

## Before the Building Practitioners Board

	BPB Complaint Nos. CB25846, CB25859 & CB25964
Licensed Building Practitioner:	Ting Xie (the Respondent)
Licence Number:	BP 138004
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 and Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	14 September 2022
Decision Date:	7 October 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr C Preston, Chair  
Ms J Clark, Barrister and Solicitor, Legal Member  
Mr G Anderson, LBP, Carpentry and AOP 2  
Ms K Reynolds, Construction Manager

**Appearances:** Ms Watson-Hughes, Counsel for the Registrar

#### Procedure:

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

#### Disciplinary Finding:

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

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**Summary of the Board’s Decision**

- [1] The Respondent has carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He has conducted himself in a manner that brings or is likely to bring the regime under this Act for licensed building practitioners into disrepute. Further he has, for the purpose of becoming licensed himself, made false or misleading representations.
- [2] The Respondent’s licence is cancelled, and the Board orders that he may not apply to be re-licensed for a period of five (5) years. Further, the Respondent is ordered to pay costs of \$4,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and there will be further action taken to publicly notify the Board’s decision. An article in The Wrap-up will be published.

## The Charges

[3] The hearing resulted from two complaints and a Board Initiated Inquiry about the conduct of the Respondent and Board resolutions under regulations 10 and 22 of the Complaints Regulations<sup>1</sup> to hold hearings in respect of them. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

**In respect of [OMITTED], Queenstown (CB25859):** that the Respondent may, after 2 September 2020, when he became a Licensed Building Practitioner, may have 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 by repeatedly calling for Final Inspections and seeking a Code Compliance Certificate without addressing or attempting to address outstanding issues noted in Council inspections.

**In respect of [OMITTED], Wanaka (CB25846):** that the Respondent may, after 2 September 2020, when he became a Licensed Building Practitioner, have:

- (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:
  - (i) building inspections were not called for as required under the building consent; and
  - (ii) the building work noted in an engineering report produced by [OMITTED] of [OMITTED], dated 5 February 2021, and those identified in failed council inspections and a Notice to Fix may not have been carried out to an acceptable standard;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT:
  - (i) building inspections were not called for as required under the building consent; and
  - (ii) the building work noted in an engineering report produced by [OMITTED] of [OMITTED], dated 5 February 2021, and those identified in failed council inspections and a Notice to Fix may not have been carried out in accordance with the building consent issued; 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 contrary to section 317(1)(i) of the Act, IN THAT, the Respondent may have:
  - (i) failed to call for building inspections required under the building consent;
  - (ii) created and/or produced falsified council inspection records for the purposes of showing compliance with the building consent; and/or

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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.

- (iii) produced licensing details for [OMITTED] (BP [OMITTED]) when he had no right to for the purposes of establishing that restricted building work would be carried out or supervised by a Licensed Building Practitioner; and/or
- (iv) allowed or procured the building work noted in the engineering report produced by [OMITTED] of [OMITTED], dated 5 February 2021, to take place and/or that he failed to take appropriate steps to address the issues once they were identified and brought to his attention by way of a Notice to Fix.

**In respect of licensing matters (CB25964):** that the Respondent may have:

- (a) for the purpose of becoming licensed himself or herself, or for the purpose of any other person becoming licensed,—
  - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
  - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i); or
  - (iii) produced to the Registrar or made use of any document, knowing that it was not genuine; 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.

[4] The Board gave noted that in further investigating the licensing matter, it would be inquiring into whether the Respondent's application and representations made in it as regards building work that he carried out under the supervision of Mr [OMITTED] [OMITTED] (BP [OMITTED], Carpentry and Site AoP 1) at [OMITTED], Wanaka and [OMITTED], Queenstown noting that Mr [OMITTED] has denied any knowledge of or involvement in the building work.

[5] The hearing was consolidated with complaint CB25963 in respect of which Mr [OMITTED], a witness in these complaints, was the Respondent. A separate decision for CB25963 has been issued.

#### **Function of Disciplinary Action**

[6] 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>.

- [7] 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.”*

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

- [9] 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.

- [10] Some of the building work at both of the properties was undertaken before the Respondent was a Licensed Building Practitioner. The Respondent was only licensed in carpentry on 2 September 2020, and the work at both properties spanned a period from June 2018 to June 2021. The Board can only inquire into “the conduct of a licensed building practitioner”. As such, the Board only inquired into building work and other conduct of the Respondent, which occurred after the date that he became a Licensed Building Practitioner.

