

Before the Building Practitioners Board

	BPB Complaint No. C2-01756
Licensed Building Practitioner:	Ali Kahdim (the Respondent)
Licence Number:	BP 107841
Licence(s) Held:	Carpentry and Site AOP 1

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	22 January 2019
Decision Date:	13 February 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

Procedure:

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

Board Decision:

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

The Respondent **has not** committed disciplinary offences under sections 317(1)(d) or (db) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	3
Background to the Complaint	3
Evidence	4
Board's Conclusion and Reasoning	7
Negligence and/or Incompetence	7
Contrary to a Building Consent	12
Record of Work	13
Not Licensed to Carry Out or Supervise Restricted Building Work.....	14
Disrepute.....	14
Penalty, Costs and Publication	16
Penalty	16
Costs.....	18
Publication	18
Section 318 Order	19
Submissions on Penalty, Costs and Publication	20
Right of Appeal	20

Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

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

- (d) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act); and
- (e) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”
- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Background to the Complaint

- [5] The Respondent was provided with the complaint and was asked to provide a response to the allegations as part of the Registrar’s Report phase of the investigation. He did not respond.
- [6] The Respondent was invited to attend a pre-hearing telephone conference scheduled for 13 December 2018. He acknowledged the invitation but did not attend.
- [7] The Respondent was advised of the hearing date. On 9 January 2019 the Respondent advised the Board Officer that he could not attend the scheduled hearing as he would be away. He was asked to provide supporting evidence to allow the Board to consider whether an adjournment should be granted. Nothing was provided. The Respondent was advised that the matter would proceed unless he provided evidence which supported an adjournment.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

- [8] The Board Officer attempted to contact the Respondent as to whether he was going to attend by phone on the day of the hearing. The Respondent could not be contacted.
- [9] The matter proceeded as scheduled.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|----------------|---|
| [Omitted] | Complainant |
| Geoffrey Brand | Witness, Auckland Council, Building Inspector |
- [13] The Respondent was contracted to undertake the construction of a new residential dwelling for the Complainant under a building consent. Building work started on or about 4 September 2015.
- [14] At the time the building work commenced the Respondent was the subject of an investigation by the Board⁶. A hearing on that matter was held on 15 July 2015. The Respondent was found, in that case, to have carried out building work in a negligent and incompetent manner and to have carried out building work in a manner contrary to a building consent. The Board issued its penalty decision in respect of the matter to the Respondent on 10 November 2015. The Board's decision was that the Respondent's licence was to be suspended for a period of 12 months. The decision was implemented on 25 November 2015 by way of the suspension being recorded on the register of licensed building practitioners. The Respondent was personally notified of the implementation on 17 December 2015.
- [15] The Respondent's disciplinary suspension ended on 25 November 2016. A further period of suspension was imposed on 26 November 2016 through until 10 January 2017 under section 293 of the Act. In effect the Respondent was suspended and could not carry out or supervise restricted building work from 25 November 2015 to 10 January 2017.

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

⁶ Refer Board Decision C2-01105.

- [16] The Respondent continued building work on the residence, notwithstanding the suspension, through until approximately 21 November 2016 when the contractual relationship came to an end.
- [17] The complaint set out various allegations about the quality and compliance of the building work.
- [18] The Board only has jurisdiction over the period during which the Respondent was licenced. This is due to the provisions of section 297 of the Act which states:

297 Effect of licensing suspension

- (1) *A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.*
- (2) *At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).*
- [19] This decision therefore only deals with the period of the build when the Respondent was licenced. It should be noted, however, that it is an offence under the Act for a person to carry out or supervise restricted building work when not licensed to do so but the Board is not the prosecuting authority⁷ in respect of such conduct.
- [20] The documentation provided to the Board included Building Consent Authority records. Those records included inspection records that the Respondent had been involved in the build as the licensed building practitioner as follows:

Inspection Type	Date
Foundation (failed)	17 September 2015
Concrete block; concrete reinforcing	25 September 2015
Preline and plumbing (partial)	1 October 2015
Concrete slab floor (failed)	5 October 2015
Concrete slab floor	7 October 2015
Framing checklist – 1 (failed)	27 November 2015
Framing checklist – 2 (failed)	3 December 2015

- [21] The building work included restricted building work.

