

## Before the Building Practitioners Board

	BPB Complaint No. CB25665
Licensed Building Practitioner:	Matthew Talbot (the Respondent)
Licence Number:	BP 116937
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	7 April 2021
Final Decision Date:	8 June 2021

#### Board Members Present:

Mr C Preston, Chair (Presiding)  
Mr M Orange, Deputy Chair, Legal Member  
Mrs F Pearson-Green, LBP, Design AOP 2

#### Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

#### Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(db), 317(1)(h) and 317(1)(i) of the Act.

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## Summary of the Board’s Decision

- [1] The Respondent held himself out to be licensed as a designer when he was not. He also misrepresented his competence and worked outside of his competence when he undertook design work. The Respondent brought the regime into dispute when he filed a certificate of work with consent documents from a licensed designer without that designer’s knowledge or consent. The Respondent’s licence is to be suspended for a period of 12 months, and he is ordered to pay costs of \$1,000.

## The Charges

- [2] On 7 April 2021, the Board received a Registrar’s Report in respect of a Board Inquiry into the conduct of the Respondent.
- [3] 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.

- [4] Having received the report, the Board decided that regulation 21 did not apply. Under regulation 22 the Board is required to hold a hearing.
- [5] 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 procedures<sup>1</sup>. 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 legislation<sup>2</sup>. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [6] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter 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**

- [8] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (a) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act);
  - (b) breached section 314B of the Act (s 317(1)(h) 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).

### **Function of Disciplinary Action**

- [9] 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

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<sup>1</sup> Clause 27 of Schedule 3

<sup>2</sup> *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.

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

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

- [11] 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 persons<sup>6</sup>:

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

## Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [13] On 29 October 2020, the Board conducted a hearing in respect of matter CB25552<sup>8</sup>.
- [14] The Respondent gave evidence at the hearing, and the documentary evidence before the Board identified him as a licenced building practitioner involved in building work at [Omitted].
- [15] A building consent application was submitted for the re-clad to the Kapiti Coast District Council by the Respondent as the agent for the owner.

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

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

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

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>8</sup> *Lim* [2020] BPB 25552

- [16] The certificate of design work required as part of a building consent application<sup>9</sup> was signed by Mr Lim (BP127698), who held a design AoP 1. License<sup>10</sup>. The certificate of work declared:

*I Kelvin Lim LBP, state that I have applied the skill and care reasonably required of a competent design professional in carrying out or supervising the Restricted Building Work (RBW) described in this form, and that based on this, I also state that the RBW:*

- *Complies with the building code*

- [17] The RBW described in the certificate of design work was as follows:

<b><i>Design Work that is restricted building work</i></b>	<b><i>Description of restricted building work</i></b>	<b><i>Carried out or supervised</i></b>	<b><i>Reference to plans and specifications</i></b>
<i>Ventilation system</i>	<i>Cavity system to exterior walls</i>	<i>Carried out</i>	<i>Refer to installation manuals provided</i>
<i>Walls cladding or wall cladding system</i>	<i>Stria on 20mm cavity ShadowClad on 20mm Cavity</i>	<i>Carried out</i>	<i>Refer to installation manuals provided</i>

- [18] The evidence heard at the hearing was that the design details were put together by Respondent. They were not reviewed by Mr Lim and were submitted by the Respondent as the building consent agent.
- [19] Neither the Respondent nor Mr Lim completed a site visit as part of the design process. They worked off photographs and existing building plans. Neither thought the design or work to be undertaken was complex. The designs provided as part of the building consent consisted of the plans from the original build undertaken in or about 2000 with hand-drawn and written notations appended to it. These were done by the Respondent.
- [20] No project specific details were included. The drawings were accompanied by standard manufacturer's details and specifications. No attempt had been made to identify which of the standard details and specifications would have applied to the building work to be undertaken. More than one cladding type was proposed for the re-clad, which would have required project-specific details so as establish a new E2/AS1 compliant cladding integrated into the existing structure.

<sup>9</sup> Section 45(3) of the Act.

<sup>10</sup> The respondent in *Lim* [2020] BPB 25552

- [21] A Risk Matrix calculation was provided as part of the application. Mr Lim stated that he did the calculation. He provided a score of 12. The Building Consent Authority rejected that score and evaluated the risk at 20.
- [22] Prior to the design being submitted for a building consent, the following correspondence passed between the Respondent and Mr Lim:

**From:** Matt Talbot

**Sent:** Monday, 18 March 2019 3:38 PM

**To:** kelvin.lim

**Subject:** Matt from Work.

Hey Mate,

Attached is what i have mate. Seems pretty straight forward. Its a reclad with most stuff being under Section 112 in terms of existing joinery and such. Attached pics, Elevation, Floor plan, proof of ownership, Wrap data sheet, Shadowclad specs and details, Stria Specs and details which are being strickly adhearded to.

