

## Before the Building Practitioners Board

	BPB Complaint No. CB25552
Licensed Building Practitioner:	Kelvin Lim (the Respondent)
Licence Number:	BP 127698
Licence(s) Held:	Design AoP 1

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

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Complaint or Board Inquiry	Board Inquiry
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	29 October 2020
Decision Date:	4 November 2020
Board Members Present:	
	Chris Preston, Chair (Presiding)
	Mel Orange, Deputy Chair, Legal Member
	Faye Pearson-Green, LBP, Design AOP 2
	Rob 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)(h) of the Act.

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**Summary of the Board’s Decision**

[1] The Respondent has been negligent and has breached section 314B(b) of the Act by working outside of his competence. He is censured, fined \$3,500, and ordered to pay costs of \$3,500.

**The Charges**

[2] The hearing resulted from a Board Inquiry about the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations<sup>1</sup> 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 contrary to section 317(1)(b) of the Act, IN THAT, he may have provided building consent documentation that did not contain adequate and/or job-specific detail for a complex two storey re-clad project involving multiple claddings, flashings, a membrane deck/roof and a chimney as noted on failed Council inspections including that of 24 September 2019; and

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

- (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have worked outside of his competency as a Design AoP 1 licence holder in carrying out a design that may have had a risk matrix score of greater than 12 noting that the Certificate of Work filed had a risk matrix score of greater than 12.

### **Function of Disciplinary Action**

- [3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [4] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [5] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

### **Background to the Board Inquiry**

- [6] On 2 June 2020, the Board received and considered a Registrar's Report in relation to a complaint made about the conduct of another Licensed Building Practitioner (Complaint Number CB25287). The Board noted the Respondent's involvement in the matters before the Board as the licensed building practitioner who had submitted the design for a building consent. The Board, on the basis of the evidence in CB25287, resolved to initiate a Board Inquiry into the Respondent's conduct.

### **Evidence**

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

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

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [8] 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.
- [9] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and from *[Omitted]*, a Licensed Building Practitioner with a Carpentry License.
- [10] The Respondent was asked by *[Omitted]*, whom he had worked with in the building consent office at the Selwyn District Council, to assist him with the reclad of a dwelling in Wellington. *[Omitted]* stated he was helping out a friend who was undergoing cancer treatment.
- [11] A building consent application was submitted for the re-clad to the Kapiti Coast District Council. The certificate of design work required as part of a building consent application<sup>5</sup> was signed by the Respondent. The certificate of work declared:

*I Kelvin Lim LBP, state that I have applied the skill and care reasonably required of a competent design professional in carrying out or supervising the Restricted Building Work (RBW) described in this form, and that based on this, I also state that the RBW:*

- *Complies with the building code*

- [12] The RBW described in the certificate of design work was as follows:

<b><i>Design Work that is restricted building work</i></b>	<b><i>Description of restricted building work</i></b>	<b><i>Carried out or supervised</i></b>	<b><i>Reference to plans and specifications</i></b>
<i>Ventilation system</i>	<i>Cavity system to exterior walls</i>	<i>Carried out</i>	<i>Refer to installation manuals provided</i>
<i>Walls cladding or wall cladding system</i>	<i>Stria on 20mm cavity ShadowClad on 20mm Cavity</i>	<i>Carried out</i>	<i>Refer to installation manuals provided</i>

- [13] The evidence heard at the hearing was that the design details were put together by *[Omitted]*. They were not reviewed by the Respondent and were submitted by *[Omitted]* as the building consent agent. Neither the Respondent nor *[Omitted]* completed a site visit as part of the design process. They worked off photographs and existing building plans. Neither thought the design or work to be undertaken

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<sup>5</sup> Section 45(3) of the Act.

was complex. The designs provided as part of the building consent consisted of the plans from the original build undertaken in or about 2000 with hand-drawn and written notations appended to it. No project specific details were included. The drawings were accompanied by standard manufacturer's details and specifications. No attempt had been made to identify which of the standard details and specifications would have applied to the building work to be undertaken. More than one cladding type was proposed for the reclad which would have required project specific details so as establish a new E2/AS1 compliant cladding integrated into the existing structure. A Risk Matrix calculation was provided as part of the application. The Respondent stated that he did the calculation. He provided a score of 12. The Building Consent Authority rejected that score and evaluated the risk at 20.

