

Before the Building Practitioners Board

	BPB Complaint No. CB26246
Licensed Building Practitioner (LBP):	Dany Alubong Lamong (the Respondent)
Licence Number:	BP136958
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	by audio-visual link
Hearing Type:	In Person
Hearing Date:	14 March 2024
Decision Date:	18 March 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

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)(h) of the Act.

The Respondent is fined \$1,250 and ordered to pay costs of \$1,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent carried out building work on a fence and pool access structure. The fence required a Building Consent, but the Board decided that the issue was technical in nature and that the Respondent had not been negligent in relation to a failure to ensure a Building Consent was in place.
- [2] The building work that was carried out on the pool access structure was assessed by the local Council. It found that the building work did not comply with clauses B1, B2, D1 or F4 of the Building Code. The departures were serious and the Board decided that the Respondent had been negligent.
- [3] The Board also investigated whether the Respondent had carried out design work that was outside of his competence. Because of the findings as regards negligence, and because the design work failure was somewhat inadvertent, the Board decided that the conduct was not serious enough to make a disciplinary finding.
- [4] In relation to the negligence finding, the Board decided that it would censure the Respondent and fine him \$1,250. He was also ordered to pay costs of \$1,500. The fine was reduced due to mitigating factors, and the costs were reflected that the hearing was conducted by way of an audio-visual link.

The Charges

- [5] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [6] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, in that:
 - (i) he may have carried out building work that required a Building Consent without first ensuring that one had been obtained; and
 - (ii) the matters outlined in letter from the Whanganui District Council dated 17 February 2023 (pages 78 and 79 of the Board's file) in respect of the pool fence, associated deck, barrier and access to the pool, and
 - (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, in that, he may have carried out design work in relation to the deck that he was not competent to carry out.

Evidence

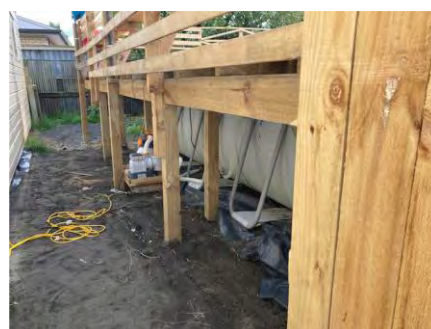
- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [8] The Respondent was hired to carry out various building work jobs at the complaint address. Included was the construction of a fence to enclose a swimming pool and an access structure around it. The pool, fence, steps and access structure are shown below:



¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1



- [9] A neighbour brought the building work to the attention of the Whanganui District Council (the Council), who issued a compliance letter and then a Notice to Fix (NTF). The compliance letter noted the following compliance issues, which formed the basis of the Board’s investigations. The complaint was made by the Council.

Further to our recent site visit and further discussion on 16 February 2023 please find below details relating to unconsented building work and work that does not meet the requirements of the Building Code at 54A Alma Road, Gonville, Whanganui.

Pool Fence and associated deck structure

Code		Comments	Requirements
B1	Stability	Deck structure appears to be constructed using rough sawn landscaping timber, this type of timber is not suitable for structural use as it is not structural graded.	Remove structure.
B2	Durability	Rough sawn 100 x 100 posts supporting deck are assumed landscaping grade with a timber treatment level of H4. H4 treatment does not provide the 50 year durability required for structural foundations.	Remove structure.
D1	Access routes	As a main private stairway; stairs are required to have a maximum step height (riser height) of 190mm, a tread depth of 280mm. In addition, open risers shall not permit the passage of a 100mm sphere. A minimum of 1 handrail is required with a minimum height of 900mm and a rail that can be readily grasped (refer to NZ Building Code clause D1, figure 26).	Remove structure.
F4	Safety from falling	The barrier provided is non-compliant.	Remove structure.

Swimming Pool

Code		Comments	Requirements
F9	Restricting access to residential pools	All pool fencing requires a Building Consent.	The height of the pool sides may be able to be used as long as the access ladder is removed from access when the pool is not in use.