⁷ Refer sections 85 and 86 of the Act.

- [22] Mr Brand gave evidence that the Respondent was at inspections and that if the Respondent's name was entered onto the inspection record then it would have been done by the inspector present at the time of the inspection as part of the detail that has to be manually entered onto the inspection form.
- [23] Mr Brand noted that throughout the build it was a struggle to get the building work to the point where it met compliance requirements. He noted that whenever he attended the site there was always something wrong with the building work. As a result there were numerous failed inspections and re-inspections.
- [24] Mr Brand believed the Respondent was not carrying out the building work. He believed the Respondent was supervising and was only on site when inspections were called. His opinion was that he was relying on the Council to identify compliance issues with the build.
- [25] The Complainants gave evidence that the Respondent was on site some of the time. They stated he drove a digger when the foundations were being dug and that he did some work on site when the framing was being erected but that most of the time the work was carried out by the Respondent's labourers and that he was seldomly on site.
- [26] The Complainants were not aware of the disciplinary action against the Respondent or of his suspension. The Respondent did not give them any notice of either.
- [27] In respect of specific matters complained about the aspects which were undertaken prior to the suspension included a lack of cover between foundation steel work and foundation trenches noted on the inspection dated 17 September 2015. Mr Brand stated the issues was consistent around the entire foundation
- [28] The Inspection carried out on 3 December 2015 noted, in the fail comments, that:
- 1. Sighted bottom floor brace incomplete.*
 - 2. Framing for beam system is not completed and it bolted to top plate.*
 - 3. Garage is 15cm not not plum and leaning toward west side.*
 - 4. Packers where beam is sitting on may required Strengthen*
 - 5. Where B3 and B5 meet needs confirmation for lintel size and fixings as top plate has compressed dramatically.*
 - 6. Straps to all multi studs support*
 - 7. Fill all floor slab voids and complete brace walls.*
 - 8. Beam not supported directly by studs. This building needs Engineers on site observation and report on the structural integrity of the framing. Have all work completed before booking in for framing inspection. Engineer to provide all site notes for the next inspection.*

- [29] It was noted on a number of inspections that required certification had not been provided such as siting certificate, finished floor level certificate, height to boundary certificate, and engineer observations.
- [30] The build was completed by other contractors who were noted on the inspections from 20 June 2016.
- [31] The Complainants stated they have not received a record of work from the Respondent and that they have not been able to obtain a code of compliance certificate due to a lack of documentation from the Respondent.

Board's Conclusion and Reasoning

- [32] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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
 - (a) 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.
- [33] The Board has also decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); or
 - (b) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act).
- [34] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

- [35] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ 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.*
- [36] 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

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

- [37] 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*¹¹ it was stated as “*an inability to do the job*”.
- [38] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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.
- [39] 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 Act¹³. 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 practitioner¹⁴.
- [40] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[41] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building consent¹⁶. 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.

[42] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁷ 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.

[43] In this instance the Board, which includes persons with extensive experience and expertise in the building industry, has found that the Respondent has been negligent in that his conduct has fallen below that to be expected of a licensed building practitioner with a carpentry licence.

[44] The Board notes that the building work failed numerous inspections and that the Respondent was, at times, reliant on the Building Consent Authority (BCA) identifying what needed to be done to achieve compliance. The BCA's role is only to check or inspect that the building work has been carried out in accordance with the building consent, not to direct how the building work is to proceed.

[45] It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation and it will not necessarily follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

- (a) the extent and seriousness of the non-compliance;
- (b) whether there is a pattern of continued non-compliance; and
- (c) what steps are taken when non-compliance issues are raised.