Anything extra i need let me know. If you can flick back with a memorandum mate that would be awesome as i dont have a design licence.

Cheers

Matt Talbot  
Selwyn BCO.

**Re: Matt from Work.**

**Kelvin Lim**

Tue 19/03/2019 10:18 PM

**To: Matt Talbot**

1 attachments (3 MB)  
LBP.pdf;

Hey Bro,

Please find attached the signed LBP form. You just need to fill in the details on the front page.

Good luck!

Churr,  
Kelvin

[23] Mr Lim, as part of his initial response to the Board Inquiry, stated:

*This job is not simple, but also not too overly complicated. I only had the original consented elevations and a few photos to play with provided by Matt Talbott even when I requested if he had the original consent plans with more details. He didn't so I decided to proceed with what I had and what looked like a relatively straight forward reclad project. I only provided the customised detail on page 2.1.588 as Matt said he would gather all the other proprietary details and manufacturers literature to provide to Council. Maybe I should have checked to see what documents Matt gathered before he submitted it into Council and maybe get him to request the original consent property file from Council. I heard no RFI's from Council. If there were any RFI's they would have been resolved by Matt. **All those drawings/details approved provided in the report (from possibly RFI responses) were not provided by me and I was not aware of any of them.***

[24] A series of Requests for Information (RFI) were issued by the Building Consent Authority. The RFI letters generally noted a lack of adequate details, especially with regards to cladding junctions and junctions with decks. They were, in the main, dealt with by the Respondent, who stated that he consulted with Mr Lim prior to submitting responses. Mr Lim stated that there was limited interaction and that he could not recall being consulted but did provide a junction detail for a chimney. He stated that the chimney junction detail that he created was the only design work that he completed in relation to the building consent materials.

[25] As part of the RFI process, the risk matrix was resubmitted at 18. The Respondent stated that he did not have any correspondence between himself and Mr Lim as regards RFI responses and stated that he could not remember much as it was a long time ago. The Respondent was generally evasive in his responses to questions at the Lim hearing.

[26] The correspondence from the Building Consent Authority included an email to the Respondent which stated:

*Hi Matt,*

*Please refer to the inspection note dated 09/10/2019, an application for an amended plan needed to be made for the deck/wall junctions.*

*From the photos provided it appears the works to these areas have progressed from what was sighted at the 22/10/2019 inspection, if that is the case an application for Certificate of Acceptance will now need to be made.*

*If this isn't the case and the amended plan is still able to be made the person providing the design input for this aspect needs to hold a design licence, the LBP register does not list you as holding this class.*

*If you are to act as the agent for the owners I suggest you arrange for a meeting at the council office's with myself and Michelle Salmon (inspections Team Leader) to clarify the appropriate progress path from this point.*

- [27] Mr Lim stated, at his hearing, that he would have expected to have been contacted if there were any other issues with the building consent application that required his attention. Evidence was heard that there were time constraints and so the approach taken was to submit limited information and then see what the Building Consent Authority came back within the way of RFIs. When questioned about the adequacy of the design that was submitted, the Respondent took the position that it was accepted by the Building Consent Authority and that he sees that sort of approach being taken all the time, so he saw no issues with the approach. The Respondent engaged in the following correspondence with the building consent authority in which he signed off as the "lead designer and agent":

**From:** Matt Talbot [mailto:Talbotmj15@hotmail.com]

**Sent:** Tuesday, 19 November 2019 7:33 PM To: John Peterson <John.Peterson@kapiticoast.govt.nz>; Mailbox - Building Approvals <Building.Approvals@kapiticoast.govt.nz>

**Subject:** [Omitted]. BC[Omitted]

*Hi John,*

*I have been informed from the builder that there was some complication around the deck to wall junction. I have explained what needs to be done around this to the builder. Given the fairly complex nature of this junction i have gone for a construction onsite method rather than a design and build first. This junction would be inherently hard to draw with any kind of accuracy.*

*I hope you dont mind but i asked the builder for photos of every stage of the construction of these junctions for KCDC records and to help you be satisfied on reasonable grounds the construction will comply with E2.*

