Before the Building Practitioners Board

	BPB Complaint No. C2-01721
Licensed Building Practitioner:	Kameron Chand (the Respondent)
Licence Number:	BP 130932
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:	29 May 2018
Decision Date:	14 June 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
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 sections 317(1)(b) and 317(1)(da)(ii) 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 Regulations[1] 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 or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

(c) 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

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

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . 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 committed[5]. 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Kameron Chand	Respondent
[Omitted]	[Omitted]
John Rennie	Technical Assessor

[7] The Complainant engaged [Omitted] to construct a new residential dwelling. [Omitted] managed the build. He was not, at the time, a licensed building practitioner. At the commencement of the build, in July 2016, the licensed building practitioner was [Omitted]. He took the project through to the stage of the lower

[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

floor framing being erected and the sub structure for the second floor being partially erected. At this point, noted as November 2016, the Respondent took over as the licensed building practitioner. He took the build through to a near to complete stage. The Respondent was noted as being at building inspections from November 2016 on many of which were failed.

[8] The Complainant raised issues with the quality and compliance of the build. An independent person was engaged to carry out an inspection of the building work and provide a report. The report dated 3 July 2017 identified multiple issues relating to various trades. A complaint was made to the Board about the Respondent.

[9] The Board engaged a Technical Assessor to review the building work. John Rennie's report noted multiple issues with the quality and compliance of the building work including, and relevant to the Respondent's building work, issues with the sizing of the foundation and the connection of framing to it, the installation of exterior windows and doors and interior doors, issues with the upper floor being out of level and with the installation of steel beams in the lounge.

Foundations

[10] An allegation was made that the due to the difference in the concrete block foundation size and the pre-nailed framing size there is a discrepancy in the size of the building by up to 100mm. The Technical Assessor noted that he was not able to confirm the dimensions without carrying out a cadastral survey.

[11] The foundation was not constructed by the Respondent. Nor did he erect the framing connected to the foundation. An issue with the brick cavity was identified by the building consent authority. In essence, in order to obtain the necessary cavity between the bricks and the framing, which sat proud of the foundation, the bricks also sat proud of rebate in the foundation for the bricks and were thus not adequately supported. An angle bracket was installed to support the bricks and obtain an inspection pass.

[12] The Technical Assessor noted:

> *Regardless of the engineered solution eventually passing the council inspections, the discrepancies in setting out the timber framing still exceeds the tolerances stipulated within NZ3604:2011 (a maximum of 15mm) therefore does not comply with the overall requirements of the Building Code.*
>
> *Kameron Chand failed to rectify the framing and/or request the pre-cut framing be altered to accommodate the concrete flooring and foundations.*
>
> *The interior of the dwelling has had the internal linings installed and therefore the timber wall framing could not be inspected, however based on our conversations with Kameron Chand, it was confirmed that the timber framing hangs past the concrete rebate by greater than 6mm as set out at Section 6.11.9.2 of NZS 3604:2011.*

[13] At the hearing the Respondent stated that he noted that the framing required further fixings as it was overhanging the foundation. He drilled into the foundation on an angle and installed additional fixings at 600 mm centres. He did not consult the designer, an engineer, or the building consent authority prior to carrying out the remedial work or after its completion. He did advise the project manager of the issue. He stated, at the hearing, that he had not realised that he should have sought engineering and/or design input into the solution.

[14] The Respondent did not ascertain whether the issue was the size of the foundation or the size of the frames. He did not consider resizing frames as elements of the subfloor for the upper story had already been installed.

[15] The Technical Assessor noted that at the least the building consent authority should have been consulted. He was unsure whether the change would have been a minor variation or whether it would have required a formal amendment to the building consent.

[16] The Technical Assessor also noted that the solution used would not have been compliant as there would have been insufficient timber cover for the fixing method used.

Exterior Windows and Doors

[17] The Complainant alleged that the exterior doors and windows had been poorly fitted and that some of frames have been forced out of square when being fitted. This resulted in gaps around the windows when closed. The Technical Assessor confirmed the defect as well as noting that a bi-fold door could not be opened. He noted that, as a result of the defects, the windows were not operable as designed and that:

> *In order to remediate these defects, it is anticipated that the joinery units will require removal. Subsequent work will also be required to remediate the internal plasterboard linings that have been installed, plastered and painted.*

[18] At the hearing the Technical Assessor noted that the plasterboard around the windows which were not square was not fully rebated in places and that it was possible to see through gaps around the windows.

