

Before the Building Practitioners Board

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| | BPB Complaint No. C2-01935 |
| Licensed Building Practitioner: | Lidong Xie (the Respondent) |
| Licence Number: | BP 119352 |
| Licence(s) Held: | Foundations AOP Concrete or Timber Pile Foundation; Walls and Concrete Slab-on-Ground |

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 | Board Inquiry |
| Hearing Location | Wellington |
| Hearing Type: | On the Papers |
| Hearing Date: | 27 November 2018 |
| Decision Date: | 18 December 2018 |

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

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** committed disciplinary offences under sections 317(1)(a) and 317(1)(i) of the Act.

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Introduction

[1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations¹ to hold a hearing. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work; and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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 public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

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

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.

Procedure

- [5] The Respondent has not engaged in the inquiry process and has not responded to the inquiry allegations which were served on him.
- [6] A Notice of Hearing was sent to the Respondent at his residential address, as notified by him on the Register, on 12 October 2018. The notice set the matter down for a hearing on the papers. Again no response was received.
- [7] The Regulations require that notice of a hearing be given⁵. Under section 394 of the Act notice can be given by post to the address maintained by the practitioner on the Register. Given those provisions the Board finds that the required notices under the Regulations have been provided to the Respondent and that the matter can proceed.

Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [9] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses.

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 Refer regulation 12 of the Regulations

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [10] In this case the Board decided that no further evidence was required. Had the Respondent provided further evidence or submission the Board would have considered them.
- [11] The inquiry itself relates to the Respondent, an undischarged bankrupt, being convicted and sentenced for:
- (a) failing to file a statement of affairs from December 2013 to November 2015;
 - (b) acting as a director of a company while prohibited to do so;
 - (c) attempting to obtain credit;
 - (d) three charges of concealing property from the official assignee;
 - (e) three charges of obtaining credit;
 - (f) contributing to insolvency by gambling; and
 - (g) attempting to leave New Zealand without the consent of the official assignee.
- [12] The Respondent was adjudicated bankrupt on 22 July 2010 by the High Court. The petitioning creditor was [Omitted]. He has not been discharged from that bankruptcy. It was his second bankruptcy, the first being on 8 September 2004.
- [13] The matters came before the Court as a result of the Respondent's conduct whilst a bankrupt. In essence, whilst a bankrupt, the Respondent received approximately \$1.5 million in earnings through his business dealings and, rather than pay his creditors, he gambled that money. He then tried to board a flight to China before being arrested by police at Auckland Airport.
- [14] At sentencing it was argued that there were aggravating in that the Respondent deliberately ignored his obligations as a bankrupt and that he continued to run a business in a very hands-on way in that he was front and centre of his building operation. It was noted that by gambling in the way he did he incurred significant credit and caused victims substantial losses and that he concealed money and assets from the official assignee.
- [15] The Respondent had claimed he was unaware of his responsibilities as a bankrupt and did not know what he was doing. The sentencing Judge stated he had no doubt that he knew exactly what he was doing and that "any claim on your part that you did not know what you were doing does not wash with me at all".
- [16] The Judge noted there were no mitigating factors other than the plea of guilty. The Judge was not satisfied that the Respondent demonstrated any effective and objective remorse.
- [17] The Respondent was sentenced to a total of three years four months imprisonment.

Issue Estoppel

- [18] The Board has been provided with the District Court sentencing notes. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court⁷.
- [19] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are that:
- (a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties⁸.
 - (b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action⁹.
 - (c) Issue estoppel can only be founded on findings which are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel, however definite the language in which they are expressed¹⁰.
 - (d) The purpose of any estoppel is to work justice between the parties. It is therefore open to the courts to recognise that in special circumstances inflexible application of an estoppel may have the opposite result¹¹. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: “A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice”¹².
- [20] The Board considers, in this case, that estoppel applies as regards the District Court sentencing. As such the Board need not make further inquiry with regard to the facts.

⁷ Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

⁸ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352

⁹ *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41

¹⁰ *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce

¹¹ *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry

¹² *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

Board's Conclusion and Reasoning

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

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work; and
- (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and should be disciplined.

[22] The reasons for the Board's decisions follows.

317(1)(a)

[23] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent "*a licensed building practitioner has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more*".

[24] The Respondent has been sentenced to an imprisonment term of three years and four months. The first element of the disciplinary provision is therefore satisfied.

[25] The second element of the disciplinary charge is "*Does the commission of that offence(s) reflect adversely on the person's fitness to carry out or supervise building work or building inspection work*".

[26] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person.

[27] Unlike other licensing regimes the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply¹³. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of s 317(1)(a) and it does not matter that the criminal offending predated the person being licensed.

[28] Other licensing regimes have similar post licensing provisions as regards fitness to be a licensee. For example the misconduct provisions in s 73(d) of the Real Estate Agents Act under which a ground of misconduct is where conduct "*constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee*" and s 100(1)(c) of the Health

¹³ Compare with the licensing provisions in s 91(d) of the Electricity Act 1992 and s 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

Practitioners Competence Assurance Act 2003 where *“the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise”*.

