

## Before the Building Practitioners Board

	BPB Complaint No. C2-01901
Licensed Building Practitioner:	Ronald Carmichael (the Respondent)
Licence Number:	BP 114008
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	30 October 2018
Decision Date:	21 November 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Faye Pearson-Green, LBP Design AOP 2

#### Procedure:

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

#### Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(da)(ii) and section 317(1)(i) of the Act.

The Respondent **has not** committed disciplinary offences under section 317(1)(b).

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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 Regulations<sup>1</sup> 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) 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
  - (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).

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

### 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[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*<sup>4</sup> Collins J. noted that:

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

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

### Respondent’s Attendance

[5] Prior to the hearing the Respondent advised by email dated 11 September 2018 that:

*I left New Zealand permanently in February 2018. I’m applying to have my LBP NZ Licence permanently cancelled. I have no connections to New Zealand now and will not return in the future. So no I wont be participating in your hearing.*

[6] The matter proceeded in the Respondent’s absence.

### Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[8] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [9] The complaint related to financial issues with a new build. The Respondent, through his company Carmichael Construction (2013) Limited, and the Complainants entered into a fixed price contract for the construction of a 280m<sup>2</sup> house for \$450,000 inclusive of GST. The per square metre build rate was \$1,397 per m<sup>2</sup> exclusive of GST. The price included kitchen and bathroom cabinetry and fit out and all floor coverings.
- [10] The build was priced prior to plans being finalised and a consent being issued.
- [11] On 28 July 2016 the Complainants questioned an amount they had been invoiced for over and above the contract price. The Respondent replied on 29 July 2016 stating he was seeing a Lawyer. The Respondent also claimed that the Complainants had made changes to the original design too numerous to list. The only variation the Complainants were aware of a minor nature.
- [12] On 1 August 2016 the Respondent advised in an email that the house had gone over budget but provided no answers to questions in relation to the costs associated with building the house. The Complainants stated it was the first intimation they had that there was a problem meeting the fixed cost.
- [13] The Complainants asked to see invoices so they could gain clarity around payments and budgeting. In conversations with the Respondent before the contract was signed the Respondent said that information would be available if required.
- [14] On 9 August 2016, the Respondent e-mailed the Complainant and said he was still working on compiling the invoices and would provide a clear picture of the budget and what it would take to finish the house.
- [15] The Complainants received little in the way of communication from the Respondent after this. No further work was completed by the Respondent.
- [16] The Complainants gave evidence that they had paid 95% of the build price. They estimated that 60-70% of the build has been completed. Many of the items the Complainants have paid for have not, in turn, been paid for by the Respondent. The Complainants stated that suppliers and subcontractors have been contacting them for payment and that the Respondent had advised those suppliers and subcontractors that the reason the Respondent could not pay them was that he had not been paid. Trends Kitchens was cited as an example. They demanded a payment of \$19,259 for the kitchen that had been installed and was part of the contract price.
- [17] The Complainants state they have or will have to spend an additional \$232,000 over and above that which they have paid the Respondent for the house, bringing the total build price to \$660,000.
- [18] The Complainant's questioned the voracity of the Respondent's statements that he no longer has any ties to New Zealand. They gave evidence that he still owns land in New Zealand and that his wife and child still reside in New Zealand.

[19] The Complainant's have not received a record of work for the restricted building work that the Respondent completed.

### **Board's Conclusion and Reasoning**

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

- (a) 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
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)  
and should be disciplined.

[21] The Board has also decided that the Respondent **has** not carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act.

[22] The reasons for the Board's decision follow.

### Negligence and/or Incompetence

[23] In Board Decision C2-01688 the Board found, in respect of the same Respondent, that the Respondent had displayed a lack of reasonably expected care in pricing a building project and had therefore been negligent. In that case the Respondent was found to have been negligent in failing to correctly read and interpret plans and to price the project based on the actual size of the dwelling and the materials required.

[24] The same facts are not present in the current case. The Board did not have sufficient evidence as regards pricing matters to make a finding and whilst the Respondent's pricing was low there was insufficient evidence that the Respondent had displayed the lack of care that was present in C2-01688.

### Record of Work

[25] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>6</sup>.

[26] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

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<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [27] A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [28] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. There were no good reasons present.

### Disrepute

- [29] 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 C2-01111<sup>7</sup> and discussed the legal principles that apply.
- [30] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*<sup>8</sup> a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [31] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>9</sup>, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [32] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>10</sup> and the courts have consistency applied an objective test when considering such conduct. In

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<sup>7</sup> Board decision dated 2 July 2015.