[19] The Respondent stated that he both installed and supervised the installation of the windows but that the bifold door was delivered without the doors installed and was installed without the door units. He stated all units were levelled and plumbed.

Interior Doors

[20] The claimant alleged that the clearance to the base of the internal doors generally varied. The Technical Assessor noted there is no specific requirement stipulating the distance required to the base of the door and that where the door is not straight it is a defect under the guide to tolerances, materials and workmanship in new residential construction. He also considered that the doors had not been installed in

a tradesmen-like manner. At the hearing it was clarified that two doors in particular were an issue.

[21] The Respondent stated that his workers installed the doors. He submitted that issues may have been caused by the plasterboard installers who were subcontracted to do the work.

Upper Floor Levels

[22] It was alleged that the front comer of the upper floor, over the entrance, was out of level by 18 mm over a 1 metre distance. The Technical Assessor noted there was no foundation or concrete for the post that supported the area and that the lack of foundation was causing deflection and cracking that had been noted to a portion of the external plastering of the upper floor above the front door entrance.

[23] At the hearing the Respondent gave evidence that the post had been installed prior to his involvement in the project and that there was no indication that the foundation for it had not been installed. The Technical Assessor ascertained the lack of a foundation by removing soil from around the post.

Structural Steel

[24] The Complainant informed the Technical Assessor that he visited the property during construction and that the Respondent was propping the floor because there were issues with beams. The Respondent informed the Technical Assessor that there were issues where three steel beams connected in the lounge area and that the steel fabricator was requested to come to site to remediate the defect.

[25] The Responded gave evidence that he packed and adjusted the level of the floor under the particle board flooring and that he tried jacking the beams to remove a sag.

[26] It was noted at the hearing that stepped cracking in the cladding in the area of the beams was visible indicting that mortar joints in the brick veneer under the plaster coating had failed. The cracks were plastered over.

[27] The Respondent was questioned as to whether the structural engineer was consulted. He noted there were two engineers involved and it was unclear which one was responsible. The Technical Assessor had contacted one engineer who had attended the site in relation to the beams. The engineer advised him that he would not sign off on the remediation and that he had advised that a structural engineer would have to be engaged. The Technical Assessor contacted the second engineer. He stated he had not completed any site observations.

[28] The Technical Assessor noted that if the beams were installed as per the building consent and had then failed then it was a serious issue which would require close attention.

Record of Work

[29] The Respondent's involvement in the build came to an end in June 2017. He completed a record of work dated 6 July 2017 and provided it to the owners. He did not provide a copy to the Territorial Authority. The Respondent stated that he was not aware of this obligation to provide it to both and that he does normally provide it to the Territorial Authority when he is the person applying for the Code Compliance Certificate.

Board's Conclusion and Reasoning

[30] 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

and should be disciplined.

[31] The Board has also decided that the Respondent **has not**:

(a) 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);

(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)

[32] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[33] 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.*

[34] 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 Courts[8].

[35] 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"*.

[36] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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.

[37] 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 Act[11]. 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 practitioner[12].

[38] 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.*

[39] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. 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.

[40] 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.*

[41] The Board accepted that the Respondent was not responsible for all of the building work that was complained about. The Respondent is, however, responsible for how the rectification of the items that did not meet the requirements of the building code were dealt with.

[42] In this instance there were serious compliance issues with lower floor framing and with upper floor beams. Rectification of both was undertaken by the Respondent. Advice and/or instructions from suitably qualified exerts was not sought. Neither was the building consent authority consulted. No variations to the building consent were sought. The Respondent's negligence has come about in his failing to seek instructions and to consult with the building consent authority.

[43] In this respect the Respondent should note that he is required to work within his competence[16]. The rectification of the issues with the framing and the beams required, at the least, engineering input to ensure the solutions would meet the requirements of the building code. The Respondent was not qualified to make such an assessment. The risk in failing to seek the correct input is that the work may still be non-compliant and may be putting the safety of persons in the dwelling at risk.