[46] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. It is not enough to just turn up for inspections. Moreover when compliance failings are identified at those inspections the Board would expect prompt action to be taken and that they would

¹⁵ Section 17 of the Building Act 2004

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

not repeat the same failings. In this respect during the first reading of changes to the Act around licensing¹⁸ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [47] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁹:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [48] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*

¹⁸ Hansard volume 669: Page 16053

¹⁹ Hansard volume 669: Page 16053

- (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

- [49] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.
- [50] In considering the extent and seriousness of the non-compliance issues the inspection records detail a high number of inspection failures. The failure to provide cover is a simple matter and one which is easily rectified but also one that a supervising builder should have identified and rectified prior to an inspection. Issues such as framing being out of plumb are not so simple to rectify, are serious and show a distinct lack of supervision²⁰. Those are only examples of what were an unacceptable number of failures during the time when the Respondent was licensed.
- [51] The Board does note, however, that the building work was supervised by the Respondent. Had he carried it out the Board would have found him to have been incompetent. As he was supervising it has found that he has been negligent in that supervision.
- [52] Supervise is defined in section 7 of the Act. The definition states:
- supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
- (a) *is performed competently; and*
 - (b) *complies with the building consent under which it is carried out.*
- [53] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligation noting that the level of supervision required will depend on a number of circumstances but that ultimately the Board needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

²⁰ Whilst it is noted that this work was inspected on 3 December a high proportion of the building work would have been carried out prior to this date when the Respondent was licensed.

- [54] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992²¹. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [55] If the Respondent had carried out his duties as the supervisor in the manner to be expected of a licensed building practitioner then the matters which were noted by the building consent authority during inspections should have been identified, or at least the bulk of them should have been, and they should have been rectified prior to an inspection being called. As can be seen from the history of inspections this did not occur. Rather than the Respondent checking that the building work was completed to an acceptable standard he has, in effect, left it to the building consent authority to assess and determine compliance.
- [56] In considering the above, and looking at the building work in question the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent departed from what the Board considers to be an accepted standard of conduct as regards his supervision and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.
- [57] The Board considers that had the Respondent carried out his responsibilities as the supervisor in the manner expected of a licensed building practitioner then the high number of non-compliance issues would not have occurred.

Contrary to a Building Consent

- [58] Section 40 of the Act states that all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [59] In the present case there were multiple instances of non-compliance with building consents. These were, with the intervention of the BCA. A code compliance

²¹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

certificate has yet to be issued but the Board's understanding is that the outstanding matters relate to paperwork, not building work.

- [60] The Board has made a finding of negligence in relation to non-compliant building work and the building inspections. Given this the Board does not consider it is necessary to also make a finding under section 317(1)(d) of the Act.

Record of Work

- [61] 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 work²².
- [62] 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.
- [63] The Board discussed issues with regard to records of work in its decision C2-01170²³ 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.
- [64] 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.
- [65] 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 ...".
- [66] The complicating factor in this case is that the Respondent was only licensed for part of the build. As such he can only issue a record of work for the period over which he was authorised to carry out or supervise restricted building work. He has not done so. As he has not, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [67] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons were put forward.

²² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²³ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Not Licensed to Carry Out or Supervise Restricted Building Work

- [68] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [69] The Respondent is a licensed building practitioner with Carpentry and Site Licences. Those licences were current up until the Board made a decision to suspend them. Thereafter the Respondent was not able to carry out or supervise restricted building work. He nevertheless continued to do so. The conduct falls within the provisions of section 85 of the Act. The Board is not the prosecuting authority for such conduct.
- [70] As noted in paragraph [18] of this decision the effect of section 297 of the Act is that a licensed building practitioner ceases to be a licensed person when suspended. As such the Board has no jurisdiction during a period of suspension. Accordingly there is no jurisdiction to consider a disciplinary offence under section 317(1)(db) of the Act.

Disrepute

- [71] 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 C2-01111²⁴ and discussed the legal principles that apply.
- [72] 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*²⁵ 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.
- [73] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²⁶, 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.

²⁴ Board decision dated 2 July 2015.

²⁵ [2013] NZAR 1519

²⁶ 24 September 2014

[74] 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”²⁷ 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*²⁸ 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.*²⁹

[75] 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 convictions³⁰;
- honest mistakes without deliberate wrongdoing³¹;
- provision of false undertakings³²; and
- conduct resulting in an unethical financial gain³³.

