

BPB Complaint No. C2-01374

IN THE MATTER OF

Under the Building Act 2004 (the Act)

An inquiry by the Building Practitioners' Board
under section 315 of the Act

AGAINST

John Harris, Licensed Building Practitioner
No. BP 106000

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The matter before the Building Practitioners' Board (the Board) is a Board-initiated inquiry into the conduct of John Harris, Licensed Building Practitioner (the Respondent).
- [2] The inquiry relates to building work at [omitted] Christchurch carried out by the Respondent and whether or not he has carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 4 May 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:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Catherine Taylor | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in Christchurch on 17 August 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|------------------|----------------------------------|
| Thomas Clark | Counsel for the Registrar |
| Sarah Romanos | Board Secretary |
| John Harris | Respondent |
| Michael Copeland | Legal Counsel for the Respondent |

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[Omitted] Witness

[Omitted] Witness

[Omitted] Witness

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 matter was a Board-initiated inquiry resulting from a resolution dated 26 February 2016 following the hearing of complaint C2-01267¹.
- [10] On 27 April 2016 the Registrar of the Board prepared a report in accordance with reg 19 and 20 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. The Registrar's view was that reg 20(c) applied and that further investigation was not warranted.
- [11] On 12 May 2016 the Board considered the Registrar's report and in accordance with reg 22 it resolved to proceed with the complaint that the Respondent carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [12] On 23 June 2016 an application was made by Legal Counsel for the Respondent for the matter not to proceed on the basis that:
- (a) the matter did not warrant further inquiry;
 - (b) the matter was dealt with by the Registrar's Report which did not recommend that the matter proceed; and
 - (c) that for the Board to proceed would be an abuse of process.
- [13] On 5 July 2016 the Board considered the application and decided to continue the inquiry. The reasons for its decision were provided in its written decision on the application dated 7 July 2016.
- [14] On 1 August 2016 a pre-hearing teleconference was convened by Board Member Mel Orange. The Respondent and his Legal Counsel were present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [15] The common understanding of the purposes 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 the Supreme Court of the United Kingdom².

¹ Board decision dated 25 May 2016.

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

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[16] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*³:

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.

[17] It must also be noted that the Board has jurisdiction only with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

[18] The hearing commenced at 10 a.m.

[19] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.

[20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Inquiry

[21] The Board inquiry followed the Board hearing Complaint C2-01267. That complaint related to earthquake repairs undertaken by Summitbuild Construction Limited. The allegation in C2-01267 was that there had been negligence and or incompetence in the management of the repairs at 24 Weston Road. As a result of the evidence heard the Board resolved to inquire into the conduct of the Respondent as regards his supervision of the building work undertaken to effect the repairs.

[22] In C2-01267 the Board received and heard evidence that aspects of the sub-floor work was sub-standard and/or did not meet the requirements of the New Zealand Building Code. It also heard evidence that the person who carried out that work was under the supervision of the Respondent. It was on this basis that the inquiry was initiated.

Evidence

[23] 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*⁴ 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

³ [1992] 1 NZLR 720 at p 724

⁴ [2009] 1 NZLR 1

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.

- [24] The evidence before the Board included a transcript of the evidence received, under oath or affirmation, at the hearing into complaint C2-01267. The Respondent gave evidence at that hearing. His evidence included that he was the foreman carpenter and that he had staff under him including [omitted] who was an apprentice. The Respondent went on to state:

Respondent I took no part of the sub-floor underneath the floor. I physically did not get under. Too tight a space for myself, so no part in underfloor, no.

Question So who would have undertaken the work underneath the floor?

Respondent Tom the apprentice boy.

Question Yep. So if Tom was doing the work as an apprentice ...

Respondent Yes.

Question ... and basically working to the design given by [omitted] of Powell Fenwick ...

Respondent Yes.

Question ... and as an apprentice he fully understood the work that had to be undertaken and how it would be undertaken?