[44] The solutions should have also been checked with the building consent authority to ensure that, as the determiner of whether building work meets the requirements of the building code, the solution was acceptable to them and that it would not impact on other aspects of the consented design. In this respect it should be noted that the process of issuing a building consent and the subsequent inspections under it ensure independent verification that the building code has been complied with and the

[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74
[16] Section 314B(b) of the Act.

works will meet any required performance criteria. It is also an offence under section 40 of the Act to carry out building work other than in accordance with a building consent when one is issued. The failure by the Respondent to notify the building consent authority of the changes made to the consented design has, in essence, defeated the purpose of the consenting process.

[45] 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.

[46] As regards the other matters noted in the Technical Assessor's report the Board also finds that the manner in which the windows were installed fell below the expected standards. The remaining items, however, were either minor, not complete or was the work of other trades.

Contrary to a Building Consent

[47] The items that were carried out contrary to a building consent identified in the Technical Assessors report were completed prior to the Respondent's engagement. Given this, and the finding that the Respondent has been negligent in how he dealt with those matters, the Board does not consider a finding under this disciplinary provision is necessary.

[48] The Board does, however, consider that the conduct of the licensed building practitioner who carried out the building work that was contrary to the building consent should be inquired into.

Record of Work

[49] 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[17].

[50] 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.

[51] The Board discussed issues with regard to records of work in its decision C2-01170[18] 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.

[52] 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

[17] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[18] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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.

[53] 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 …".

[54] The Respondent's completion occurred in June 2017. A record of work dated 6 July 2017 was completed by the Respondent and provided to the owner. It was not provided to the Territorial Authority. The requirement in section 88 is that a record of work is to be provided to both the owner and the territorial authority, not one or the other. As such the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[55] 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. No good reasons were advanced.

Disrepute

[56] 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[19] and discussed the legal principles that apply.

[57] The Act does not provide guidance as to what constitutes "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[20] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[21] 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*.[22]

[58] 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,

[19] Board decision dated 2 July 2015.
[20] 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
[21] [2012] NZCA 401
[22] [2012] NZAR 1071 page 1072

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

- criminal convictions[23];
- honest mistakes without deliberate wrongdoing[24];
- provision of false undertakings[25]; and
- conduct resulting in an unethical financial gain[26].

[59] In this instance the initial information received indicated that the Respondent may not have actively supervised the building work and that he simply allowed his licence to be used by others. The evidence received at the hearing showed that the Respondent was actively involved in the build. As such the disciplinary offence has not been committed.

Penalty, Costs and Publication

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

[61] 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

[62] 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*[27] 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.*

[63] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[28] 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

[23] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[24] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[25] *Slack, Re* [2012] NZLCDT 40
[26] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[27] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[28] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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.

[64] The Respondent has been found to have committed two disciplinary offences. The negligence matter is serious. The Board believes, however, that the Respondent has learnt from the matter and the he will ensure he consults the correct experts and follows the correct process in the future. The Board also accepts that the Respondent did take steps (albeit the wrong ones) to try and rectify issues and did not just ignore them. On this basis it considers that a fine is the appropriate penalty.

[65] The second offence is a record of work matter. The Board's normal starting point for a record of work matter is a fine of $1,500. There is some mitigation in that the record of work was provided to the owner within a reasonable period of time.

[66] Based on the above the Board's overall penalty decision is that the Respondent been fined a total amount of $3,500. But for the mitigation the fine would have been much higher.

Costs

[67] 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."

[68] 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[29].

[69] In *Collie v Nursing Council of New Zealand*[30] 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.*

[70] 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.

Publication

[71] 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[31]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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[29] *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.

[30] [2001] NZAR 74

[31] Refer sections 298, 299 and 301 of the Act

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.

[72] 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.

[73] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[32]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[33]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[34]. 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*[35].

[74] 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[36]. 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.

[75] Based on the above the Board will not order further publication.

Section 318 Order

[76] 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 $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.**

[77] 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.

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[32] Section 14 of the Act
[33] Refer sections 200 and 202 of the Criminal Procedure Act
[34] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[35] ibid
[36] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[78] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **6 July 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 consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 14th day of June 2018



Richard Merrifield
Presiding Member

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[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.