*The area in question as you can see from the photos has had no previous weather tight issues. The builder has removed a square section of the deck area and rebated it out approx 3-4mm to the timber. Then a pre formed (custom made) flashing installed that has been welded across the base to give it the extra sealed edge. This was nailed to the wall for security. Flashing tape was installed over the top of the corner the flashing. A further external corner flashing was installed up the wall to the soffit area and over the bottom flashing to ensure it cascades down.*

*A membrane was installed over the flashing and sealed to the edges of the rebated area. A liquid applied membrane was installed over the effected area and the deck surrounding area to completely seal the area from moisture.*



*I hope along with photos of the entire construction method of this area that you can accept the construction of the junction.*

*Any issues please let me know.*

*Many Thanks*

*Matt Talbot*

*Lead designer and Agent.*

- [28] The building consent authority responded, noting that the Respondent was not licensed to carry out the design work:

**From:** John Peterson <John.Peterson@kapiticoast.govt.nz>

**Sent:** Thursday, November 21, 2019 11:19:48 AM To:

Talbotmj15@hotmail.com <Talbotmj15@hotmail.com> Cc: Michelle Salmon <michelle.salmon@kapiticoast.govt.nz>

**Subject:** FW: BC[Omitted]: [Omitted], e-mail re clarification needed to progress - 21 November 2019

*Hi Matt,*

*Please refer to the inspection note dated 09/10/2019, an application for an amended plan needed to be made for the deck/wall junctions.*

*From the photos provided it appears the works to these areas have progressed from what was sighted at the 22/10/2019 inspection, if that is the case an application for Certificate of Acceptance will now need to be made.*

*If this isn't the case and the amended plan is still able to be made the person providing the design input for this aspect needs to hold a design licence, the LBP register does not list you as holding this class.*

*If you are to act as the agent for the owners I suggest you arrange for a meeting at the council office's with myself and Michelle Salmon (inspections Team Leader) to clarify the appropriate progress path from this point.*

*Regards*

*John*

*John Peterson Building Officer*

*Te Āpiha Hanga Whare*

- [29] Evidence was also received as regards a Certificate of Design Work that was submitted for an amendment to the building consent, which arose from a failed inspection during the build. The certificate was represented as having come from Mr Lim. Mr Lim stated it was not his certificate. The Respondent gave evidence that he had Mr Lim's consent to alter and submit the certificate. Mr Lim denied he had provided his consent.

### **Draft Conclusion and Reasoning**

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

- (a) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act);
- (b) breached section 314B of the Act (s 317(1)(h) 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)

and **should** be disciplined

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

#### Holding Out to be Licensed

[32] The Board's consideration of the charge under 317(1)(db) came about as a result of documentation and evidence from the Lim hearing indicating that the Respondent held himself out as being a licensed building practitioner who could carry out or supervise restricted building work of a type that he was not licensed to carry out or supervise.

[33] The Board found that, in submitting the changes to the design to the Council, the Respondent represented and held himself as a Licensed Building Practitioner as a designer even though he was aware he did not hold a design licence.

[34] The Respondent's work included design work which, under clause 5 of the Building (Definition of Restricted Building Work) Order 2011, is restricted building work. Under section 84 of the Act, must be carried out by a licensed building practitioner:

*All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

[35] The Respondent is a licensed building practitioner with a Carpentry Licence.

[36] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order, the following are the types of building work each class of licence can carry out. The following is the comparative provisions for both carpentry and design :

<b>Licensing class</b>	<b>Type of building work</b>
<i>Trade Licensing Classes</i>	
<i>Design</i>	<i>Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>
<i>Carpentry</i>	<i>Carpentry for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>

- [37] On the basis of the above, a licensed building practitioner with a Carpentry Licence cannot carry out or supervise restricted building work that is design work.
- [38] It is to be further noted that the design work, in this case, was complex, with a high Risk Matrix score. Given this the design, and any amendments to the design, needed to be undertaken by a person holding a design licence that covered category 2 buildings (Design AoP 2).

