EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT TAURANGA

CIV-2016-070-000492
[2016] NZDC 21288

UNDER	the Building Act 2004
BETWEEN	PETER IAN LOCHHEAD First Applicant
AND	MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT First Respondent
AND	REGISTRAR OF LICENSED BUILDING PRACTITIONERS Second Respondent
AND	TAURANGA CITY COUNCIL Third Respondent

Hearing: 26 October 2016

Appearances: Brittain for the Appellant Lochhead
Dumbleton for 1st and 2nd Respondents
Ms Hall for 3rd Respondent

Judgment: 3 November 2016

RESERVED JUDGMENT OF JUDGE T R INGRAM

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[1] Mr Lochhead appeals against two decisions of the Building Practitioners Board dated 29th April 2016 and 5th July 2016 respectively. The 29th April decision determined firstly that Mr Lochhead had acted in a negligent manner as a building practitioner, and secondly had conducted himself in a manner that brings the regime under the Building Act 2004 for Licensed Building Practitioners (LBP's) in to disrepute. That decision also proposed an indicative sentence, later confirmed in the 5th July decision.

[2] Mr Lochhead filed his Notice of Appeal on the 3rd of August 2016, exactly 20 working days after the decision of 5th July 2016. The Appeal was accordingly filed within time. Out of an abundance of caution, to the extent that it might be thought necessary that leave be required because the 5th July decision was merely confirmatory of the 29th April decision as to penalty, if such leave be required, it is granted. No party to the litigation has suggested any prejudice, and the interests of justice in this case require that this appeal be heard and determined promptly.

[3] The third Respondent, the Tauranga City Council, was added to the appeal proceedings by consent, and Counsel have filed written submissions and addressed me on behalf of Tauranga City Council in relation to the issues arising in this appeal.

[4] In the decision delivered on the 29th of April 2016, the Board determined that Mr Lochhead had altered a producer statement relating to a cast iron balustrade, and that he had sent that document to the Tauranga City Council (TCC) in support of an Application for a Building Consent, all the while knowing that the producer statement was not a bona fide document, it having been altered by him without the knowledge of the original producer. The Board quite rightly regarded such conduct as inimical to the fundamental purpose of public confidence in quality assurance that underlies the LBP regime set out in the Building Act 2004.

[5] The Board took such a dim view of Mr Lochhead's actions that it cancelled Mr Lochhead's license to practice, and ordered him not to apply for relicensing within a period of two years. That penalty was seen by the Board as being necessary to uphold the integrity of the quality assurance provisions upon which the Building Act 2004 is based. Without more, that level of penalty could not readily be criticised in a case involving both the alteration of a producer statement and the use of that altered document to a territorial authority in support of an Application for Building Consent. The seriousness of this kind of matter was recently examined in a criminal context in *F v POLICE* [2016] NZHC 1969, where Thomas J upheld a District Court ruling refusing an order for name suppression.

[6] On appeal, counsel for the appellant has not sought to attack the Board's decision in respect of its determinations of negligent conduct, nor its finding that Mr Lochhead has conducted himself in a manner that brings or is likely to bring the regime for LBP's in to disrepute. Instead, counsel for the appellant has submitted that the Board has erred in law, and the Board has taken account of irrelevant considerations in assessing the appropriate penalty in this case.

[7] The applicable principles are set out in *Kacem v Bashir* [2010] NZSC 112. An error of law, or taking account of irrelevant considerations, are both sufficient grounds to invalidate a decision.

[8] The proper interpretation of the regulatory framework applicable to this jurisdiction was detailed comprehensively by Heath J in *Beattie v Licensed Building Practitioners Board* [2015] NZHC 1903, and I need not repeat his analysis here.

[9] The Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 applies to proceedings of this kind before the Board, and the Regulations set out a number of detailed procedural requirements. The applicable portions of the complaints and enquiry procedures as can be found at clauses 3.5, 3.6 and 3.9. Clause 3.5 of the procedures specifies that complaints must comply with Rule 5 of the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008. That in turn provides that a complaint must provide details of the conduct that is the subject matter of the complaint, and is to be accompanied by evidence to support the complaint.

