

Before the Building Practitioners Board

	BPB Complaint No. C2-01921
Licensed Building Practitioner:	Simon Marshall (the Respondent)
Licence Number:	BP 125287
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	Christchurch
Hearing Type:	In Person
Hearing Date:	4 December 2018
Decision Date:	21 December 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

Appearances:

Brian Burke, Harmans Lawyers, Legal Counsel for the Respondent appearing with
Edward Sharpe Davidson

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.

The Respondent **has not** committed a disciplinary offence under section 317(1)(d) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	3
Evidence	3
Weathertightness	4
Cavity Battens	5
Plasterboard.....	5
Retaining Wall Waterproofing	5
Flooring and Floor Joists	5
Roofing Substrate.....	5
Cladding	6
Concrete Stairs.....	6
Supervision.....	6
Board’s Conclusion and Reasoning	7
Negligence and/or Incompetence	7
Contrary to a Building Consent.....	12
Penalty, Costs and Publication	13
Penalty	13
Costs.....	14
Publication	14
Section 318 Order	15
Submissions on Penalty, Costs and Publication	15
Right of Appeal	16

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); and

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

- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

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 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.

Evidence

- [5] 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 relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [6] 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.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|----------------|---|
| Simon Marshall | Respondent |
| [Omitted] | Complainant, Licensed Building Practitioner, Design AOP 2 |
| [Omitted] | Witness, Licensed Building Practitioner, Carpentry |

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

[Omitted] Witness, Licensed Building Practitioner, Carpentry

[Omitted] Witness, Christchurch City Council, Consent Officer

- [8] The complaint related a new build that the Respondent's business SM Builders 2013 Limited took over following the completion of the foundations, concrete walls and floors and garage block walls by another licensed building practitioner. The Complainant, the owner of the dwelling, was the designer of it and obtained the building consent. He was dealing with consenting issues including with building consent amendments and minor variations.
- [9] The Complainant raised various issues with the build in his complaint which was supported by reports he had obtained and by building consent authority (BCA) records. Particular issues that the Board inquired about were:
- (a) weathertightness issues including issues with the install of building wrap and insulation;
 - (b) install of cavity battens;
 - (c) the install of plasterboard;
 - (d) waterproofing of a retaining wall;
 - (e) the install of flooring and flooring joists over a dining room;
 - (f) the install of roofing substrate;
 - (g) the install of cladding; and
 - (h) the construction of concrete stairs.
- [10] It should be noted that the Board has not traversed all of the matters complained about but has focused on those which were significant and which the Respondent had a role in.

Weathertightness

- [11] The Complainant raised various issues with weathertightness. In particular he complained that delays in the building process resulted in water ingress and damage. He noted that the delays also resulted in the rigid air barrier having to be replaced as it had exceeded the recommended amount of time that it could be exposed to the elements. He also noted that insulation was saturated and, contrary to his instructions, it was re-used.
- [12] The Respondent noted that he weatherproofed the house with a rigid air barrier to allow internal building work to continue and that the BCA had noted: "exterior cladding is weather tight for the purpose of pre line". Various weather events and high winds caused water ingress and some damage to plaster board which was replaced. The rigid air barrier was replaced after the BCA noted that it had exceeded its exposure limits. The Respondent gave evidence that after the second weather

event new insulation was installed. The Respondent also submitted that marks on concrete complained about were not the result of the failure to a roof membrane over a concrete wall but were lime releasing from the concrete and that a leak did develop after high winds caused a flap to lift on the roof membrane which was installed by another contractor.

- [13] There was also an allegation in relation to no horizontal gaps between the sheets at the flashing joints as required by the manufacturer, which was accepted. The Respondent submitted that it was a limited instance which was repaired.

Cavity Battens

- [14] The Complainant alleged the incorrect cavity battens were installed and that they were of various thicknesses. The Respondent gave evidence that the varying widths were to straighten a wall and that he could not install battens as per the specification then there was a possibility a leak may have occurred. The Complainant disagreed and gave evidence that, in his opinion, if the design had been followed there was no risk of a leak.

Plasterboard

- [15] The Complainant noted unacceptable gaps in the plasterboard of up to 10 mm. The Respondent gave evidence that the largest gap was 3 mm and that his plasterer would not have accepted gaps of 10 mm.

