

Before the Building Practitioners Board

	BPB Complaint No. CB25585
Licensed Building Practitioner:	James Smith (the Respondent)
Licence Number:	BP 117817
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry

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	Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	8 December 2020
Final Decision Date:	1 February 2021

Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)
Mr R Dunlop, Retired Professional Engineer
Ms F Pearson-Green, LBP, Design AOP 2
Mr F Thomas, LBP, Roofing, Registered Plumber

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

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Summary of the Board’s Draft Decision

[1] The Respondent has carried out building work in a negligent manner and in a manner that was contrary to a building consent. He failed to provide a record of work on completion of restricted building work. The Respondent brought the licensing regime into disrepute when he failed to appear at a hearing as a witness when he was lawfully summonsed. The Respondent is fined \$2,000 in respect of the negligence, building contrary to a building consent and failure to provide a record of work. He is censured as regards the disrepute finding. He is ordered to pay costs of \$1,000. The matter will be published.

The Process and Charges

- [2] On 19 July 2020, the Board resolved to investigate the Respondent's conduct. The Resolution arose out of a hearing into another matter¹. The matters the Board resolved to investigate were in respect of whether the Respondent had:
- (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);
 - (c) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and/or
 - (d) has 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) by failing to appear when summoned to do so.
- [3] The Board instructed the Registrar when preparing a report under regulation 18 of the Complaints Regulations to take into consideration:
- (a) finishing levels and tolerances as noted on the consented plans and specification; and
 - (b) minor variations requested at two blockwork inspections.
- [4] On 8 December 2020, the Board received the Registrar's Report. Under regulation 22 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 21 of the Complaints Regulations applies.
- [5] Having received the report, the Board decided that regulation 21 did not apply. Under regulation 22 the Board is required to hold a hearing.
- [6] The Board's jurisdiction is that of an inquiry. Board Inquiries are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures². It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation³. As such, it may depart from its normal procedures if it considers doing so

¹ [Omitted].

² Clause 27 of Schedule 3

³ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

- [7] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that, given the limited response provided by the Respondent and the weight of evidence before it, it would be appropriate for the Board to make a decision on the papers.
- [8] The Board does, however, note that there may be further evidence in the possession of the Respondent or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [9] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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);
 - (c) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
 - (d) has 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) by failing to appear when summonsed to do so.

Function of Disciplinary Action

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

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

Evidence

[11] 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 which allow it to receive evidence that may not be admissible in a court of law.

Negligence and Contrary to a Building Consent

[12] The following pictures depict and are indicative of, the Respondent's work. The first shows blockwork that has not been completed to a tradesperson like standard. The second shows a lack of cover for steel work. The building consent required that the blockwork be completed in accordance with NZS4229. It had not been completed in accordance with that standard.



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

- [13] There was also evidence in the building consent documentation that the blockwork finishing heights were not in accordance with those that had been specified.
- [14] In terms of minor variations, Building Consent Authority inspection of 25 June 2017 and 25 July 2017 the Board also noted that a minor variation was required for an extension of a block wall. It is shown in the following photograph.



Record of Work

- [15] The Respondent building work was restricted building work as it was carried out on a new residential dwelling under a building consent. A record of work was required on completion, which was in or about May 2018. One was not provided to the owner or to the Territorial Authority.

Disrepute

- [16] The Board issued a summons dated 25 February 2020 to the Respondent for him to appear as a witness at the hearing for [Omitted]. He had been identified as a witness who could evidence that would assist the Board in its investigations. The Respondent did not appear.

Response

- [17] The Respondent was served with the Board Inquiry. He did not initially respond but did provide a limited email response to questions that were put to him as follows:

1. Question: What work was carried out at the Property?

Respondent's statement: "Provide labour only blockwork sub base and ground level block wall and upper sub base".

2. Question: What was your involvement in the job/works? Please provide dates of your involvement (including the date you started and the date you finished work on site) and identify what works you carried out.

Respondent's statement: "2 April 2017 to August 2018".

3. Question: Who was in charge of the work? Were you supervising any other persons? Respondent's statement: "James Smith".