[10] Under clause 3.6.2 of the Procedures, a Registrar is required to consider whether the person being complained about was a LBP at the time when the work complained about was carried out, a point which is reinforced by reference to Regulation 3 of the Regulations, which defines "complaint" to mean a complaint about the conduct of a LBP. Under clause 3.9.1 of the Procedures, the Registrar has an obligation to prepare a report on the complaint for the Board's consideration, but only where the complaint falls within the Board's jurisdiction.

[11] The complaint report dutifully prepared by the Registrar in this case, included a reference to an email from a Mr Sherman, a senior building control officer for Western Bay of Plenty District Council, which referred to issues arising with Mr Lochhead "some two or three years ago". Because Mr Lochhead was licensed on the 18th of October 2012, that conduct could not fall within the statutory requirement that a complaint relate to his conduct while licenced.

[12] The complaint report goes on to refer to three other occasions in giving rise to concerns about Mr Lochhead's conduct in respect of matters occurring on the 11th of March 2011, the 3rd of February 2011, and "late 2009". Again, each of those preceded the 18th of October 2012, the date Mr Lochead received his licence.

[13] It is important to note that the reference to events which preceded Mr Lochhead's commencement as an LBP on the 18th of October 2012 can never be the subject of a valid complaint to the Board, and any complaint which includes such matters as matters of complaint, and requiring an answer, as was required in this case, should not be accepted for filing by the Registrar, and should not be included in the Registrar's report to the Board as matters of complaint.

[14] Counsel for the respondents did not seek to argue that any of these matters could properly be the subject of a complaint requiring an answer. Instead, both counsel for the 1st and 2nd respondents, and counsel for the 3rd respondents, sought to persuade me by reference to the typed transcript of hearing, that the Board had recognised that these matters were not legitimate matters of complaint, as they preceded the issue of Mr Lochead's licence, that the Board recognised that Mr Lochhead could not be called upon to answer those allegations, and that the Board had not taken account of any of those matters in reaching its decision on the appropriate penalty to be applied.

[15] It was common ground that the Registrar had filed a report for the Board's consideration which included detailed reference to matters arising prior to Mr Lochhead's commencement as a LBP on the 18th of October 2012, and that Mr Lochead had been asked to reply to those allegations, which he did. The Registrar's report was indubitably before the Board, as the transcript makes clear.

[16] At page 9 of the transcript, the Chair of the Board is recorded as saying the following:

> "Before we proceed any further, I would just like to say that we - - the Board has reviewed some of the evidence that's been put before us in respect to submissions or representations from Bob Sherman. We've decided that as a result of some of that being a) before the respondent was licensed and because to some extent practically it is very difficult to substantiate some of those, in a way that would allow the Board to give any weight to it, we've decided we're not going to take that into account, okay? And we also won't be calling Bob Sherman as a witness any longer".

[17] Counsel for the respondents sought to persuade me that the Chairman's recognition of the fact that Mr Sherman's purported complaint preceded the issue of a license to Mr Lochhead, should be extrapolated to the point where this Court could safely infer that the Board had identified the same issue, and reached the same conclusion, in respect of the other three matters of complaint arising prior to Mr Lochead receiving his licence.

[18] That reasoning is flawed. Firstly, if it was necessary for the Chairman of the Board to identify that issue in relation to Mr Sherman's complaint and evidence, why would it not be necessary for the Board also to identify that issue in respect of the other three matters of complaint which fell into the same category? Secondly, if it was necessary to specify that Mr Sherman's evidence would not be taken into account, why would it not be necessary for the Board also specify that the other three matters of complaint which fell into the same category would not be taken into account?

[19] Thirdly, the carefully crafted and detailed decisions delivered by the Board simply say nothing at all to the effect that the Board recognised that the three other matters of complaint preceding Mr Lochead's commencement date as an LBP were not matters of complaint, that they did not require an answer, and that they should be put to one side.

