

Before the Building Practitioners Board

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| | BPB Complaint No. C2-01612 |
| Licensed Building Practitioner: | Paul Reynolds (the Respondent) |
| Licence Number: | BP 109018 |
| 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

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Wellington |
| Hearing Type: | In Person |
| Hearing Date: | 6 September 2017 |
| Decision Date: | 14 September 2017 |
| Board Members Present | Mel Orange (Presiding) Brian Nightingale Catherine Taylor Faye Pearson-Green |

Procedure:

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

Board Decision:

The Respondent **has not** committed disciplinary offences under section 317(1)(b) or (d) of the Act.

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

Contents

| | |
|--|----|
| Introduction | 2 |
| Function of Disciplinary Action | 2 |
| Background to the Complaint | 3 |
| Evidence | 3 |
| Board’s Conclusion and Reasoning | 7 |
| Negligence and/or Incompetence | 8 |
| Contrary to a Building Consent | 9 |
| Record of Work..... | 10 |
| Penalty, Costs and Publication | 12 |
| Penalty | 12 |
| Costs..... | 12 |
| Publication | 13 |
| Section 318 Order | 14 |
| Submissions on Penalty, Costs and Publication | 14 |
| Right of Appeal | 14 |

Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the

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

public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a Complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

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

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

Background to the Complaint

- [5] The Complainant alleged that the Respondent, in carrying out building work in relation to a consented alteration to her home, had:
- (a) left rotten timber in a wall;
 - (b) put fasteners from new timber into rotten timber;
 - (c) installed an untreated bottom plate without fastenings but left propping in place without underpinning;
 - (d) installed lintels incorrectly, and
 - (e) not provided a record of work.

Evidence

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [7] The Board heard evidence from:

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|---------------|---|
| Paul Reynolds | Respondent |
| [Omitted] | Witness for the Respondent |
| [Omitted] | Complainant |
| Chris Ng | Porirua City Council, summonsed witness, by |

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

phone

- [8] The Complainant set out in her complaint that the Respondent was engaged on a labour only basis to carry out a consented alteration to her home. Preparatory work had been completed by other contractors. The Respondent's work started in September 2016 and came to an end in the same month after the building work failed a council inspection and the council closed the job down. The Complainant arranged for a building surveyor to review the work and he identified the items listed in paragraph [5]. Thereafter some of the work completed by the Respondent had to be removed and redone with new materials.
- [9] Included with the complaint were copies of council inspection notes and an email from Haydon Miller, NZIBS Registered Building Surveyor, which set out his involvement with the project. He noted:
- (a) he was engaged on the instruction of the Porirua City Council by the Complainant to act as a timber remediation specialist;
 - (b) on 14 September 2016 he attended the site with the Respondent and the Complainant to inspect external wall framing that was exposed after the removal of wall cladding;
 - (c) he marked up areas of decay that required replacement in the presence of the Respondent and discussed the need to paint remaining framing with Protim Framesaver; and
 - (d) that the areas marked up were only an indicator of damage and was only a guide. He advised the Respondent that he would have to use his judgement on other areas that might have required replacement.
- [10] The Building Surveyor also noted that he would have urged the replacement of the entire south western elevation as the decay observed was extensive, advanced and generally wide spread.
- [11] The Respondent provided a written response to the Complaint. He set out the background to his engagement by way of a verbal agreement in July 2016 on a labour only basis and that:
- (a) the agreement was that he would attend site as required to save costs;
 - (b) the Complainant had engaged a labourer and that she was, with the assistance of the labourer, removing walls and framing sections;
 - (c) there were delays on site, he had other work commitments and he suggested that the Complainant engage full time contractors. This did not occur;
 - (d) issues were then caused by a weather event. He stated he provided workers to assist in dealing with those issues;
 - (e) work began on 13 September to prepare for a pre-wrap and pre-clad inspection. Rotten sections were discovered. He issued instructions to his employees to remove those areas. He was on site at the time but working in a different area of the house. More areas of rot were discovered and these

- were pointed out to the Complainant. It was agreed they would continue to work up until the council inspection;
- (f) when the Council attended, areas that had been covered with plastic were exposed and more rot was found. The Council then required the engagement of a building surveyor;
 - (g) the surveyor was met on site and areas of concern were noted over the entire house;
 - (h) he met with the Complainant on site on 16 September and an estimate for the revised work was provided and discussions took place about the payment of existing invoices;
 - (i) a dispute then arose and the contract came to an end on 24 September;
 - (j) he discussed handover procedures with the council inspector, Chris Ng, who told him to document what had been done and to take photographs of his work. At this stage new contractors were on site; and
 - (k) he contacted MBIE who advised that he had to provide a record of work but that the Complainant had to allow access for him to do so. Access was not provided.

[12] The Respondent summarised:

To sum up, the nature of my Agreement with (the Complainant) was to provide labour-only for her job. SHE was the project manager and therefore organising contractors, inspections and providing all materials.

