

Before the Building Practitioners Board

BPB Complaint No. CB25848
Licensed Building Practitioner: Sam Newman (the Respondent)
Licence Number: BP 101290
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 Napier
Hearing Type: In Person
Hearing Date: 25 May 2022
Decision Date: 3 June 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister(Presiding)
Mr C Preston, Chair
Mr R Shao, LBP, Carpentry and Site AOP 1
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 disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

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Summary of the Board’s Decision

[1] The Respondent conducted himself in a negligent manner when he carried out building work without first ensuring that a building consent was issued for building work that required a building consent and in respect of cabinetry work carried out. The Respondent also brought the licensing regime into disrepute in respect of charging for services that were not delivered and for misrepresenting his competence and the building work that he was able to carry out, including that he could carry out building work that required a building consent without one on the basis that he was a Licensed Building Practitioner. The Respondent is censured and fined the sum of \$3,500. He is ordered to pay costs of \$3,500. A record of the disciplinary offending will be on the Public Register for a period of three years.

The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [OMITTED] Napier. 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, and
 - (b) conducted himself 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.
- [3] The Board gave notice that, in investigating the above grounds of complaint, the Board would be considering whether the Respondent:
- (a) undertook building work in respect of which he should have obtained a building consent,
 - (b) misrepresented or miscommunicated to the Complainant whether a building consent was required and the process to do so, (and, in particular, his statements as to his ability to obtain an exemption),
 - (c) produced inadequate plans for the work, and
 - (d) produced work that was not of an acceptable standard.

Function of Disciplinary Action

- [4] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [5] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁴ Collins J. noted that:
- “... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [6] 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

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

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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 persons⁵:

... 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.

- [7] 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.
- [8] 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

- [9] 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.
- [10] 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.

Background to the Complaint

- [11] Prior to the hearing, the Respondent challenged the validity of the complaint made. On 20 January 2022, the Board issued a Minute ruling that the complaint met the requirements of regulation 5 of the Complaints Regulations.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [13] 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

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

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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.

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

Sam Newman	Respondent
[OMITTED]	Complainant
[OMITTED]	Complainant
Craig Bergman	Witness, Napier District Council
Chris Beecham	Witness, Napier District Council

- [15] The Respondent was engaged to assist with the conversion of an office space to a dental surgery. The Complainants had sought a building consent to allow for the building work and a price from the Respondent to do the work. They submitted their own consent application. The building consent was rejected on the basis that the plans and specifications were not adequate.

- [16] The Respondent then undertook to prepare and submit a building consent application as the Complainant's agent for a fee of \$5,000, which was paid. The Respondent maintained that he had prepared the plans and specifications but that, due to a variety of reasons, he was not able to provide them to the Complainants. The reasons included an inability to email large files. He did provide some basic floor plans. The Respondent's fee was noted in an email to the Complainants dated 25 January 2021. He noted in the emails that as it was a commercial project, there would be more involved in the consenting than there would be for a residential consent.

- [17] The Respondent did not apply for a building consent. Rather he advised the Complainants that the work could be done without a building consent and that as he was a Licensed Building Practitioner, there were certain exemptions that allowed him to do the work. In an email to the Complainants dated 15 March 2021, he stated, amongst other things:

I can make a call on exemption to building consent works and am allowed to (do) the work this is one of the things that only a LBP can do as long its done to nz3604.

I deem this to be under (maintenance) / repair and have spec it to building code

(Corrections have been made to the quotes (in brackets) to enable them to be understood).

