

## Before the Building Practitioners Board

	BPB Complaint No. CB25410
Licensed Building Practitioner:	Rex Wood (the Respondent)
Licence Number:	BP 102304
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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	8 October 2020
Decision Date:	8 March 2021

#### Board Members Present:

Chris Preston, Chair (Presiding)  
Mel Orange, Deputy Chair, Legal Member  
David Fabish, LBP, Carpentry and Site AOP 2  
Faye Pearson-Green, LBP, Design AOP 2

#### Appearances:

Pierce Bedogni, Martelli McKegg, for the Respondent

#### Procedure:

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

#### Disciplinary Finding:

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

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

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## Summary of the Board’s Decision

- [1] The Respondent is found to have been negligent when he failed to ensure a building consent was in place for building work. He is censured and ordered to pay costs of \$3,500. The Respondent did not bring the regime into disrepute.

## The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, he may have;
    - (i) carried out building work that required a building consent without one being in place in that; he may have made structural changes to the dwelling requiring a building consent when removing a bathroom/toilet

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

wall, and he may have installed a wet area shower that required a building consent; and/or

- (ii) breached the provisions of Part 4A of the Act in respect of how he estimated, contracted, and invoiced for building work; and/or
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have:
- (i) provided an unreasonable or unrealistic estimate of the work to be completed; and/or
  - (ii) overcharged for building work completed to the extent that he may have obtained an unethical financial gain; and/or
  - (iii) failed to ensure that systems and process were in place to manage and accurately invoice variations to the contract.

### **Function of Disciplinary Action**

[3] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[4] 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>4</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.”*

[5] 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>5</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*

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

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

*includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

- [6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [7] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [11] 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.

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[12] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Rex Wood	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Complainant

[13] The Respondent was contracted by way of his company AA Craftsman Builders Limited by the Complainant to carry out a bathroom refurbishment in a rental property owned by the Complainant. The Respondent and Complainant were known to each other. The Respondent was advised by his lawyers that the work was “commercial” and that Part 4 of the Building Act and the Consumers Guarantee Act did not apply. The Building (Residential Consumer Rights and Remedies) Regulations 2014 disclosure and contractual documentation was not provided. A commercial dispute has arisen between the Complainant and the Respondent following the completion of the work.

[14] The Complainant raised issues with the amounts charged for the work and, in particular, the difference between the final amount charged compared to the estimate provided and the amounts charged for additional work that was undertaken.

[15] The Board decided, given the nature of the allegations, that it would seek further evidence prior to making a decision on the invoicing matters. The evidence sought was a report from a qualified quantity surveyor (QS) appointed by the Board. The QS was instructed to review the building work carried out at the subject address and to determine the value of that work.

[16] In terms of the building work that may have required a building consent it involved the creation of a wet area shower that replaced a stainless tray shower, and the removal of a wall. The Respondent gave evidence that he had sought advice from the Council by phone and that he had been advised that the work would be repairs and maintenance under Schedule 1 of the Act. He stated that he had advised the Council that it was a wet area shower. The Respondent produced his diary to confirm the call. The diary contained a sparse note with regard to whether a permit was required.

[17] The Auckland Council website states:

*You will need a building consent to:*

*install a tiled wet area shower - as it involves critical building work that is not sanitary plumbing, such as carpentry and installing waterproof membranes*

*Wet area shower - A shower with a floor that is a continuation of the bathroom floor rather than a separate raised shower tray or cubicle. Also known as a level entry shower.*

**12. Internal linings and finishes in existing dwellings**

*Wet area or level entry showers are generally outside the scope of this exemption. For guidance, please refer to Wet area showers need building consent.*

**35. Alteration to existing sanitary plumbing (excluding water heaters)**

**Examples where a building consent is required**

*Installing a tiled wet area shower will require a building consent. This is because it will involve critical building work that is not sanitary plumbing, such as carpentry and installing waterproof membranes.*

[18] The government Building Performance Website notes:

*Installing 'wet area' showers is work that requires a building consent, although there are some inconsistencies in the approval approach of building consent authorities (BCAs).*

*This information was confirmed as current in February 2016. It originally appeared in Codewords newsletters prior to January 2014.*

*Published on 1 May 2009*

[19] The Respondent also gave evidence as regards the checks that he had carried out to ensure the wall was not load-bearing. It was noted that a wall in which a mirror was installed had a brace in it and that the brace was removed to install the mirror cabinet. The Respondent described the replacement bracing that he installed as being a split brace above and below the cabinet.

