

Before the Building Practitioners Board

	BPB Complaint No. CB25691
Licensed Building Practitioner:	Jamie Hartnett (the Respondent)
Licence Number:	BP 123937
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

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 Type:	On the Papers
Hearing and Decision Date:	22 June 2021
Reissue Date:	9 August 2021
Final Decision Date:	4 October 2021

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1

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)(i) of the Act.

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Summary of the Board's Draft Decision

- [1] The Respondent has carried out building work in a negligent manner. His licence is cancelled for a period of six months. He is ordered to pay costs of \$500.

The Charges

- [2] On 22 June 2021, 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] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [6] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Respondent and the Complainant will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Background to the Reissued Decision

- [8] The Board issued an initial Draft Decision and sought submissions. On 6 July 2021, further submissions were received from the Complainant. On 9 August 2021, the Board met and considered those submissions. It decided, in light of them, to reissue the Draft Decision. The reissued Draft Decision includes a further disciplinary offence of bringing the regime into disrepute and a reconsideration of the indicative penalty.
- [9] The Respondent did not respond to the Draft Decision. The same procedure will apply following the reissue of the Draft Decision in that the Respondent will be provided with an opportunity to accept the Draft Decision, to make submissions on it, or seek an in-person hearing.

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Disciplinary Offences Under Consideration

- [10] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had, at [Omitted]:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [11] As noted above, the disrepute charge was included following further submissions being received from the Complainant.

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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [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*,⁵ 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 persons⁶:

... 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [15] 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.
- [16] The above commentary on the limitations of the disciplinary process is 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.

Evidence

- [17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [18] The Respondent was engaged by the Complainants to install a replacement roof. The existing roof, a decramastic tile roof, had been badly damaged in a storm and needed to be replaced. The Respondent was hired to install a long run steel roof. The building work was not carried out under a building consent.
- [19] The work was started but not finished by the Respondent. The Complainants raised workmanship issues with the work that had been completed by the Respondent.
- [20] The Board was provided with videos and photographs of the work, a Television New Zealand (TVNZ) article, and a Fair Go article about the work. The Board reviewed those materials.
- [21] The Complainants contacted the Roofing Association of New Zealand (RANZ). They stated that Graham Moor, the Chief Executive Officer of RANZ, informed them that the work he had seen was “well short of good trade practice and that there are compliance issues apparent as well”.
- [22] The materials reviewed raised issues with the quality and compliance of the building work, including a failure to remove old battens and install new purlins with complying fixings, poor coverage of building paper, missing flashings, poor fixing of iron and the use of incorrect fixings, poorly attached guttering, and damage to new roofing materials. The materials also showed that scaffolding and edge protection were not used when the work was carried out.
- [23] The Complainants noted that the roof installed by the Respondent would have to be replaced because of the use of the wrong types of fixings.
- [24] The video clips showed that the incomplete roof leaked.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [25] The Respondent was provided with a copy of the complaint and was asked to respond. The only response provided was an email dated 1 February 2021 in which the Respondent stated:

Thanks a lot for the fast reply, I can only access some of the videos, im not too concerned about seeing the remaining photos, im just curious about what happens now?

- [26] The Respondent did not address the matter raised in the complaint.

Further Submissions

- [27] The Complainant emailed the Board in response to its Draft Decision. The Complainants brought further matters to the Board's attention. Specifically, that:

- (a) the Respondent did not provide a contract for the building work which was over the threshold in the Building (Residential Consumer Rights and Remedies) Regulations 2014 for disclosure information and the provision of a contract;
- (b) that he may have misappropriated funds paid to him; and
- (c) that he may have mislead them with regard to the application of funds provided.

- [28] The Board searched the Insolvency Register. It notes that the Respondent was adjudicated as bankrupt on a creditor's petition on 30 September 2019, that he is a sickness beneficiary, and that he remains a bankrupt. Under the Insolvency Act 2006, a bankrupt must inform the Assignee of income and expenses including any funds obtained over \$1,300 during your insolvency. Under section 433A of the Insolvency Act, it is an offence for a bankrupt to obtain credit of more than \$1,000.