[20] Justice must not only be done, but must be seen to be done. In this case, it is indubitable that a series of inadmissible complaints have wrongly been accepted by the Registrar, and have wrongly been put before Mr Lochhead for reply in terms requiring him to make a reply for the Board's consideration. Those matters have

wrongly been included in the Registrar's report to the Board, as matters of complaint, and the Board has not at any stage, either at the hearing, or in its decisions on liability and penalty, either implicitly or explicitly identified that material as not being a valid matter of complaint, and therefore outside the Board's jurisdiction.

[21] There can be no doubt that the Board had before it the evidence relating to the three improperly admitted complaints, and Mr Lochead's reply thereto. In the absence of a specific direction to itself, that all of that material should not play any part in its deliberations as a matter of complaint, the only available inference is that the Board has considered all of the material which was before it, in reaching its conclusions. On the material available to me, I cannot be satisfied that the Board has both identified and put to one side the allegations made and the answers given in relation to the additional three matters of complaint which arose prior to the commencement of Mr Lochhead's status as an LBP. It follows that the Board has erred in law, and it also follows that irrelevant considerations have been taken into account by the Board in reaching its decisions.

[22] In this case, Mr Lochhead does not argue that the Board erred in its conclusions that he has been negligent and has brought the Building Standards Regime into disrepute through his actions. Those findings are not impeached.

[23] However, Mr Lochhead argues that the penalty imposed was not appropriate, for several straight forward reasons. The approach taken by the Board to assessment of penalty has been submitted to be inadequate, by failing to properly assess the seriousness of the transgression, and giving inadequate weight to several matters of mitigation.

[24] Firstly, Mr Lochhead has something in the order of 40 years experience in the industry, and there was evidence before the Board that despite his transgression on this occasion, he is nevertheless still held in high regard by other experienced members of the profession, one of whom had offered to act as his "mentor".

[25] Secondly, in relation to the background to the matter, Mr Lochhead pointed out in mitigation, that the document that he had altered had been provided to him under cover of an email which referred to it as a "generic" producer statement. Another email made a similar reference. He had initially approached the matter on the basis that such a thing as a "generic" producer statement did exist, and all that was relevantly being altered was the date and the name of the council. He did however accept that he knew he should not have altered the document before providing it to the Council.

[26] Thirdly, Mr Lochhead made some claim to extenuating circumstances. His client required the building work to be completed promptly, as he had a handicapped son, and it was Mr Lochhead's intention to initially provide the altered producer statement simply to get the consent process underway, and to then promptly replace it with an original and specific producer statement. To that end, Mr Lochhead had set in train a process for a proper original document to be procured, prior to the matter being raised with him by either the Council or the Board. From his point of view, he had attempted to cut a corner to speed up the consenting process out of sympathy for his client, always intending to rectify the situation by replacing the altered document. There is no question but that a replacement document would have been readily made available.

[27] Fourthly, Mr Lochhead knew from experience of this manufacturer that a producer statement would be made available relatively promptly, and the only consenting issue that could realistically arise with such an item is the fixing method. The fixing method is not specified in the portion of the document he had altered. Mr Lochhead's design included 12mm bolts and backing for the fixings, fixing dimensions that were later approved.

[28] Accordingly, although it can fairly be said that any conduct involving unauthorised alteration of producer statements necessarily involves an attack on the integrity of the Building Consent process, Mr Lochhead had both recognised the need for a proper original document to be provided, and had taken steps to procure exactly such a document prior to the matter coming to the attention of the Council. He was cutting a corner to help a client with an urgent need.

[29] Fifthly, Mr Lochead did not stand to gain anything personally from his misconduct, and his motives, if not entirely pure, were at worst charitable, in the sense that he personally ran a professional risk on behalf of a client in desperate and immediate need, someone for whom he had a great deal of personal sympathy.