- [10] The owner of the property did not support the complaint, and a person who resided at the property noted the impact of the NTF on the owner, who had suffered a financial loss as a result.

[11] The platform around the pool was deconstructed following the NTF.

Negligence or Incompetence

[12] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

[13] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any Building Consent issued.¹⁰ The test is an objective one.¹¹

[14] At issue in the matter was whether the Respondent knew or ought to have known that a Building Consent was required prior to the building work being undertaken and whether he had been negligent for proceeding with the building work without one being in place. The Board also investigated the specific aspects of the build that were raised by the Council.

Building and Resource Consent

[15] The property resident gave evidence that the access structure was only intended to be temporary to assist with the owner's access to the pool whilst rehabilitating from an injury. A scaffolding structure had been considered, but the Respondent recommended a platform around the pool to allow the owner to get in and out of

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as "an inability to do the job"

⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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".

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

the pool. The platform was 1.2 metres above the ground. It came within clause 24 of Schedule 1 of the Act. A Building Consent was not needed.

- [16] The pool itself did not require a Building Consent. Nor did the fence that surrounded the pool as the only means of access to the pool was by way of a ladder that could be secured away from the pool. The addition of an access structure around the pool changed that situation.
- [17] Section 162A of the Act, which is the first section in *Subpart 7A – Special provisions for residential pools*, states:

162A Purpose

The purpose of this subpart is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.

- [18] Section 162C of the Act states that every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age. The barrier must comply with clause F9 of the Building Code. As noted, the pool at the property had a physical means of preventing access when it did not have a platform around it. With the inclusion of the platform and steps leading to it, access could be gained, so some other form of barrier was needed. The fence that was being constructed could have served that purpose.
- [19] Ordinarily, fences do not require a Building Consent as they come with an exemption in clause 21 of Schedule 1 of the Building Act. That clause, however, does not include pool fences. This is because of the provisions noted in the Act above about restricting access to pools. Clause 21 states:

21 Fences and hoardings

- (1) *Building work in connection with a fence or hoarding in each case not exceeding 2.5 metres in height above the supporting ground.*
- (2) *Subclause (1) does not include a fence or hoarding to restrict access to a residential pool.*

- [20] It is for this reason that, once the platform was built or anticipated, the fence needed a Building Consent or approval by way of a Certificate of Acceptance.
- [21] The Board notes that the above scenario and the requirement for a Building Consent is complex. It is, therefore, a matter which a reasonable Licensed Building Practitioner might not turn their mind to. As such, the Board has decided, given the sequencing of the building work, with the fence coming before the platform structure, and the technical nature of the breach, that the Respondent's conduct had not fallen below an acceptable standard.

Building Work

[22] The same cannot be said of the building work. The Board has decided that the Respondent carried out the building work on the platform structure and access stairs negligently.

[23] The issues as set out in the Council compliance letter are clear. The Respondent's general defence was that the building work was temporary and, as such, it did not have to comply with the Building Code. He also submitted that the posts that were to be used as piles were not available at the time in the required size.

[24] There are no Building Code exemptions for temporary building work. Firstly, section 17 of the Act states:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a Building Consent is required in respect of that building work.

[25] Also, section 8 of the Act states:

8 Building: what it means and includes

(1) *In this Act, unless the context otherwise requires, building—*

(a) *means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and*

(b) *includes—*

(i) *a mechanical, electrical, or other system; and*

(ii) *any means of restricting or preventing access to a residential pool; and*

[26] As can be seen, temporary work is included in the definitions. The Respondent's building work had to comply with the Building Code. It did not. Specifically, it did not comply with clauses B1 Stability, B2 Durability, D1 Access routes, or F4 Safety from falling. The contraventions from the Building Code were those that were set out in the Council's compliance letter.

[27] The Board questioned the Respondent as to how he determined the building methodology, including the design and material choice. In particular, it questioned whether he had referenced NZS 3604, an acceptable solution for compliance with the Building Code with respect to lightweight timber structures. Somewhat disconcertingly, the Respondent was not aware of and did not reference NZS 3604 when carrying out the work. If he had, and if he had followed the provisions of NZS 3604. then the work would have complied.

