

Before the Building Practitioners Board

	BPB Complaint No. CB25992
Licensed Building Practitioner:	Tony Magele (the Respondent)
Licence Number:	BP126358
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	26 January 2023 at 10 AM
Decision Date:	13 March 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs F Pearson-Green, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

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

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under sections 317(1)(b) and (d) of the Act.

The Respondent **has not** committed a disciplinary offence under sections 317(1)(i) of the Act.

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Summary of the Board’s Decision

[1] The Respondent carried out or supervised building work in an incompetent manner and in a manner that was contrary to a building consent. His licence is cancelled for a period of nine (9) months. He is ordered to pay costs of \$3,000. A summary of the Board’s findings will be published, and a record of the disciplinary offending will be recorded on the public register for a period of three years.

The Board

- [2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

Background to the Hearing

- [3] The Respondent did not appear at the hearing. Prior to it a Notice of Proceeding was issued on 12 September 2022 detailing the charges the Board would investigate at a hearing. A prehearing conference was scheduled for 25 November 2022. The Respondent was informed of the conference and emailed stating he would attend. He did not. The matter was set down for a hearing, and a Notice of Hearing was issued on 29 November 2022.
- [4] All the notices were sent to the Respondent in accordance with the provisions of the Act, and to the addresses the Respondent maintains on the Licensed Building Practitioner Register. The Respondent has not responded to the notices.
- [5] On the day of the hearing, the summoned witnesses appeared. The Respondent did not. The Board Officer contacted the Respondent by phone. He advised that he had been away travelling but was now back and that he had not had a chance to look at his emails. He informed the Board Officer that he had too much happening at present and would not be attending the hearing.
- [6] The Board directed that the Board Officer contact the Respondent to ascertain if he could attend by zoom or if he wanted to seek an adjournment. The Respondent did not answer his phone. He was sent a text with the same queries. He did not respond and did not answer a subsequent phone call.
- [7] No application for an adjournment was made. Nevertheless, the Board considered whether, in the interests of natural justice, one should be granted.
- [8] The Board noted the expense that had been incurred in convening the hearing and the Respondent's failure to engage in the process. Notwithstanding, the Board was concerned that if it continued the hearing, natural justice principles, and in particular the Respondent's right to appear, be heard and challenge the evidence, may be put at risk.
- [9] The Board decided that it would proceed with the hearing but that it would adopt a procedure that would still afford the Respondent his natural justice rights. The procedure adopted was as follows:
- (a) the Board would receive the evidence of the witnesses that were present and would then adjourn the hearing;

¹ Section 341 of the Act.

- (b) a transcript of the evidence received would be produced and provided to the Respondent together with a further copy of the hearing file; and
- (c) a direction would be issued that the Respondent is to advise, no later than 10 working days after the transcript is issued to him, whether he requires that the hearing resume to him to cross-examine any of the witnesses and/or to call or give evidence in his defence.

[10] Directions in line with the above were issued. The Respondent was given until 17 February 2023 to respond. No response was received. The Board proceeded to make a decision.

The Charges

[11] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Wellington. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:

- (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;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.

[12] In further investigating the allegations under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the matters raised by Mr [OMITTED] in a letter dated 4 September 2021 (page 44 of the Board's file, document number 2.1.31). And, with respect to the allegations of disrepute, the Board gave notice that it would be further investigating the Respondent's invoicing and whether he obtained an unethical financial gain.

Function of Disciplinary Action

[13] 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

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [14] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁵ Collins J. noted that:

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

- [15] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [16] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct breaches the Code of Ethics for Licensed Building Practitioners⁷ (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [17] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [18] 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

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

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

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

⁷ a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

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.

- [19] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [20] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁸. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [21] 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.
- [22] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|-----------|---|
| [OMITTED] | Church Treasurer |
| [OMITTED] | Report Writer, Licensed Building Practitioner |
- [23] The Respondent was engaged to carry out building work on a church. The full scope of building work was not completed, with the Respondent's involvement in the building work coming to an end on or about 16 August 2021.
- [24] Mr [OMITTED] gave evidence that there were a number of workers on the site and no real consistency in those workers. He noted that most of the work was carried out in the Respondent's absence.
- [25] Mr [OMITTED], a Licensed Building Practitioner with some 37 years of experience, was then engaged by the church to review what had been completed and recommend remediation/rectification work. He provided a quote dated 4 September 2021, which outlined the areas that required rectification and the proposed actions. That quote formed the basis of the Board's investigations. The following are the building work concerns that were raised:

Floor Level Height Difference

- [26] Mr [OMITTED] noted that there was a floor level height difference of 60 mm between a new extension and the existing building. Mr [OMITTED] gave evidence that an old lean-to extension that had a difference in height level from the main

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

building was removed, and the intention was to build a new permanent structure that had a level entry from the main building. Mr [OMITTED] also gave evidence that required saw cuts to prevent cracking had not been installed.

