinary offences. They will be dealt with separately.
- [93] The Board has decided that, as regards the finding of negligence, the Respondent is to be censured. A censure is a public statement of dissatisfaction. The Board

<sup>30</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>31</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

considered that this was an appropriate penalty as the matters did not relate to the Respondent's overall competence as a carpenter.

- [94] Turning to the record of work the Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. The Board notes that the Respondent may have provided a record of work to the owners (but not to the territorial authority). On that basis, the Board will reduce the fine to \$1,000.

### Costs

- [95] 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."
- [96] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>32</sup>.
- [97] In *Collie v Nursing Council of New Zealand*<sup>33</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

*But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

- [98] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's normal amount for a hearing of this type.

### Publication

- [99] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>34</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

*In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

- [100] 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.

<sup>32</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>33</sup> [2001] NZAR 74

<sup>34</sup> Refer sections 298, 299 and 301 of the Act

[101] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>35</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>36</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>37</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>38</sup>.

[102] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>39</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

### Section 318 Order

[104] 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 with respect to the finding under section 317(1)(b) of the Act; and

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent ordered to pay a fine of \$1,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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(l)(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.

[105] 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

[106] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **19 November**

<sup>35</sup> Section 14 of the Act

<sup>36</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>37</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>38</sup> *ibid*

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

**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.

[107] 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

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

Signed and dated this 29<sup>th</sup> day of October 2020



**M.J. Orange**  
Presiding Member

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

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

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- (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.*