- [18] At the hearing, the Respondent was not able to elaborate on what those exemptions were. Notwithstanding that the Respondent did not provide the building consent documentation that he claimed he had developed. Nor did he apply for a building

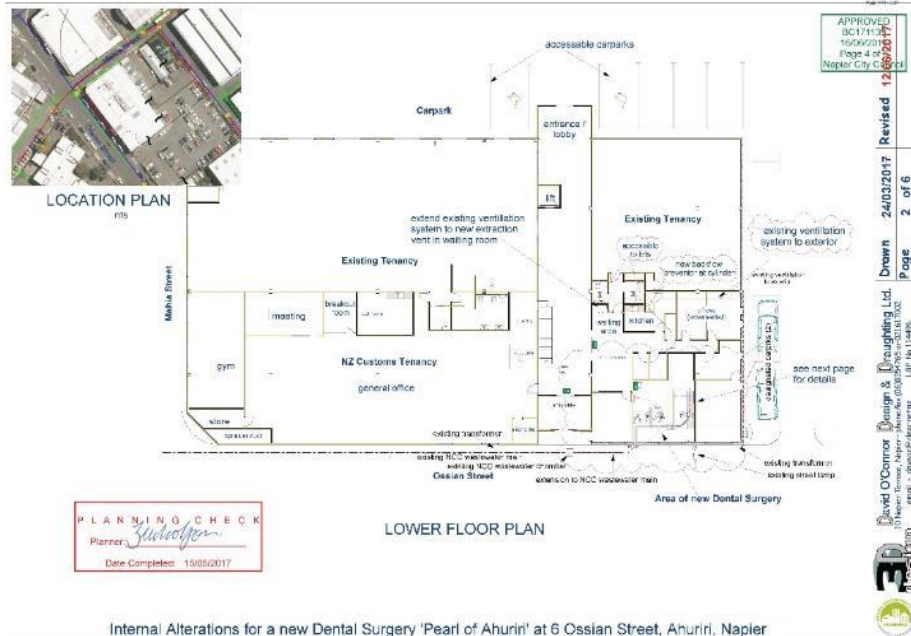
consent. He did charge for the work. Also, at the hearing, the Respondent referred to an exemption strategy, and he stated that he phoned the duty building inspector at the Napier District Council to discuss whether a building consent was required. The Respondent's evidence was that he was advised by the duty consent officer that a building consent was not required provided that no additional sanitary fixtures were being added. He stated that he had taken advice from a plumber as to what was allowed and that he had also referred to MBIE guidance documentation.

- [19] The Respondent also expressed his opinion that a building consent would only be required for work on the concrete floor if he had cut through the foundation footings, which he had not.
- [20] The Respondent was questioned as regards his competence to carry out design work. He stated that he had some experience in developing building consents in that he had developed and submitted building consents for a residential bathroom renovation, a small residential renovation and for a fire, but no training. He gave evidence that the building consent authority allowed him to file the building consent even though the design work he had undertaken was restricted building work that had to be completed by a Licensed Building Practitioner with a Design Licence. When he was asked who provided the statutorily required certificate of design work for the building consent applications, he was not able to answer⁷. The Council witnesses confirmed that a building consent for residential building work would not be accepted without a certificate of design work from a Licensed Building Practitioner with a Design Licence. A limited number of pages of plans developed by the Respondent were included in the file. They were basic and were not what would be expected to achieve a building consent.
- [21] The work that was subsequently carried out included changing a doorway that was the means of access into the office from a waiting room, cutting into the concrete floor to create channels for services and adding sinks. The Council witnesses stated that the building work required a building consent. The following photographs show the trenching in the floor when it was cut to make provision for new pipes with new steel inserted and after it was filled.