**Further Evidence**

[20] Mr Richard Angell, Registered Building Surveyor and Heidi van Eeden, Registered Quantity Surveyor, provided the Board with a report to provide an independent technical assessment as to the reasonable value to complete the proposed and completed building work that is the subject matter of the complaint. A site visit was completed prior to the report being developed.

[21] The report noted:

*5.2.1 We understand that the refurbishment works were completed without a building consent. No detailed plans or specifications were produced for the works. The only sketches/drawings observed were those produced by the owners (as contained at Appendix A).*

*5.2.2 We consider that the replacement of the original bath and shower cubicle (comprising a stainless-steel tray and acrylic wall linings) and reinstating a fully tiled shower cubicle, over a liquid applied membrane, would have required a building consent as it does not fall*

*within any of the categories described within Schedule 1 of the Building Act 2004.*

5.2.3 *The removal of the internal wall between the original toilet and bathroom could have been completed without a building consent assuming that it was not structural/load bearing. Had any structural/bracing elements been removed or altered (within the internal walls or external wall framing) then a building consent would have been required for those works.*

[22] The report set out the following as regards the values of the work:

6.4.5 *I have prepared an estimate of cost to undertake the works on the original data on a commercial basis and valued the works at \$ 25,862+GST (refer to Appendix B). This is 12% less than the original rough estimate and still within the acceptable range of variance, taking into consideration that the trades will have minimum charges for attendance.*

6.4.6 *I have also undertaken the same exercise to extract the labour hours and found that the expected expended hours would have been in the 266 hour range. Similar, to the 270-hour range indicated on the original estimate.*

6.4.7 *We set out below a table confirming our assessment of the value of the works (at the various stages) and our assessment as to the number of hours required to complete (refer to Appendix B for a breakdown of the assessed values*

<b>Scope of Works / Stage</b>	<b>Assessed Value of the works</b>	<b>Assessed No. of hours to complete works</b>
<i>Work identified within Craftsman Builders Limited rough cost estimate (dated 16 August 2019)</i>	<i>\$25,862 (plus GST)</i>	<i>266 hours</i>
<i>Scope of work detailed in the hand drawn plans (on page 199 and 200 of the Board's file)</i>	<i>\$25,910 (plus GST)</i>	<i>270 hours</i>
<i>Additional work detailed in the Response to the Complaint dated 25 February 2020</i>	<i>\$18,670 (plus GST)</i>	<i>183 hours</i>
<i>The total value of all the work completed.</i>	<i>\$43,649.00 (plus GST)</i>	<i>449 hours</i>

- [23] The Board provided the Respondent with an opportunity to file a response and/or submissions on the QS report that it had sought.

### Submissions

- [24] Counsel for the Respondent submitted that, on the basis of the QS report, the disciplinary offence of disrepute under section 317(1)(i) of the Act had not been committed.
- [25] Counsel further submitted that it would be a breach of natural justice if the Board was to take aspects of the report the dealt with matters outside of the value of the building work into account as the Respondent was not invited to attend the site visit and the report writers went beyond the scope of the report that was sought. Notwithstanding, Counsel submitted:
- 9.1 *All building work is compliant with the Building Code.*
  - 9.2 *A building consent was not required. Mr Wood contacted Auckland Council to ensure that any work he undertook at the Property did not require a consent. He was informed that any work he undertook did not require a consent.*
  - 9.3 *In response to paragraph 5.2, there was no stainless steel tray and acrylic wall lining installed. This would have been known if Mr Wood had been invited to the site visit.*
- [26] Counsel concluded:
- 13. *Overall, the Report has agreed that Mr Wood has not engaged in any wrongdoing. Their calculations are substantially similar to the amount charged.*
  - 14. *AA Craftsman Builders Limited (Mr Wood's company) has simply asked the Complainant to adhere to its contractual obligations, namely pay for work legitimately performed by subcontractors. The complaint is in effect, a payment dispute of a contractual nature. The Board has no interest in commercial disputes. Those disputes are for the Courts / Tribunals. Accordingly, it has been referred to the Disputes Tribunal.*

### Board's Conclusion and Reasoning

- [27] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.
- [28] The Board has decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [29] The reasons for the Board's decisions follow.

