

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01219

IN THE MATTER OF

Under the Building Act 2004 (the Act)
A complaint to the Building Practitioners'
Board under section 315

AGAINST

[The Respondent], Licensed Building
Practitioner No. BP [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) dated 4 July 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 18 January 2011.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|-------------------|------------------|
| Chris Preston | Chair(Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
- [6] The matter was considered by the Board in [omitted] on 23 March 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

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[7] The following other persons were also present during the course of the hearing:

Greg La Hood	Counsel for the Registrar
Sarah Romanos	Board Secretary
[Omitted]	Respondent
[Omitted]	Support Person
Warren Nevill	Special Adviser to the Board
[Omitted]	Witness
[Omitted]	Witness (by telephone)
[Omitted]	Witness (by telephone)
[Omitted]	Witness (by telephone)

Members of the public were not present.

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

[9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.

[10] On 14 December 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

[11] On 28 January 2016 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint 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).

[12] The Board requested a Special Adviser be appointed to prepare a report. Warren Nevill’s report dated 25 February 2016 was received and circulated to the Respondent and Complainant.

[13] On 9 March 2016 at 10 a.m. a pre-hearing teleconference was convened by Chris Preston. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

The Hearing

[14] The hearing commenced at 9.30 a.m.

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- [15] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [16] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [17] The complaint related to several aspects of the building work carried out or supervised by the Respondent which the Complainant alleged were done in a negligent manner and or contrary to the building consent issued and that a record of work was not provided by the Respondent on completion of restricted building work.

Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [19] The complaint related to a new build where the Respondent was engaged on a labour only basis. The foundation had been completed by another contractor. [Omitted], a non-licensed person, was also involved in the build up until when the cladding was starting to be installed. He was paid by the Complainant but both he and the Respondent accepted at the hearing that he was being supervised by the Respondent.
- [20] The Complainant outlined in her complaint that the Respondent:
- (a) installed a wooden claw beam instead of the consented portal beam without following the correct process resulting in issues with structural bracing in the

¹ [2009] 1 NZLR 1

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- vicinity of the beam and the requirement for internal plasterboard linings and garage door tracks to be removed to remediate bracing;
- (b) poured concrete around the two pillars holding up the patio with an allegation that one big block of concrete did not have a purpose;
 - (c) fitted cladding before soffits creating a gap that had to be covered with an additional flashing;
 - (d) cut cedar weatherboards too short around window openings requiring clip on extension flashings to the windows to cover gaps;
 - (e) nailed a block of pine wood and painted it white to waterproof the end of a cedar weatherboard;
 - (f) cut Coloursteel with a grinding disk creating a risk of rust;
 - (g) ordered flashings that did not fit the windows and failed to fit head flashings;
 - (h) nailed wooden blocks onto Coloursteel cladding and screwed fascia boards on to the blocks making it difficult to remove some of the Coloursteel when it was remediated;
 - (i) made errors measuring and cutting flashings requiring them to be reordered; and
 - (j) failed to provide a record of work.
- [21] The Complainant alleged the Respondent's errors required a professional Coloursteel crew to refit all the Coloursteel around the windows and to fit head flashings.
- [22] The Respondent provided a written response to the complaint in which he:
- (a) accepted that a bracing element was missed above and beside the garage door and stated he acknowledged the error to the Complainant and provided a solution at his expense which could not be implemented as he was dismissed soon thereafter;
 - (b) advised the change to the claw beam was approved by the Complainant, that he contacted the designer and building inspector before making the change, and that the building inspector required an amendment to the consented plan;
 - (c) noted the concrete blocked complained about was a support for the bearer of the patio decking (foundation post for patio);
 - (d) stated a special cutting disc which could be used on Coloursteel was used and then only on the sloping sections of wall;
 - (e) noted the scribe at a beam to weatherboard junction was required to be weatherproofed in the way that it was;
 - (f) stated the flashings that did not fit were not ordered by him;
 - (g) stated the wooden blocks over the cladding were fitted appropriately;
 - (h) advised an alternative method of flashing junctions was approved by Buller District Council; and
 - (i) advised he would supply the amendment along with the Record of Work when the job is complete and ready for final inspection.
- [23] The Respondent submitted that he had taken responsibility for mistakes and that they were all rectified except for the garage door bracing panels which would have been rectified if had been given the opportunity to do so.
- [24] The Special Adviser commented that:
- (a) the weatherboards were not installed in accordance with E2AS1 in that they were cut approximately 20 mm short of the window joinery;