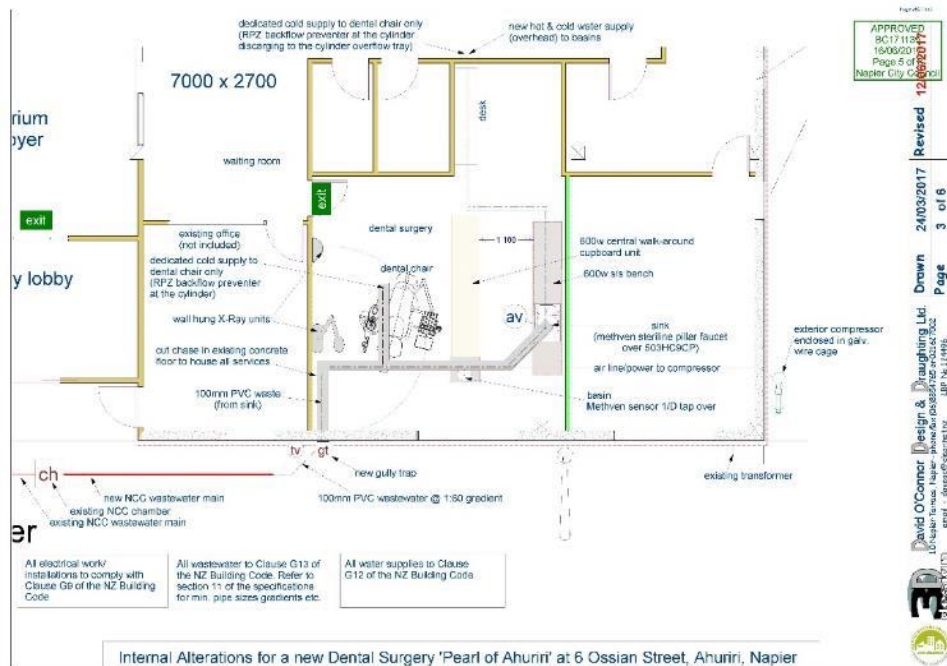
⁷ As the design work for the conversion of an office into a dental practice was not for a residential dwelling a certificate of design work was not required.



[22] The Respondent gave evidence that he had recently carried out similar work in the Hastings region and that a building consent was not required for that building work. No evidence to support this was provided. He also submitted that the building work that was to be carried out did not require a building consent as a building consent issued in 2017 for similar work provisioned for the two sinks to be installed. The Complainant and Council witnesses gave evidence that the 2017 building consent included installing sewer pipes and that those pipes had the additional capacity to allow for future connections, but that sinks were not installed in the adjacent office at the time. The Council witnesses were asked to check the 2017 building consent file to ascertain if the consented works included two additional sinks in the position that they were installed in 2021 and to advise the Board by 27 May 2022. The Council provided a copy of the full 2017 building consent file. The following floor plans show the building work that was undertaken in 2017:



Internal Alterations for a new Dental Surgery 'Pearl of Ahuriri' at 6 Ossia Street, Ahuriri, Napier



Internal Alterations for a new Dental Surgery 'Pearl of Ahuriri' at 6 Ossia Street, Ahuriri, Napier

- [23] The work carried out by the Respondent was on the office to the corner office to the right of the office where a dental surgery was created in 2017. There was no evidence on the building consent file of any work having been undertaken on that office or of any sanitary fittings or fixtures having been installed in it as part of the 2017 consented building work.
- [24] The Respondent made a post-hearing submission which included a text message from the Respondent which stated:

*Good morning
So when you did the first stage of the dental clinic it looks like on that consent there was allowance for the extra vanity in the wall and the allowance in the floor for extra dental chair to the sewer line as it looks like the pipe diameter*

*is able to take the extra sanitary fixings in that room.
Is this correct?*

[25] The response was:

Yes we did plan to plumb into that room eventually, hence the door being framed up, I just don't know to what extent that was shown on the plan.

[26] The Respondent also made a submission calling the Complainant's credibility into question.

[27] The Complainant's had concerns with the manner in which the building work was being carried out and, as a consequence, had concerns over whether the Respondent's claims that a building consent was not required were correct. They made inquiries with the Council as regards the requirement for a building consent. They were informed that a building consent was required. A Licensed Building Practitioner with a Design Licence was engaged to apply for a certificate of acceptance for the building work that had been completed. The Complainants did not use any of the plans that the Respondent had developed and provided. A certificate of acceptance was granted by the Council about four weeks prior to the hearing.

[28] The Complainants brought three doors from the joinery that was built and installed by the Respondent to the hearing. The door panels were inspected. They were out of square by a considerable margin and more than acceptable tolerances. The Complainants stated that the doors were representative of the quality of the joinery that was installed. They also provided photographs of the joinery. The Complainants noted that the joinery presented a health hazard as it was installed in what was to be a dental surgery. The following photographs are representative of those provided with the complaint.