[14] Prior to the design being submitted for a building consent the following correspondence passed between the Respondent and [Omitted]:

**From:** [Omitted]

**Sent:** Monday, 18 March 2019 3:38 PM

**To:** kelvin.lim

**Subject:** [Omitted] from Work.

Hey Mate,

Attached is what i have mate. Seems pretty straight forward. Its a reclad with most stuff being under Section 112 in terms of existing joinery and such. Attached pics, Elevation, Floor plan, proof of ownership, Wrap data sheet, Shadowclad specs and details, Stria Specs and details which are being strickly adhearded to.

Anything extra i need let me know. If you can flick back with a memorandum mate that would be awesome as i dont have a design licence.

Cheers

[Omitted]

Selwyn BCO.

**Re:** [Omitted] from Work.

**Kelvin Lim**

Tue 19/03/2019 10:18 PM

**To:** [Omitted]

1 attachments (3 MB)

LBP.pdf;

Hey Bro,

*Please find attached the signed LBP form. You just need to fill in the details on the front page.*

*Good luck!*

*Churr,  
Kelvin*

[15] The Respondent, as part of his initial response to the Board Inquiry, provided stated:

*This job is not simple, but also not too overly complicated. I only had the original consented elevations and a few photos to play with provided by [Omitted] even when I requested if he had the original consent plans with more details. He didn't so I decided to proceed with what I had and what looked like a relatively straight forward reclad project. I only provided the customised detail on page 2.1.588 as [Omitted] said he would gather all the other proprietary details and manufacturers literature to provide to Council. Maybe I should have checked to see what documents [Omitted] gathered before he submitted it into Council and maybe get him to request the original consent property file from Council. I heard no RFI's from Council. If there were any RFI's they would have been resolved by [Omitted]. All those drawings/details approved provided in the report (from possibly RFI responses) were not provided by me and I was not aware of any of them. Only detail I drew was on page 2.1.588. Even if the risk matrix score is slightly higher or is not within my design competency band does not mean I can not still sign off the CoDW. As once said from is it [Omitted] or [Omitted] from LBP/MBIE? "If you have a Design 1 Licence, that does not mean you can not do Design 2 or Design 3 work. A LBP with a Design licence of any class, as long as you are competent you can sign off the work". Therefore even though the risk matrix score may seem high for someone holding a Design 1 licence, I disagree the work was outside my competency. I have designed and supervised many more complex jobs than this before without any issues and CCC issued. Not only that, but I would never jeopardise my LBP licence, as you can see from my proven track record, it has been clean since day one.*

*I agree the consented plans may have lacked a few critical details now looking back at it which I didn't pick up at the beginning. I'm surprised Council never asked for these details, as if Council requested some of these details at RFI stage, then I would have been more than happy to provide them. Once again, I would never do anything silly to jeopardise my LBP licence, and my proven clean track record dating back to 2014 just shows you how seriously I consider my work.*

- [16] The Respondent also provided examples of complex design work he had peer-reviewed and provided certificates of design work stated that felt the work was within his competence given his overall experience as a designer and experience working as a consenting officer for building consent authorities. He stated he had completed a few simple extensions and no previous designs for a re-clad.
- [17] A series of Requests for Information (RFI) were issued by the Building Consent Authority. The RFI letters generally noted a lack of adequate details, especially with regards to cladding junctions and junctions with decks. They were, in the main, dealt with by [Omitted], who stated that he consulted with the Respondent prior to submitting responses. The Respondent stated that there was limited interaction and that he could not recall being consulted but did provide a junction detail for a chimney. He stated that the chimney junction detail that he created was the only design work that he completed in relation to the building consent materials. As part of the RFI process, the risk matrix was resubmitted at 18. [Omitted] stated that he did not have any correspondence between himself and the Respondent as regards RFI responses and stated that he could not remember much as it was a long time ago. [Omitted] was generally evasive in his responses to questions.
- [18] The correspondence from the Building Consent Authority included an email to [Omitted] which stated:
- Hi [Omitted],*
- Please refer to the inspection note dated 09/10/2019, an application for an amended plan needed to be made for the deck/wall junctions.*
- From the photos provided it appears the works to these areas have progressed from what was sighted at the 22/10/2019 inspection, if that is the case an application for Certificate of Acceptance will now need to be made.*
- If this isn't the case and the amended plan is still able to be made the person providing the design input for this aspect needs to hold a design licence, the LBP register does not list you as holding this class.*
- If you are to act as the agent for the owners I suggest you arrange for a meeting at the council office's with myself and [Omitted] (inspections Team Leader) to clarify the appropriate progress path from this point.*
- [19] Evidence was also heard as regards issues raised by the Building Consent Authority with weathertightness around arched windows. The Respondent stated he was made aware of the issue and that a decision was made to make the windows simple rectangles rather than deal with complications created by an arch. Evidence on the Board's file showed that the windows were not changed to rectangles.
- [20] The Respondent stated that he would have expected to have been contacted if there were any other issues with the building consent application that required his attention. Evidence was heard that there were time constraints and so the approach