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- (b) the method of cutting of the Coloursteel was not as per acceptable trade practice, was contradictory the manufacturer's recommendations as required in the consented plans and was therefore in breach of the building consent;
 - (c) bracing demands had been missed but note the Respondent was prepared to rectify this error.
- [25] The Special Adviser considered at para 4.3.1.9 of his report that note with regard to building consent variations:
- “the replacement of a steel portal with a fabricated timber lintel with associated replacement of a gable roof truss with a structural truss, inclusion of a diagram ceiling to the garage and upgrading of bracing demands at the garage door thresholds appears to exceed the interpretation of minor ...”*
- [26] The changes to the beam were noted in the council file on 22 April 2015 and as of 3 July 2015 the file still noted that amendments were still outstanding.
- [27] An engineered solution was required for bracing changes created by the change in beams.
- [28] At the hearing the Special Adviser gave evidence and answered questions in relation to the weatherboards at the windows noting they were cut 20 mm short and in relation to the cutting of the Coloursteel noting that damage can be cause to the coatings by the use of a cutting disc due to heat buildup and sparks. He advised that 10-20 mm of the edge of the Coloursteel would have to be removed with a cold mechanical cut to ensure rusting did not occur. He was not aware of any cutting discs that could be used, even at a slow speed.
- [29] The Special Adviser also gave evidence as to the normal process for variations to building consents and included guidance documentation for minor variations with his report.
- [30] Evidence was heard from the other persons called and the Respondent questioned them. Included was the designer who confirmed that he had been consulted prior to variations to the consents being undertaken.
- [31] The Respondent gave evidence and was questioned as to his methods of installing the windows, the cutting of the cladding and the variation process affirming that all variations were discussed and approved before being undertaken. He accepted his mistake as regards the cutting of weatherboards but considered he should have been given the opportunity to rectify. He gave evidence and questioned witnesses in relation to the ability to cut Coloursteel with a cutting disc.

Board's Conclusion and Reasoning

Contrary to a Consent

- [32] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and 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 must be submitted as a variation to the consent before any further work can be undertaken.
- [33] An exception is made for minor variations as defined in s 45A of the Act. Work can continue if the variation is considered to be minor in nature and guidance is provided

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as to the process to be used when dealing with what might be a minor variation. The required documentation is then submitted at a later stage and often as a mop up at the end of the job.

- [34] Key to this minor variation process is obtaining agreement with the owner and then consulting with the designer and the building consent authority. The rationale for these latter steps is to ensure that the variation is actually minor before work is undertaken and that the variation will still meet Building Code and will not adversely affect other parts of the building work.
- [35] Put quite simply the minor variation has to be agreed to by all the key parties prior to it being undertaken, not once it has already been done.
- [36] The Board accepts that notwithstanding the Special Adviser's opinion that the variation to the portal beam was probably not a minor variation the Building Consent Authority accepted it be treated as a minor variation and their decision is determinative under the relevant legislation.
- [37] The Board also accepts the Respondent's evidence that he advised the designer and the building inspector prior to undertaking the changes.
- [38] Given these factors the Board finds that the matters complained of in relation to building contrary to a building consent are not upheld. The items were minor variations and agreement to the changes had been obtained prior to them being undertaken.

Negligence or Incompetence

- [39] 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*². 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.