- [29] The Complainants also provided an opinion from a joiner who noted that “no one panel is up to a joinery standard”. All of the cabinets provided by the Respondent have been replaced by the Complainants.
- [30] The Respondent stated that some of the joinery was flat-pack joinery that he assembled and installed and that he had to cut joinery to fit on site. He outlined his previous experience as a joiner stating he had worked for a joiner as an installer and that he also did some fabrication whilst employed and that he had previously trained as a joiner. The Respondent described the processes he used to cut on-site and the processes that can be used to ensure clean cuts of materials that have veneers. The Respondent’s position was that the work was not complete and that he would have remediated any issues if he had been allowed to continue with the work. He also stated he had photographs of the joinery, which showed a different finish. He was given an opportunity to supply those photographs, which he did. The eight photographs provided showed a selection of cabinets which appeared to be of reasonable quality.
- [31] The Complainants also supplied photographs of a double-hinged door that the Respondent had installed, which they stated constantly fell off its hinges. They stated he has since been replaced.



[32] The Respondent stated he supplied the door hardware on the basis of the weight of the door and that he installed an extra hinge to take the weight.

Board's Conclusion and Reasoning

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

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

and **should** be disciplined.

Negligence – Carrying out Building Work without a Building Consent

[34] The Board's considerations in relation to negligence and/or incompetence relating to the failure to obtain a building consent.

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

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

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

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

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

49 Grant of building consent

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

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

3 Purposes

This Act has the following purposes:

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

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

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

[40] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

[41] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[42] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[43] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[44] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[45] In this respect, section 45(4) of the Act states:

(4) An application for an amendment to a building consent must, —

(a) in the case of a minor variation, be made in accordance with section 45A; and

⁸ [2015] NZHC 3299 [18 December 2015]

- (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[46] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[47] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

(3) *This section—*

(a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*

(b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[48] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[49] The Respondent argued that the building work in relation to sanitary fixtures came within Schedule One of the Act. It provides for a number of exemptions, including an exemption for Sanitary plumbing and drainlaying carried out by persons authorised under Plumbers, Gasfitters, and Drainlayers Act 2006. The Respondent noted that the work was carried out by a registered and licensed plumber.

[50] The specific exemption relied on was that in Clause 32. This was apparent from the Respondent's statement to the Complainant:

I deem this to be under (maintenance) / repair and have spec it to building code

[51] Clause 32 provides:

32 Repair, maintenance, and replacement

(1) *The repair and maintenance of any sanitary plumbing and drainage in or associated with a building, provided that comparable materials are used.*

- (2) *Replacement of sanitary plumbing and drainage in or associated with a building, provided that—*
 - (a) *a comparable component or assembly is used; and*
 - (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
 - (a) *complete or substantial replacement of a specified system; or*
 - (b) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
 - (c) *repair or replacement of any water heater (unless permitted under clauses 36 to 38).*

[52] Clause 32 was not applicable as it was not a repair, maintenance or replacement. It was new work. The provision that may have applied was Clause 35:

35 Alteration to existing sanitary plumbing (excluding water heaters)

- (1) *Alteration to existing sanitary plumbing in a building, provided that—*
 - (a) *the total number of sanitary fixtures in the building is not increased by the alteration; and*
 - (b) *the alteration does not modify or affect any specified system.*
- (2) *Subclause (1) does not include an alteration to a water heater.*

[53] Clause 35 clearly excludes any work that will result in the total number of sanitary fixtures being increased. The Respondent's submission relied on work carried out under a building consent in 2017 and the provision, at that time, for additional wastewater capacity in the drainage pipes installed. Whilst that may well have been the case, the fact is, regardless of the provision for future sanitary fixtures in the pipework, the new work has added new fixtures.

