

Before the Building Practitioners Board

	BPB Complaint No. CB25901
Licensed Building Practitioner:	Campbell Grant Senior (the Respondent)
Licence Number:	BP112492
Licence(s) Held:	Design AoP 2 and Site AoP 2 (when the conduct occurred)

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	Palmerston North
Hearing Type:	In Person
Hearing Date:	30 August 2022
Decision Date:	16 September 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

Appearances:

S Curlett 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.

Disciplinary Finding:

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

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

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Summary of the Board’s Decision

- [1] The Respondent conducted himself in a negligent manner when he failed to advise that a building consent was required for the construction of a residential dwelling that he designed and which his business constructed. He is fined \$5,000 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.
- [2] The Respondent did not bring the regime into disrepute. The Respondent’s conduct was questionable, but it did not reach the threshold for a disciplinary finding.

The Board

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

¹ Section 341 of the Act.

The Charges

- [4] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act in that he may have:
 - (i) failed to ensure that a building consent was in place for the building work prior to it being undertaken; and
 - (ii) as further detailed in the report of [OMITTED] dated 11 August 2021 (Document 2.1.21, Page 41 of the Board's file), the exclusions noted on the Certificate of Acceptance dated 15 September 2020 (page 175 of the Board's file) and the Building Assessment Report of the Horowhenua District Council dated 10 September 2020 (Page 155 of the Board's file); and/or
 - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act. In further investigating the ground of discipline, the Board will, in addition to the matters referred to in paragraph 3(a) above, be investigating:
 - (i) the failure to ensure a building consent was in place prior to the building work being undertaken;
 - (ii) whether the Respondent misrepresented the services being offered when he built a 60m² building but contracted to build an 86m² building; and/or
 - (iii) charged for design services (Preliminary and General – building consent application and drawings) that may not have been delivered.

Function of Disciplinary Action

- [5] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

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

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

⁴ [1992] 1 NZLR 720 at p 724

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

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

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

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

- [8] 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.
- [9] 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

- [10] 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.
- [11] 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.

⁵ [2016] HZHC 2276 at para 164

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

Evidence

[12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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 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] Prior to the hearing, Counsel for the Respondent filed submissions together with supporting documentation and an evidentiary statement from the Respondent. At the hearing, in addition to the documentary evidence before the Board, it heard evidence from:

Campbell Grant Senior	Respondent
[OMITTED]	Complainant
[OMITTED]	Complainant
[OMITTED]	Witness, [OMITTED]

[15] The Complainants contacted the Respondent's business Thermawise Homes (BPM Contracts Limited), to construct a residential dwelling for them on their farm property by way of their company [OMITTED]. There was a period of pre-contractual negotiation where various options and various sizes of dwelling were considered. A contract was entered into on 19 June 2018 for a three-bedroom home with an open plan living area.

[16] The contract, which was drawn up by the Respondent, noted that it was "based on the floor plan as supplied by the owner".

[17] The contract went on to stipulate:

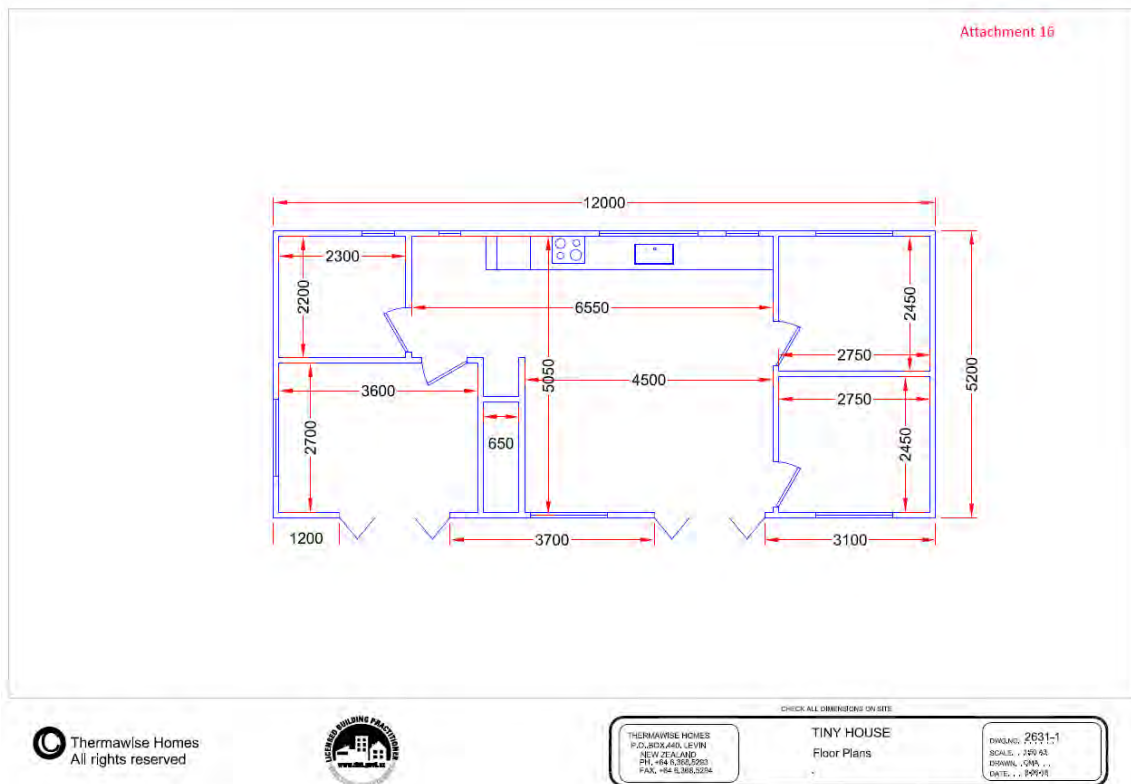
Broad Description of works

Design and construction of a new temporary tiny house at the above address, with a floor area of 86.4m²

The contract doesn't include any provision for obtaining a building consent, as this will be a temporary building. Site works are excluded and the building will be on timber piles.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[18] The actual dwelling constructed was 62.4m² and was based on the following design:



[19] At the hearing, the Complainants stated that they believed they were contracting for a dwelling, based on their design, that encompassed an outdoor living area that would be closed in on the sides and back but open at the front so that they could close it in at a later point in time.

[20] The Respondent's evidence was that he contracted to build a dwelling as per his design above and that the roof would extend out over a deck area which was where the outdoor living space would be constructed. He was not contracted to do the deck. The Complainants confirmed that the Respondent did not do the deck area.

[21] The Respondent's position was that the 86.4m² detailed in the contract was a typographical error. At the same time, he considered that the balance of the contract written by him should be taken as written when it came to provisions around obtaining a building consent.

[22] With regard to consenting, the contract stipulated:

All as detailed in the attached Contract Cost Breakdown.

Specifically excluded from the scope of Works:

Engineering certification. Required if a building consent was going to be obtained.

Building consent and consent documentation

[23] The Thermawise Homes Contract Breakdown referred to above, in turn, stipulated:

Preliminary and General

*Building consent application and drawings
(not council fees)*

[24] Notwithstanding, the Respondent's position was that consenting was excluded. The Complainants stated that they were not provided with any plans prior to or during the build. It was only afterwards, as part of other dispute processes, that they obtained any plans. The Respondent stated plans were developed and that the builders had them but that he was not sure if they had also been sent to the Complainants.

[25] The build progressed without a building consent.

[26] The Respondent's written statement, with regard to building consents, stated:

98 *At the time that this project was carried out, It was agreed that the [OMITTED]s would be making inquiries with the Council about whether consents were required. I relied on what I had been told by Mrs [OMITTED] in relation to the building consent: that a consent would not be required provided the tiny house was to be 'temporary'.*

99 *At the time, I was aware that certain temporary structures were exempt from requiring a building consent (for example, site offices and prefab buildings). I understood that some 'tiny houses' would fall within these exemptions.*

100 *However, I was not aware of the specific criteria which a tiny house is required to fulfil in order to be exempt from requiring a building consent, as set out in Schedule 1.*

101 *I now accept that the tiny house did require a building consent and that I should not simply have relied on what I was told by Mrs [OMITTED], but I should have checked the exemptions in Schedule 1, or made enquiries myself as to whether a building consent would be required for the tiny house.*

[27] Counsel for the Respondent also submitted that there was a lack of understanding in the industry over what came within the building consent exemptions as regards tiny houses and that this had led to the Ministry of Business Innovation and Employment issuing guidance documentation under section 175 of the Act in November 2021, well after the building work that was complained about was carried out.

[28] The Respondent also gave evidence that he genuinely believed that the structure was going to be moveable and that the Complainant's intention was to move it around the farm site. He noted that the type of construction used (structurally insulated Panel or SIPs) was ideal for this. The Complainants gave evidence that

earlier discussions included moveable structures but that the intention with the house that was built was for it to be a permanent home. The building was constructed on piles concreted into the ground, and bearers bolted to those piles. It had permanent services attached to the dwelling.