- [30] Prior to outlining the Board’s reasoning, however, the Board would comment on the Respondent’s perception that Part 4A of the Building Act and the Consumer Guarantees Act did not apply and cautions him for the future.
- [31] Part 4A applies to a residential building contract. That term is defined in section 362B of the Act. The work clearly came within that definition. The Board is not aware of any exemptions from Part 4A that apply when the two contracting parties are in business. Section 362C of the Act makes it clear that the Consumer Guarantees Act applies. That Act can be contracted out of when one business is contracting with another. If it is not contracted out of it applies.
- [32] When Part 4A applies there are certain obligations that must be met if the contract is over the prescribed minimum price which is \$30,000 inclusive of GST<sup>7</sup>. The initial rough estimate for the work was just under that figure, but the final invoiced amount was well over it. Given it was a rough estimate and the final amount was well over the threshold, it would have been prudent to provide disclosure information and a contract.
- [33] The Board had indicated that it might look at the Respondent’s conduct as regards Part 4A. Ordinarily, breaches come within the jurisdiction of the Ministry of Business Innovation and Employment. The Board has, however, found in past cases that instances of gross negligence as regards contracting processes may result in a finding under section 317(1)(b) of the Act. In this instance, the Board did not consider the conduct reached the threshold, but, as noted, the Respondent is cautioned in respect of future contracts.

#### Negligence – Carrying out Building Work without a Building Consent

- [34] The Board’s considerations in relation to negligence relate to the failure to obtain a building consent.
- [35] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [36] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:
- 40      *Buildings not to be constructed, altered, demolished, or removed without consent***
- (1)      *A person must not carry out any building work except in accordance with a building consent.*
- (2)      *A person commits an offence if the person fails to comply with this section.*

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<sup>7</sup> Pursuant to regulation 4 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

- (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.*

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

**49 Grant of building consent**

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

[38] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

**3 Purposes**

*This Act has the following purposes:*

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

[39] In *Tan v Auckland Council*<sup>8</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

*[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.*

[40] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented, can potentially put persons and property at risk.

[41] Justice Brewer in *Tan* also noted:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[42] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[43] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[44] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

**96 Territorial authority may issue certificate of acceptance in certain circumstances**

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

[45] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is in place prior to building

work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

- [46] The Board also notes that section 362F of the Act imposes minimum requirements for contracts for residential building work over \$30,000 in value. It also imposes an obligation for the contract to be in writing and for the contract to comply with any regulations. The Board heard evidence that a written contract had not been entered into. Notwithstanding the lack of a written contract, the minimum requirements for residential building contracts, which are implemented by way of the Building (Residential Consumer Rights and Remedies) Regulations 2014, are deemed to be part of an oral contract for residential building work. This is by way of Regulation 7 which states:

**7 Prescribed clauses deemed to be included in oral residential building contracts for prescribed minimum price or more**

- (1) *This regulation applies to a residential building contract where the price for the building work is not less than the prescribed minimum price if there is no written contract as required under section 362F of the Act.*
- (2) *The contract is deemed to include the terms prescribed in Schedule 3.*

- [47] Within Schedule 3 clause 1 states:

**1 Building consents**

- 1.1 *The building contractor undertakes to obtain all necessary approvals, including building consents, before commencing the building work.*

- [48] Given this provision there may have been, in addition to the obligations outlined in the *Tan* decision, a contractual obligation on the Respondent to obtain any required consents or at least to ensure they were obtained before the building work was started.