The short comings of her organisation falls in her hands and I'm not responsible for the condition of the existing framing or any delays or costs incurred because of that. Whether it was myself or another builder work on this job, the Council would have come to the same conclusion regarding the condition of her existing house framing and recommended the same course of action.

[13] The Respondent also provided responses to the specific allegations questioning the evidence supplied and noting that it was work in progress and:

- (a) denying responsibility for rotten timber left in a wall;
- (b) he was unsure as to the location of fasteners into rotten timber and stating it may have been done by his workers and he had not had the opportunity to inspect it
- (c) the allegedly untreated timber was H1.2 and complied;
- (d) lintels were installed as per the engineer's specifications;
- (e) the reasons for not providing a record of work were that the work was not complete, he was denied access and he was advised by the complainant that his work had been subsequently removed; and
- (f) he would provide a record of work for work carried out in the early stages of the project.

- [14] The Registrar, as part of the preparation of the Registrar's Report, engaged a Technical Assessor to provide an independent technical assessment of the work to the Board. The Technical Assessor noted with regard to installed new framing timber immediately adjacent to decayed framing that this was outside of the scope of the existing building consent and that it was inconsistent with recommended practices found in Guidance Documentation.
- [15] Prior to the hearing the Complainant provided digital photographs of the work complained about and the Respondent provided a statement as to the outcome of a Disputes Tribunal hearing and a settlement arrangement that was entered into.
- [16] At the hearing the Board heard evidence as regards to what building work the consent covered and what building work was carried out up until the contractual relationship came to an end. The job was an evolving one. The original consent did not, as far as the evidence before the Board disclosed, include the reframing and recladding of the south west wall which was at the centre of the complaint. The consent did include structural work on the inside which was carried out by the Respondent.
- [17] As work progressed it became apparent that the south west wall was significantly compromised by rotten timber. A decision was eventually made to reframe and re-clad it. An amendment to the original consent was granted for this work. The amendment came about after the Respondent's involvement had ceased.
- [18] The need for the amendment came about as a result of an inspection of the work by the witness Chris Ng on behalf of the Building Consent Authority, the Porirua City Council. The inspection was arranged by the Complainant at the request of the Respondent. What transpired from there was a difference of opinion and/or understanding as to what the inspection was for and why it was called.
- [19] The Complainant stated she arranged for a pre-clad inspection as she understood the building was ready to be closed in and clad. She stated the building was wrapped and that cavity battens were installed. The Respondent stated the wrapping was temporary to protect the building, given the weather event. The Complainant referred to an invoice from the Respondent which included wrapping and battens in support of her contention.
- [20] The Council Inspector stated he had expected to carry out a pre-clad inspection but when he was on site it soon became apparent that the building was not ready for a pre-clad inspection and as such the inspection was changed to a site inspection. He confirmed that a pre-wrap inspection had not taken place and it would be normal for such an inspection to occur prior to a pre-clad inspection. He noted that the inspection of 13 September was the first inspection of the job. A stop work was not issued.
- [21] The Respondent noted that the work had only just commenced and that it was not ready for a pre-clad inspection. He was wanting to have the Building Consent Authority engaged so that the extent of the remedial work required as a result of

rotten timber could be determined and this is why he asked the Complainant to arrange for an inspection. He wanted to get them involved as it was a case of the more they opened up and revealed of the existing framing the more they discovered that required remediation.

- [22] The Respondent gave evidence that when he started working on the job he noted the presence of asbestos, that other contractors were engaged to remove it, that they covered the site with plastic and that as the plastic was removed damaged timber was revealed. He noted that at the time of the inspection the areas that had been exposed were those that were being worked on by his employees which was predominately around framing for new windows and that his intention was to get the windows in as quickly as possible so as to make the house weathertight.
- [23] The Respondent was questioned as to the sequence of the work and why new framing for windows was installed when other timber around it was rotten and why straps were installed into rotten timber. He reiterated the need to get the house weathertight and noted that the work on the windows was done in a temporary manner. He stated other work was only temporary pending an inspection to determine the extent to which timber would have to be replaced or remediated. He stated that he did not work on those areas himself but was on site carrying out other work.
- [24] Following the council inspection Haydon Miller a Registered Building Surveyor was engaged and he developed a remediation plan. The Respondent's involvement came to an end before this work could be undertaken. As noted above a decision was eventually made to replace all of the framing.
- [25] With regard to the record of work the Respondent reiterated that the restricted building work on the exterior of the building had been re done and that the issue of a code compliance certificate had not been delayed as a result of his not providing a record of work for other restricted building work he carried out.
- [26] The Respondent also advised of his experience in weathertight remediation work and the Council Inspector confirmed his compliant work on other sites.

Board's Conclusion and Reasoning

- [27] The Board has decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
 - (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)
- [28] The Board has decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the

restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act) and should be disciplined.

[29] The reasons for the Board's decision follows.

Negligence and/or Incompetence

[30] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁶. Judge McElrea provided guidance on the interpretation of those terms:

[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.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[31] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ as regards the threshold for disciplinary matters:

[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.