- [29] The Complainants noted that they paid the Respondent the total of \$28,620 dollars and that a further \$10,000 was to be paid. Evidence of the payments was provided. The Complainants noted:

We contacted Canterbury Longrun Timaru about our flashings and discovered that even though they were ordered, they would not be made until it was paid for. Jamie had already told us all materials were paid for and he was waiting for flashings to be made.

- [30] The Complainant also provided a report from the remedial roofers, which identified further issues with the building work. The roofing report was completed by [Omitted], of Huston Cross Limited. The Report included photographs taken during deconstruction of the Respondent's work. Issues noted included the following serious issues:

Denting & scratching on the iron below a pitch change.

Under current code & best practise a change of pitch flashing should have been installed.



The sheeting behind the chimneys is appalling. As corrugate has an overlap & an underlap to sheet behind a chimney this way involves creating an overlap out of an underlap. This needs to be marked & cut carefully but will never be as good as a factory edge. There has been one attempted to achieve this & the cut is poor. Other sheeting behind the chimneys has the overlap left uncut. Silicon has been applied to one to prevent water entering inside.



Ridging junctions poorly finished clearly by someone unskilled in this area.



A raised valley placed over the top of the existing valley. No valley purlins were installed with the roof over existing tile battens.



New roofing layed over existing tile battens. Purlins have been installed on the bottom row & ridge/hip rows. The purlins are thicker than the battens & damage can be seen on a lot of the sheets from this.



[31] The report writer summarised his on-site findings as follows:

ASSESSMENT COMMENT

The works carried out on this property are well below industry standard and do not meet the building code. When replacing a metal tile roof with long-run roofing new purlins need to be installed as per building code. Most of the tile battens & underlay may remain in place with new underlay laid under the new roof. Some areas of roof were lifted on the day of inspection & it was obvious that this had not been done with iron laid over the tile battens & original underlay. Some areas had new underlay.

Iron was lifted up the valleys where no fixings were installed & no valley purlin had been installed. I am uncertain exactly how many new purlins have been installed.

Denting & scratching was observed over the new roof. This is not uncommon but was excessive & these sheets would have required replacing.

Flashing's have not been installed. Although this was a work in process a change of pitch flashing, front apron & ridging should have been fitted. The ridging that has been installed is well below industry standard.

This roof has been left unrepairable & requires replacing.

In my opinion the contractor engaged to carry out the replacement of roof & gutter has little knowledge of roofing & should discontinue his services.

[32] As noted above, the Respondent has not, to date, responded to the Board's Draft Decision.

Draft Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act); and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and **should** be disciplined.

Negligence and Incompetence

[34] There are three aspects of the Respondent's conduct in relation to which the Board found the Respondent had been negligent. They were:

- 1. A failure to ensure a building consent was in place for the building work prior to it being undertaken;
- 2. A failure to meet health and safety at work requirements; and
- 3. The manner in which the work was carried out.

Building Consent

[35] 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).

[36] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

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

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

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

49 Grant of building consent

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

- [38] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

- [39] In *Tan v Auckland Council*⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [40] Justice Brewer in *Tan* also noted:

⁸ [2015] NZHC 3299 [18 December 2015]

[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.

- [41] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.
- [42] 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.
- [43] 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.
- [44] Clause 1 of Schedule 1 allows for the general repair, maintenance and replacement of building work. The Specific provision states:
- 1 *General repair, maintenance, and replacement***
- (1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*
- (2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*
- (a) *a comparable component or assembly is used; and*
- (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
- (a) *complete or substantial replacement of a specified system; or*
- (b) *complete or substantial replacement of any component or assembly contributing to the building’s structural behaviour or fire-safety properties; or*
- (c) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a*

failure to comply with the external moisture requirements of the building code; or

(d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.