[54] The Council witnesses, both of whom were building consent officers, considered that a building consent was also required because of the building work that had been carried out on the concrete floor and in moving a point of access to and from the office. The Board agreed. That building work did not come within an exemption. The possible exemptions were Clause 1 of Schedule 1 in relation to foundations and Clause 11 in relation to the access way. They provide:

1 General repair, maintenance, and replacement

- (1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*

- (2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*
- (a) *a comparable component or assembly is used; and*
 - (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
- (a) *complete or substantial replacement of a specified system; or*
 - (b) *complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or*
 - (c) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
 - (d) *sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

11 Internal walls and doorways in existing building

Building work in connection with an internal wall (including an internal doorway) in any existing building unless the wall is—

- (a) *load-bearing; or*
- (b) *a bracing element; or*
- (c) *a fire separation wall (also known as a firewall); or*
- (d) *part of a specified system; or*
- (e) *made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar.*

- [55] The foundation work involved cutting away the concrete and reinforcing steel. New steel was inserted. There was no evidence that any engineering input or design was obtained to ensure the structural integrity of the floor was retained. From the pictures, it was evident that a comparable component or assembly was not used, and, given the extent of the channel that was cut, the Board considered it was a substantial replacement of any component or assembly contributing to the building's structural behaviour. As such, Clause 1 was not available as an exemption.
- [56] The access door formed part of a "specified system" as it formed part of the passive fire protection system as it was part of the safe pathway to exit the building in the event of a fire. Again, the exemption was not available.
- [57] Moreover, a certificate of acceptance has been issued. A certificate of acceptance, as noted above, is only issued when building work that required a building consent was carried out without one. That, in itself, is evidence that a building consent was required.

- [58] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and, if so, whether the Respondent has, as a result of the failing, been negligent.
- [59] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [60] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.
- [61] 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 purposes of the Act¹², which are outlined above. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹³.
- [62] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴, 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.*
- [63] Looking at the Respondent's conduct, he put himself in a position whereby he held out that he was knowledgeable and experienced in consenting matters. If that is to be accepted, then he should have known that a building consent was required. The Board does not, however, accept his claimed level of expertise. Notwithstanding, he is a Licensed Building Practitioner with a Carpentry Licence. Part of the requirements to obtain and hold a Carpentry License is a knowledge of the regulatory environment

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

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

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

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁴ [2001] NZAR 74

of the building construction industry.¹⁵ This includes the following required competency:

1.4 Describe the process for work requiring a building consent.

Includes but not limited to – trigger points for consent, application, inspection, code compliance certificates, and consequences of non-compliance.¹⁶

[64] The structural work on the concrete floor alone should have raised a question with the Respondent as to whether a consent was required. As regards the plumbing, the Respondent stated he consulted MBIE Guidance Documentation¹⁷. The provisions he referred to were those in Section 4. Specifically, he referred to a table with the following note:

The table below shows the exemptions included in this section and the professional you will need to hire.

[65] The table itself provides the following, which is what the Respondent, in his submission, highlighted:

Description*	Is an authorised professional legally required?	Who can provide professional advice?
4.6. Minor alteration to drains	Yes	All drainlaying work must be carried out by an authorised drainlayer.
4.7. Alteration to existing sanitary plumbing (excluding water heaters)	Yes	All sanitary plumbing work must be carried out by an authorised plumber.

*Owners must look at the relevant section of guidance to identify under which detailed conditions the building work qualifies for the exemption.

[66] The Guidance goes on, in section 4.7 (Alteration to existing sanitary plumbing (excluding water heaters) to state:

This exemption enables an authorised person to carry out alterations to sanitary plumbing. However, this is only as long as these alterations do not increase the number of sanitary fixtures within any existing building and they do not modify or affect any specified system.

[67] The Guidance includes a cautionary note that states:

Where sanitary plumbing work could adversely affect the structural performance of structural elements such as floor joists or wall framing, the work may require a building consent. If you are not sure, we recommend seeking professional advice first from a licensed building practitioner,

¹⁵ Competency 1 of the Licensed Building Practitioner Rules 2007

¹⁶ Ibid

¹⁷ Exemptions Guidance for Schedule 1 of the Building Act 2004, Fifth edition - August 2020

chartered professional engineer, registered architect, building consultant, registered building surveyor or accredited building consent authority.

