

Before the Building Practitioners Board

	BPB Complaint No. CB24382
Licensed Building Practitioner:	Martin Eillebrecht (the Respondent)
Licence Number:	BP 107092
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	Auckland
Hearing Type:	In Person
Hearing Date:	19 March 2019
Decision Date:	12 April 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2

Appearances:

[Omitted] – Building Consultant, for the Respondent

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 sections 317(1)(b) and 317(1)(da)(ii) of the Act.

The Respondent **has not** committed disciplinary offences under sections 317(1)(c) or 317(1)(d) 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) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (d) 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-

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

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).

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.

Procedure

[5] The Complainant indicated that she did not want to proceed with the complaint. Under regulation 17(2) of the Complaints Regulations the Board may proceed with a complaint where a complainant has decided not to proceed as a Board Inquiry. Regulation 17(2) provides:

- (2) *This Part also applies to an inquiry into a matter about the conduct of a building practitioner raised by a complaint where the Board carries on an inquiry into that matter on its own motion after the complainant decides not to proceed with the complaint—*
 - (a) *as if every reference to a matter raised by the Board’s own inquiries included a reference to the matter raised by that complaint; and*
 - (b) *with all modifications necessary to take into account that there is no need for the Board to repeat any process already undertaken as part of the investigation of the complaint under*

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

Part 1 where a substantially equivalent process may be, or is required to be, undertaken as part of an inquiry under this Part; and

(c) *with any other necessary modifications.*

- [6] The Board retains a discretion as to whether or not it continues with the matter as a Board Inquiry. In coming to a decision, the Board needs to take various matters into consideration including sufficiency of evidence, the seriousness of the alleged offending, and whether an inquiry would further the purposes of Part 4 of the Building Act.
- [7] The Complainant did not formally advise that she did not want to proceed. Notwithstanding, and having considered the matter and taking the above tests into consideration the Board decided that continuing with the matter was necessary.

Evidence

- [8] 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.
- [9] 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.
- [10] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|--------------------|--|
| Martin Eillebrecht | Respondent |
| [Omitted] | Witness summonsed by the Board, Design AOP 2 |
| [Omitted] | Witness for the Respondent, [Omitted] |
- [11] The Board's Special Adviser, Steve Alexander, also gave evidence at the hearing. He had been engaged to complete a site visit, review the complaint documentation, and advise on:
- (a) the adequacy of the plans and specifications including whether the alteration was buildable based on those plans;
 - (b) whether the deck that was designed could have been built as designed;
 - (c) the quality and compliance of the building work carried out.

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

- [12] Turing to the building work the Respondent was engaged to undertake alterations to an existing dwelling under a building consent. The Respondent's building work, which included restricted building work, commenced in May 2017 and came to an end in June 2017. Not all of the envisaged building work was complete when the Respondent's involvement in the project came to an end. The building work was completed by another unlicensed contractor. A record of work has not been issued by the Respondent for his restricted building work.
- [13] The complaint raised issues with the building work which included dismantling and replacing an existing deck which utilized existing concrete columns and a steel beam between the columns as a support structure. Photographs of the building work and copies of Council inspection records were provided with the complaint.
- [14] The issues with the build arose as a result of the existing support structure not being level. One of the support columns had, prior to the build, sunk 120mm into the ground. Geotechnical investigations and remedial work had previously been undertaken to stabilise the column. The issue was not identified at the design stage. The design solution assumed a level build platform.
- [15] At the hearing evidence was heard from [Omitted]. He noted that he did a site visit and that at his direction the Respondent took a site measurement for him of the height between the ground and the steel beam on one of the columns. It was assumed that the beam between the columns was level and there were no visual cues to the contrary. The column that was measured was the one that had sunk 120mm into the ground. As the Special Adviser noted:

7.7 ... it seems that the plans were drawn based on a range of assumptions. Those assumptions were not made clear on the plans and to make matters worse other complicating factors were uncovered.

