

Before the Building Practitioners Board

	BPB Complaint No. C2-01535
Licensed Building Practitioner:	Gary Stowe (the Respondent)
Licence Number:	BP 111087
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Gisborne
Hearing Type:	In Person
Hearing Date:	23 May 2017
Decision Date:	29 May 2017
Board Members Present	Richard Merrifield (Presiding) Mel Orange Brian Nightingale Robin Dunlop

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 a disciplinary offence under section 317(1)(b) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
- (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

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

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

- (d) has 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 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 with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

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

Background to the Complaint

[5] The Respondent was engaged by the Complainant to undertake building work which included alterations and renovations to an existing dwelling. The Complainant alleged the Respondent carried out the building work without a building consent when one was required and that the building work was carried out in a non-compliant and substandard manner. Specific allegations as regards the quality of the work were outlined in a Site Visit Report prepared by Phillip Simpson, Building Surveyor, dated 12 September 2016.

[6] The Board also noted that the Respondent may have carried out design work in relation to structural beams when he was not licensed to do so.

Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has

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

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[8] The Board heard evidence from:

Gary Stowe	Respondent
[omitted]	Witness for the Respondent
William Hursthouse	Technical Assessor
[omitted]	Complainant
[omitted]	Witness for the Complainant

[9] Mr Tony Robertson, Barrister and Solicitor, appeared for the Respondent. Mr John O’Leary, Barrister and Solicitor, appeared for the Complainant.

[10] The Complainant alleged he initially engaged the Respondent to carry out a pre-purchase inspection of the property. The Respondent considered it more of a “quick look” than a full inspection.

[11] Following the purchase of the property by the Complainant’s father, the Complainant engaged the Respondent to carry out alterations and renovations of the property. The Complainant provided a sketch diagram of his requirements⁶ and evidence was heard that the plan was later amended⁷ and the Respondent alleged there were continual changes during the build.

[12] The Board heard conflicting evidence as to whether the Complainant was told that a building consent was required. Irrespective of the evidence a building consent was not obtained and the building work commenced without one.

[13] Part way through the build the Complainant brought the contractual relationship to an end and made a complaint to the Board. The Complainant provided various supporting documents.

[14] The Respondent provided a written response to the complaint on 19 December 2016. He outlined his engagement and history on the build and responded to specific allegations.

[15] The Board was also provided with a report from William Hursthouse as Technical Assessor to the Board. His report outlined various issues with the building work. He provided a table of non-compliance issues and the Board asked questions of him and the witnesses in respect of the issues noted in it. These were:

- (1) failure to provide a written contract for the residential building work;
- (2) failure to obtain a building consent prior to starting the building work;

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

⁶ This was admitted into evidence.

⁷ The amended plan was admitted into evidence.

- (3) designed and built inadequate replacement support for a removed load bearing wall;
 - (4) installation of insulation in external walls in possible contravention of clause B2 and E2 of the Building Code;
 - (5) construction of an external deck hard against the external cladding; and
 - (6) plasterboard lining has been inadequately fixed in places.
- [16] The Respondent accepted that he had not provided a written contract for the residential building work as required by the Act.
- [17] The Technical Assessor noted that the building work required a building consent as a result of the removal of load bearing walls, the installation of insulation in outside walls and the addition of sanitary fixtures. The Respondent accepted that a building consent was required for the intended building work.
- [18] With regard to the load bearing wall the Respondent stated he used NZS3604 to determine the size of the beams where load bearing walls were removed and the Board heard evidence that the spans involved came within the scope of NZS3604. The Technical Assessor had also noted that various connections and fixings between structural elements were inadequate and were covered over with ceiling insulation. The Respondent gave evidence that they were temporary and had been done to allow other work to continue and that he had ordered the correct fixings. He was questioned about his process to ensure the temporary fixings would be replaced with the correct ones. He stated he had made a mental note of the items.
- [19] With regard to the insulation the Technical Assessor noted that the insulation would have been in direct contact with the exterior weatherboard cladding and that this would have prevented the air from circulating in the cavity which could cause the rusticated weatherboards to rot. The Technical Assessor gave his opinion that an alternative product such as polystyrene could have been used to ensure a gap was maintained or that building paper could have been installed in the spaces between studs. The Respondent gave evidence that there were rotten weatherboards and he thought the whole house would be re-clad at which time it would be wrapped with building paper. The Complainant stated there was no intention to re-clad.
- [20] The Respondent accepted that the deck had been constructed hard against the cladding but noted that this was an easily rectified issue.
- [21] The Respondent also accepted that the plasterboard installation noted was done poorly. He stated that the work highlighted in the report was done by his two apprentices while he was away on holiday. Other instances of poor workmanship including poor architrave and sill installation which were carried out whilst the Respondent was on holiday, were also noted.