- [11] 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**

- [12] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove

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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

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.

- [13] 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**

- [14] 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.
- [15] 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.
- [16] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:
- [OMITTED], (BP [OMITTED])
- [OMITTED], Complainant for CB25859, Building Consent Officer
- [OMITTED], Engineer, [OMITTED]
- [OMITTED], (BP [OMITTED])
- [OMITTED] (BP [OMITTED])
- [17] Mr [OMITTED] and the Board were assisted by an interpreter, Ms Bi.
- [18] The Respondent did not attend the hearing. He did not provide a response to the complaint to the Investigator and did not engage in the process in any way. He was provided with all the required notices.
- [19] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it.
- [20] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent.

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

Similarly, under regulation 12, if the complaint is to proceed to a hearing, the Board must give notice of the hearing to the Respondent.

- [21] The Register of Licensed Building Practitioners must contain certain information, including under section 301(1)(d) an “address for communications under this Act”. Under section 302 the licensed building practitioner must keep their details up to date:

**302 Obligation to notify Registrar of change in circumstances**

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
  - (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
  - (b) *includes any change that may be prescribed (if any).*

- [22] As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.

- [23] Section 314 of the Act makes it an offence for a licensed building practitioner to fail to update the Register:

**314 Offences relating to licensing**

- (1) *A person commits an offence if the person holds himself or herself out as a person who is licensed to carry out or supervise building work or building inspection work, or building work or building inspection work of a certain type, while not being so licensed.*
- (2) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$20,000.*
- (3) *A person commits an offence if the person—*
  - (a) *fails to produce evidence of being licensed as required by section 289; or*
  - (b) *fails to give written notice of a change in circumstances in accordance with section 302.*
- (4) *A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$5,000.*

- [24] The Act also provides for the service of notices in section 394. It provides that:

**394 Service of notices**

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*

- (a) *delivered personally to the person; or*
  - (b) *delivered to the person at the person's usual or last known place of residence or business; or*
  - (c) *sent by fax or email to the person's fax number or email address; or*
  - (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*
- (5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

- [25] Given the above provisions, the Board finds that the required notices under the Regulations have been provided to the Respondent.
- [26] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not maintaining up-to-date contact details as per the requirements of the Act.
- [27] As such, the Board finds that it is appropriate that it considers the complaint.

Complaint CB25859 – [OMITTED], Queenstown

- [28] Mr [OMITTED], the Queenstown District Council Building Consent officer (at the time) and now team leader for inspections at the Council, was the Complainant and gave evidence. He stated that he was on site 3-4 times during the building project and that the Respondent was running the site.
- [29] Mr [OMITTED] set out the main issues with the building work being –
- (a) a change in the size of the retaining walls without a minor variation to the building consent;
  - (b) foundation slab levels were about 75mm lower than the floor level so the framing could not sit fully on the slab;
  - (c) the cladding was fixed incorrectly as it was nailed through the weathergroove contrary to the manufacturer's recommendation; and
  - (d) The windows were not as per the consented plans. The Respondent submitted a minor variation to amend this but then did not follow the minor variation.
- [30] The Respondent attempted to obtain Council final sign-off without rectifying outstanding issues. When he failed the preclad inspection, he ignored it and called for a final inspection which was failed by the Council on 28 July 2020 (Document 4.3, Page 352 of the Board's file on CB25859). The Respondent then booked another final inspection after rectifying internal issues but not addressing the cladding. This was failed again by the Council on 15 February 2021 (Document 4.3, Page 358 of the



Board's file on CB25859). Mr [OMITTED] advised that the Respondent then tried to book another final inspection by targeting different inspectors, and as a result, Mr [OMITTED] put a stop to inspections until the cladding was rectified.

- [31] This project was the first time Mr [OMITTED] had dealt with the Respondent, but he subsequently dealt with him on two further projects. His view was that the Respondent was "out of his depth", did not understand what the Council was asking him to do and had a mindset that he did it that way in Auckland so what was the problem.
- [32] Mr [OMITTED]'s last involvement with the Respondent was when he was trying to get the final inspections done. Mr [OMITTED] advised the Board that the issues were not yet resolved, and all of the cladding had to be removed and done again.