<sup>8</sup> [2013] NZAR 1519

<sup>9</sup> 24 September 2014

<sup>10</sup> 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

*W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>11</sup> 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.*<sup>12</sup>

[33] 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 finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions<sup>13</sup>;
- honest mistakes without deliberate wrongdoing<sup>14</sup>;
- provision of false undertakings<sup>15</sup>; and
- conduct resulting in an unethical financial gain<sup>16</sup>.

[34] 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.

[35] The Board noted that whilst the Respondent had not been negligent in his pricing of the project it did consider that there had been an element of inducement to enter the contract by way of presenting an unrealistic offer. The Board doubted that the build could have been completed for the fixed cost amount agreed.

[36] In C2-01688 the Board found that the Respondent had brought the regime into disrepute in respect of his conduct. It was also in relation to financial transactions.

[37] The Board makes the same finding in this case. The Respondent has taken money and has not applied it to the purposes for which it was received. Moreover when confronted he has not dealt with the matter. Rather he ceased work and left the country. The Complainants have been left with significant costs to complete the built.

[38] His conduct has resulted in the Respondent obtaining a financial gain at the expense of the Complainants. Such conduct brings the regime into disrepute.

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<sup>11</sup> [2012] NZCA 401

<sup>12</sup> [2012] NZAR 1071 page 1072

<sup>13</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>14</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>15</sup> *Slack, Re* [2012] NZLCDT 40

<sup>16</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [39] Finally the Board also notes that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and 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.*

- [40] The matters before the Board are serious and the sums of money involved are considerable. On the basis of the above the Board therefore finds that the Respondent's conduct has brought the regime into disrepute.

### **Penalty, Costs and Publication**

- [41] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [42] 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

- [43] 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*<sup>17</sup> 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.*

- [44] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>18</sup>. The High Court when discussing penalty stated:

*[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed*

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<sup>17</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>18</sup> [2012] NZAR 481

*overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

- [45] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime. The Respondent's licence has been cancelled as a result of disciplinary action. His disciplinary record is as follows:

<b>Complaint Number</b>	<b>Finding</b>	<b>Penalty</b>
C2-01302 June 2016	Breached sections 317(1)(b) and 317(1)(da)(ii)	Fined \$2,500
C2-01503 June 2017	Breached section 317(1)(da)(ii)	Fined \$1,000
C2-01688 January 2018	Breached sections 317(1)(b), 317(1)(da)(ii) and 317(1)(i)	Licence cancelled for 2 years.

- [46] The Board notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>19</sup> 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.
- [47] The Respondent has been found to have brought the regime into disrepute. It is not the first time that this finding has been made with regard to the Respondent.
- [48] Taking the above into account the Board has decided that a further and longer period of cancellation is warranted. The Respondent's licence will be cancelled for a period of five years.

#### Costs

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

<sup>19</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[50] 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<sup>20</sup>.

[51] In *Collie v Nursing Council of New Zealand*<sup>21</sup> 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.*

[52] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry.

### Publication

[53] 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 Act<sup>22</sup>. The Board is also able, under section 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.*

[54] 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.

[55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>23</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>24</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>25</sup>. 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*<sup>26</sup>.

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<sup>20</sup> *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.

<sup>21</sup> [2001] NZAR 74

<sup>22</sup> Refer sections 298, 299 and 301 of the Act

<sup>23</sup> Section 14 of the Act

<sup>24</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>25</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>26</sup> *ibid*

- [56] 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 interest<sup>27</sup>. 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.
- [57] The Board considers that it is important that others learn from the Respondent's conduct and that the public are warned with regard to his behaviour. To this end an article will be published in Code Words and the matter will be published in the New Zealand Gazette.

### **Section 318 Order**

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

**Penalty:** Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 60 months..

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

- (a) an article in Code Words; and
- (b) a published notice in the New Zealand Gazette.

- [59] 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**

- [60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **12 December 2018**. 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

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<sup>27</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

consider those submissions prior to coming to a final decision on penalty, costs and publication.

- [61] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

### Right of Appeal

- [62] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 21<sup>st</sup> day of November 2018

  
Chris Preston  
Presiding Member

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#### <sup>i</sup> Section 318 of the Act

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

ii **Section 330 Right of appeal**

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

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

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