- [29] The Complainants gave evidence that the Respondent had advised them, prior to the build, that the Respondent had advised them that a Certificate of Acceptance could be obtained after the build. The Respondent denied that statement.
- [30] A Certificate of Acceptance was issued on 11 September 2020. It excluded compliance with B1 Structure, B2 Durability, D1 Access Routes, E1 Surface Water, E2 External Moisture, E3 Internal Moisture, G4 Ventilation and G12 Water Supplies.
- [31] The Complainants also raised issues with the quality and compliance of the build. They obtained a report from [OMITTED] which detailed various issues. Mr Senior stated that he did not carry out any building work and that he did not provide any supervision of those that were on site. There was one Licensed Building Practitioner on-site during at least the subfloor framing stage of the build. The Respondent stated that he had other experienced builders involved in the balance of the build.
- [32] The Board questioned the Respondent as to his on-site involvement. He stated he visited the site at the prebuild stage and possibly once or twice during the build to meet with the Complainants. The Complainants confirmed the Respondent did not carry out any work. The Respondent stated he did not provide any direction, control or oversight to the builders who were carrying out the work or check any of it. He did organise some of the bulk materials for the build, such as the SIPs panels.
- [33] Both parties made submissions. The Respondent's submissions were in writing and submitted by Counsel. The Complainants noted the impact the Respondent's conduct had on them and stated that they were motivated by a desire not to see others go through what they have. They also noted contractual issues and the impact on them of those issues.

Post Hearing Submissions

- [34] The Board closed the hearing and reserved its decision. It did not call for further submissions or evidence and leave was not sought by the Respondent to file any. Notwithstanding, on 12 September 2022, the Respondent filed further submissions and evidence. The Board did review what was provided. The submissions and evidence do not change the Board's decision.

Board's Conclusion and Reasoning

- [35] 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.

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

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

Negligence – Carrying out Building Work without a Building Consent

[38] The Board's decision in relation to negligence relates to the failure to obtain a building consent. With regard to the building work issues noted, the Board noted that the Respondent did not carry out or supervise any of the building work. Nor did he provide any oversight or direction. As such, the Board is not able to make any findings as regards the quality or compliance of the building work. However, the Respondent, as the holder of Design AoP and a Site AoP⁸ licenses should have been aware of the need for a building consent and should have ensured that one was in place before the building work was commenced. In failing to do so, he has conducted himself in a negligent manner.

[39] In terms of the need for a building consent 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.*

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

49 Grant of building consent

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

⁸ The Respondent held a Site AoP 2 licence at the time. He has since surrendered it.

- [41] In this respect, 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).
- [42] 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.*

- [43] In *Tan v Auckland Council*⁹ 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.

- [44] 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.

⁹ [2015] NZHC 3299 [18 December 2015]

- [45] 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.
- [46] 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.
- [47] 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.
- [48] The exemptions did not apply in this matter. The only way it may have come within an exemption would have been if, under section 8 of the Act, it was a vehicle. However, it was to be permanently occupied, and affixed to piles, power supply, water and a septic tank. As such, it was immovable as per the section 8 definition and was not a vehicle. It, therefore, came within the definition of a building, and a building consent was required.
- [49] 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.
- [50] The Respondent accepted that he should have enquired further as regards the requirement for a building consent and he points to a degree of uncertainty in the industry around exemptions as they apply to tiny houses. The Board finds that those factors do not excuse or diminish his behaviour. They are, however, potential mitigating factors. The Board will consider them determining the appropriate penalty. They are not a defence. The Board will also take into account that whilst a Certificate of Acceptance was obtained, it was extremely limited in its scope and does not provide the owner with the level of confidence a Code Compliance Certificate, which applies to consented work, does.
- [51] In terms of negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is

being inquired into. This is described as the *Bolam*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

- [52] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹². The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [53] 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 Act¹³, 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 practitioner¹⁴.
- [54] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵, 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.

- [55] Building consents are the foundation of the regulatory framework for buildings in New Zealand. They are the means by which compliance with the Building Code is assessed and assured. Further, the building consent process, as was not in *Tan*, ensures that the compliance of the build is reviewed at critical junctures during the build. In this matter, had a building consent been sought, as it should have been, then many, if not most, of the issues complained about may not have arisen. Given those factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent to have 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.

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

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

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

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

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

¹⁵ [2001] NZAR 74

Disrepute

- [56] 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 C2-01111¹⁶ and discussed the legal principles that apply.
- [57] 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*,¹⁷ 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.
- [58] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁸, 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.
- [59] 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",¹⁹ 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*²⁰ 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.*²¹
- [60] 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,

¹⁶ Board decision dated 2 July 2015.