- [49] Looking at the building work, it included the installation of a wet area shower. Publicly available guidance documentation makes it clear that installing a new wet area shower where one was not previously installed requires a building consent. The Respondent gave evidence that he had enquired as to whether a building consent was required and that he had been advised that one was not needed. Given the Auckland Council's own clear guidance, it is doubted that the Council would have advised the Respondent in the manner that it did. The Board also notes that, other than a vague diary note, the Respondent was not able to produce any evidence to substantiate the advice.

- [50] The Respondent also took out a brace and replaced it with a brace that was split around a mirror. That work would have required a building consent as it involved a structural element.

- [51] On the basis of the above, the question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent or incompetent.
- [52] 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*<sup>9</sup> test of negligence which has been adopted by the New Zealand Courts<sup>10</sup>.
- [53] 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*<sup>11</sup> it was stated as “*an inability to do the job*”.
- [54] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>12</sup>. 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.
- [55] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purposes of the Act<sup>13</sup> which are outlined above. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>14</sup>.
- [56] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>15</sup>, 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*

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<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

<sup>11</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

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

<sup>15</sup> [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.*

- [57] There were two items requiring consideration for a building consent. One was the wet area shower. The requirement to obtain a building consent for wet area showers is not a recent one. One of the responsibilities of a Licensed Building Practitioner is to keep themselves informed of and updated on building and legislative requirements. It is for this reason that Licensed Building Practitioners are required to undertake, as part of continued licensing, continuing professional development. The other was the removal of a brace. A braced wall is a structural element. As such it falls outside of schedule 1 of the Building Act. A building consent was required for both.
- [58] Consenting goes to the heart of the building compliance regime. It ensures that building work will meet Building Code requirements and that it has been carried out in accordance with the Building Code and the consent issued. A failure to adhere to the requirements is serious.
- [59] 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.

#### Disrepute

- [60] The Act does not provide guidance as to what “disrepute” means. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”<sup>16</sup>, 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*<sup>17</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>18</sup>

- [61] There were three matters that the Board had resolved to further investigate. They were that the Respondent may have provided an unreasonable or unrealistic estimate of the work to be completed; overcharged for building work completed to the extent that he may have obtained an unethical financial gain; failed to ensure that systems and process were in place to manage and accurately invoice variations to the contract.

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<sup>16</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>17</sup> [2012] NZCA 401

<sup>18</sup> [2012] NZAR 1071 page 1072

- [62] 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.*

- [63] The Board sought an independent evaluation of the amounts charged for the work undertaken. Given the findings of that evaluation, the Board has decided that the Respondent's conduct did not reach the threshold required to make a finding under section 317(1)(i) of the Act.

### **Penalty, Costs and Publication**

- [64] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [65] The Board has decided, given the nature of the penalty it has decided to impose, and the submissions already received, that it will make the appropriate orders.

### **Penalty**

- [66] 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>19</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.*

- [67] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>20</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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

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<sup>19</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[68] The offending, whilst serious, is at the lower end of the scale. Given this and the background to the matter, it has decided that a censure will suffice. A censure is a public expression of disapproval of the Respondent's conduct.

### Costs

[69] 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."

[70] 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 case<sup>21</sup>.

[71] In *Collie v Nursing Council of New Zealand*<sup>22</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.*

[72] The matter was determined at a hearing. A Special Adviser was engaged. Ordinarily the Board would seek to recover some of those costs from a Respondent. However, given the findings as regards disrepute, the Board has decided that it will only order its scale costs for a half-day hearing which is \$3,500. This is significantly less than 50% of actual costs.

### Publication

[73] 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>23</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.*

[74] 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.

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<sup>21</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>22</sup> [2001] NZAR 74

<sup>23</sup> Refer sections 298, 299 and 301 of the Act

- [75] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</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>26</sup>. 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*<sup>27</sup>.
- [76] 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>28</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.
- [77] Based on the above, the Board will not order further publication.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

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

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

**In terms of section 318(5) of the Act, there will 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.**

- [79] 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.

### **Right of Appeal**

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

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<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 26<sup>th</sup> day of March 2021

  
**Mr C Preston**  
Presiding Member

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**<sup>i</sup> 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."*

**<sup>ii</sup> 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.*