- [22] The Board heard evidence as regards various areas of external work where weatherproofing of the work was in question. This included timber junctions and the lack of a head flashing over a door. The Respondent stated a roof over the deck would weatherproof the area in question and he noted that not all the work was complete. The Technical Assessor considered a roof would help. The Complainant stated there was no definite intention to roof the area.
- [23] The Respondent stated that his involvement in the building work came to an end soon after his return from his holiday, the plans were continually changing and that he was not afforded an opportunity to complete the work or to remediate items noted as non-compliant.
- [24] The Respondent's counsel made submissions including:
- (a) the contextual background to the complaint and the Complainant's complicity in not obtaining a building consent;
 - (b) issues as to credibility of the evidence and inconsistency within it;
 - (c) the seriousness threshold required for a finding of negligence and the high threshold required for a finding of disrepute;
 - (d) that the Respondent had not been paid a substantial sum of money and that the sums the Complainant claimed would have to be expended to remediate issues were less than what was owed to the Respondent; and
 - (e) the attempts made by the Respondent to return and attend to the issues raised.

Board's Conclusion and Reasoning

- [25] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [26] The Board has decided that the Respondent **has not**:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
 - (b) 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); or

- (c) 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).

[27] The Boards reasoning for its decisions are as follows.

Negligence and/or Incompetence

- [28] In considering whether the Respondent has been negligent and/or incompetent there are two matters that the Board needs to consider. They are:
- (a) carrying out building work without a building consent; and
- (b) the alleged issues with the building work which was carried out.
- [29] The Board's finding in respect of negligence is with regard to carrying out building work without a building consent.
- [30] In terms of the building work the Board finds that there were aspects which were non-compliant or were substandard. Notwithstanding this the Board has found that the Respondent's conduct, as regards the actual building work, did not meet the disciplinary threshold.

Carrying out Building Work without a Building Consent

- [31] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
- [32] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [33] The Board has found in previous decisions⁸ that a licensed person who commences or undertakes building work without a building consent when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁹.
- [34] More recently in the High Court in *Tan v Auckland Council*¹⁰ Justice Brewer stated that in relation to a prosecution under s 40 of the Act:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

⁸ Refer for example to Board Decision C1030 dated 21 July 2014

⁹ Board Decision C2-01068 dated 31 August 2015

¹⁰ [2015] NZHC 3299 [18 December 2015]

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [35] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [36] The Board also notes that section 362F of the Act imposes minimum requirements for contracts for residential building work over \$30,000 in value. It also imposes an obligation for the contract to be in writing and for the contract to comply with any regulations.
- [37] The Board heard evidence that a written contract had not been entered into. Contravention of the requirement for a contract is an infringement offence but the Board does not have any jurisdiction over infringement offences¹¹.
- [38] Notwithstanding the lack of a written contract the minimum requirements for residential building contracts, which are implemented by way of the Building (Residential Consumer Rights and Remedies) Regulations 2014, are deemed to be part of an oral contract for residential building work. This is by way of Regulation 7 which states:

7 Prescribed clauses deemed to be included in oral residential building contracts for prescribed minimum price or more

- (1) *This regulation applies to a residential building contract where the price for the building work is not less than the prescribed minimum price if there is no written contract as required under section 362F of the Act.*
- (2) *The contract is deemed to include the terms prescribed in Schedule 3.*

- [39] Within Schedule 3 clause 1 states:

1 Building consents

- 1.1 *The building contractor undertakes to obtain all necessary approvals, including building consents, before commencing the building work.*

- [40] Given this provision it is clear that there was, in addition to the obligations outlined in the *Tan* decision, a contractual obligation on the Respondent to obtain any required consents or at least to ensure they were obtained before the building work was started.

¹¹ Infringement offences fall within the Jurisdiction of the Ministry of Business Innovation and Employment.

- [41] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken.
- [42] The Technical Assessor noted three aspects which would have required a building consent. They were changes to load bearing walls, addition of sanitary plumbing units and installation of wall insulation. Any one of the three items would have triggered the requirement for a building consent.
- [43] The Respondent accepted in questioning at the hearing that a building consent was required and that the building work was carried out without one. In his written response he had placed responsibility for obtaining a building consent on the Complainant. As outlined above this would not have absolved him from his obligation to ensure that a building consent had been obtained. Nor would it negate his responsibility to ensure a building consent was in place prior to commencing the building work.
- [44] On the basis of the above the Board finds that the Respondent knew a building consent was required for the building work and as such has been negligent in failing to obtain one and for commencing the building work without one.

Non-Complaint and/or Substandard Building Work

- [45] With respect to the building work itself there were instances of work that did not comply with the Building Code or which were completed in a substandard manner. Some of these were accepted by the Respondent.
- [46] The Board notes, however, that the building work was not complete and the Respondent was not given the opportunity to carry out remedial or rectification work. It also notes that some of the non-compliant or substandard work was carried out by the Respondent's apprentices whilst he was on holiday and just prior to the contract between the Respondent and the Complainant coming to an end.
- [47] With respect to the issues which do arise during a build, it does not always follow that a licensed building practitioner will have been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right the first time and not to have to rely on snag lists or rectification.
- [48] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:
- (a) the extent of the error, omission or noncompliance;
 - (b) whether failings by the Respondent in their planning and execution of the building work have contributed to the issue arising or not; and
 - (c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.

