

Before the Building Practitioners Board

	BPB Complaint No. CB24197
Licensed Building Practitioner:	Scott Todd (the Respondent)
Licence Number:	BP 133212
Licence(s) Held:	Concrete Foundation Walls and Concrete Slab on Ground

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	28 February 2019
Decision Date:	29 March 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye 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.

Board Decision:

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

The Respondent **has not** committed disciplinary offences under sections 317(1)(b), (c) or (i) of the Act.

Contents

Introduction..... 2

Function of Disciplinary Action..... 3

Evidence..... 3

 Licensing..... 4

 Negligence/Incompetence..... 5

 Health and Safety..... 6

 Record of Work..... 6

 Disrepute..... 7

Board’s Conclusion and Reasoning..... 7

 Record of Work..... 8

 Not Licensed to Carry Out or Supervise Restricted Building Work..... 9

 Negligence and/or Incompetence 9

 Disrepute..... 11

Penalty, Costs and Publication..... 12

 Penalty 13

 Costs..... 13

 Publication 14

Section 318 Order..... 15

Submissions on Penalty, Costs and Publication..... 15

Right of Appeal..... 15

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
- (c) 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-

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

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) 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

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

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

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.
- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------|--|
| Scott Todd | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness for the Respondent |
| [Omitted] | Witness for the Respondent |
| [Omitted] | Witness called by the Board, Licensed Building Practitioner. |
- [8] TC Groundworks Limited, the Respondent's company, was contracted to carry out an alteration to an existing residential dwelling under a building consent. The Respondent acted as the project manager for TC Groundworks and supervised the construction of the foundations for the renovation. Certain aspects of the alteration were managed by the Complainant by way of his contracting directly for the services.
- [9] A contract for the building work was not provided. Nor was disclosure documentation. Both were required under the Building (Residential Consumer Rights and Remedies) Regulations 2014. The Respondent stated that the failure to provide a contract was an administrative oversight. He was not aware of disclosure requirements. Matters under the Building (Residential Consumer Rights and Remedies) Regulations 2014 do not come within the Board's jurisdiction.
- [10] The Complainant raised various issues with the building work carried out by TC Groundworks including
- (a) workplace health and safety issues;
 - (b) failure to provide a record of work on completion of restricted building work; and
 - (c) conduct which may have brought the regime into disrepute.
- [11] As part of the investigations into the Respondent's conduct it was noted that the Respondent may have carried out or supervised building work in a negligent or incompetent manner and that he may have carried out or supervised restricted building work that he was not licensed to carry out or supervise.
- [12] At the hearing the Board made inquiries about the various allegations and matters that were being further investigated.

Licensing

- [13] Included in the documentation provided to the Board for the hearing were various records of work. Those records of work did not create a complete picture of who carried out what in the way of restricted building work. It was not clear who had carried out or supervised structural elements such as framing, beams, and the construction of a deck or weathertightness elements such as window installation.

Council inspection records indicated that the Respondent was present for many of the associated inspections.

- [14] The Respondent gave evidence at the hearing he had carried out and supervised the foundations but that [Omitted], a contractor to TC Groundworks, had carried out and supervised the restricted building work in question in conjunction with [Omitted] an employee of TC Groundworks.
- [15] [Omitted] gave evidence that he had both carried out and supervised the restricted building work not covered in the records of work provided. He stated he had not included those aspects in his record of work as they were not complete. He stated that he did not have any invoices, diary notes or site health and safety sign in sheets to show that he was present at the site and had not invoiced for the building work as he was doing it in return for other work that was being provided to him by TC Groundworks. He did not attend inspections. He had other jobs on the go at the time.
- [16] [Omitted], who carried out the bulk of the building work, gave evidence that he had been supervised by [Omitted]. He further stated that [Omitted] also carried out aspects of the work with him. [Omitted] was not licensed at the time but is now trade qualified and is seeking a carpentry licence.
- [17] The Complainant stated that he had not seen [Omitted] on site.