[30] Lastly, it must be remembered that the item we are dealing with is a cast iron balustrade. Of all the prefabricated items involved in the construction of a dwelling, it would seem self evident that a cast iron balustrade is the least likely item, with possible exception of an outside water tap, to have potentially serious consequences for the safety and durability of a building. The inherent strength and durability of cast iron construction is obvious. The only safety and durability issue arising is the fixing, which must be adequately strong to support foreseeable loads, and weathertight to ensure durability. Those matters would be obvious to any building inspector, and would require inspection in any event, as the producer statement actually specifies.

[31] The inherent risk that Mr Lochead's transgression posed to the safety and structural integrity of the building, or the safety of its inhabitants and users was low, in contrast to such items as prefabricated beams or perhaps windows. An outside balustrade poses little or no threat to the safety or structural integrity of the building, or the safety of its inhabitants, unless improperly fixed, which would be subject to inspection. No evidence to the contrary was put before the Board, and Counsel for the Respondents did not seek to persuade me otherwise.

[32] An appeal of this nature is by way of rehearing. In this case, having perused and considered all the material that was originally before the Board, together with a transcript of the Board's hearing, and having perused and considered the two decisions of the Board, I am satisfied that the Board has fallen to error of law. Further, I accept that the appellant has established that the only inference available to me on the material that I have, is that the Board wrongly took into account against Mr Lochhead, that there had been three prior incidents, none of which could properly have been the subject of complaint, nor required any answer from Mr Lochhead.

[33] In relation to the Board's consideration of penalty, and recognising as I do the expertise of the Board in an area of specialist knowledge, I am naturally reluctant to interfere in an assessment that may be informed by such specialist knowledge. But the process of assessment of penalty is very familiar to members of this Court, and I have some reservations about the assessment of penalty reasoning expressed in the Board's decision.

[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.

[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example *Department of Labour v Hanham & Philp Contractors Ltd & Ors* (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ)

[36] In its decisions, the Board has not explained at all how it derived the starting point adopted for the penalty to be imposed. It has explained why it regards the matter as serious, but it has not sought to undertake a principled analysis of the applicable penalty range. Aggravating and mitigating features are not explicitly identified and assessed.

[37] Acknowledging, as I must, the analysis provided by Heath J in *Beattie v Licensed Building Practitioners Board* [2015] NZHC 1903, I am all too conscious that the Board's procedures and processes should be kept as free as possible from technicality and unnecessary formality.

[38] Nevertheless, the terms of the Board's two penalty decisions, in which the latter simply confirmed the former, have driven me to the unwelcome conclusion that the Board has not identifiably weighed and balanced the competing considerations applicable to its penalty decision. The factors tending to enhance the seriousness of the case are explicitly covered, while the many mitigating factors referred to above are not. Given the severity of the penalty imposed, I consider that Mr Lochead should have been provided with a decision which at the very least explains why the penalty chosen was more appropriate than any lesser penalty, and acknowledging the severity that the totality of the penalty imposed would necessarily produce.

[39] For those reasons, I have reluctantly reached the view that this appeal should be allowed. I have jurisdiction to remit the question of penalty to the Board, or determine the matter myself on the material presently available.

[40] The matter has now been in train for many months. Considerable further delay is likely to be occasioned if I remit the matter to the Board, and I consider further delay to be most undesirable in the circumstances. I will thus determine the matter myself on the material presently available to me.

[41] I approach the matter from first principles. Mr Lochhead's transgression is relatively serious, falling at least in the mid-range of the scale of possible offending. It is certainly not the most serious transgression possible, given the nature of the item the producer statement related to. Worse cases would involve clear personal gain from the transgression, or serious risk to the safety and structural integrity of the building. There are no aggravating features, and Mr Lochhead has no disciplinary or other record which could realistically justify an uplift for matters personal to him. A penalty of suspension from practise for a period of or approaching the 12 month maximum would accordingly seem an appropriate starting point for a mid-range

case, given the inevitable and very substantial financial consequences of the imposition of such a penalty.