#### Misrepresentation and Outside of Competence

- [39] There are two types of disciplinary offences under s 314B. The first relates to representations as to competence (314B(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).
- [40] Misrepresentation under s 314(a) is not defined in the Act, so it bears the meaning it has at common law. A misrepresentation is a representation that is false. A representation is a statement that relates to a matter of present or past fact, not one which relates to the future<sup>11</sup>. It is not a statement of opinion<sup>12</sup> or puffery<sup>13</sup>. A misrepresentation may be express or implied and may be inferred from acts or conduct as much as from words. There was no evidence that there had been a misrepresentation.
- [41] As regards working outside of one's competence 314B(b) of the Act provides:
- A licensed building practitioner must—  
(b) carry out or supervise building work only within his or her competence.*
- [42] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete

<sup>11</sup> *Ware v Johnson* [1984] 2 NZLR 518 at 537

<sup>12</sup> *David v TFAC Ltd* [2009] NZCA 44

<sup>13</sup> *Dimmock v Hallett* (1866) 2 Ch App 21

the building work, then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single-level dwellings unsuccessfully undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class,<sup>14</sup> then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

- [43] The Respondent, in signing off the changes to the design as a result of RFI's from the Council as the "lead designer", misrepresented his competence to undertake the design work. It is the Board view that the Respondent did not only not have the appropriate licence, but had a *laissez-faire* approach to the design taking a *lets see what the Council come back with in terms of RFI's* approach. Added to this were the poor drawing standards and the lack of specific detail, all of which showed that he did not have the competence to do such designs.

#### Disrepute

- [44] The disrepute disciplinary provision in the Act is similar to legislation in other occupations, including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111<sup>15</sup> and discussed the legal principles that apply.
- [45] 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*<sup>16</sup> 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.
- [46] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>17</sup>, 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.

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<sup>14</sup> Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

<sup>15</sup> Board decision dated 2 July 2015.

<sup>16</sup> [2013] NZAR 1519

<sup>17</sup> 24 September 2014

[47] 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”<sup>18</sup>, 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*<sup>19</sup>, the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>20</sup>

[48] 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 convictions<sup>21</sup>;
- honest mistakes without deliberate wrongdoing<sup>22</sup>;
- provision of false undertakings<sup>23</sup>; and
- conduct resulting in an unethical financial gain<sup>24</sup>.

[49] 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.

[50] In the Board’s view the Respondent did not consult with the designer, Mr Lim, when responding to the Council RFI’s. The Respondent submitted design changes on an altered COW that was produced by Mr Lim, using Mr Lim’s design licence, which Mr Lim did not approve or know about. The Board finds that the Respondent’s deliberate actions were designed to deceive and that they did, therefore, bring the regime into disrepute.

[51] The Respondent also submitted documentation to the Council that stated he was the lead designer and represented that he was a licensed designer when he in fact did not hold a design licence. This was at best misleading, but on the basis that the Respondent works for a Council in the capacity as a building consent officer it goes

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<sup>18</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

<sup>19</sup> [2012] NZCA 401

<sup>20</sup> [2012] NZAR 1071 page 1072

<sup>21</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>22</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>23</sup> *Slack, Re* [2012] NZLCDT 40

<sup>24</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

beyond misleading. The Respondent should have known better. The Board finds that the Respondent's actions were deliberate and were designed to mislead. As such, as per the above finding, they have brought the regime into disrepute.

- [52] 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.*

- [53] The conduct was serious. Design work is critical to the safe and healthy functioning of buildings. The Respondent, as a building consent officer, should have been acutely aware of the regulatory requirements. He flagrantly ignored them and has put the design of the licensing regime at risk.

#### **Draft Decision on Penalty, Costs and Publication**

- [54] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [55] 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

- [56] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>25</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [57] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>26</sup>. The High Court, when discussing penalty, stated:

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<sup>25</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>26</sup> [2012] NZAR 481

*[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.*

- [58] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime. Suspension is a lesser step.
- [59] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>27</sup> the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they 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
- [60] 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 adhere to the regulatory regime puts those objects at risk.
- [61] 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 to deter others from such conduct.
- [62] Based on the above, the Board's penalty decision is to suspend the Respondent's licence for 12 months. Given the limited response to the complaint, the Board felt there were no mitigating circumstances on which to base a lesser penalty.

### Costs

- [63] 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."
- [64] 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

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<sup>27</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>28</sup>.

- [65] In *Collie v Nursing Council of New Zealand*<sup>29</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

*But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

- [66] 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 \$2,000 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

- [67] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>30</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

- [68] 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.
- [69] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>31</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>32</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>33</sup>. The High Court provided

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<sup>28</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>29</sup> [2001] NZAR 74

<sup>30</sup> Refer sections 298, 299 and 301 of the Act

<sup>31</sup> Section 14 of the Act

<sup>32</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>33</sup> *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*<sup>34</sup>.