4. Question: Were there any problems/issues that occurred during the job/works?

Respondent's statement "...Complete as consented drawings and engineers inspections".

5. Question: If the work was restricted building work, did you complete a record of work on completion of the restricted building work? Please provide information on who you provided this document to, and when you did so.

Respondent's statement: "Records of works completed provide to [Omitted] August 2018".

6. Question 6: Any other comments you wish to provide.

Respondent's Statement: "Completed minor variation as instructed by owner an agreed by engineer".

[18] The Respondent was asked to respond to the allegations as regards his failure to appear when summonsed. He did not respond to the allegation.

Draft Conclusion and Reasoning

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

- (e) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
- (f) 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);
- (g) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (h) 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).

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

Negligence and/or Incompetence

[21] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[22] 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.

[23] 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 Act¹⁰. 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.

[24] 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:*
- (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.*

[25] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building

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

¹² Section 17 of the Building Act 2004

consent¹³. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

- [26] 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.

- [27] The building work that the Respondent carried out was not completed to an acceptable standard. It was not carried out in accordance with the applicable New Zealand Standard. The workmanship was poor and, in the instance of the first photograph above, amateurish. It was not what is to be expected from a licensed building practitioner.
- [28] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent – Minor Variations

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

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

¹³ Section 40(1) of the Building Act 2004

¹⁴ [2001] NZAR 74

[31] 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.

[32] 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*
 - (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.*

[33] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably it states:

45A Minor variations to building consents

- (1) *An application for a minor variation to a building consent—*
 - (a) *is not required to be made in the prescribed form; but*
 - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A building consent authority that grants a minor variation—*
 - (a) *must record the minor variation in writing; but*
 - (b) *is not required to issue an amended building consent.*

[34] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

3 Minor variation defined

- (1) *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
 - (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining);*
 - (b) *minor wall bracing changes:*

- (c) *a minor construction change (for example, changing the framing method used around a window):*
- (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*

(3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

[35] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still applies. Most importantly, the building consent authority retains a discretion to refuse a minor variation¹⁵. To aid the process of applying for a minor variation, most building consent authorities have a minor variation application form.

[36] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought¹⁶.

[37] It must also be noted, as regards a licensed building practitioners' obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of a breach of a building consent:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

(1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*

(a) *the territorial authority in whose district the building is situated; and*

(b) *the owner.*

(2) *The notification must—*

(a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*

¹⁵ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

¹⁶ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

- (b) *state how the building work does not so comply; and*
- (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

[38] In *Tan v Auckland Council*¹⁷ 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.

[39] The same applies to the ongoing verification of building work against the requirements of the building consent. A failure to notify the Council of changes to the consented documents prior to them being carried out defeats the purpose of the process.

[40] Unlike negligence contrary to a building consent is a form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established¹⁸.

[41] There was evidence before the Board that minor variations had been carried out prior to the variation being assessed and granted. There was also evidence of building work that did not comply with the building consent. Given those factors, the Board finds that disciplinary offence has been committed.

Record of Work

[42] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁹.

[43] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

[44] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[45] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on

¹⁷ [2015] NZHC 3299 [18 December 2015]

¹⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

completion of the restricted building work ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*²⁰ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

- [46] As to when completion will have occurred is a question of fact in each case.
- [47] In most situations' issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Completion occurred in May 2018. A record of work was not provided. On this basis, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [48] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [49] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high. No good reasons were put forward.

Disrepute

- [50] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111²¹ and discussed the legal principles that apply.
- [51] 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*²² 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

²⁰ [2018] NZHC 1662 at para 50

²¹ Board decision dated 2 July 2015.

²² [2013] NZAR 1519

the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[52] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²³, 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.

[53] 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” and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*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

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

[55] 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.

[56] Licensed Building Practitioners are expected to cooperate with investigations and the courts have emphasised the same in respect of other disciplinary regimes³⁰. A licensed person’s duties go beyond those that relate to building work as is made evident by the scope of the disciplinary charges under section 317 of the Act and the

²³ 24 September 2014

²⁴ [2012] NZCA 401

²⁵ [2012] NZAR 1071 page 1072

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 *Orlov v National Standards Committee 1* [2013] NZHC 1955

provision in the Act for a code of ethics to “prescribe a code or codes of minimum standards of ethical conduct for licensed building practitioners or classes of licensed building practitioners”.

