

Before the Building Practitioners Board

	BPB Complaint No. C2-01772
Licensed Building Practitioner:	Andrew Musson (the Respondent)
Licence Number:	BP 101339
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:	6 June 2018
Decision Date:	4 July 2018

Board Members Present:

Mel Orange, Legal Member (Presiding)
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

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 a disciplinary offence under sections 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 or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (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).

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

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*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 Respondent was sent a Notice of Proceeding dated 9 April 2018 which detailed the hearing date and a Notice of Hearing was sent on 10 April 2018 which gave further detail of the time and place of the hearing. A prehearing teleconference was convened on 3 May 2018. The Respondent was in attendance. The hearing details were discussed. The Respondent advised that he would be attending together with a witness that he would be calling.
- [6] On the day of the hearing the Respondent did not appear. Summoned witnesses were in attendance. The Respondent was contacted and asked if he would be attending. He advised that he had work commitments that meant he could not attend and that he had not put the date in his diary and so had forgotten about the hearing. He sought an adjournment.
- [7] As summoned witnesses were in attendance the Board decided to proceed with the hearing and to take the evidence of those witnesses and then to adjourn to allow the Respondent an opportunity to be heard.
- [8] The Respondent was provided with a transcript of the evidence of the witnesses. A direction was issued that the Respondent was to notify the Board Secretariat in writing no later than five working days after receipt of the transcript whether the Respondent required that the hearing be reconvened. A date was set for the hearing to reconvene if required.

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

- [9] Alternatively the Respondent was advised that he could provide further written evidence and/or submissions for the Board to consider. Again a time frame of five working days was given.
- [10] The Respondent did not act upon the directions. The Secretariat attempted, unsuccessfully, to contact him when the time frames elapsed. A further five working days was allowed for. No response was forthcoming and as such the Board has decided to proceed and make a decision on the basis of the evidence before it.

Evidence

[11] 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.

[12] In addition to the documentary evidence before the Board heard evidence at the hearing from:

[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner, Design AOP 2
[Omitted]	Licensed Building Practitioner, Design AOP 2
[Omitted]	Builder

[13] The Respondent was engaged by way of his company to carry out alterations to an existing dwelling house under a building consent. The building work, which included restricted building work, commenced in May 2015. The building contract was terminated in June 2016.

[14] The Complaint set out that during the project it was found that a block wall that was to remain as part of the build was not fit for purpose. A decision was made to remove the block wall and replace it with a timber framed wall. Subsequently, during a building consent authority (BCA) inspection, it was ascertained that the change to the consented plans had not been approved by the BCA.

[15] Documentation from the BCA included an "IF1 – Residential final checklist" which noted the issues as follows:

THE MINOR VARIATION FOR CHANGE IN WINDOW AND ADDITION OF DOOR TO GARAGE BROUGHT TO LIGHT A CHANGE IN CONSTRUCTION OF GARAGE WALL FROM 20 SERIES BLOCK WALL TO TIMBER FRAMED WALL AND CHANGE OF CLADDING TO CEDAR BOARD AND BATTONS THIS HAS NOT BEEN ADDRESSED PREVIOUSLY AND BECAUSE THE WORK HAS BEEN DONE AN AMENDMENT IS NOT THE PROFFERED PROCESS IN THE CIRCUMSTANCES IT IS LIKELY THAT A CERTIFICATE OF ACCEPTANCE WILL HAVE TO BE SOUGHT AND IS SUBJECT OF FURTHER CONSIDERATION FROM SENIOR INSPECTION STAFF

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

[16] The Respondent made a written response to the complaint allegations and provided copies of related correspondence and documentation. He noted a commercial dispute and stated the framing had previously passed and that the final inspection failed as the inspector had concerns over the timber framed wall which was only partially detailed and that it was an architectural issue and was not the result of any flaw of his or his company. The Respondent noted on an inspection record that a request had not been made for a minor variation at the time by the BCA.

[17] The Respondent provided further responses as regards the wall in which he stated:

At design stage the engineers Aireys Consultants and architect [Omitted] failed to discern that the existing hollow block wall (which was tagged to stay) was unable to safely bear the load from the 6 courses of blocks shown to be added (approx. 3 ton). Once myself and the block layer shot our levels and discovered what they wanted us to do we flagged it to the engineer Carlton Cribb and it was deemed to require removal. The owner was not happy about this and blamed me for the situation. I meet with both owner and architect to try and resolve the issue in the best way for the project.

This involved the architect drawing some elevations and floor plans and we received approval from the owner to proceed in timber with shadow clad identical to the opposing elevation. I was expected to absorb the cost of this removal and extra work which I did.

I was instructed by the architect to get the plan approved by council as an on site alteration as the wall was not load bearing (due to the nature of the steel work in the building). I had the alteration approved by the inspector covering saddle and chase flashings, RAB and other required details.

That was job done as far as I was concerned, unfortunately his inspection note was considered too ambiguous later by another inspector.

We passed a framing inspection, a site meeting dealing with all the details for junctions a wrap inspection and a cladding inspection only to have this raised at final. I am upset that we have endeavoured to be diligent and peoples interpretation of site notes or the lack of has created issue.