taken was to submit limited information and then see what the Building Consent Authority came back within the way of RFIs. When questioned about the adequacy of the design that was submitted, *[Omitted]* took the position that it was accepted by the Building Consent Authority and that he sees that sort of approach being taken all the time so he saw no issues with the approach.

- [21] Evidence was also received as regards a Certificate of Design Work that was submitted for an amendment to the building consent which arose from a failed inspection during the build. The certificate was represented as having come from the Respondent. The Respondent stated it was not his certificate. *[Omitted]* gave evidence that he had the Respondent's consent to alter and submit the certificate. The Respondent denied he had provided his consent.

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

- [22] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
  - (b) breached section 314B of the Act (s 317(1)(h) of the Act)
- and **should** be disciplined.

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

#### Negligence Design Work

- [24] The Board's considerations as regards negligence are in respect of the Respondents design work.

- [25] Under the definitions in the Building Act design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b) it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

#### **3 Design work declared to be building work**

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

- [26] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

- [27] 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, in this case a Licensed Building Practitioner with a Design License. This is described as the *Bolam*<sup>6</sup> test of negligence which has been adopted by the New Zealand Courts<sup>7</sup>.
- [28] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>8</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [29] 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 Act<sup>9</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>10</sup>.
- [30] 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:*

<sup>6</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>7</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>10</sup> *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.*

[31] The Board also notes the provisions of section 14D of the Act which states:

**14D Responsibilities of designer**

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[32] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design<sup>11</sup>.

[33] Looking at the Respondent's conduct, the Board noted that he had, in essence, allowed his licence to be used to submit building consent documentation that was not his own. Whilst that conduct does not constitute negligence the fact that he did not thoroughly check the plans and specifications submitted and ensure that they were up to an acceptable standard, and appropriate for the work to be undertaken, did. The Board would expect a Licensed Building Practitioner with a Design Licence to ensure that building consent documentation that they submit meets the compliance statement made in their Certificate of Design Work that they have applied the skill and care reasonably required of a competent design professional. In this instance, the Respondent did not. Rather he took the approach of allowing the submission of what was clearly substandard documentation with the stated intention of seeing what the Building Consent Authority thought of it.

[34] The Building Consent Authority's role is to check that the design work has been carried out in accordance with the Building Code. It is not uncommon that a Building Consent Authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. In this respect, it is noted that the Building Consent Authority's job is to grant or refuse a building consent. It is not its' role nor responsibility to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.

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<sup>11</sup> Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

- [35] A designer should be aiming to get their design and specifications 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. This is why a Certificate of Design Work is required under section 45(3) of the Act.
- [36] It should also be noted that 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 of the enabling legislation<sup>12</sup>:

*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.*

- [37] This aligns with the provisions of section 14D of the Act noted above.
- [38] The Board also noted that the Respondent knew that RFI requests were being made. This was evidenced by his providing a wall to chimney junction detail. Notwithstanding, and knowing that it was his design licence that was being used, he took no steps to enquire as to the status of the building consent application or the full extent of the RFI issues.
- [39] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

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

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<sup>12</sup> Hansard volume 669: Page 16053

<sup>13</sup> [2001] NZAR 74

[40] Given the Board’s findings as regards the design work submitted under the Respondent’s name, the Board which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Misrepresentation or Outside of Competence

[41] Section 314B(b) of the Act provides:

*A licensed building practitioner must—  
(b) carry out or supervise building work only within his or her competence.*

[42] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a Licensed Building Practitioner must only work within their individual competence. In this respect it should be noted that if they hold a class of license for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence.