- [68] The following analogous example of work that requires a consent is given:
4. *A restaurant owner decides to increase the number of sanitary fixtures to allow for increased customer capacity. This work will require a building consent.*
- [69] Furthermore, the Respondent, on his own evidence, was clearly informed by the Council when he contacted them that a building consent was required if the number of sanitary fixings was being increased which it was.
- [70] Given the above, it was clear to the Board that the Respondent did not give due diligence to the question of the requirement for a building consent. He was fixated on plumbing capacity and ignored advice and Guidance that clearly spelt out the requirement for a building consent. As a Licensed Carpenter, he should have known that the work on the foundations, the change of access routes and the addition of sanitary fixtures all required a building consent. Rather than seeking one, he pushed forward. The Board finds that his conduct was deliberate and serious. Accordingly, 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.

Negligence – Building Work

- [71] The same tests as outlined above apply.
- [72] The Board was provided with physical evidence and pictures which showed poor workmanship. The Respondent provided his own photographs showing cabinets where the workmanship was to an acceptable standard.
- [73] Whilst some of the cabinets may have been of an acceptable standard, there was sufficient evidence of cabinetry that was not of an acceptable standard for the Board to be satisfied that the matters complained about were substantiated.
- [74] As with the issues around the building consent, the Board must consider whether the Respondent has departed from an acceptable standard of conduct and, if so, whether the failures were serious enough to warrant a disciplinary outcome.
- [75] The Respondent claimed to have experience and ability in joinery. He also considered his work was to an acceptable standard and submitted that he would have remediated anything that was not. In this respect, the Board considers that Licensed Building Practitioners should be aiming to get building work right the first time and not to be relying on remedial or rectification work. In this respect, during the first reading of changes to the Act around licensing,¹⁸ it was noted by the responsible Minister:

¹⁸ Hansard volume 669: Page 16053

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.

- [76] 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 legislation¹⁹:

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

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

- [77] Whilst the above commentary is in relation to the building of houses, the Board considers that it equally applies to buildings and the components that go in them. It is not enough to say, once poor workmanship has been identified, that the practitioner was going to return and rectify or replace the defective cabinets. Further, there was no evidence of an intention to do so, other than as part of the Respondent's defence to the matters before the Board.

- [78] The Respondent knew that the cabinetry was to be installed in a dental surgery. He should have known that hygiene compliance would be essential. The cabinetry would not have met the requirements of Clause F3 of the Building Code, which deal with Hazardous Substances and Processes. The Building Code defines hazardous as:

Hazardous *Creating an unreasonable risk to people of bodily injury or Code deterioration of health.*

- [79] Clause F3, in turn, provides:

OBJECTIVE

¹⁹ Hansard volume 669: Page 16053

F3.1 The objective of this provision is to safeguard people from injury or illness, and other property from damage, caused by hazardous substances or processes in buildings.

FUNCTIONAL REQUIREMENT

F3.2 Buildings where hazardous substances are stored and hazardous processes undertaken, shall be constructed to provide adequate protection to people and to other property.

PERFORMANCE

F3.3 Spaces in buildings where hazardous substances are stored, handled or used, or where hazardous processes are undertaken, shall be located and constructed to protect people, and other property, under both normal and reasonably foreseeable abnormal conditions, and shall be provided with:

(f) Impervious, easily cleaned surface finishes on building elements likely to be splashed or become contaminated in the course of the intended use of the building, and

- [80] The joinery he built was not only unsightly, but it also had the potential to create a hazard to the health of patients and did not meet Building Code requirements. On the basis, and in accordance with the above, the Board finds that the Respondent's conduct fell below the standard to be reasonably expected of a Licensed Building Practitioner and that the conduct was serious enough.