Complaint CB25846 – [OMITTED], Wanaka

- [33] Mr [OMITTED]'s role during the project was construction monitoring of the structural components. He inspected the building work on 21 January 2021 and produced a report dated 5 February 2021 (Document 2.1.55, Page 70 of the Board's file on CB25846). At the hearing, he confirmed the contents of his report and gave a summary of the issues
- (a) the most serious was the gluing of a bolt to give the impression of connection when there was zero connection (Document 2.1.60, Page 75 of the Board's file on CB25846);
  - (b) double stacking of floor joists to achieve correct height (Document 2.1.66, Page 81 of the Board's file on CB25846);
  - (c) cantilever beams without bolts (Document 2.1.63, Page 78 of the Board's file on CB25846); and
  - (d) connections of bottom plates – cut end off bolts instead of drilling through the steel beam (Document 2.1.61, Page 76 of the Board's file on CB25846).
- [34] Mr [OMITTED] said that there were issues with the Respondent's work before the January inspection, which led to the report, including the floor slab construction being too shallow and steel beams missing web stiffeners.
- [35] Mr [OMITTED] described the project as "*one of the most error ridden properties I have ever supervised in 27 years*". He stated that whilst each component issue could be fixed, added together, they became insurmountable. There had been "*total disregard for structural details*". Mr [OMITTED] confirmed that the design and engineering details available to the Respondent were clear, adequate, and achievable.
- [36] The Council noted in its inspection of 11 December 2020 that "*..there are steel elements not correctly positioned or fixed/supported....Due to these structural defects identified, and the fact that the monitoring structural engineer has not yet signed off the structural Works – it is not known whether this building has sufficient structural*

*integrity to resist imposed forces from strong winds and/or seismic activity.....A Notice to Fix will follow this report”* (Document 2.1.112, Page 127 of the Board’s file on CB 25846)

- [37] The Council issued a notice to fix dated 28 February 2021 (Document 2.1.42, Page 57 of the Board’s file on CB25846). Mr [OMITTED] advised the Board that the property was sold, and the Council required as a condition of the sale, that the building was demolished.
- [38] The Respondent did not acknowledge the Notice to Fix until 7 April 2021 (Document 2.1.14, Page 29 of the Board’s file on CB25846). He had no involvement in the resolution process.
- [39] Mr [OMITTED] gave evidence that the falsified Council inspection reports in respect of [OMITTED] were found after being alerted to the issue by a falsified report on another property at [OMITTED], Queenstown.
- [40] The documents in issue are Underslab Plumbing & Drainage inspection dated 13 December 2019, Pre-slab-Reinforcing DPC inspection dated 18 December 2019, Framing & Bracing - Prewrap inspection dated 25 May 2020 (Documents 2.1.78-2.1.85, Pages 93 -100 of the Board’s file for CB25846).
- [41] Mr [OMITTED] told the Board that these documents were from another unrelated project and had had the address and building consent number altered to match the [OMITTED] project. The inspections show as being passed when they were failed by the Council. The documents were not on the Council file. They were supplied to the Council by the homeowner, who was given them to obtain progress payments.
- [42] Mr [OMITTED] had had no contact with the Respondent about these documents.
- [43] Mr [OMITTED]’s Licensed Building Practitioner’s license was shown to the Council at the Framing & Bracing – Prewrap inspection on 14 August 2020 (Document 4.3, Page 350 of the Board’s file on CB25846). Mr [OMITTED] gave evidence that the Respondent said Mr [OMITTED] was the Licensed Building Practitioner supervising the building work. The Council took the Respondent’s word for this. and there was no process to check this was correct. Mr [OMITTED] and the other Council inspectors never saw Mr [OMITTED] on site.
- [44] Mr [OMITTED] gave evidence that he had no involvement with this property, did not consent to his license being used by the Respondent and did not know why his license was associated with this project.
- [45] Mr [OMITTED], a Licensed Building Practitioner, was contracted by the Respondent to do the architectural design for [OMITTED]. He had worked on one other project for the Respondent. On this one, he stated he never went to the site, dealt only with the Respondent, and was unaware of any issues as he was not asked for any input after the design stage.