- [16] The Special Adviser noted a number of issues with the design and its buildability. He observed:

7.24 Out of all those inadequacies with the plans, some of them could readily be noticed by the builder before a lot of progress was made, but others would have been a surprise in the sense that the builder would have assumed that the designer had already figured these matters out.

7.25 A prudent builder in this situation would begin by opening up the structure, taking measurements and planning the works in advance. My experience indicates however that most builders are likely to complete the demolition phase before realising that the design would not work as presented.

7.26 When the works were uncovered it is apparent that the builder did seek design amendments from the designer. However, the evidence

suggests that the wrong design amendments were chosen leading to the outcome that is the basis of the owner's complaint, as discussed below.

- [17] The Respondent identified the issue with the sunken column early in the build. He developed a solution to it and continued with the build. The solution involved packing the steel beam at its lowest point to create a level platform. A timber plate ramsetted into the steel beam with packers was used. The lowest point was the point at which the design was developed from.
- [18] The Respondent did not consult with the designer or with an engineer prior to packing the beam but noted that the Council would have seen it during inspections and had not raised issues with it. The packing resulted in compounding problems with the building work and with the overall design solution having to be changed to accommodate the 120mm increase in height. This included changes to ensure there was sufficient height between the top of the supporting beam and the floor structure to provide the necessary falls for the deck.
- [19] The Special Adviser's opinion was that the Respondent should have sought design and engineering input into the method used to pack the beam prior to undertaking the work to account for matters such as shear stress on the plate and fixings. He noted that the solution used did not come within the parameters of any acceptable solutions such as those in NZS:3604. He also considered that a minor variation to the building consent should have been sought.
- [20] The Respondent also developed a solution to deal with weathertightness issues at the juncture between the deck and the building. He stated he did this in consultation with the Council and the designer who developed a redesign based on it. A minor variation was processed. The redesign involved creating a threshold step above the internal floor level to ensure that there was a 100mm step from the top of the waterproofing membrane to the sill of the window. This, in turn, resulted in the existing doors no longer fitting into the opening. New doors had to be installed. The Complainant's noted that had they known of the implications of the solution in advance then they may have chosen not to do the project or to only do a more limited scope refurbishment.
- [21] The Special Adviser noted:
- ... if a number of design amendments were made to reflect site conditions, then building the deck in accordance with the plans might have been possible and that the need for new sliding doors may have been avoided. In any event, different details would have been needed*
- [22] The witnesses at the hearing discussed various options that may have been used as alternatives to the solution that was used.
- [23] The Board also requested that the Special Adviser make enquiries as regards who carried out or supervised the installation of butynol membrane. The query was with

regard to the charge that the Respondent had carried out restricted building work that he was not licensed to carry out. The Special Adviser noted a specialist contractor had been used. At the hearing the Respondent provided details of the licensed person who did the butynol work.

- [24] With regard to the record of work the Respondent presented one at the hearing for his restricted building work. He noted issues with an unlicensed person continuing with the work and of the work carrying on under his licence when his involvement had ceased over a payment dispute. He stated that the owners were requiring a record of work from him for all of the restricted building work which included items he had not carried out or supervised. The Respondent did not advise the Council that he was no longer the licensed building practitioner for the consented building work.

Board's Conclusion and Reasoning

- [25] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent 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 should be disciplined.

- [26] The Board has also 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); or
- (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).

- [27] The reasons for the Boards decisions follow.

Negligence and/or Incompetence

- [28] 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 into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [29] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [30] 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 Act⁹. 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 practitioner¹⁰.
- [31] 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:*
- (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.*

- [32] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹ and be carried out in accordance with a building consent¹². 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.

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

- [33] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³ 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.