[43] The Respondent holds a Design AoP 1 Licence. Licensing classes are designated under section 285 of the Act. The current ones were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a Licensed Building Practitioner can carry out or supervise. Under clause 4 of the Order Design the following are the types of building work each class of licence can carry out:

<b><i>Licensing class</i></b>	<b><i>Type of building work</i></b>
<i>General Licence Classes</i>	
Design	Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building

[44] The Building (Designation of Building Work Licensing Classes) Order 2010 defines areas of practice as:

*area of practice 1, area of practice 2, and area of practice 3, in relation to licensing, or an application to be licensed, in a licensing class, have the same meanings as in the rules*

[45] The “rules” are the Licensed Building Practitioners Rules 2007. It contains the following definitions:

***area of practice** means a category of building work of the type set out in Schedule 2*

***area of practice information** means information about every area of practice in respect of which a licensed building practitioner has demonstrated that he or she has met the minimum standards of competence for that licensing class*

[46] The following is the current licensing matrix for design from the Rules:

<b>Licensing class</b>	<b>Type of building work</b>
<i>General Licence Classes</i>	
Design	Design 1 (Category 1 buildings) Design 2 (Category 1 and 2 buildings) Design 3 (Category 1, 2 and 3 buildings)

[47] A Category 1 Building is one that has a Risk Matrix score of 12 or less. The design and building work had a risk matrix of 20. As such it did not come within the competencies of a Design AoP 1 Licence.

[48] The Respondent submitted that, notwithstanding the above, he had the personal competence to carry out the work, and he referred to his experience in peer-reviewing complex new builds in support of this. At the same time, the Board noted that he did not have any experience with re-clad designs and that he only had limited experience with alterations. The Board considers that it does not necessarily follow that experience in complex new builds equates to competence in remedial cladding work. This was especially the case in this instance. The project related to a cladding that had failed within 18 years of its installation, there were multiple complex junctions and changes in materials. The lack of adequate design and failure to recognise that what had been submitted was inadequate showed that the Respondent was working outside of his personal competence. The disciplinary charge is upheld.

**Penalty, Costs and Publication**

[49] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[50] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

## Penalty

- [51] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>14</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [52] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>15</sup>. 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.*

- [53] Cancellation of a license is the equivalent of striking off within the Licensed Building Practitioner regime.
- [54] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>16</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [55] The Respondent’s failing, and approach toward his design work, was disappointing, especially as he is currently in the employ of a Building Consent Authority as a Consenting Officer. The Respondent has failed to understand that as a Licensed

<sup>14</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>15</sup> [2012] NZAR 481

<sup>16</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Building Practitioner, he is responsible for his work. He has also failed to take responsibility for his conduct. His approach was cavalier, and it put the purposes of the licensing regime at risk.

- [56] 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.
- [57] On the basis of the above, the Board considered the cancellation of the Respondent's licence.
- [58] The Board did note that the Respondent was helping out others in difficult circumstances and that *[Omitted]* conduct was a contributing factor<sup>17</sup>. It did not consider that the design practices shown were necessarily indicative of the Respondent's normal approach. On that basis, it decided not to cancel or suspend the Respondent's licence. A significant penalty is, however, required.
- [59] Taking the above factors into account, the Board's penalty decision is that the Respondent be censured and that he pay a fine of \$3,500. A censure is an expression of disapproval of the Respondent's conduct. The Board considered a censure was required given the Respondent's overall conduct and approach to the matter.

#### Costs

- [60] 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."
- [61] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>18</sup>.
- [62] In *Collie v Nursing Council of New Zealand*<sup>19</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [63] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. The amount ordered is the Board's scale amount for a half-day hearing. It is less than 50% of actual costs.

<sup>17</sup> The Board resolved to further investigate Mr Talbott's conduct by way of a Board Inquiry.

<sup>18</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>19</sup> [2001] NZAR 74

## Publication

[64] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>20</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

[65] 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.

[66] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>21</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>22</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>23</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>24</sup>.

[67] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>25</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[68] Based on the above, the Board will order further publication. The Respondent will not be named in it but will be named in this decision and on the Register.

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<sup>20</sup> Refer sections 298, 299 and 301 of the Act

<sup>21</sup> Section 14 of the Act

<sup>22</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>23</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>24</sup> *ibid*

<sup>25</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### Section 318 Order

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

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

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will 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. The Respondent will not, however, be named in that publication.

[70] 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

[71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Monday 7 December 2020**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[72] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

## Right of Appeal

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

Signed and dated this 16<sup>th</sup> day of November 2020



**Chris Preston**  
Presiding Member

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

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

### <sup>ii</sup> **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*

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