Retaining Wall Waterproofing

- [16] The complaint alleged the specified waterproofing product was changed and that a filter cloth was not installed. The complaint further set out that the error with the filter cloth was repeated when remedial work was carried out.
- [17] The Respondent gave evidence that filter cloth was installed by his employee but that it was not installed to the required height. He noted that it was fixed at no cost to the Complainant. The Respondent gave evidence that the Complainant agreed to the change in waterproofing product used. The membrane was installed by an authorised subcontractor.

Flooring and Floor Joists

- [18] The Complainant set out that there was a 10mm difference in height between joists and that two layers of Rab was used as packers on top of each joist instead of solid packers under the end of each joist which resulted in creaking. The Respondent gave evidence that the floors were within tolerance and that the Rab was used as packing as the Complainant did not want any treated products in the house. He stated it was fixed by him at his own cost.

Roofing Substrate

- [19] The incorrect roofing substrate was installed over the garage and bedroom. The specified product was CD which is C grade face and a D grade back. C grade is a non-

appearance grade with a solid face. D grade is low appearance with permitted defects. A mixture of CD and DD was delivered and installed. The issue was brought to the Respondent's attention and the DD grade was replaced with correct CD grade. The Respondent gave evidence that he had not noticed that the incorrect product had been supplied and installed. The Respondent both carried out and supervised the install.

Cladding

- [20] The Respondent gave evidence that the supplier of the cladding product delivered an incorrect product. There were issues with the quality and the product was rejected. The same occurred with a second consignment. A correct product was then supplied by a different supplier. The Complainant alleged he had not authorised a product replacement.
- [21] The Complainant obtained a report from Barry Chapman about the cladding install. It set out various issues with the quality and compliance of the cladding install supported by photographs. The cladding has since been replaced by another contractor.
- [22] Issues identified included poor alignment of sheets and negative detailing, poor cutting of sheets, failure to pre-drill sheets and damage caused in affixing sheets, missing fixings, failure to install flashings, general aesthetic issues and failure to adhere to E2/AS1 and the Roofing Code of Practice.
- [23] The Respondent noted he was not able to finish the cladding work due to a contractual dispute with the Complainant and that he tried to make arrangements to rectify the install by way of using other contractors.
- [24] The Respondent gave evidence that he had experience with installing metal cladding on sheds but not on a residence.

Concrete Stairs

- [25] The Complainant alleged the boxing for the concrete stairs collapsed and that the resulting finish was not acceptable. The Respondent submitted that it was a complex build and that the finished product was of a high quality. He accepted that there was some movement in the boxing but stated it was only 20 mm and that the stairs have been signed off by an engineer. The Respondent also submitted that the issues with the rise and tread of the stairs were the result of the set out of walls completed by the previous contractor.

Supervision

- [26] The Respondent gave evidence that he was undertaking another job at the time and that much of the building work that formed part of the complaint was done by his employees.

- [27] The Respondent submitted that he did not abdicate his responsibility as a supervisor noting that he:
- (a) employed a qualified carpenter and two apprentices at the site;
 - (b) employed competent subcontractors to complete parts of the work including the roof, insulation and painting;
 - (c) was supervising only one other building job at the time;
 - (d) met with the Complainant for around two hours each week to discuss building issues and the progress of the building work;
 - (e) personally visited the building site at least every two days;
 - (f) started much of the building work himself before leaving employees to complete the work once he was satisfied that they knew what they were doing; and
 - (g) would often work weekends with the Complainant and his son on landscaping at the building site and until midnight to get jobs done;
- [28] The Respondent also submitted that the Complainant was often on site directing his employees and that many of the items complained about would have been picked up by him in due course.

Board's Conclusion and Reasoning

- [29] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [30] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [31] The Reasons for the Board's decisions follows.

Negligence and/or Incompetence

- [32] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.

- [33] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired

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

into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

- [34] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*⁹ it was stated as “an inability to do the job”.
- [35] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [36] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².
- [37] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

(b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[38] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[39] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[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.

