

## Before the Building Practitioners Board

	BPB Complaint No. CB25127
Licensed Building Practitioner:	Philip Mills (the Respondent)
Licence Number:	BP 115519
Licence(s) Held:	Carpentry and Site AOP 2

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	25 June 2020
Decision Date:	12 July 2020

#### Board Members Present:

Mel Orange, Deputy Chair, Legal Member, Chair (Presiding)  
Richard Merrifield, LBP, Carpentry and Site AOP 2  
Robin Dunlop, Retired Professional Engineer  
Rob Shao, LBP, Carpentry and Site AOP 1

#### Appearances:

Andrew Wedekind, Legal Counsel for the Respondent

#### 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), 317(1)(da)(ii) and 317(1)(i) of the Act.

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## Introduction

- [1] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at *[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) 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
  - (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 (s 317(1)(i) of the Act).

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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.

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

[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*<sup>4</sup> Collins J. noted that:

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

[4] In a similar vein, the Board’s investigation and hearing process are 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 persons<sup>5</sup>:

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

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

[6] 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

[7] 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

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

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

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

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

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.

- [8] 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

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

- [10] 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.

- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Philip Mills	Respondent
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	<i>[Omitted]</i> , witness for the Respondent

- [12] The Respondent was engaged, by way of his building business, to carry out an addition to an existing residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The work started on or about 21 August 2017 and came to an end on or about 19 October 2018. The full scope of the consented building work had not been completed at the time the contract came to an end. A record of work was not provided by the Respondent following his disengagement from the project. The Respondent submitted that the full scope of work was not complete and that he considered a record of work was not due. He did provide a record of work when one was requested as part of the investigation process and accepted, at the hearing that he may have failed to provide a record of work as required by the Act.

- [13] The Complainant raised the following issues with the building work that had been completed whilst the Respondent was engaged:

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

1. Flat roof above garage left exposed and damaged as laid to the wrong fall.
2. Site abandoned and no protection or butynol in place.
3. Countless small jobs, e.g. scribes, weatherboards, trap doors etc.
4. Electrical cable boxed into framing and un-accessible.
5. Pergola left unfinished and misaligned with soffit lighting.
6. Hardwood floor cupping and laid without sufficient support now cracking in multiple areas including along an 8m join.
7. Ceiling and wall gib popping, screws visible.
8. Multiple unlevel and un-plumb walls (some have been repaired) at least 5 have not.
9. Miscalculation of floor level in bathroom to accommodate tiles.
10. Large window (2mx1m) not plum.
11. Damage to existing lighting, alarm and hard wired doorbell.

[14] The noted issues were supported by photographs.

[15] The Complainant also raised issues with regard to fraudulent invoices submitted by the Respondent. A complaint had been laid with the police. The police laid a charge of dishonestly and without colour of right, using a document to obtain a pecuniary advantage. The Board was provided with Judge Aitken's ruling following a guilty plea being entered by the Respondent. The Judge granted a discharge without conviction<sup>7</sup>. Included in the reasons why a discharge was granted was the impact a conviction may have on the Respondent's licence in relation to section 317(1)(a) of the Act.

[16] The Respondent filed a statement with the Board. It noted a medical issue that the Respondent was suffering at the time as well as personal and financial matters. With regard to the police prosecution, the Respondent noted he had made reparations and that:

5 *I am unable to adequately explain why the offending occurred. At the time I was very worried about the company's serious financial problems and I was receiving counselling and medical treatment for depression. I was suffering from insomnia and my health was affected in other ways by what I later discovered was a brain tumour, which was causing a loss of hearing and problems with my balance.*

6 *When the complainant became aware of the overcharging I felt unable to admit responsibility. If the overcharging was taken into*

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<sup>7</sup> NZ Police v Mills [2020] NZDC 10636

*account, there was in fact no money owing by the complainant, but I felt I had no option but to deny that I had overcharged and to issue a suspension notice, to be consistent with the position that payment was overdue.*

7 *I accept that I had no proper basis for issuing the notice. I accept full responsibility for my actions and I am very sorry for the trouble I have caused [Omitted] and [Omitted].*

[17] With regard to the building issues raised, the Board questioned the Respondent with reference to the photographs presented. The Respondent generally took the position that the work was incomplete and that he had not, as a result of the contract coming to an end, been able to correct the issues noted. He submitted a report from [Omitted], which supported his stance. The Complainant noted that the Respondent had used seven different lead contractors during his time on the build, and that he would only be on site for about 30 minutes per day.