[70] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>35</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

### **Draft Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(b) of the Building Act 2004, the Respondents licence will be suspended for a period of 12 months from the date of this decision.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 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.**

[73] 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**

[74] 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.

[75] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 1 June 2021.

[76] If submissions are received, then the Board will meet and consider those submissions.

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<sup>34</sup> *ibid*

<sup>35</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [77] 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.
- [78] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

### **Request for In-Person Hearing**

- [79] 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.
- [80] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 1 June 2021.
- [81] If a hearing is requested this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

### **Submissions Made**

- [82] The Board received a submission from the Respondent on 31 May 2021.
- [83] The Respondent did not seek a hearing. He did ask that his submissions be taken into account prior to a final decision being made. Those submissions are repeated in full:

*It must be noted i was asked to help put together and act as the agent for my friend James. He failed to keep good contact and stole money from the owners. I did my best to help the owners as much as i could. I stated i was not the designer as i was just helping. I engaged Kelvin as he is a licensed designer. I involved him throughout the process. I had no intention to ever undermine the LBP system and don't believe my actions bought it into disrepute. I unreservedly apologize for any harm i have caused by my actions.*

- 1. The finding that i used Kelvins LBP without his knowledge is not correct. By the mare fact he stated in his email thats part of the evidence. "Hes a ROW mate, Just fill in the blanks". I did communicate with him via loads of phone conversations but was unable to get them in writing at the time as we were friends.*
- 2. Where i stated i was the "Lead Designer". This was nothing more than a typo. I should have used another term to reference that i was looking after the whole job from a paperwork and process to see the completion of the project.*

*In regards to the penalties. Im under a large amount of financial pressure at the moment due to a marriage breakup and bitter custody battle. Im now being asked to pay large amounts of Child support which means im now struggling to get food on the table for me and my partner.*

*In regards to putting this up on the public register. I would urge this not to happen as this would have an unfair effect on me due to me working for a Local Council in the Building Control team. As a building inspector publishing my name would put undue pressure on me personally and professionally. It would be a sure thing i would see abuse from the public and other colleagues. This would have a massive effect on my job security and my family and me. Can i please urge you to reconsider making this public.*

*I accept my licence is now being suspended.*

- [84] Whilst the Respondent has accepted the Board's decision to suspend his licence, he does not appear to fully appreciate the seriousness of the matters that were before the Board. He notes that he was just helping out. Being licensed carries with it responsibilities which include maintaining the integrity of the regime.

### **Final Decision**

- [85] The Board has decided that it will uphold the draft penalty order that the Respondent's licence be suspended for 12 months. It will, on the basis submissions received, reduce the costs to \$1,000.

- [86] With regard to publication, the Board has not ordered further publication. It has noted that the Respondent will be identified in the Board's decision and that his name will appear in the Register for a period of three years. There is no discretion as regards the name being recorded on the Register, in accordance with section 301(1)(l)(iii) of the Act.

- [87] The Register is established by section 298 of the Act and section 299 sets out its purposes which are:

*The purpose of the register is—*

- (a) to enable members of the public to—*
  - (i) determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person's [licensing]; and*
  - (ii) choose a suitable building practitioner from a list of licensed building practitioners; and*
  - (iii) know how to contact the building practitioner; and*
  - (iv) know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

- [88] Section 301 sets out the matters to be contained in the Register. The section uses the phrasing "must" which makes the provisions mandatory, not discretionary:

- (1) The register must contain all of the following information, to the extent that the information is relevant, for each licensed building practitioner whose name is entered in the register:*

- (l) *information about the status and history of the person's [licensing], particularly—*
- (i) *the class [in which the person is licensed]; and*
  - (ii) *the date on which the person's name was entered in the register; and*
  - (iii) *any action taken under section 318 on a disciplinary matter in respect of the person in the last 3 years:*

[89] The final provision, action taken under section 318, is the reason why detail on the disciplinary offence must be contained in the Register.

[90] Taking the above provisions into consideration it is clear that one of the purposes of the Register is to allow informed consumer and providing information as regards disciplinary action helps to facilitate this. It is also clear that the Board has no discretion as regards information on disciplinary action being retained on the Register.

#### **Final Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(b) of the Building Act 2004, the Respondents licence will be suspended for a period of 12 months from the date of this decision.

**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(l)(iii) of the Act.

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

#### **Right of Appeal**

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

Signed and dated this 16<sup>th</sup> day of June 2021



**Mr C Preston**  
Presiding Member

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**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.*