- [34] The Board finds that the Respondent was negligent in the manner in which he dealt with the steel supporting beam when he found it was not level. The Board considers the Respondent should not have proceeded with the build at that point in time. Rather he should have consulted with the designer to ensure a design solution was developed. Had he done so then the issues and cost escalations that followed could have been avoided.
- [35] The Board also finds that the Respondent was negligent in the manner in which he went about packing the steel beam. He did not seek the appropriate engineering advice. There is no assurance that the solution he developed meets building code requirements. He also failed to notify the Council of the change and to process a minor variation or to engage the designer to do so.
- [36] Whilst the Respondent noted that the Council did not raise an issue with the solution that does not mean that it meets the building code. As the solution was not an "acceptable solution" as defined in the Act some form of verification of its compliance would have been required. No means of verification were provided. Had the correct process been followed, which would have been to have a solution designed and agreed to by all parties including the Council, then verification would have been required and provided. The Respondent was negligent in failing to follow such a process.
- [37] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent 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.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [38] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [39] The Respondent is a licensed building practitioner with Carpentry Licence. The butynol work required a roofing licence. The Board was provided with evidence that

¹³ [2001] NZAR 74

an appropriately licensed person carried out the work. As such the disciplinary offence has not been committed.

Contrary to a Building Consent

- [40] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [41] With the exception of the packing of the steel beam for which a minor variation should have been sought, and which has been dealt with under negligence, the Board noted that the building consent was varied for the other changes and the building work that the Respondent did was consistent with the building consent.

Record of Work

- [42] 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 work¹⁴.
- [43] 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.
- [44] The Board discussed issues with regard to records of work in its decision C2-01170¹⁵ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [45] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [46] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [47] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. This did not occur in the present case. The Respondent’s involvement ceased before all of the

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

¹⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

envisaged restricted building work was complete. The Respondent noted that the building work was carried on by an unlicensed person.

[48] Given the Respondent's knowledge that another person was completing the building work it follows that he knew he would not be carrying out any further work. At that point in time his obligation to provide a record of work arose. He did not provide one until the hearing which was well after completion. 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.

[49] The Respondent has raised issues with the build being completed by an unlicensed person. Those are matters that he should have brought to the Council's attention. Section 89 of the Act, for example, requires:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

(1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*

(a) *the territorial authority in whose district the building is situated; and*

(b) *the owner.*

(2) *The notification must—*

(a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*

(b) *state how the building work does not so comply; and*

(c) *be given as soon as practicable after the licensed building practitioner forms that view.*

[50] The Respondent should also note that a record of work can be used to detail what has and what has not been done for a licensed building practitioner. In other words it could have been used to distinguish between what he did and what was completed post his involvement.

[51] 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.

[52] In this instance there was an ongoing payment dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Penalty, Costs and Publication

- [53] 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.
- [54] 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

- [55] 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*¹⁶ 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.

- [56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ 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.
- [57] The Respondent has a disciplinary history before the Board. The previous matter, C2-01416, also involved a finding of negligence. It related to carrying out building work without a building consent. The Board did not, however, consider that the prior conduct was related to the present conduct and, as such, it has not taken it into account as an aggravating factor.
- [58] The Respondent has been found to have committed two disciplinary offences. Negligence and a failure to provide a record of work.
- [59] The negligence found was moderate but the consequences for the owners was significant. Build costs escalated as a result of it.
- [60] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500.

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

There were mitigating factors in relation to the record of work in respect of an unlicensed person carrying on with the build. The Board has taken these into account.

- [61] Taking the above matters into consideration the Board has decided that a fine of \$2,000 is the appropriate penalty for the disciplinary offending.

Costs

- [62] 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.”
- [63] 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 case¹⁸.
- [64] In *Collie v Nursing Council of New Zealand*¹⁹ 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.

- [65] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board’s inquiry. This is significantly less than 50% of actual costs.

Publication

- [66] 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 Act²⁰. 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.

- [67] 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.

¹⁸ *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.

¹⁹ [2001] NZAR 74

²⁰ Refer sections 298, 299 and 301 of the Act

- [68] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.
- [69] 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 interest²⁵. 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.
- [70] Based on the above the Board will not order further publication.

Section 318 Order

- [71] 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 \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 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.

- [72] 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

- [73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **10 May 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

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

- [74] 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

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

Signed and dated this 12th day of April 2019



Richard Merrifield
Presiding Member

ⁱ Section 318 of the Act

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