- [49] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioner's attention it is more likely a disciplinary outcome will follow but the Board will take into account the overall circumstances leading up to and after the issue occurring into account.
- [50] The Board also needs to consider the definitions of negligent and incompetent set forth in *Beattie v Far North Council*¹². In the case Judge McElrea noted:
- [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.*
- [51] The Board has to also consider the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*¹³ 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.*
- [52] Taking the above factors into account the Board finds that whilst the building work carried out by the Respondent fell below the reasonably expected standards of care the failings were not serious enough to warrant a disciplinary outcome.
- [53] The Respondent is cautioned to take more care with his building work in future. The Board also recommends that the Respondent consider implementing better systems for ensuring remedial or finishing work is carried out. The Board noted that the Respondent relies on mental notes of work that has to be completed. This creates a risk of items being missed, especially where the incomplete work has subsequently been covered over as was the case with work in the roof space where insulation had been placed over temporary fixings.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [54] The Respondent is a licensed building practitioner with a Carpentry Licence.

¹² Judge McElrea, DC Whangarei, CIV-2011-088-313

¹³ [2001] NZAR 74

- [55] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise.
- [56] Under clause 4 of the Order a holder of a Carpentry Licence can carry out or supervise carpentry for category 1, 2 and 3 buildings. Design work can only be carried out by a person with a Design Licence. As such the Respondent is not licensed to carry out design work.
- [57] The evidence before the Board as regards structural beams which may have required a design was that they most likely came within the parameters of NZS3604 and that the Respondent used NZS3604 to determine the requirements for the structural beams that were installed. On this basis the Board finds that the Respondent has not carried out design work and as such has not committed a disciplinary offence under section 317(1)(c) of the Act.

Record of Work

- [58] 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 territorial authority on completion of restricted building work¹⁴.
- [59] Restricted building work was established by the Building (Definition of Restricted Building Work) Order 2011. Clause 5 of the Order states that restricted building work includes the construction or alteration of the primary structure of a house. Given this definition the work undertaken by the Respondent was restricted building work.
- [60] Matters are, however, complicated by section 401B of the Act which is the enabling legislation for the Order. It states:

401B Order in Council declaring work to be restricted building work

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*

- [61] The complicating factor is the statement “*other than building work for which a building consent is not required*”. In the present case a consent was required but was not obtained. The question for the Board then is whether the record of work provisions in section 88 are triggered in such circumstances.
- [62] Looking at section 88 itself it makes it clear that a record of work is only required for restricted building work carried out under a building consent.

88 Licensed building practitioner to provide record of work in respect of restricted building work

¹⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

(1) *Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised.*

[63] Section 88 makes it clear that the record of work provisions only apply when building work is carried out under a building consent. As no building consent was obtained the record of work provisions do not apply and the Respondent has not committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

Disrepute

[64] 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 C2-01111¹⁵ and discussed the legal principles that apply.

[65] Looking at the types of 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”¹⁶ and the Courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁷ 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.”¹⁸

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

- criminal convictions¹⁹;
- honest mistakes without deliberate wrongdoing²⁰;
- provision of false undertakings²¹; and

¹⁵ Board decision dated 2 July 2015.

¹⁶ 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

¹⁷ [2012] NZCA 401

¹⁸ [2012] NZAR 1071 page 1072

¹⁹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

- conduct resulting in an unethical financial gain²².

[67] 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.

[68] 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.

[69] The Board did not hear any evidence which would warrant a disciplinary outcome of disrepute under section 317(1)(i) of the Act.

Penalty, Costs and Publication

[70] Having found that one 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.

[71] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[72] 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*²³ 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.

²¹ *Slack, Re* [2012] NZLCDT 40

²² *Colliev Nursing Council of New Zealand* [2000] NZAR 7

²³ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [73] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁴ 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.
- [74] As noted in *Tan v Auckland Council*²⁵ failing to obtain a building consent deprives the building consent authority of its ability to check any proposed building work and ensure it meets the required standards set out in the Building Code. Offences under section 40 of the Act attract very high fines which, in turn, demonstrate the seriousness of a failure to obtain a building consent.
- [75] At the same time the Board notes that the Complainant took no steps to ensure a Building Consent was obtained. Whilst he stated he had left it to the Respondent it would be unusual for the Complainant not to be involved in the development and sign off of plans and specifications in preparation for applying for a building consent.
- [76] The Board has also taken the non-payment of invoices into account in determining the appropriate penalty.
- [77] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,000. The Board had a starting point of \$4,000 but it has reduced this based on the mitigation heard.

Costs

- [78] 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."
- [79] 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 case²⁶.
- [80] In *Collie v Nursing Council of New Zealand*²⁷ 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.*
- [81] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. The Board has

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

²⁵ [2015] NZHC 3299 [18 December 2015]

²⁶ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²⁷ [2001] NZAR 74

taken the Respondent's cooperative approach to the complaint into consideration in setting this amount.

Publication

- [82] 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 Act²⁸. 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.

- [83] 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.
- [84] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction the Courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².
- [85] 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 interest³³. 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.
- [86] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

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

[88] 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

[89] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **28 June 2017**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 6th day of June 2017.



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:*

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- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only 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.*