Negligence/Incompetence

- [18] The building work the Board was investigating in respect of negligence included health and safety matters which are outlined below as well as:
- (a) a leak behind a block wall;
 - (b) a raised step to between the lounge and a new deck; and
 - (c) then failure to install a water proofing membrane on the deck in the correct sequence.
- [19] The Respondent stated that the leak was caused by a pump that cleared water away not operating. He gave evidence that the wall was an engineered wall, that the block laying was done by another tradesperson and that he did not carry out the tanking to seal the wall. [Omitted] corroborated the Respondent's evidence. The Complainant's evidence was that the leak was independent of the action of the pump and that it occurred when the pump was in operation.
- [20] The Complainant also gave evidence that he had wanted a flat access to the deck whereas a raised step was created by the installation of a ranch slider with a sill reveal. He stated that there was a fall in the floor that the Respondent did not deal with correctly. This increased the step and had a flow on effect through the house. Extra cost was incurred in raising the floor. The Complainant was not aware that, as drawn and consented, the ranch slider was to be installed with a step.

- [21] The Respondent and [Omitted] gave evidence that that they installed blocking to rectify pre-existing unevenness in the floor as compared to the new level deck and that the ranch slider was installed as per the consented plans.
- [22] With regard to the membrane on the deck the Respondent and [Omitted] stated that the intention was to remove the ranch slider and Hebel panels installed by others to allow the decking membrane to go under the window frame and to return the required distance up the wall. This was despite the window being site glazed and over 6 metres in length, the Hebel panels joints having been taped and plastered and WANZ bars being installed.

Health and Safety

- [23] The two matters the Complainant was concerned about with regard to health and safety were:
- (a) the general state of the building site. The Complainant gave evidence that accumulated rubbish on site made it dangerous; and
 - (b) a lack of safety from falls in respect of a deck that had been constructed.
- [24] With regard to the rubbish the Respondent stated it was not part of his contract to remove bricks from the site. The Complainant stated that he had raised the need for construction rubble to be removed from site but that the Respondent had wanted to leave it till the end of the project and to get a machine in to clean up the site.
- [25] The Board questioned the Respondent about steps taken to protect against falling from heights. He stated that the intention was to install a temporary balustrade on the deck but that the Complainant would not allow this. [Omitted] corroborated this stating that the Complainant wanted to stain the deck and that he did not want holes in the bearer. The Complainant did not accept that evidence.
- [26] The Respondent and [Omitted] gave evidence that they put tape across the access points and locked the doors to the deck to prevent access to the deck.
- [27] The Board also questioned the Respondent and [Omitted] as regards the safety measures taken to prevent falls into an empty swimming pool adjacent to the building work. Both stated that temporary fencing had been erected around it. The Board noted photos of ongoing work where there was no fencing. The Respondent and [Omitted] both stated that the fencing had been temporarily removed as it was not required.
- [28] The Respondent also gave evidence that they had a site specific safety plan and that they have since engaged an independent health and safety site auditor.

Record of Work

- [29] The Complainant stated that he had asked the Respondent multiple times for a record of work, but the Respondent had refused to provide one unless final payment was made.

- [30] The Respondent stated that he had relied on advice that a record of work did not have to be provided until such time as the work was complete and that, as it was not, he did not have to provide one.
- [31] A record of work was provided with the Respondent's written response to the complaint. The Respondent stated that an email statement by him to payment in respect of a record of work had to be taken in context in that there were other far bigger issues to be dealt with between them than the record of work.

Disrepute

- [32] The conduct being investigated with regard to disrepute was:
- (a) an alleged break in to the property; and
 - (b) the dumping of waste on the driveway.
- [33] The Complainant gave evidence that after TC Groundworks had ceased its involvement at the site the Respondent's workers entered the site and removed materials that he stated had been paid for. He further stated that the Respondent dumped a skip full of rubbish onto the drive.
- [34] The Respondent stated that the ownership of materials was disputed and that they were retrieving what he considered they owned. With regard to the rubbish he stated that the Complainant had filed a skip with masonry despite being told not to. The result was that the skip was overweight and as the Respondent was not responsible for the removal of the masonry rubble, he dumped the material and removed the skip that he was paying for.

Board's Conclusion and Reasoning

- [35] The Board has decided that the Respondent **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 should be disciplined.
- [36] The Board has decided that the Respondent **has not**:
- (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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); or
 - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

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

Record of Work

- [38] 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 work⁶.
- [39] 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.
- [40] The Board discussed issues with regard to records of work in its decision C2-01170⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [41] 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.
- [42] 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 completion of the restricted building work ...".
- [43] 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.
- [44] In the present case the contract came to a premature end. Not all of the intended restricted building work was completed. The Board has previously and consistently stated that when the point in time arises where a licensed building practitioner is not be able to carry out any further restricted building work completion will be deemed to have occurred.
- [45] In this respect it must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [46] On the basis that completion had occurred and a record of work was not provided until a complaint was made the record of work was not provided as per the requirements of the Act and the disciplinary offence has been committed.