[40] The Board has taken the High Court's directions as regards seriousness into consideration. The matters that the Board have decided met that threshold were:

- (a) waterproofing of a retaining wall;
- (b) the install of roofing substrate; and
- (c) the install of cladding.

[41] Looking at each of the above items there was clear evidence of departures from acceptable standards. The waterproofing membrane, protection and drainage system was installed under the Respondent's supervision. It was not installed as per the building consent and building code requirements and had to be rectified on two occasions. The error was not identified by the Respondent but by the BCA. Similar circumstances applied to the roofing substrate. The Respondent took delivery of and installed the incorrect product and failed to identify the error. The substrate membrane was to have a rubberised membrane installed over it and as such the grade of the material was important. Both the filter membrane and the substrate are essential elements in achieving building code compliance.

[42] Turning to the issues with the cladding whilst the majority of the issues were aesthetic the Board did have concern over the long-term performance of the cladding as installed. Overall the Board did not consider that it had been installed to an acceptable standard.

[43] It is to be noted that the Respondent carried out building work on the roofing substrate but that he supervised the other building work noted above. He submitted

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

that he had not been negligent as regards his supervision. His legal Counsel referred to the Board's findings in C2-01143.

- [44] It is to be noted that the aspects of the building work that were not completed to an acceptable standard were restricted building work and as such they had to be supervised by a licensed building practitioner. It is also to be noted that supervise is defined in section 7¹⁶ of the Act as:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

- [45] The building work supervised did not meet those requirements.
- [46] The Respondent also submitted that the building work was not finished and/or that he would have found and rectified the issues in due course.
- [47] The substrate and membrane issues were not identified by the Respondent. The Respondent did not appear to have a process to ensure the cladding was being installed to an acceptable standard.
- [48] The Board considers that licensed building practitioners should be aiming to get building work right the first time, not relying on the building consent authority to identify compliance failings and to assist them to get it right. Moreover when compliance failings are identified the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing¹⁷ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [49] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁸:

¹⁶ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

¹⁷ Hansard volume 669: Page 16053

¹⁸ Hansard volume 669: Page 16053

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [50] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
- (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
- (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

- [51] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.
- [52] Taking all of the above into consideration the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has been negligent in that he has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [53] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [54] In *Tan v Auckland Council*¹⁹ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:
- [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.*
- [55] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [56] There was evidence before the Board of changes that had been made to the building consent. However, given that the Complainant was the designer for the project and that he was dealing with consenting issues, including changes to the consent, the Board does not consider that a disciplinary finding in respect of section 317(1)(d) of the Act is appropriate.
- [57] As regards building work that was not completed in accordance with the building consent the Board considers that the finding in respect of negligence is sufficient.

¹⁹ [2015] NZHC 3299 [18 December 2015]

Penalty, Costs and Publication

- [58] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [59] 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

- [60] 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*²⁰ 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.

- [61] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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.
- [62] The matters before the Board were serious. The Respondent's failings have had a significant impact on the build and on the Complainant. At the same time the Board notes that he has attempted to remediate some of the issues at his own cost.
- [63] The Board noted that the Respondent took on a difficult and complex project as a replacement contractor. It appeared to the Board that the project stretched his abilities but that his systems and process have now improved.
- [64] Taking the above into consideration the Board had a starting point of a \$5,000 fine. It has, on the basis of the mitigation heard, decided to reduce this to \$3,500.

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [65] 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.”
- [66] 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 case²².
- [67] In *Collie v Nursing Council of New Zealand*²³ 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.*
- [68] 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.

Publication

- [69] 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 Act²⁴. 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.*
- [70] 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.
- [71] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. The High Court provided

²² *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.

²³ [2001] NZAR 74

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁸.

- [72] 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 interest²⁹. 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.
- [73] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500.

Costs: Pursuant to section 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.

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 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.

- [75] 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

- [76] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 February 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [77] 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.

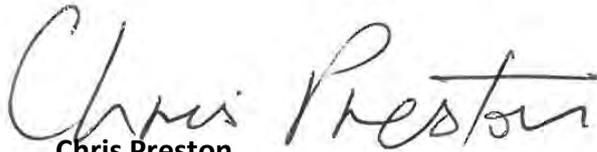
²⁸ *ibid*

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 21st day of December 2018



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*

- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*