- [45] As can be seen, the provision is reasonably wide in its application, but there are limitations. In this instance, the limitations in sub clause (2) need to be considered.
- [46] The existing roof was a decramastic tile roof. The replacement roof a long run steel roof. There are critical differences between the two types of roofing materials. They are affixed in a different manner, and the purlin set out and requirements are different. As such, it does not necessarily follow that a comparable component or assembly was used.
- [47] The Respondent should have turned his mind to this and should, at the least, have made inquiries about whether a building consent was required or have given advice to the owners that inquiries should be made with the building consent authority to ascertain whether a building consent was required. There is no evidence that either was done.

Health and Safety

- [48] As noted above, all building work must comply with the Building Code. The Code incorporates health and safety requirements. There is also a general obligation for all persons conducting a business or undertaking to comply with the requirements of the Health and Safety at Work Act 2015.
- [49] With regard to the work carried out, the Respondent had an obligation to ensure that the work that was carried out at height was done in a safe manner. The standard industry methods to achieve this are to use scaffolding that has been installed by an authorised person and to use edge protection. There are alternative means, but what was clear from the materials provided was that health and safety requirements had not been addressed. The images provided to the Board showed the Respondent standing on the roof with no means of protecting him from a fall. An image on the Fair Go video clip showed him standing on the edge of the roof with no means of protection or restraint being used.

Building Work

- [50] Turning to the building work, there were serious quality and compliance issues. New iron was not installed on new purlins. Rather the old battens, which would not have been appropriate for a long run iron roof, were reused. Roofing underlay (building paper) cover was not adequate. Building paper is a key weathertightness element. Its correct installation is essential. Materials were poorly cut and installed. The wrong fixings were used, and in several instances shown in video clips, they did not penetrate any structural substrate under the iron. Many were not installed on the correct angle or did not fully penetrate, which can create weathertightness issues. Flashings were poorly fitted and affixed. Again, this would have compromised the weathertightness of the roof. The Board does not consider that the building work

would have complied with the requirements of E2/AS1, an acceptable solution for meeting Building Code E2 External Moisture requirements for light-framed buildings. The Board also noted that the general workmanship was substandard.

- [51] The further evidence provided by the Complainant in the Huston Cross report further substantiated the building work issues. The building work was amateurish and was not that to be expected from a competent Licensed Building Practitioner.

Negligence and Incompetence

- [52] 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.

- [53] 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.
- [54] 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”.
- [55] The New Zealand Courts have stated that an 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.
- [56] 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, which are noted 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

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

case, the Board was required to take into account subjective considerations relating to the practitioner¹⁵.

- [57] 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.
- [58] In the present matter, there were clear breaches of the Building Code as it related to the management of external moisture (clause E2 of the Code) along with evidence of a failure to meet clause F4 – Safety from Falling.
- [59] Turning to seriousness 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 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.

- [60] The Board has noted its findings as regards the failure to ensure a building consent was not required, the failure to implement health and safety requirements, and the non-compliant and substandard workmanship. The findings and the level of negligence displayed are serious. The conduct goes beyond negligence to incompetence. The Respondent has made fundamental errors that a competent Licensed Building Practitioner would not or should not make.
- [61] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not only departed from what the Board considers to be an accepted standard of conduct, but that he has also failed to display the skills and knowledge required of a Licensed Building Practitioner. The Board has further found that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Disrepute

- [62] 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 C2-01111¹⁹ and discussed the legal principles that apply.

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

¹⁹ Board decision dated 2 July 2015.

- [63] 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*,²⁰ 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.
- [64] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of *Chartered Accountants*²¹, 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.
- [65] 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",²² and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²³ 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.*²⁴
- [66] 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 convictions²⁵;
 - honest mistakes without deliberate wrongdoing²⁶;
 - provision of false undertakings²⁷; and

²⁰ [2013] NZAR 1519

²¹ 24 September 2014

²² 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

²³ [2012] NZCA 401

²⁴ [2012] NZAR 1071 page 1072

²⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁷ *Slack, Re* [2012] NZLCDT 40

- conduct resulting in an unethical financial gain²⁸.