[18] With regard to the plywood substrate, the Respondent noted that it had been lifted and re-laid. He did not accept that damage noted was caused by the plywood being lifted. He submitted the damage might have been caused by weathering. He stated that the butynol layer was satisfied with the surface and that he had a written statement issued at the time to that effect. He was given a week to provide it to the Board. The Respondent provided two emails containing statements from persons involved in the work recording their recollections. One noted that they withdrew from doing the work for payment reasons.

[19] The Respondent, in his statement to the Board, also outlined details as regards his supervision. H stated:

18 *In relation to the [Omitted] job the site foreman until June 2018 was [Omitted] who was very experienced and a competent builder. When he left to take up another position my leading hand [Omitted] took over. I typically made visits to this site twice a week.*

19 *It is my practice to spend a concentrated period of time, usually a full day and sometimes two days, going over all of the completed building work ahead of each Council inspection. I only book the inspection when I am satisfied that the work is acceptable, in that it complies with the consent documents and is of good standard of workmanship.*

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

[20] 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);
- (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);

- (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.

### Negligence and/or Incompetence

- [21] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [22] The finding of negligence relates to the Respondent's supervision of non-licensed persons.
- [23] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>8</sup> test of negligence which has been adopted by the New Zealand Courts<sup>9</sup>.
- [24] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>10</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.
- [25] 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>11</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>12</sup>.
- [26] The Board notes that the purposes of the Act are:

### **3 Purposes**

<sup>8</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>9</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

*This Act has the following purposes:*

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

[27] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>13</sup> and be carried out in accordance with a building consent<sup>14</sup>. 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.

[28] The issues with the building work as presented, was not overly serious when considered as individual items. There was, however, accumulative effect. There were multiple issues, a pattern of substandard work, and questionable sequencing and methodology in how the work was undertaken. The Respondent took the position that the work was not complete and that it would have been put right prior to the next stage of the building process. That may have been the case, but the Board needs to consider whether, from a disciplinary perspective, the manner in which the work was carried out was acceptable.

[29] The Board considers that licensed building practitioners should be aiming to get building work right the first time. In this respect during the first reading of changes to the Act around licensing,<sup>15</sup> 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.*

[30] 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 legislation<sup>16</sup>:

<sup>13</sup> Section 17 of the Building Act 2004

<sup>14</sup> Section 40(1) of the Building Act 2004

<sup>15</sup> Hansard volume 669: Page 16053

*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.*

- [31] 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;*
- (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.*

- [32] 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.

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<sup>16</sup> Hansard volume 669: Page 16053

[33] In the present build, that was not the case. Issues built up and were not dealt with. Rather they were left to accumulate. With some issues remediation, given the stage the build was at, would not have been straight forward. It would have made little sense to rectify and more sense to have done it right the first time. It would, most likely, have also been cheaper.

[34] The Respondent did not carry out any work. He did supervise. Supervise is defined in section 7<sup>17</sup> 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.*

[35] When considering the adequacy of a licensed building practitioner's supervision, the Board also needs to consider the quality and compliance of the building work. The reality of supervision is that it is the supervisor who ultimately takes responsibility and is accountable to the Board.

[36] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992<sup>18</sup>. 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 in 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.”*

[37] As noted above, there were issues with the Build. Some were more serious than others. The standard of the substrate, for example, was very poor. There were issues with how it was laid and the condition of it was not caused by weathering but by

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<sup>17</sup> 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.*

<sup>18</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

workmen on the site. The issue the Board has is that there was an accumulation of building work that had been carried out in a substandard manner and it was clear to it that the Respondent had failed in his duties as a supervisor.

- [38] Given the above factors 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.

