

Before the Building Practitioners Board

	BPB Complaint No. CB25710
Licensed Building Practitioner:	Darshan Shah (the Respondent)
Licence Number:	BP 132197
Licence(s) Held:	Carpentry, Site 2.

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 Type:	In Person (via videoconference)
Hearing Date:	8 December 2021
Decision Date:	13 December 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

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 section 317(1)(b) and (d) 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 carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. The Board orders the suspension of the Respondent’s Carpentry and Site 2 licences for a period of 6 months, and he is ordered to pay costs of \$2,500.
- [2] The allegation that the Respondent conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute did not meet the threshold for the matter to be dealt with as a disciplinary offence.

The Charges

- [3] 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]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act), in that, he may have deliberately concealed building work that required inspection or engineer's observation prior to it being inspected or observed.

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 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

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

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

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] The Respondent was contracted to KB Projects Limited to carry out and supervise the construction of the sub-floor foundation, sub-floor framing, mid-floor framing and all other framing related to the two dwellings at the property.

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 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 it, the Board heard evidence at the hearing from:

Darshan Shah, Respondent

[OMITTED], Complainant, Structural Engineer

[OMITTED], Main Contractor

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

Xantia Funaki, Building Officer, Auckland City Council

- [15] An Interpreter attended the hearing for the assistance of the parties but was not, in the end, called upon.
- [16] [OMITTED] gave evidence that the Respondent was the lead builder and licensed building practitioner on site. There was, in addition, a site manager, employed by K.B. Projects Limited, but he was not a licensed building practitioner. [OMITTED] explained that the site manager and the Respondent would liaise on the progress of the work and when to call for engineer's inspections.
- [17] [OMITTED], the Complainant and a structural engineer, was contracted to K.B. Projects Limited to undertake structural inspection works and to issue the PS4 for the proposed dwellings.
- [18] [OMITTED] explained that his dealings with the Respondent had been over about 3 years, and in that time, he had seen a decline in the Respondent's performance and professional behaviour. He stated that he only wanted the Respondent to learn and to please do the work right for the safety and betterment of society.
- [19] The Respondent gave evidence that he communicated with the engineer by phone and sent pictures of the work to him on his phone. [OMITTED] told the Board he had discussions on-site with the Respondent, but all instructions were always put in writing. This was in the form of a site notice or an email that was sometimes sent to [OMITTED] alone and sometimes to both [OMITTED] and the Respondent.
- [20] The Board had already considered the documentary evidence provided by the Complainant (Document 2.1.22 – 2.2.15, Pages 34-108 of the Board's files) and at the hearing focussed on the following particular issues.

Issue one – concrete pour without Engineer approval

- [21] [OMITTED] gave evidence that at the time of the Lot 2 dwelling sub-floor post foundation inspection in April 2018, he observed that a number of post foundations at critical locations were missing, and the post grid had also been shifted by the Respondent from the position shown on the consented plans. (Document 2.1.33 and Page 45 of the Board's files). As a consequence, he issued an instruction to exclude the affected piles from the concrete pour so that the missing pile could be provided, and the design engineer could confirm the relocated position of the anchor pile was acceptable. (Document 5.3.3.5, Page 404 of the Board's file). [OMITTED] advised that this was discussed on-site with the Respondent.
- [22] [OMITTED] discovered when he returned to the site sometime later that the concrete pour had not excluded these 2 locations. The Respondent asked why was work from 2018 being questioned now and that the inspection notes said that it was ok to pour the concrete.

Issue two – joists directly onto the concrete

- [23] When further investigating issues with the dwellings, the floorboards were cut out to disclose joists directly onto the excess concrete pad. [OMITTED] told the Board the foundation had been poured too high, there was no ventilation, and the floorboard was moulded. The Respondent stated that he was not responsible for the concrete but that he had placed the joists directly onto the concrete. He said that he had “no other choice” and, in response to a question from the Board, said he did not talk to anyone about the issue.

Issue three – pipe bridging

- [24] [OMITTED] stated that an additional post foundation grid built under the dwelling was within the required one-metre horizontal clearance of a public service pipe. [OMITTED] confirmed that the pile was, in fact, within 100 millimetres of the pipe. [OMITTED] gave evidence that the usual process of getting CCTV images of the pipes and then pegging their location on site was done on this project.
- [25] The Respondent initially said he was not aware of the pipe but agreed that the plans shown to him (Documents 2.1.37 and 2.1.38, Pages 49 and 50 of the Board’s file) clearly showed the pipe and the bridging requirements. He said that he usually drilled one metre away from such pipes, but in this case, he did not get anyone to locate the pipe before drilling, and he was “not sure why”.

Issue four – No Engineer Inspections and non-compliant work

- [26] After his inspection in April 2018, [OMITTED] gave evidence that he was not notified for the remaining sub-floor foundation inspection or the inspection of the sub-floor framing. The Respondent continued progressing the works on site, and the entire two-storey house framing above the sub-floor was fully built without the required inspections.
- [27] This absence of inspections was not explained by the Respondent and [OMITTED] said he was not sure why this had occurred.
- [28] The consequence, as explained by [OMITTED], was that he was not able at a later stage to physically check some of the work and had to rely on what the Respondent told him had occurred.
- [29] Subsequently, [OMITTED] had cause to uncover the work carried out on these dwellings and discovered several instances of work being contrary to that advised to him by the Respondent. These included no joist hangers, no 600 mm foundation embedment requirement, missing multigrip to mid-floor framing double joist, and sub-floor bearer left to cantilever approximately 1.2m and not extended and fixed to the block wall. (Documents 2.1.44, 2.1.48, 2.1.43 and Pages 56,60,55 of the Board’s file).