[42] In mitigation of penalty, Mr Lochhead is nearing the end of his career. He has no prior convictions, nor any judgments on liability against him in connection with his professional life. The nature of his transgression is relatively serious, but the circumstances in which it arose did not involve any personal gain on his part.

[43] His ultimate objective was altruistic, and I accept that he intended to rectify the matter through provision of an appropriate document promptly, and that he had indeed commenced such steps before the complaint was drawn to his attention. He was cooperative with the Board's employees in the course of the enquiry into the matter. He has already suffered a very considerable punishment in terms of diminution of his professional standing, and personal shame and embarrassment. He has been directed to make a $2,000 contribution to the costs of the proceedings, and his licence has been cancelled since 5th July 2016. He has lost his income since then, and no doubt a portion of his business. A penalty of cancellation of licence for two years is likely to end his career, and the inevitable loss of earnings at his age and stage of life will produce very considerable financial hardship, from which he is unlikely to be able to recover.

[44] Balancing those matters against the nature of the transgression, and acknowledging the need to make an example of those who transgress in this way, I have reached the view that the Board's decision as to costs should stand, but that instead of cancellation and an order restricting future application for a licence, a suspension of license is the appropriate response by way of penalty. The Board's unchallenged findings of Mr Lochead having acted in a negligent manner as a building practitioner, and having conducted himself in a manner that brings the regime under the Building Act 2004 for Licensed Building Practitioners (LBP's) in to disrepute could not realistically permit any lesser penalty, in my view.

[45] I accordingly modify the Board's decision under the provisions of s335 (3). In lieu of cancellation of Mr Lochhead's license, his licence will be suspended for a period of five months from the date of this decision. The maximum period of

suspension available is 12 months, and I consider that a reduction from that maximum period is appropriate for several reasons.

[46] Firstly, Mr Lochead has already been precluded from practising his profession for nearly four months, justifying four month's reduction in the suspension, as he has served that period of cancellation. Secondly, prompt acknowledgment of his own wrongdoing and cooperation with the Board's investigation is deserving of substantial recognition in the penalty imposed as a matter of policy, in accordance with long standing common law principle, justifying one month's further reduction. Thirdly, the many mitigating features already identified require recognition, justifying one month's further reduction. Finally, the costs award of $2,000, the loss of income, and the cost of these proceedings represents a very substantial financial penalty, far greater than that usually imposed in most criminal proceedings, all of which justify one month's further reduction.

[47] The total reduction of seven months from the 12 month starting point is not excessive, given that four months amounts to time served. Absent that portion of the reduction, a 12month sentence would be reduced to 9 months for mitigating features, equivalent to 25% reduction from the starting point.

[48] Despite reaching the conclusion that this appeal must be allowed as to penalty, I wish to expressly record that this case should not be regarded as being of substantial precedent value in most cases. Absent the many mitigating factors that I have referred to, cancellation of license could well be the usual, if not invariable, outcome in cases where altered producer statements are knowingly put forward for personal gain, or where the safety, durability or integrity of a building is compromised .

[49] In cases where substantial mitigation is available, in considering the penalty to be imposed, a balancing exercise should be undertaken, both recognising the fundamental public interest underlying the legislative scheme, and explicitly identifying and taking into account both the aggravating and mitigating features applicable to the individual case, as I have sought to do here.

[50] For the reasons given, the Board's decision as to cancellation is modified by the substitution of a sentence of 5 months suspension of license, from the date of this judgment, in lieu of cancellation of Mr Lochead's licence. In all other respects, the Board's decision, including its decision on costs, is confirmed.

[51] Counsel may file memoranda on the issue of costs within 14 days of the date of this judgment, if they are unable to agree. In all the circumstances of the case, I may take some persuasion to conclude anything other than that the costs of this appeal should lie where they fall, on the basis that this decision is the first dealing with the issues raised, and is thus at least akin to a test case.

T R Ingram
District Court Judge