Disrepute

- [81] 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 C2-01111²⁰ and discussed the legal principles that apply.
- [82] The Board, in C2-01111, considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above, there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example, in the High Court held in *Davidson v Auckland Standards Committee No 3*,²¹ a company director, who, in the course of his duties as a director, was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time. However, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example, dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [83] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²², convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [84] 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",²³ 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*,²⁴ 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.*²⁵
- [85] 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,

²⁰ Board decision dated 2 July 2015.

²¹ [2013] NZAR 1519

²² 24 September 2014

²³ 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

²⁴ [2012] NZCA 401

²⁵ [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 convictions²⁶;
- honest mistakes without deliberate wrongdoing²⁷;
- provision of false undertakings²⁸; and
- conduct resulting in an unethical financial gain²⁹.

[86] 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.

[87] The conduct in question was the Respondent representing that he was competent and capable of undertaking design work and charging for that design work along with fees for obtaining a building consent without delivering the actual services. In this respect, the Board is of the view that the conduct comes within the above category of an unethical financial gain.

[88] The board has, in previous matters, found that such conduct can bring the regime into disrepute³⁰. The Board makes the same finding in this case. The Respondent has taken money and has not applied it to the purposes for which it was received. His conduct has resulted in the Respondent obtaining a financial gain at the expense of the Complainants. Such conduct brings the regime into disrepute.

[89] Finally, the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

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

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

Penalty, Costs and Publication

[91] 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.

²⁶ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

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

²⁸ *Slack, Re* [2012] NZLCDT 40

²⁹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

³⁰ C2-01688 and *Carmichael* [2018] BPB 1901

- [92] 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

- [93] 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*³¹ 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.

- [94] 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 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.
- [95] The matters before the Board are serious. A penalty that deters the Respondent and others from similar conduct is required.
- [96] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*³³. 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.

³¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

³³ [2012] NZAR 481

- [97] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [98] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁴ the High Court, in relation to the principles relating to suspension of a legal practitioner's licence, stated:

[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

- [99] This was affirmed in *Jefferies v National Standards Committee*,³⁵ where the High Court also stated:

[25] I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.

*[26] And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*³⁶

- [100] The licensing regime exists to ensure the public can have confidence in those who carry out building work as Licensed Building Practitioners. The Respondent's conduct has put that confidence at risk. The Board, on that basis, adopted a starting point of a suspension of the Respondent's licence. The Board did note, however, that the building work was not restricted building work which is central to the licensing regime. On that basis, the Board decided that it would reduce the penalty to one of a censure and a fine.

³⁴ [2011] 3 NZLR 850

³⁵ [2017] NZHC 1824

³⁶ *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

[101] A censure is a public expression of disapproval of a Licensed Building Practitioner's conduct, and the Respondent is so censured. The fine needs to reflect the seriousness of the offences committed. It is set at \$3,500. The Board considers the amount reflects the seriousness of the offending. The Board considers those penalties are appropriate and are required to not only punish the Respondent but to deter others from such conduct

Costs

[102] 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."

[103] 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 case³⁷.

[104] In *Collie v Nursing Council of New Zealand*,³⁸ 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.

[105] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁹ 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.*

[106] 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 current matter was moderately complex. Adjustments based on the High Court decisions above are then made.

³⁷ *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.

³⁸ [2001] NZAR 74

³⁹ CIV-2011-485-000227 8 August 2011

[107] 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. This is the Board's scale amount for a half-day hearing and is considerably less than 50% of actual costs.

Publication

[108] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act⁴⁰. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

[109] 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.

[110] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990⁴¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction⁴². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴³. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*⁴⁴.

[111] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest⁴⁵. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

⁴⁰ Refer sections 298, 299 and 301 of the Act

⁴¹ Section 14 of the Act

⁴² Refer sections 200 and 202 of the Criminal Procedure Act

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

⁴⁴ *ibid*

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Act, the Respondent is censured and pursuant to section 318(1)(f) of the Act he 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(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.

[114] 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

[115] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 July 2022**. 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.

[116] 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

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

Signed and dated this 21st day of June 2022



Mr M Orange
Presiding Member

ⁱ Section 318 of the Act

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

ⁱⁱ Section 330 Right of appeal

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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