- [30] In response to these issues, the Respondent stated variously, “no comment”, that he had relied on his crew to do the work, and they told him it was done, and that the engineer told him to do it. [OMITTED] disputed this last statement.
- [31] The Respondent also suggested that he had sent a photo of the subfloor to [OMITTED] but was not able to produce this. [OMITTED] stated that he was not given any information at the time from the Respondent which disclosed the lack of hangers or the joists directly onto the concrete.

Issue five - Balustrade

- [32] When the upper floor floorboards were opened up it was discovered that there were no straps or cleats installed at the internal glass balustrade. At the hearing, the Respondent confirmed that he did tell [OMITTED] that the required straps or cleats were there when they were not.
- [33] The Respondent explained this was not done because there was no balustrade fixing detail on the plans. In response to a question from the Board as to why he did not follow the Building Code, the Respondent replied that “on this day we follow the plan”.

Issue six - Supervision

- [34] The Respondent was questioned on the process of his supervision. He stated that there could be 4-5 weeks between him asking his crew to do particular work and him getting back to the site. He gave evidence that he relied on his crew to do the work and accepted them telling him that it was done. In response to the question – “who supervised the carpenters doing this work?” – the Respondent said – “Nobody.”
- [35] In a closing statement, the Respondent acknowledged mistakes had been made, and he was still learning but that there was no need to be dragged into all of this.

Board’s Conclusion and Reasoning

- [36] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)
- and **should** be disciplined.
- [37] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Negligence

- [38] The finding of negligence relates to the Respondent’s supervision of non-licensed persons.

- [39] 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 Bolam⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [40] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁹. 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.
- [41] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act.¹⁰ 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 practitioner¹¹.
- [42] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[43] Supervise is defined in section 7¹² of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[44] In C2-01143¹³, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

- (a) the type and complexity of the building work to be supervised.
- (b) the experience of the person being supervised.
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities.
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

[45] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[46] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁴. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work

¹² Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

¹³ *Licensed Building Practitioner's Board Case Decision C2-01143* 14 April 2016

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[47] 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.

[48] The Complainant, [OMITTED] as a structural engineer, gave detailed written and oral evidence (supported by photographs) of the Respondent’s failures. The Respondent did not have any acceptable explanations.

[49] The structural fixing details such as multigrips, joist hangers, straps, and cleats for the balustrade and bowmac brackets were not completed in accordance with the structural drawings in the consent documentation. The works were allowed to proceed ahead of the construction process in that the appropriate inspections were not called for, and work that should have been made available to be inspected by [OMITTED], was covered up. These were significant mistakes that a Licensed Building Practitioner should not have made.

[50] The Respondent disregarded his obligation to supervise the works in a way that ensured the work was completed in accordance with the plans, the building consent, and the Building Code. The Respondent’s level and frequency of supervision given to the builders on site was not acceptable.

[51] On that basis, 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.

Contrary to a Building Consent

[52] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 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.*

¹⁵ [2001] NZAR 74

- (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.*

- [53] 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.
- [54] 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.
- [55] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁶.
- [56] Given the above factors, the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Disrepute

- [57] 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”,¹⁷ and the courts have consistently applied an objective test when considering such conduct. In

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁷ 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

*W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁸, 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.*¹⁹

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

- criminal convictions²⁰;
- honest mistakes without deliberate wrongdoing²¹;
- provision of false undertakings²²; and
- conduct resulting in an unethical financial gain²³.

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

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

[60] The alleged conduct, specifically that the Respondent may have deliberately concealed building work that required engineer's inspection or observation, was, in the Board's view, very close to being conduct which brought the regime into disrepute. However, the Board was not satisfied on the balance of probabilities that the Respondent's conduct could be classified as being deliberate. In this instance, therefore, the Board considers that there was insufficient evidence to establish that the conduct complained of met the seriousness threshold.

¹⁸ [2012] NZCA 401

¹⁹ [2012] NZAR 1071-page 1072

²⁰ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²² *Slack, Re* [2012] NZLCDT 40

²³ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

Penalty, Costs and Publication

- [61] 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.
- [62] 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

- [63] 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*²⁴ 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.

- [64] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²⁵. 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.

- [65] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁵ [2012] NZAR 481

- [66] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁶ 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. 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.
- [67] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*²⁷ 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.*
- [68] This was affirmed in *Jefferies v National Standards Committee*²⁸ 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.*²⁹
- [69] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

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

²⁷ [2011] 3 NZLR 850

²⁸ [2017] NZHC 1824

²⁹ *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

- [70] Taking all of the above factors into account, the Board considers that a suspension of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [71] Based on the above, the Board's penalty decision is to suspend the Respondent's Carpentry licence and his Site AoP 2 licence for a period of six (6) months.

Costs

- [72] 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."
- [73] 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 case³⁰.
- [74] In *Collie v Nursing Council of New Zealand*,³¹ 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.

- [75] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³² 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.

- [76] 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 moderate in complexity. Adjustments based on the High Court decisions above are then made.

³⁰ *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.

³¹ [2001] NZAR 74

³² CIV-2011-485-000227 8 August 2011

[77] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

[78] 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 Act³³. 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.

[79] 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.

[80] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁶. 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*³⁷.

[81] 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 interest³⁸. 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.

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

³³ Refer sections 298, 299 and 301 of the Act

³⁴ Section 14 of the Act

³⁵ Refer sections 200 and 202 of the Criminal Procedure Act

³⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁷ *ibid*

³⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of six (6) months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (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.

[84] 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

[85] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs, and publication up until close of business on 8 February 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.

[86] 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

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

Signed and dated this fourteenth day of January 2022.



Mr C Preston
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.*