Windows

- [27] A sheet of asbestos on an exterior wall had not been removed. Mr [OMITTED] noted that because it had not been removed, a new head flashing to window W1 had not been installed correctly. He stated head flashing had been siliconed to the existing cladding, and the head flashing turned down was 15 mm off the face of the window and that it would not have been compliant with E2 Building Code provisions. Mr [OMITTED] believed that the window and exterior cladding would have to be removed to remediate the issue.
- [28] Mr [OMITTED] noted that the required 50 mm bead of silicon to the sides of the head flashing connection to the cladding had not been installed, there were no stop ends, and window W6 had a two-piece head flashing with only a 30 mm lap, whereas it should have been a single continuous flashing.

Roof Framing

- [29] Mr [OMITTED] gave evidence that roof framing had not been installed as per the consented plans. He noted that the Respondent had not installed the trusses as per the consented truss layout, had installed an undersized lintel beam as structural support over a door where a truss landed, that there was no structural path to take the load of the truss and lintel and that the trusses had not been mechanically fixed. The matter had been referred to the designer to develop a solution.

Door Installation

- [30] Door D1 the door had been installed, wracked and out of square. The door, flashings and trims had to be removed and reinstalled. The hall/storage room door gib linings had not been securely installed and had to be remediated.

Door Landing

- [31] D1 landing was placed too high on the existing exterior cladding with no weather clearance, and the shape and angle of the installed ramp were hazardous. No damp course had been installed at the junction. The plans did not provide details for the ramps or landings. The landing was removed and replaced.

Pathways

- [32] Exterior pathways were noted as having been placed poorly, and uneven and small steps had been installed. Both were considered to be hazardous and were removed and replaced.

Cladding

[33] Exterior weatherboard cladding had large gaps on overlapping boards, and there was no expansion gap between the boards. The finished ground level around the cladding did not allow for the required 225 mm clearance from the soil. There was no damp course at the junction of the weatherboards and the foundation.

Foundation

[34] Concrete slab boxing had blown when poured, and the Respondent chipped out the excess concrete as opposed to cutting it back to give a smooth line. The jagged edge impacted on the installation of the lowest weatherboard.

Internal Finishing

[35] Skirtings and trim were not secure or adequately packed or flush with the linings.

Disrepute

[36] The complaint raised issues with the amounts invoiced for the building work by the Respondent. Mr [OMITTED] gave evidence that all of the Respondent's invoices had been paid except for the cost of the roof. He noted that additional costs of \$34,152 had been incurred for required remedial work and that a number of subcontractor invoices were paid by the church. Further, Mr [OMITTED] stated that further demands for payment were made by the Respondent, who threatened to remove fittings and materials if they were not paid, which they were not.

Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in an 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);

and **should** be disciplined.

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

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

Negligence and/or Incompetence

[40] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁹ Judge McElrea noted:

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

[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.

- [41] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.
- [42] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,¹² it was stated as “*an inability to do the job*”.
- [43] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [44] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹⁴. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁵.
- [45] 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*

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

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

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

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

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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

- (iii) *people who use a building can escape from the building if it is on fire; and*
- (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[46] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶ and be carried out in accordance with a building consent¹⁷. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[47] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁸ the Court's noted, as regards the threshold for disciplinary matters, that:

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

[48] The building work was amateurish and showed a lack of care and attention to compliance and quality requirements. In many instances, clauses E2 (weathertightness), B1 (durability) and B2 (structure) of the Building Code would not have been met. It was not completed to the standard expected of a Licensed Building Practitioner. Significant remedial work has had to be undertaken.

[49] There was evidence that the work was mostly done under supervision. It was apparent from the lack of compliance and quality of that work, that the supervision was either non-existent or very poor.

[50] Supervise is defined in section 7¹⁹ 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.*

¹⁶ Section 17 of the Building Act 2004

¹⁷ Section 40(1) of the Building Act 2004

¹⁸ [2001] NZAR 74

¹⁹ Section 7:

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.*

- [51] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:
- (a) the type and complexity of the building work to be supervised;
 - (b) the experience of the person being supervised;
 - (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
 - (d) the number of persons or projects being supervised; and
 - (e) the geographic spread of the work being supervised.
- [52] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [53] 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 1992²⁰. 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.”