Respondent There was several penetrations in the floor which we could – he got down; we could instruct what had to be done, and I think he was – yes.

Question So who instructed him as to what was required for that work?

Respondent we had drawings from Powell Fenwick, and just got the verbal instructions and then on, showed the pictures and ...

Question So basically the apprentice was given the drawings from Powell Fenwick ...

Respondent No, with discussion from us.

Question With you?

Respondent Yes.

Question So you were supervising his work under the floor?

Respondent I was not supervising underfloor, no. As I said before I did not get under the floor to supervise underfloor. It was done by Powell Fenwick.

Question So Powell Fenwick signed off all the work that the apprentice did underneath the floor?

Respondent Yes.

[25] [Omitted], the apprentice referred to above also gave evidence at the C2-01267 hearing. His evidence included the following:

Question So we've heard evidence that you did a lot of the work underneath the floor?

[Omitted] Yes.

Question And you – how did you know what to do? Who instructed you in what you were to do and how it was to be done?

[Omitted] Well my foreman John told me how to do it, or how to get it ready for inspection, I should say, and we also had plans.

Question I beg your pardon?

[Omitted] It was to the plans.

Question Sorry?

Question To the plans?

[Omitted] There were plans.

Question So is this the document, if you have a look in the bundle there and turn to page 221, and tell me if that's the document that you recognise?

[Omitted] I don't recall ever seeing the plan, but that was how the piles were done.

Question So just – let – what was the plan that you used that you've just told us about, that you worked to?

[Omitted] I was never given a plan.

Question So all your instructions ...

[Omitted] Was verbal.

Question ... were verbal? So you, from what I'm ascertaining John told you what to do so you and, I'll use this expression "drew the short straw" because you were the small person to go under the house, which apprentices do, I've been down that road many years ago, so you had to crawl around under the house and observed what piles had been worked on during Lift Tech's work that they did ...

[Omitted] Yes.

Question ... and do what you were instructed to do on each pile by John?

[Omitted] Yes.

- [26] At the inquiry hearing the engineer from Powell Fenwick, [omitted] gave evidence as he did at the complaint hearing. He gave evidence at the inquiry that he provided observation to construction monitoring service CM2. He tabled a document which outlined CM2 as:

Level	Review	Comment
CM2	<i>Review, preferable at the earliest opportunity, a sample of each important work procedure, material of construction and component for compliance with the requirements of the plans and specifications and review a representative sample of each important completed work prior to enclosure or completion is appropriate. Be available to provide the constructor with technical interpretation of the plans and specification.</i>	<i>This level of service is appropriate for smaller projects of a routine nature being undertaken by an experienced and competent constructor and where a higher than normal risk of non-compliance is acceptable. It provides for the review of a representative sample of work procedures and materials of construction. The assurance of compliance of the finished work is dependent upon the constructor completing the work to at least the same standard as the representative sample reviewed.</i>

- [27] He provided producer statements as a result of his observation and accepted that he provided inspections of the work similar to those council would undertake under a building consent. He stated that his inspections were limited and based on a sample and that he was confident all was good from what he saw and he was confident with the Respondent as site foreman. When asked who was ultimately responsible for the work he provided his opinion that it was a combination of persons but was evasive in his response. He accepted the he did not see the Respondent carrying out any work.
- [28] [Omitted] gave evidence. He stated he did not carry out any underfloor work, that the Respondent was the go to person on site and that the Respondent did not get under the floor due to the limited clearances available.
- [29] [Omitted] gave evidence. He stated that the Respondent went over the plans and what to do under the floor with him. He stated he saw the plans and that the Respondent did not go under the house. He did not raise any issues with the Respondent during his carrying out the building work. He was working under the understanding that the engineer would be looking at his work and was supervising.
- [30] [Omitted] was asked about the differences in his evidence at the inquiry as compared to that at the complaint hearing. He said he was nervous at the first hearing and that his evidence at the inquiry was the correct account. He confirmed he is still working with the Respondent.