### Record of Work

- [39] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>19</sup>.
- [40] 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.
- [41] The Board discussed issues with regard to records of work in its decision C2-01170<sup>20</sup> and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [42] 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.
- [43] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>21</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [44] As to when completion will have occurred is a question of fact in each case.
- [45] In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. That did not occur in the present case. The Respondent’s involvement in the project came to an end. From that point on, he would not have been able to complete any further

<sup>19</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>20</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>21</sup> [2018] NZHC 1662 at para 50

restricted building work and, as such, completion for the Respondent had, in effect, occurred. To find otherwise would mean that a record of work would never be required which would defeat the purpose of the legislative provisions.

- [46] A record of work was not provided until such time as one was asked for as part of the investigation. The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [47] On the basis of the above, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [48] 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. There were no good reasons.

#### Disrepute

- [49] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111<sup>22</sup> and discussed the legal principles that apply.
- [50] The Act does not define conduct which brings or is likely to bring the regime into disrepute. Nor does it provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”<sup>23</sup>, and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>24</sup>, the Court of Appeal held that:
- the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>25</sup>
- [51] 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,

<sup>22</sup> Board decision dated 2 July 2015.

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

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

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

however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

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

[52] 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.

[53] The allegation of disrepute related to fraudulent invoices. The Board was provided with documentation relating to the related prosecution. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court<sup>30</sup>.

[54] The Respondent pleaded guilty and was discharged without conviction. The Board considers that estoppel applies as regards the ruling by the District Court. As such the Board need not make further inquiry with regard to the facts that led to the complaint.

[55] 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.*

[56] The base fact is that the Respondent engaged in unethical and dishonest financial conduct. He was not convicted, but that does not diminish the seriousness of the conduct. The behaviour is not to be condoned. The Board has, therefore, decided that the Respondent has brought the regime into disrepute.

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

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

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

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

<sup>30</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

## Penalty, Costs and Publication

- [57] 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.
- [58] 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

- [59] 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>31</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.*

- [60] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>32</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.
- [61] The Board has found that the Respondent has committed three disciplinary offences.
- [62] Dealing first with the negligence and disrepute matters, the Board notes the significant mitigating factors that were present at the time. On the basis of those factors, the Board has decided that, rather than imposing a more serious or significant penalty, that a censure will suffice. A censure is a formal expression of disapproval. The Board hope that the Respondent has learnt from the events and that he will not re-offend.
- [63] With regard to the record of work matter whilst they are at the lower end of the disciplinary scale, the Board has set a starting point fine which acts as a deterrent to records of work being withheld or not provided. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500. There are no aggravating

<sup>31</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>32</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

### Costs

- [64] 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.”
- [65] 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>33</sup>.
- [66] In *Collie v Nursing Council of New Zealand*<sup>34</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.*

- [67] The matter was dealt with at a hearing. The Board’s scale of costs for a half-day hearing is \$3,500. This is the amount the Board orders that the Respondent pays toward the costs of and incidental to the Board’s inquiry. This is significantly less than 50% of actual costs.

### Publication

- [68] 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>35</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.*

- [69] 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.
- [70] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>36</sup>. The Criminal Procedure Act 2011 sets out

<sup>33</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>34</sup> [2001] NZAR 74

<sup>35</sup> Refer sections 298, 299 and 301 of the Act

<sup>36</sup> Section 14 of the Act

grounds for suppression within the criminal jurisdiction<sup>37</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>38</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>39</sup>.

[71] 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>40</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.

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

### Section 318 Order

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

**Penalty:** Pursuant to section 318(d) of the Building Act 2004, the Respondent is censured with regard to the findings under sections 317(1)(b) and (i) of the Act.

Pursuant to section 318(i) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500 with regard to the finding under section 317(1)(da)(ii) of the Act.

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

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

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

[74] 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

[75] 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 August 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

<sup>37</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>38</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>39</sup> *ibid*

<sup>40</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [76] 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

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

Signed and dated this 17<sup>th</sup> day of July 2020



**Mel Orange**  
Presiding Member

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

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

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(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.*