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [47] The Respondent has stated that he relied on advice that he did not have to provide a record of work. The advice was incorrect. The Respondent's reliance on it is not a defence.
- [48] 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.
- [49] In this instance there was an ongoing payment dispute. The Board has concluded that there was an element of the record of work being withheld for commercial reasons. It has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [50] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:
- 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.*
- [51] The Respondent has a Foundations licence. The Board accepts that he did not carry out or supervise the carpentry work. It finds that the restricted building work for which a carpentry licence was required was carried out or supervised by [Omitted].
- [52] Whilst it has made the above finding the Board was not convinced that [Omitted] supervised to the extent that he said he did and it cautions him that in future he needs to keep far better records of his supervision, especially if he is being contracted in as a supervisor as he was in this case.

Negligence and/or Incompetence

- [53] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
- [54] 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

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

- [55] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*¹¹ it was stated as “an inability to do the job”.
- [56] The Respondent’s building work was limited to foundations. The block wall that allegedly leaked and the matters as regards the deck and installation of the ranch slider was the work of another licensed building practitioner (as noted in paragraphs [50] to [52]). As such the Respondent cannot be held accountable for it.
- [57] Having made this finding the Board does note that there were aspects of the installation of the building decking membrane that the Board did consider were not completed to an acceptable standard.
- [58] With regard to the health and safety matters the Board can consider this as regards the Respondent within the ambit of section 317(1)(b).
- [59] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [60] 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 Act¹³. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁴.
- [61] With regard to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court’s noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour

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

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

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

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

¹⁵ [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [62] The Board has noted that there were health and safety contraventions but that the evidence with regard to the extent of them was not conclusive. More could and should have been done, especially as regards protection from falls. The Board, which includes persons with extensive experience and expertise in the building industry, has, however, decided that the Respondent's conduct was not sufficiently serious enough to warrant a disciplinary outcome. The Respondent should, however, take more care in the future as regards health and safety.

Disrepute

- [63] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹⁶ and discussed the legal principles that apply.
- [64] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*¹⁷ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [65] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁸, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [66] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁹ and the courts have consistency applied an objective test when considering such conduct. In

¹⁶ Board decision dated 2 July 2015.

¹⁷ [2013] NZAR 1519

¹⁸ 24 September 2014

¹⁹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

*W v Auckland Standards Committee 3 of the New Zealand Law Society*²⁰ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²¹

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

[68] 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.

[69] 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.

[70] The Board considered that there was insufficient evidence of disrepute and/or that the conduct complained about was not serious enough. It noted that there was a dispute over the ownership of materials recovered from site and conflicting evidence as regards the dumping of rubbish.

Penalty, Costs and Publication

[71] Having found that one of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the

²⁰ [2012] NZCA 401

²¹ [2012] NZAR 1071 page 1072

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

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

²⁴ *Slack, Re* [2012] NZLCDT 40

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

Respondent should be ordered to pay any costs and whether the decision should be published.

- [72] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [73] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²⁶ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [74] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁷ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [75] The only disciplinary matter upheld was with regard to the record of work. Failure to provide a record or work is at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. The only mitigation, with regard to the record of work, was the Respondent following legal advice. Whilst this may have been the case the Board also notes that as a licensed building practitioner the Respondent should have been aware of his obligations. It also considers that there was an element of withholding for payment. As such the fine will be set at \$1,500.

Costs

- [76] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [77] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and

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

²⁷ 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 case²⁸.

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

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

- [79] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

Publication

- [80] 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 Act³⁰. 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.

- [81] 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.
- [82] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³³. 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*³⁴.
- [83] 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 interest³⁵. It is,

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

²⁹ [2001] NZAR 74

³⁰ Refer sections 298, 299 and 301 of the Act

³¹ Section 14 of the Act

³² Refer sections 200 and 202 of the Criminal Procedure Act

³³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁴ *ibid*

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

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

[85] 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 \$1,500.

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(1)(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.

[86] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

[87] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **26 April 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[88] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 29th day of March 2019



Richard Merrifield
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.*