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[31] The Respondent also gave evidence. He stated that in hindsight he would have walked off the job given the repair methodology approved. The job should have had a new foundation but this was turned down. He confirmed his previous statements from complaint hearing C2-01267 that the underfloor work was supervised by the engineer.

Boards Conclusion and Reasoning

[32] Legal Counsel for the Respondent provided written submissions dated 21 July 2016 which included:

- (a) a reaffirmed challenge to the Board's jurisdiction;
- (b) the Respondent's denial of any breach of the Act;
- (c) the background to the events;
- (d) a submission as to the tests for negligence and that the thresholds for discipline under the Act were high;
- (e) a submission that the principles and requirements relating to supervision under Subpart 4 of Part 2 of the Act did not apply to the work;
- (f) a submission that [omitted] was primarily responsible for supervising the work relating to the subfloor;
- (g) a submission that the Respondent simply performed the building works as directed by Summit and Powell Fenwick and based on the information provided to him and that it did not include any building work under the house; and
- (h) a submission that the Respondent did not certify any building work.

[33] At the hearing Legal Counsel for the Respondent made further submissions to the effect that the disciplinary provisions under the Act only apply to restricted building work and reference was made to the provisions of ss 282A and 84 of the Act and he cited the decision in *Tan v Auckland Council*⁵ in support of his submission.

[34] As regards the challenge to Board's jurisdiction the Board reaffirms its decision of 5 July 2016.

[35] In terms of the legal tests for negligence and incompetence and the thresholds for disciplinary action the Board agrees that those set out in the submissions apply. In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board will have regard to the case of *Beattie v Far North Council*⁶ where 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.

⁵ CRI-20 15-404-323 [2015] NZHC 3299, Brewer J

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

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[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.

- [36] The Board will also take into consideration 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.

- [37] Turning to the submission that the disciplinary provisions under the Act only apply to restricted building work⁸ the Board does not agree. Whilst it is noted that s 282A of the Act refers to the "Purposes of licensing building practitioners" and whilst it states in subsection (b) that the stated purpose is to "to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it" other sections of the Act make it clear that the Board's disciplinary jurisdiction is wider than just restricted building work.

- [38] Firstly s 315(1) states "Any person may complain to the Board about the conduct of a licensed building practitioner in accordance with the regulations". The definition of "disciplinary matter" in s 282 uses the same language. The use of the word "conduct" infers a wide jurisdiction and when looked at in conjunction with the provisions of s 317 which set out the disciplinary provisions it is clear that more than just restricted building work was envisaged by Parliament. For example subsection (1)(a) relates to the commission of an offence which adversely impacts on fitness, 1(g) to the breach of a code of ethics, 1(h) to misrepresenting competence and (1)(i) to bringing the regime into disrepute. None of those provisions make reference to a requirement that the conduct be in relation to restricted building work.

- [39] Secondly, looking at it from another perspective, the Act establishes specific disciplinary charges in s 317 that relate to restricted building work, such as those in subsection (1)(c), (da) and (db) whilst there are others which do not make any reference to restricted building work such as subsections (1)(a), (d) and (b) under which the Respondent has been charged. The creation of specific charges for restricted building work in the Act, and of others which do not, makes it clear that the disciplinary provisions are wider than just conduct as regards restricted building work.

- [40] As regards the submission that principles and requirements relating to supervision under Subpart 4 of Part 2 of the Act do not apply, the Board dealt with the relationship between supervision of building work undertaken other than under a building consent in Board Decision C2-01143⁹. In it the Board held:

[48] It is clear from the stated purpose of the Act that regulation of and accountability for licensed building practitioners are fundamental aspects. Given this purpose an interpretation of supervise which resulted in a licensed building practitioner avoiding accountability

⁷ [2001] NZAR 74

⁸ The Board accepts the work undertaken was not restricted building work as no building consent had been issued for it.