Complaint CB25964 – Licensing

- [46] The evidence given by Mr [OMITTED] in respect of this complaint was also relevant to the issues under complaint CB25846.
- [47] Mr [OMITTED] said the Respondent contacted him through an advertisement to ask his advice on construction methods. Mr [OMITTED] stated that the Respondent had never worked for him and that he had never been to the two project sites, which are the subject of these complaints.
- [48] Mr [OMITTED] advised the Board that he went to Queenstown on 6 September 2019 at the Respondent's request. He checked a job of the Respondent's, which was at the framing stage, and did the record of work for that property. He was paid for doing this. He could not recall the address of that property, but it was not either of the two properties at the centre of these complaints. Mr [OMITTED] confirmed that he no longer had any documents which would provide the address of the property.
- [49] The Board showed Mr [OMITTED] the photo of his Licensed Building Practitioner's license in the Council inspection report for [OMITTED]. (Document 4.3, Page 350 of the Board's file for CB25846). Initially, Mr [OMITTED] said that the Respondent asked for a photocopy of Mr [OMITTED]'s Licensed Building Practitioner's license, and he did not recall when he sent it to the Respondent. After further questioning from the Board, Mr [OMITTED] stated he did not know why or when the Respondent had a copy of his license and that the Respondent was *"trying to use my name without my consent"*.
- [50] Mr [OMITTED] denied all involvement with or knowledge of the [OMITTED] and [OMITTED] projects.
- [51] Mr [OMITTED], a Licensed Building Practitioner, was the other referee put forward by the Respondent. Mr [OMITTED] did the foundation work at both the [OMITTED] and [OMITTED] properties. He gave evidence that he told the assessor he could support the Respondent's application on the condition he passed inspections and obtained a Code Compliance Certificate. He said this because he left both projects after the foundation work and did not know about the Respondent's carpentry abilities.
- [52] The assessor's report was put to Mr [OMITTED] (Document 2.5.21, Page 44 of the Board's file on CB25964) and he agreed that he had made some of the recorded comments but not all of them.
- [53] Mr [OMITTED] said that he had never seen the Respondent at either property.
- [54] Mr [OMITTED] acknowledged that he had been contacted by the assessor as a referee for the Respondent to obtain a license. He described the telephone call as very quick, and he thought it was only in relation to the project he had visited in September 2019 at the Respondent's request. The assessor's report was put to Mr [OMITTED], and he denied making many of the statements recorded in it.

### Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) for the purpose of becoming licensed, made a declaration or representation, knowing it to be false in a material particular (s 317(1)(e) 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)

and **should** be disciplined.

### Negligence

[56] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>7</sup> 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.*

[57] 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>8</sup> test of negligence which has been adopted by the New Zealand Courts<sup>9</sup>.

[58] 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>10</sup> it was stated as "*an inability to do the job*".

[59] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>11</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.

[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

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<sup>7</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>8</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

<sup>10</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

assessment of what is appropriate conduct, bearing in mind the purpose of the Act.<sup>12</sup> 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>13</sup>

[61] The Board notes that the purposes of the Act are:

### **3 Purposes**

*This Act has the following purposes:*

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

[62] In terms of seriousness in *Collie v Nursing Council of New Zealand*,<sup>14</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 which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[63] In *Pillai v Messiter (No 2)*<sup>15</sup> the Court of Appeal stated:

*... 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>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>14</sup> [2001] NZAR 74

<sup>15</sup> (1989) 16 NSWLR 197 (CA) at 200

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

- [64] The matters raised in Mr [OMITTED]'s report and highlighted in his evidence before the Board contained serious examples of building work at [OMITTED], Wanaka, which had not been completed to a standard to be expected from a Licensed Building Practitioner. The Council's Notice to Fix reinforced the significant nature of the Respondent's failures.
- [65] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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. The Board also decided that it was evident that the Respondent lacked the skills and knowledge required of a Licensed Building Practitioner and, therefore, that he was incompetent.