[32] The Board notes most judicial comments as regards seriousness relate to the medical disciplinary jurisdiction and a charge of professional misconduct where the threshold is considered to be higher than that for negligence or incompetence. Some lean toward it being a matter for consideration in penalty whilst others see it as a factor in determining liability. The more recent judicial statements, however, tend toward the latter. For example in *Pillai v Messiter (No 2)*⁸ 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 includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ [2001] NZAR 74

⁸ (1989) 16 NSWLR 197 (CA) at 200

- [33] These comments are important as the case before the Board is one where the Board considers that whilst there have been failings on behalf of the Respondent they are such that they do not reach the required threshold for a disciplinary outcome.
- [34] The actual question of whether the Respondent has been negligent and/or incompetent though is one that turns on what the purpose of the inspection called for on 13 September 2016 was. If the work was complete and ready for inspection then the Respondent would have been negligent to put forward such work. In this respect the Board notes the differences in perceptions between the Complainant and the Respondent. The Complainant understood she was calling for a pre-clad inspection. The Respondent was seeking the engagement of the Building Consent Authority given the state of the existing framing.
- [35] The Board finds that whilst the Complainant was genuine in her understanding of what she was calling for it is unlikely that the Respondent's intention was that he was seeking a pre-clad inspection when he asked her to arrange an inspection. He had only been working on the site for a very short period of time, not all of the areas that needed to be inspected and or worked on had been exposed, some of the work done was temporary in nature and a pre-wrap inspection had not yet been called for. Given the state of the framing and the work that had been completed up until that point in time the Board finds, on the balance of probabilities, that it was more likely than not that the work was not complete and that further remediation work would have been carried out had the relationship continued. Given this the Respondent is found to have not been negligent nor incompetent.

Contrary to a Building Consent

- [36] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [37] Given the Board's findings in relation to negligence and/or incompetence above and in particular that the work was not complete and was not at an inspection stage the Board finds that the Respondent has not carried out building work contrary to a building consent.

Record of Work

- [38] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁹.
- [39] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [40] The Board discussed issues with regard to records of work in its decision C2-01170¹⁰ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [41] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [42] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [43] The Respondent has submitted the reasons for not providing a record of work were that the work was not complete, he was denied access and he was advised that his work had subsequently been removed but that he would provide a record of work for work carried out in the early stages of the project.
- [44] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed practitioner may have to provide a record of work before all of the intended restricted building work has been completed. In this respect the Board has, in past cases, held that where it becomes apparent that a licensed building practitioner will not be continuing then their work will be considered to have been completed and they will be required to provide a record of work soon thereafter. In the present case this occurred soon after September 2016 when the contractual relationship came to an end.
- [45] Dealing with the submission that a record of work was not provided as a result of access not being provided the Board notes that a record of work is not a compliance document. It makes no statements as to the standard or compliance of the building

⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁰ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

work. It simply states who did or supervised what and it does not, of itself, create any liability that would not otherwise exist as section 88(4) provides:

- (4) *A record of work given under subsection (1) does not, of itself,—
create any liability in relation to any matter to which the record of work relates; or
give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

- [46] Notwithstanding this if building defects do emerge then the record of work becomes useful historical knowledge for owners (both present and future), or other parties involved in defective building cases, who wish to pursue litigation. In this respect though it is not just about who to bring an action against but also who will be able to give evidence as to the restricted building work carried out.
- [47] It must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [48] Turning to the submission that the record of work was not required for work that was redone the Board accepts that this can be a reason for a record of work not to be provided. It must, however, be foreseeable that the restricted building work would be undone or replaced in its entirety when the record of work was otherwise due. In this instance this was not the case. It was only because of subsequent events that the record of work requirement became redundant.
- [49] Finally the Board notes that a record of work for restricted building work that was completed and remains has not been provided and this by itself is sufficient to find that the disciplinary offence has been committed.
- [50] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [51] In this instance there was an ongoing dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Penalty, Costs and Publication

- [52] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [53] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [54] 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*¹¹ 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.

- [55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹² the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [56] The only disciplinary matter upheld is the failure to provide a record of work. Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. The Board has decided that it will take into account as mitigation the context of the dispute. On this basis the Board will reduce the penalty to that of a censure.

Costs

- [57] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [58] 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

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹² 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹³.

- [59] In *Collie v Nursing Council of New Zealand*¹⁴ 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.

- [60] The Board notes the matter was dealt with at a hearing. Notwithstanding this the only disciplinary charge that has been upheld is that in relation to a record of work. On this basis the Board has decided to order costs as if that was the only matter under consideration and it has reduced the amount it would normally order to \$500 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [61] 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 Act¹⁵. The Board is also able, under s 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.

- [62] 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.
- [63] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. 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*¹⁹.

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

[64] 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 interest²⁰. 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.

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

Section 318 Order

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

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

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$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 s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[67] 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

[68] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **6 October 2017**. 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.

Right of Appeal

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

Signed and dated this 14TH day of September 2017



Mel Orange
Presiding Member

²⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*