⁹ Board Decision dated 14 April 2016.

because the building work they were supervising was unconsented would be contrary to it. As such the Board has adopted a disjunctive purposive interpretation of supervise in s 7 and it considers this approach is consistent with the findings of the High Court in Tan.

[49] *The Board's position is that under s 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out.*

[41] Full reasoning can be found in the Board's Decision C2-01143. In that case the Board also discussed the level of supervision that is expected of a licensed building practitioner. It noted the level of supervision required will depend on the circumstances under which the work is being undertaken and that the supervisor needs to assess the situation and determine the level of supervision which is appropriate. Consideration must be given to factors including but not limited to:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

[42] The quality and compliance of the building work completed must also be taken into consideration. The above is consistent with the findings in *Electrical Workers Registration Board v Gallagher*¹⁰ where similar provisions under the Electricity Act were being considered. In that case the court stated:

"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."

[43] Looking at the conduct of the Respondent the Board has heard contradictory evidence as to who was responsible for supervising the work of [omitted]. The Respondent considered [omitted] was supervising as the engineer, [omitted] gave evidence at complaint hearing C2-01267 that the Respondent was supervising and at the inquiry hearing that [omitted] was. [Omitted] in turn considered he was providing construction monitoring services.

[44] The Board finds, on the evidence received and heard and on the basis of its interpretation of the Act, that the Respondent was supervising [omitted]. In this respect it is important to distinguish between supervision under the Act and the more general notion of oversight or observation provided by the engineer. Supervision

¹⁰ Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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under the Act is ensuring those who are working under the licensed building practitioner carry out the building work in a compliant manner. The role of the engineer was to provide the repair methodology which he did by way of the plans. He then provided monitoring observation of the work as a whole and signed off the resultant work. The engineer has professional responsibility for his sign off. He did not, however, have responsibility for the workers carrying out the building work. The Respondent did as site foreman.

- [45] Having made the above finding the board needs to look at whether the supervision fell below the required standards and, if so, whether it was sufficiently serious to warrant a disciplinary outcome. In coming to a decision on this the Board has considered the items in paragraph [41] of this decision.
- [46] Having considered all the evidence before it, the Board finds that the Respondent's conduct has fallen below the expected standard in that he has exhibited a serious lack of care judged by the standards reasonably expected of licensed building practitioners. The Board notes, in particular, that the building work was undertaken by an apprentice, it was complex and difficult work and that there was a high level of noncompliance in the work that was carried out.

Board Decision

- [47] The Board has decided that the Respondent has supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

Disciplinary Penalties

- [48] 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 Act.
- [49] 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.
- [50] 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. Included in this are the circumstances under which the work was carried out and the complex relationships involved in the repair.
- [51] 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 are further matters which the Board should take into consideration.
- [52] 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.¹¹

[53] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*¹²:

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.

[54] The High Court in *Patel v Complaints Assessment Committee*¹³ 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.

[55] Given the above factors the Board has decided that a censure is the appropriate penalty.

Costs

[56] 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."

[57] 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*¹⁴ 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."

¹¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹² [1992] 1 NZLR 720 at p 724

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

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

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- [58] The judgment in *Macdonald v Professional Conduct Committee*¹⁵ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*¹⁶ where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.
- [59] In *Collie v Nursing Council of New Zealand*¹⁷ 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.

- [60] The Board has decided that \$750 is an appropriate sum toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication of Name

- [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 Licenced Building Practitioners' scheme as is required by the Act.
- [62] 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.*
- [63] 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.
- [64] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

- [65] 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 \$750 (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.

¹⁵ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹⁶ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁷ [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 and his being named in this decision.

Submissions on Penalty Costs and Publication

- [66] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 14 October 2016.
- [67] If no submissions are received then this decision will become final.
- [68] 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 23rd day of September 2016



Richard Merrifield
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.*