[76] 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.

[77] The conduct the Board has considered in the context of disrepute is the Respondent’s continued involvement in the restricted building work when he knew or ought to have known that he would not be able to continue with it. As noted above the Board does not have jurisdiction over the period when the Respondent’s licence was suspended. It can, however, consider the Respondent’s conduct leading up to the suspension.

[78] The Respondent was the subject of disciplinary finding when he contracted to carry out the build. He did not inform the Complainants of that disciplinary action. He was then penalised for the conduct on 10 November 2015. Again no notice of the Board’s decision to suspend him was given to the Complainants. He simply continued to

²⁷ 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

²⁸ [2012] NZCA 401

²⁹ [2012] NZAR 1071 page 1072

³⁰ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

³¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

³² *Slack, Re* [2012] NZLCDT 40

³³ *ColliervNursing Council of New Zealand* [2000] NZAR 7

complete the build. The suspension of the licence was recorded on the register on 25 November 2015 and this was the effective date of the suspension.

- [79] The question for the Board was whether the Respondent, leading up to his suspension, had a duty to inform his clients of the suspension and to take action to ensure he would not continue to carry out or supervise restricted building work once the suspension was effective.
- [80] The Board considers that a licensed building practitioner does have a duty to so inform his or her clients. In coming to this decision the Board notes that the purposes of the Register under section 299 of the Act includes informed choice and notification of disciplinary histories. The Board also notes that part 4A of the Act includes pre contractual disclosure requirements and that one of the stated purposes under section 362E is to inform a client of any dispute history. Given these provisions the Board considers that there are implied duties to inform.
- [81] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [82] The Board has decided that the Respondent's failure to inform of his disciplinary action and of his suspension prior to it becoming effective is serious enough. Accordingly the Board finds that the Respondent has brought the regime into disrepute.

Penalty, Costs and Publication

- [83] 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.
- [84] The matter was dealt with at a hearing but the Respondent did not appear. The Board had available 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

- [85] 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*³⁴ commented on the role of

³⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

"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.

- [86] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*³⁵ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [87] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³⁶. 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.

- [88] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [89] The Respondent has an extensive disciplinary history with the Board. Most relevant though is the conduct that lead to his suspension in November 2015. That conduct was similar to the present and was committed prior to the conduct in this case being committed. A finding had been made by the Board as regards negligence and incompetence and as regards building contrary to a building consent when the building work in this case was started. A penalty had not been imposed but the Board's reasons for its findings had been given to the Respondent. Notwithstanding this he has repeated the behaviour. This is an aggravating factor.

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

³⁶ [2012] NZAR 481

- [90] The Respondent has not participated in the investigations. The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*³⁷ 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.
- [91] 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.
- [92] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of two years.

Costs

- [93] 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."
- [94] 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 case³⁸.
- [95] In *Collie v Nursing Council of New Zealand*³⁹ 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.

- [96] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [97] 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 Act⁴⁰. 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.

³⁷ [2011] 3 NZLR 850.

³⁸ *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.

³⁹ [2001] NZAR 74

⁴⁰ Refer sections 298, 299 and 301 of the Act

- [98] 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.
- [99] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990⁴¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction⁴². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴³. 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*⁴⁴.
- [100] 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 interest⁴⁵. 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.
- [101] Based on the above the Board will order further publication. It is important that the industry learns from the Respondent's conduct and that the public are advised of the cancellation. Publication will be in Code Words and by way of a general press release.

Section 318 Order

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

Penalty:	Pursuant to s 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 s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 24 months.
Costs:	Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
Publication:	The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act. In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

⁴¹ Section 14 of the Act

⁴² Refer sections 200 and 202 of the Criminal Procedure Act

⁴³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴⁴ *ibid*

⁴⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [103] 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

- [104] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **7 March 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [105] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 13th day of February 2019



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

-
- (d) order that the person be censured:
 - (e) order that the person undertake training specified in the order:
 - (f) order that the person pay a fine not exceeding \$10,000.
 - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii Section 330 Right of appeal

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*