- [29] In *Professional Conduct Committee v Dr Y*¹⁴ the practitioner had a conviction for excess breath alcohol. The Tribunal determined that not all convictions for offences will reflect adversely on a practitioner's fitness to practise. It stated further, that "fitness to practise" will bear some relationship with competence. However, that fitness to practise is not simply a reference to competence. In *Professional Conduct Committee v Martin*¹⁵ the court stated:

“Fitness’ often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession

- [30] Within the legal profession s 241(d) of the Lawyers and Conveyancers Act 2006 provides for a charge of *“has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute”*. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*¹⁶ the High Court stated:

[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.

[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.

[188] For the same reason, the practitioner’s previous disciplinary history may also assume considerable importance. In some cases, the fact that a

¹⁴ registered practitioner of X TAU (June 2015)

¹⁵ High Court WN 2007

¹⁶ [2013] 3 NZLR 103

practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.

[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[31] Applying the tests and factors outlined above the Board notes:

(a) Nature of the charges:

There was a connection between the Respondent's conduct and the running of the Respondent's business within the construction sector. The Respondent has traded whilst bankrupted and has then gambled business earnings rather than pay creditors. There is a direct link between the conduct and the Respondent's fitness to be licensed.

The Respondent has also shown a disregard for his obligations as a bankrupt. The construction sector is one that relies heavily on self-regulation to ensure compliance with regulatory requirements. The Respondent's attitude toward compliance poses a serious risk.

(b) Gravity of the charges:

The Respondent has been convicted of 9 charges most of which were serious. The charges spanned a period of time and showed a systematic pattern of behaviour. It is clear to the Board, given the number of convictions, the substantial sums of money gambled and the penalty imposed the convictions are serious in nature.

(c) Acceptance of responsibility:

The comments from the sentencing Judge show that the Respondent did not accept responsibility.

(d) Previous history:

The Respondent has previous but unrelated history with the Board. He does have a previous bankruptcy which is relevant.

(e) The effect on public confidence:

The Board considers a person who continued to trade whilst bankrupt and who gambled with creditor's funds as the Respondent did would have an effect on public confidence in the licensing regime.

[32] Given the above factors the Board finds that the second element of 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work.

Disrepute

- [33] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹⁷ and discussed the legal principles that apply.
- [34] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*¹⁸ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [35] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁹, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [36] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"²⁰ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²¹ the Court of Appeal held that:
- the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²²
- [37] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will,

¹⁷ Board decision dated 2 July 2015.

¹⁸ [2013] NZAR 1519

¹⁹ 24 September 2014

²⁰ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

²¹ [2012] NZCA 401

²² [2012] NZAR 1071 page 1072

however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions²³;
- honest mistakes without deliberate wrongdoing²⁴;
- provision of false undertakings²⁵; and
- conduct resulting in an unethical financial gain²⁶.

[38] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[39] There is an element of duplication between the disciplinary provisions of section 317(1)(a) and 317(1)(i) the Board does consider that it is appropriate that it consider both charges and that there is no risk of double jeopardy. Each charge can stand on its own. The Board will take any duplication into account when considering penalty.

[40] The conduct in this instance has been discussed in relation to section 317(1)(a) and need not be traversed again. It is suffice to say the conduct includes criminal convictions and unethical financial conduct.

[41] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[42] The Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent's conduct is serious and that it does reflect adversely on the industry. The Respondent has brought the regime into disrepute.

Penalty, Costs and Publication

[43] 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.

[44] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders

²³ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

²⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁵ *Slack, Re* [2012] NZLCDT 40

²⁶ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [45] 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*²⁷ 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.

- [46] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²⁸. The High Court when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [47] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [48] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁹ 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.

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

²⁸ [2012] NZAR 481

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

- [49] The Respondent has been found to have committed serious disciplinary offences which reflect on his suitability to be a licensed building practitioner.
- [50] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work.
- [51] The Respondent's offending has been aggravated by his attitude toward compliance and his handling of financial matters.
- [52] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [53] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of five (5) years.
- [54] The Board has imposed a long period of cancellation so as to reflect the seriousness of the conduct and to deter others from similar conduct.

Costs

- [55] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [56] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case³⁰.
- [57] In *Collie v Nursing Council of New Zealand*³¹ 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.*
- [58] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry. The Board has taken into account the fact that the matter was dealt with on the papers.

Publication

- [59] 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 Act³². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

³⁰ *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.

³¹ [2001] NZAR 74

³² Refer sections 298, 299 and 301 of the Act

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.

- [60] 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.
- [61] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁵. 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*³⁶.
- [62] 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 interest³⁷. 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.
- [63] Based on the above the Board will order further publication. It is important that the public and the industry be aware of the Respondent's conduct and that other licensed building practitioners be aware of it.

Section 318 Order

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

- Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of five (5) years.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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(1)(iii) of the Act.

³³ Section 14 of the Act

³⁴ Refer sections 200 and 202 of the Criminal Procedure Act

³⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁶ *ibid*

³⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

- [65] 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

- [66] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 January 2019**. 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.
- [67] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

- [68] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱ.

Signed and dated this 18th day of December 2018



Chris Preston
Presiding Member

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.