- [67] 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.
- [68] In C2-01688, the Board found that the Respondent had brought the regime into disrepute in respect of his conduct. It was also in relation to financial transactions.
- [69] The Board makes the same finding in this case. The uncontested evidence shows that the Respondent has, more than likely, taken money and has not applied it to the purposes for which it was received. The manner in which he has carried out the building work has meant that the Complainants have not received value for money and have had to replace the building work that the Respondent carried out. Furthermore, the evidence indicates that the Respondent has, more than likely, breached the Insolvency Act in the way that he has conducted his financial affairs. He has also failed to comply with the requirements of the Building (Residential Consumer Rights and Remedies) Regulations 2014. He has not provided pre contractual disclosure information nor a contract and the provision of a written contract²⁹. It should also be noted that regulation 7 and Schedule 3 of the Building (Residential Consumer Rights and Remedies) Regulations 2014 provides for deemed contractual provisions when there is no written contract including provisions relating to payments which have not been complied with.
- [70] Taking the above into consideration, the Board finds, that the Respondents conduct has, on the balance of probabilities, resulted in the Respondent obtaining a financial gain at the expense of the Complainants. The Board further finds that the Respondent has, on the balance of probabilities, conducted himself in a manner that is contrary to the Insolvency Act. The Board finds that the Respondent's conduct has brought the regime into disrepute.
- [71] Finally, the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and 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.

²⁸ *CollievNursing Council of New Zealand* [2000] NZAR 7

²⁹ A failure to provide disclosure information or a written contract are infringement offences under the sections 362D and 362F of the Building Act 2004 respectively.

- [72] The matters before the Board are serious, and the sums of money involved are considerable. On the basis of the above, the Board finds that the Respondent's conduct has brought the regime into disrepute.

Draft Decision on Penalty, Costs and Publication

- [73] 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.
- [74] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [75] 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*³⁰ 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.

- [76] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³¹. 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.

³⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³¹ [2012] NZAR 481

- [77] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [78] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,³² 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.
- [79] The Respondent's approach to the matters under inquiry is an aggravating feature. In *Daniels v Complaints Committee*³³ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the Respondent has not engaged in the process.
- [80] The level of negligence was high. The Board has also made a finding of incompetence, which is the lack of skill or knowledge required to carry out the work in a safe and compliant manner. In this respect, it is to be noted that the licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. A significant penalty is required.
- [81] It is also to be noted that the licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [82] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct. Cancellation will also ensure that the Respondent's competence is revaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [83] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

Costs

- [84] 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."
- [85] 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

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

³³ [2011] 3 NZLR 850.

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case³⁴.

- [86] In *Collie v Nursing Council of New Zealand*,³⁵ 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.

- [87] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [88] 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 Act³⁶. 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.

- [89] 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.
- [90] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁹. The High Court provided

³⁴ *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.

³⁵ [2001] NZAR 74

³⁶ Refer sections 298, 299 and 301 of the Act

³⁷ Section 14 of the Act

³⁸ Refer sections 200 and 202 of the Criminal Procedure Act

³⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*⁴⁰.

- [91] 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 interest⁴¹. 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.
- [92] Based on the above, the Board will order further publication. Publication is appropriate so that others learn from the matter.

Draft Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

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

- [94] 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 the Reissued Draft Decision

- [95] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

- [96] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **1 October 2021**.

⁴⁰ *ibid*

⁴¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [97] If submissions are received, then the Board will meet and consider those submissions.
- [98] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [99] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [100] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required, then one will be scheduled, and a notice of hearing will be issued.
- [101] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **1 October 2021**.
- [102] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 10th day of September 2021



Mr M Orange
Presiding Member

This decision and the order herein were made final on 4 October 2021 on the basis that no further submissions were received.

Signed and dated this 26th day of October 2021



Mr M Orange
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.*