- [54] The Board, when considering the above, formed the view that the Respondent's lacked the knowledge and skills required of a supervisor. As such, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent had supervised the building work in an incompetent manner and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent – Building Consent Changes

- [55] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

²⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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

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

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

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

49 Grant of building consent

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

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

[59] Again, there was clear evidence that the build had not been carried out in accordance with the building consent that had been issued. As such, the Board finds that the disciplinary offence has been committed. The Board does note, however, that there is a degree of commonality between the findings under section 317(1)(b) and 317(1), and it will take that into consideration when dealing with penalty.

Disrepute

[60] 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 C2-01111²¹ and discussed the legal principles that apply.

²¹ Board decision dated 2 July 2015.

[61] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”,²² and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²³ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²⁴

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

- criminal convictions²⁵;
- honest mistakes without deliberate wrongdoing²⁶;
- provision of false undertakings²⁷; and
- conduct resulting in an unethical financial gain²⁸.

[63] 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, and cases that have been considered under them make it clear that unethical or unprofessional conduct can amount to disreputable conduct.

[64] On 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022²⁹. The conduct in this matter predated the Code. As such, it cannot be considered in light of it.

[65] In C2-01688, the Board found that the Respondent had brought the regime into disrepute in respect of his conduct. It was also in relation to financial transactions. The conduct in this matter is not as serious or egregious as that in C2-01688. Whilst the Board noted that the Respondent had caused the church some financial hardship

²² Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

²³ [2012] NZCA 401

²⁴ [2012] NZAR 1071 page 1072

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

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

²⁷ *Slack, Re* [2012] NZLCDT 40

²⁸ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

²⁹ Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

and that he had made some unreasonable demands for further payments, the Board has decided that the conduct does not reach the threshold for a finding of disrepute.

- [66] In this respect, the Board notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

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

- [67] The Respondent should note that the conduct came close to being conduct which had brought the regime into disrepute and that if the additional payments demanded had been made that the finding may have been different.

Penalty, Costs and Publication

- [68] 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.

- [69] 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

- [70] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*³⁰ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [71] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³¹. The High Court, when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been

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

³¹ [2012] NZAR 481

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.

- [72] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [73] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,³² the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [74] The Respondent has committed two disciplinary offences. The Board does, however, note the commonality in the disciplinary offending in the incompetence finding and the finding as regards building contrary to a building consent. As such, it will treat those as a single offence. The finding of incompetence is significant. As noted above, incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. The licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. The Respondent has put those objects at risk. He has failed to understand that as a Licensed Building Practitioner, he is responsible for his work as well as the work of those under his supervision.
- [75] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*³³ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, he has not engaged in the disciplinary process.
- [76] 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 and to protect the public.

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

³³ [2011] 3 NZLR 850.

- [77] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct. Cancellation will also ensure that the Respondent's competence is re-evaluated under the Licensed Building Practitioners Rules 2007, if and when he seeks to obtain a new licence.
- [78] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of nine (9) months.

Costs

- [79] 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."
- [80] 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 case³⁴.
- [81] In *Collie v Nursing Council of New Zealand*,³⁵ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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

- [82] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁶ the High Court noted:

[46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*

[47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

- [83] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The

³⁴ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

³⁵ [2001] NZAR 74

³⁶ CIV-2011-485-000227 8 August 2011

current matter was moderate. Adjustments based on the High Court decisions above are then made.

- [84] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry. Ordinarily, the Board's scale costs for a half-day hearing is \$3,500. However, as the Board held two hearings on the same day in respect of the Respondent, there were some economies in the costs incurred, and the costs order has been reduced accordingly.

Publication

- [85] 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 Act³⁷. 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.

- [86] 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.
- [87] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴⁰. 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*⁴¹.
- [88] 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 interest⁴². 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.
- [89] Based on the above, the Board will not order further publication.

³⁷ Refer sections 298, 299 and 301 of the Act

³⁸ Section 14 of the Act

³⁹ Refer sections 200 and 202 of the Criminal Procedure Act

⁴⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴¹ *ibid*

⁴² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of nine [9] months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (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(I)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[91] 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

[92] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 April 2023**. 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.

[93] 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

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

Signed and dated this 20th day of March 2023



M Orange
Presiding Member

ⁱ **Section 318 of the Act**

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

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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