- [40] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*³ 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

² Judge McElrea, DC Whangarei, CIV-2011-088-313

³ [2001] NZAR 74

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which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [41] The Board considers the building work carried out or supervised by the Respondent in relation to the installation of the weatherboards around windows and the cutting of the Coloursteel with a cutting disc to have been negligent. The weatherboards failed to meet E2/AS1 and the Coloursteel cutting was contrary to standard industry practice. Both aspects displayed a serious lack of care as judged by the standards reasonably expected of licensed building practitioners.
- [42] Whilst in both instances the errors could be rectified they were errors that should not have occurred in the first place and which had serious consequences. Extra flashings had to be designed and installed around the windows and Coloursteel had to be recut and reinstalled by a specialist install team.
- [43] The Board also notes that whilst the Respondent consulted with the designer and the building consent authority prior to undertaking changes to the consented plans he proceeded with the work, in particular in relation to the change to the steel portal beam, without the benefit of the design and or engineering input. In doing so he created a risk of the work he completed not meeting New Zealand Building Code requirements. As matters transpired bracing elements were missed and invasive work had to be carried out to obtain information for engineering input and to complete the necessary work to make the change compliant. In this respect the Respondent has displayed a lack of reasonably expected care but in this instance the Board does not consider it meets the seriousness threshold.

Record of Work

- [44] There is a statutory requirement under s 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the building consent authority on completion of restricted building work they undertook or supervised.
- [45] Failing to provide a record of work is a ground for discipline under s 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.
- [46] The Board discussed issues with regard to records of work in its decision C2-01170 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.
- [47] 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).
- [48] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work. The use of the word “each” makes it clear that every licensed building practitioner who carries out or supervises restricted building work has to complete a record of work for the work they did.
- [49] The Respondent has submitted that he would provide a record of work when the work was complete and ready for inspection. The Board has previously considered when completion occurs. 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

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fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner's involvement in the work comes to a premature end. One such situation is where it is clear the licensed building practitioner will not be able to carry out any further restricted building work on a site as has occurred here. The Respondent's involvement in the build ended part way through it and that basis his involvement had come to an end and a record of work was due. As one was not provided the disciplinary offence is made out.

Board Decision

[50] The Board has decided that Respondent has:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) 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.

[51] The Board has decided that Respondent **has not** 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).

Disciplinary Penalties

[52] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.

[53] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

[54] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration.

[55] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there a further matters which the Board should take into consideration.

[56] The Board is aware that the common understanding of the purposes 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*⁴

[57] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁵:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[58] The High Court in *Patel v Complaints Assessment Committee*⁶ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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.

[59] In all the circumstances of the case and taking into account the mitigation already heard the Board considers a fine of \$1,000 to be the appropriate penalty.

Costs

[60] 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."

[61] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*⁷ included the following:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

⁷ HC, Wellington, AP23/94, 14 September 1995

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[62] The judgment in *Macdonald v Professional Conduct Committee*⁸ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*⁹ where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

[63] In *Collie v Nursing Council of New Zealand*¹⁰ 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.

[64] The Board considers the sum of \$1,000 to be a fair and reasonable contribution toward the costs of and incidental to the Board's inquiry.

Publication of Name

[65] 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 Licenced Building Practitioners' scheme as is required by the Act.

[66] 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.

[67] As a general principal 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.

[68] The Board does not consider any further publication is required.

Penalty, Costs and Publication Decision

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

Penalty: Pursuant to s 318(1)(f) of the Act, the Respondent is ordered to pay a fine of \$1,000.

Costs: Pursuant to s 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 s 301(1)(iii) of the Act.

⁸ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁹ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁰ [2001] NZAR 74

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.

Submissions on Penalty Costs and Publication

- [70] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 20 May 2016.
- [71] If no submissions are received then this decision will become final.
- [72] 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

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

Signed and dated this 29th day of April 2016



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.*

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- (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.*