- [57] Looking at the conduct, the Board has a power under section 323 of the Act to summons a person to give evidence. It is an offence under section 326 to fail to comply with a summons. A person convicted of such an offence is liable to a conviction and fine not exceeding \$2,000. Failure to comply with a summons can also be viewed as a matter of contempt.
- [58] The Board’s statutory powers do not include specific powers in respect of contempt. Other jurisdictions do have such powers. Contempt, in the context of disciplinary proceedings, is an act which tends to interfere with the course of a disciplinary investigation or hearing. Notwithstanding that the Act is silent as regards contempt, the Board considers that an act of contempt may come within the disrepute provisions of section 317 of the Act.
- [59] The Respondent’s failure to attend and present evidence put the hearing in matter [Omitted] at risk. No explanations or reasons were given either at the time of the hearing or subsequent to it when the issue was brought to the Respondent’s attention. Again, his conduct has been contemptuous.
- [60] The Board does note that it could pursue a prosecution under section 326 of the Act. It considers, however, that the matter is better dealt with within the licensing regime as opposed to in the courts.
- [61] Finally, 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.*
- [62] The Board does consider that the failure to appear when summonsed was serious. It is conduct that puts the disciplinary regime under the Act, and the purposes for which it was established (to protect the public and uphold standards) at risk. As such, it has decided to uphold the ground of discipline.

Draft Decision on Penalty, Costs and Publication

- [63] 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.
- [64] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [65] 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.

- [66] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*³² the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [67] The matters before the Board are serious. The Respondent’s approach to the investigation, which could be described as less than helpful, is an aggravating factor. The fact that the Respondent has committed multiple offences is also an aggravating factor.
- [68] The Board has decided to deal with the building work and record of work matters separately from the disrepute finding.
- [69] With respect to the building work, the Board adopted a starting point of a fine of \$3,000. The amount reflects the nature and seriousness of the findings and is consistent with fines imposed by the Board for similar offending. There are no mitigating factors that the Board is aware of. It has, however, taken into account the

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

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

fact that the matter has been dealt with, to date, on the papers. On that basis alone the Board has decided to reduce the fine to \$2,000.

- [70] With respect to disrepute finding, the Board has decided to impose a censure. A censure is a public expression of disapproval. The Board hopes that the finding and the penalty imposed will serve as a deterrent to other licensed building practitioners from refusing to comply with a summons.

Costs

- [71] 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.”
- [72] 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 case³³.
- [73] In *Collie v Nursing Council of New Zealand*³⁴ 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.

- [74] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [75] 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 Act³⁵. 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.

³³ *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.

³⁴ [2001] NZAR 74

³⁵ Refer sections 298, 299 and 301 of the Act

- [76] 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.
- [77] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁸. 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*³⁹.
- [78] 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 interest⁴⁰. 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.
- [79] Based on the above, the Board will order further publication. The publication will focus on the Board's decision to find that the Respondent brought the regime into disrepute by failing to appear as a witness at a hearing when summoned.

Draft Section 318 Order

- [80] 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 \$2,000 in respect of the findings under section 317(1)(b), (d) and (da)(ii); and
- Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured in respect of the finding under section 317(1)(i)
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.
- In terms of section 318(5) of the Act, there will 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.

³⁶ Section 14 of the Act

³⁷ Refer sections 200 and 202 of the Criminal Procedure Act

³⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁹ *ibid*

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

- [81] 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 Draft Decision

- [82] The Board invites the Respondent to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [83] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **29th January 2021**.
- [84] If submissions are received, then the Board will meet and consider those submissions.
- [85] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [86] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [87] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [88] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **29th January 2021**.
- [89] If a hearing is requested this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 21st day of December 2020



Mr C Preston
Presiding Member

This decision and the order herein were made final on 1 February 2021 on the basis that no further submissions were received.

Signed and dated this 10th day of February 2021



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.*