¹⁷ [2013] NZAR 1519

¹⁸ 24 September 2014

¹⁹ 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

²⁰ [2012] NZCA 401

²¹ [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 convictions²²;
- honest mistakes without deliberate wrongdoing²³;
- provision of false undertakings²⁴; and
- conduct resulting in an unethical financial gain²⁵.

[61] 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 has been established but is not yet in force. What is clear from the cases though, is that unethical or unprofessional conduct can amount to disreputable conduct.

[62] In C2-01688, the Board found that the Licensed Building Practitioner had brought the regime into disrepute in respect of financial transactions. The matters and conduct before the Board in that matter, and in other matters where disrepute has been upheld, were far more serious.

[63] With respect to seriousness, as with negligence, the Board courts have stated that the threshold for disciplinary complaints of disrepute is high. Further, 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.

[64] The Board found, on the basis of the test, that whilst the Respondent's conduct was unsatisfactory, it did not reach the threshold for disrepute. The issues arose out of poor communication and documentation. The Board did not find that it was deliberate or intended to unjustifiably enrich the Respondent. The Respondent should note, however, that in October this year, a Code of Ethics will come into force and that the matters complained about with regard to disrepute may well come within the disciplinary provisions relating to that Code.

[65] The Respondent should also take care with regard to his contractual processes. Errors in his documentation led to confusion and commercial disputes. Attention to detail is required, and again, the errors in the Respondent's contractual documentation might, in the near future, be conduct that could be investigated under the Code of Ethics.

²² *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

²³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁴ *Slack, Re* [2012] NZLCDT 40

²⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

Penalty, Costs and Publication

- [66] 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.
- [67] 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

- [68] 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*²⁶ 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.

- [69] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁷ 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.
- [70] The Board has only made a finding with regard to negligence. The degree of negligence displayed was, however, at the upper end of the scale. As the holder of both Design AoP 2 and Site AoP 2 licenses, the Respondent should have been fully aware of the requirement for a building consent.
- [71] The Board has previously disciplined the Respondent. In an earlier case, it imposed a training order as, in that matter, the Respondent’s regulatory knowledge was also lacking. The Respondent has completed that training. The order and the training were after the conduct complained about. As such, a further training order is not appropriate. The Board has decided that a fine is. The Board sets the starting point at \$5,000.

²⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [72] Whilst the Respondent has previously been before the Board, it has not taken that into account as an aggravating factor. The conduct on those matters was at or around the same time as the present matter, and the Respondent has not further offended after the Board has made a decision about his conduct.
- [73] The implications for the Complainants have been significant. Whilst that is an aggravating factor the Board considers the fine is sufficiently high to take it into account. The Board decided the same as regards the Respondent's attitude toward the matters complained about. The Respondent tended to trivialise the issues and the impact on the Complainants. Whilst it may have been a small house from his perspective, it was a significant investment for the Complainants, and it was to be their home.
- [74] The Respondent noted a degree of uncertainty around the regulatory provisions that apply to tiny houses. The Board does not consider that to be a mitigating factor. Firstly, the dwelling was not tiny. It was a three-bedroom house, albeit on the smaller side. Secondly, questions about the regulatory requirements for tiny houses arose after the building was constructed. It was not as topical at the time. Thirdly, the need for guidance came about as a result of a need to clarify what a vehicle was with regard to buildings. The building in question was far from being a vehicle.
- [75] As there are neither aggravating nor mitigating factors present, the fine is set at \$5,000.

Costs

- [76] 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."
- [77] 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 case²⁸.
- [78] In *Collie v Nursing Council of New Zealand*,²⁹ 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.*
- [79] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁰ the High Court noted:

²⁸ *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.

²⁹ [2001] NZAR 74

³⁰ CIV-2011-485-000227 8 August 2011

[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.

- [80] 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. Adjustments based on the High Court decisions above are then made.
- [81] 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. It is less than 50% of actual costs.

Publication

- [82] 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 Act³¹. 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.

- [83] 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.
- [84] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁴. The High Court provided

³¹ Refer sections 298, 299 and 301 of the Act

³² Section 14 of the Act

³³ Refer sections 200 and 202 of the Criminal Procedure Act

³⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*³⁵.

[85] 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 interest³⁶. 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.

[86] Based on the above, the Board will order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$5,000.

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

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

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

[88] 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

[89] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **20 October 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.

[90] 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.

³⁵ *ibid*

³⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 28th day of September.



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.*