[28] The Board considers that a competent Licensed Building Practitioner would have carried out the building work in a manner that was compliant with the Building Code. Because the Respondent did not, the Board decided that his conduct had fallen below acceptable standards. It did consider whether the conduct met the tests for incompetence but decided that the Respondent most likely knew what was required to make the work compliant but took shortcuts to save time or money and that he was influenced by the work being temporary. As noted, however, temporary work has to be Building Code compliant, and the Respondent's work was not.

Was the conduct serious enough?

[29] The extent of the failings were significant, and it was clear that choices had been made by the Respondent that led to the non-compliance. The non-availability of piles aside, he decided what materials were to be used and how the structure was to be built. Even with the piles, he could have used alternatives to a 125mm square ground-treated post to meet compliance requirements. As the non-compliance was directly related to the Respondent's decisions, the Board finds that the conduct was serious enough to warrant disciplinary action.

Has the Respondent been negligent or incompetent?

[30] The Respondent **has** carried out building work in a negligent manner.

Outside of Competence

[31] The allegation was that the Respondent had worked outside of his personal competence by undertaking design work. The disciplinary charge arose because the Respondent, who holds a Carpentry Licence, did not have a design provided to him for the building work that he undertook. On that basis, the question for the Board was how was the design developed, and was it a competent design?

[32] As noted, the Respondent did not use an acceptable solution such as NZS 3604. Rather, he developed the design himself. He was not competent to do so, and the non-compliance issues are evidence of this. The Board has, however, already made a finding regarding negligence, and the Board considers the conduct as regards section 314B(b) of the Act did not reach the seriousness threshold. The Respondent is, however, cautioned that he either needs to follow an acceptable solution or seek a design from a qualified person in the future.

Penalty, Costs and Publication

[33] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[34] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [35] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹² It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹³
- (a) protection of the public and consideration of the purposes of the Act;¹⁴
 - (b) deterring other Licensed Building Practitioners from similar offending;¹⁵
 - (c) setting and enforcing a high standard of conduct for the industry;¹⁶
 - (d) penalising wrongdoing;¹⁷ and
 - (e) rehabilitation (where appropriate).¹⁸
- [36] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases¹⁹ and applying the least restrictive penalty available for the particular offending.²⁰ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²¹ that is consistent with other penalties imposed by the Board for comparable offending.²²
- [37] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.²³
- [38] In this matter, the Board adopted a starting point of a fine of \$2,500, a penalty which reflects the seriousness of the findings and which is consistent with other penalties imposed by the Board for similar offences.
- [39] The Respondent outlined his personal circumstances. He is not working but is seeking employment in the industry. There are strained family finances, and he has been left with outstanding invoices that he has to pay for materials related to the job. Those are mitigating factors. On the basis of them, the Board has decided that it

¹² *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

¹³ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁴ Section 3 Building Act

¹⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²³ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

will impose a censure, which is a public expression of disapproval and a fine of \$1,250.

Costs

- [40] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.²⁴
- [41] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁵. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁶.
- [42] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was simple. Adjustments are then made. The hearing was conducted using an audio-visual link. The Board's scale costs for an investigation and hearing of a matter of this nature is \$1,500. That is the amount the Respondent is to pay toward the costs of and incidental to the Board's inquiry.

Publication

- [43] 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,²⁷ and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [44] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁸ Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.²⁹
- [45] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other

²⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁵ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁶ *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.

²⁷ Refer sections 298, 299 and 301 of the Act

²⁸ Section 14 of the Act

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

[46] 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 and pursuant to section 318(1)(f) of the Act, the Respondent is ordered to pay a fine of \$1,250.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (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(I)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

[47] 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

[48] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Signed and dated this 26th day of March 2024



M Orange
Presiding Member

ⁱ Section 3 of the Act

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.*

ii 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.”*

iii Section 318 Disciplinary Penalties

- (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:*

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- (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 1 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.*

^{iv} **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.*