#### Contrary to a Building Consent

- [66] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

**40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [67] 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.
- [68] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established<sup>16</sup>.
- [69] Given the above factors and the workmanship set out in Mr [OMITTED]'s report, the Board finds that in respect of [OMITTED], the building consent had not been complied with. It is noted, however, that the finding of negligence and that of

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<sup>16</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

building contrary to a building consent are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

### Obtaining a Licence by Deception

- [70] Section 317(1)(e) of the Act contains three alternatives. All relate to obtaining a licence. They are making a false or misleading declaration or representation, producing a false or misleading document and making use of a document knowing it was not genuine.
- [71] The evidence before the Board was that the Respondent gave Mr [OMITTED]'s name as a referee to the assessor and in doing so represented that Mr [OMITTED] was a person who had supervised the Respondent's building work. The Board accepts Mr [OMITTED]'s evidence that he had no involvement in the [OMITTED] and [OMITTED] projects. No evidence to counter Mr [OMITTED]'s position was before the Board.
- [72] The Board notes that under regulation 6(2)(b)(ii) of the Licensed Building Practitioners Rules 2007, there is a mandatory requirement to provide those details and to declare that they are true and correct. As such, the first alternative of section 317(1)(e) – making a false or misleading declaration or representation - has been made out, and the Board finds that the disciplinary offence has been committed.

### Disrepute

- [73] 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>17</sup> and discussed the legal principles that apply.
- [74] 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>

- [75] 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,

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<sup>17</sup> Board decision dated 2 July 2015.

<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

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>.

[76] The Respondent's behaviour across the two projects showed a lack of integrity and repeated deliberate conduct. In particular, the Board notes the use and production of another licensed building practitioner's license, the production of falsified documents for the purposes of payment from the homeowner, the booking of further Council inspections when required remedial work had not been done, and the failure to address the issues in the Council's Notice to Fix. Such conduct brings the regime into disrepute.

[77] His conduct has resulted in one homeowner having to reclad their house and the other selling the property with the Council requirement that the building be demolished.

[78] Finally, the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and 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.*

[79] The matters before the Board are serious, and the consequences for the homeowners were significant. On the basis of the above, the Board finds that the Respondent's conduct has brought the regime into disrepute.

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

[80] 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.

[81] 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.

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<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



## Penalty

[82] 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.*

[83] 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:

*[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.*

[84] 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 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.

[85] The Respondent has been found to have committed six disciplinary offences across two building projects. He has engaged in a consistent pattern of behaviour which involved misrepresentation, a disregard for the integrity of the Licensed Building Practitioner’s scheme and defective workmanship, which was potentially structurally unsound. His actions showed a cavalier attitude to his legal obligations and

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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

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

responsibilities as a Licensed Building Practitioner. It was evident that he lacked the skills and knowledge required to be a Licensed Building practitioner.

- [86] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*,<sup>28</sup> the High Court held that it was permissible to take into account as an adverse factor when determining the penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. The Respondent's non-engagement with the investigation process and failure to appear at the hearing are germane in this respect.
- [87] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct. Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [88] Whilst the Respondent is no longer in New Zealand and no longer licensed, it is important for the integrity of the scheme that there is a record of the disciplinary findings against him. Should he ever return to New Zealand and seek to be re-licensed, he will have to re-apply, and that outcome is a protection for the consumer.
- [89] Based on the above, the Board's penalty decision is the cancellation of the Respondent's licence and a direction that he cannot re-apply for a Licensed Building Practitioner's licence for a period of five (5) years.

### Costs

- [90] 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."
- [91] 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>29</sup>.
- [92] In *Collie v Nursing Council of New Zealand*,<sup>30</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.*
- [93] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$4,500 toward the costs of and incidental to the Board's inquiry.

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<sup>28</sup> [2011] 3 NZLR 850.

<sup>29</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>30</sup> [2001] NZAR 74

## Publication

[94] 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>31</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.*

[95] 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.

[96] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>32</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>33</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>34</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>35</sup>.

[97] 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>36</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.

[98] Based on the above, the Board **will** order further publication. Publication is appropriate so that others learn from the matter and the public is appropriately informed.

## **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be re-licensed before the expiry of five years.

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<sup>31</sup> Refer sections 298, 299 and 301 of the Act

<sup>32</sup> Section 14 of the Act

<sup>33</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>34</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>35</sup> *ibid*

<sup>36</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$4500 (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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

[100] 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**

[101] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 November 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

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

### **Right of Appeal**

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

Signed and dated this 20<sup>th</sup> day of October 2022



**Mr C Preston**  
Presiding

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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:*

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- (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.*