This project was complex and the owner was a difficult individual when programme was extended due to sub contractor mistakes surrounding the garage door causing the in ability to get pre line, We had some paint and decoration remedial work to do as our painters rushed due to market demand but over all I am proud of the quality of the project. I would welcome your inspection.

[18] The BCA documentation obtained by the Board included copies of minor variation requests for change to the consented plans but not for the matter complained about.

- [19] At the hearing [Omitted] gave evidence and stated that he was present during demolition when it was ascertained that the wall in question had cracks and was not as per what was on the plans and that he raised it with the Respondent. He was not involved in the next phase of the work.
- [20] The Board also heard from the two designers that were involved in the project. They stated that they did not issue any instructions to replace the wall in question with a timber wall and that they were not aware of any instructions from the engineer to replace it. [Omitted] did go to site to look at the wall and the footing when the issue was first noticed. There was some discussion about a light timber frame wall, some mock up elevations were completed and circulated. No further instructions were received. They did not process any building consent changes for it. They did not have an observation or administration contract.
- [21] [Omitted] expected to receive a request for an amendment to the consent. He considered an engineer would have to be consulted to complete the changes for the footings but that the wall itself was not structural and that it would have come within NZS3604 parameters. When he found out that it had been completed and passed at a framing inspection he thought the council must have accepted it without drawings or other arrangements for the change had been made. He noted that they had processed other minor variations to the building consent for the job. He did not think the change to the wall would have been a minor variation.
- [22] The Complainant noted that one of the issues that has since been discovered and that they are dealing with is that the footings created were not tied into the original foundations. There is just a layer of concrete over the existing foundation. It has since been remediated by other contractors. The Complainant stated that he hoped to be able to get a code compliance certificate for the work as opposed to a certificate of acceptance as it has now been rebuilt with engineer's drawings.
- [23] The Complainant also alleged that the Respondent had allowed an unlicensed builder [Omitted] to undertake restricted building work without adequate supervision. The Complainant alleges that the Respondent told them that [Omitted] was a licensed builder, which they later found to be untrue, and the Complainant obtained a statutory declaration from [Omitted] in which he stated:
- From Feb 2016 to May 2016, I was left on site to carry out the building construction work with minimal site supervision and was asked to direct other apprentices/sub-contractors on site.*
- [24] The Complainant also obtained a statutory declaration from [Omitted] who had, in the early stages of the build, been an on-site foreman. He stated, as regards [Omitted] a second-year apprentice:
- After I finished working on stage one, I was aware that Musson Building Services had left [Omitted] on site to undertake Stage 2 building construction work of the garage minimal supervision of a licensed builder.*

- [25] The Respondent denied making a statement to the effect that [Omitted] was licensed and noted he was a skilled adult apprentice. He further noted that [Omitted] was, in his opinion a disgruntled ex-employee. As regards his supervision of [Omitted] he stated:

This statement is factual. I left him with minimal supervision to complete tasks he was capable of but would shy away from if he could as he lacked confidence. I reviewed his work at each stage, made him review product spec sheets and start to take responsibility. I believe that this is training.

- [26] [Omitted] gave evidence. He stated that once he left the site [Omitted] was in charge and that he was not supervised. He noted he would get calls from [Omitted] after he had left the Respondent's employ asking how to do aspects of the build as he was not getting assistance from the Respondent. [Omitted] noted that the Respondent's supervision when he was involved in the job was also minimal, that documentation was a shambles and that the Respondent was more interested in getting the work to the next stage so that he could get the next payment. [Omitted] stated that the Respondent had other jobs on the go at the time and that the Respondent was the only licensed person in the company.
- [27] [Omitted] stated that the Respondent had about three to four other jobs on the go at the time one of which was larger than the Complaint job.
- [28] The Complainant also alleged that the Respondent had failed to provide a record of work and that he had been requesting one for over twelve months.
- [29] With regard to the record of work the Respondent provided a copy of a record of work dated 1 December 2016. He stated it has been provided. The Respondent stated he provided it at the final inspection that he was involved in to the Complainant but not to the Territorial Authority.

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 or incompetent manner (s 317(1)(b) of the Act);
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);
- and should be disciplined.
- [31] The Board has also 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).

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

Negligence and/or Incompetence

- [33] The findings of negligence relate to the Respondent's failure to ensure changes to the building consent were dealt with in the appropriate manner and to his lack of supervision.
- [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 into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [35] 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.
- [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 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.
- [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*

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)

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

- (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.*

[38] 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.

[39] 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.

[40] As regards building consent changes the Respondent had a duty, if the building work could not be carried out in accordance with the consented plans, to consult with the designer and/or the building consent authority to establish if the proposed change would still meet building code compliance requirements. This could have been done by way of an application for a building consent amendment or, if minor in nature, a minor variation under section 45A of the Act. In this respect section 89 of the Act states:

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*

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ [2001] NZAR 74

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

[41] The design witness considered the change may have required an amendment and at least engineering input for the footings. There is no evidence that such an amendment was sought or that there was any engineering assessment before the building work was carried out. There is no evidence of a minor variation having been sought. The Board does accept that the designer was consulted but in this respect the design process for a change has not been completed.

[42] The Respondent has indicated that it was not his responsibility to seek a minor variation or amendment to the building consent. Whether it was his responsibility or not the Respondent is required, under section 40 of the Act, to build in accordance with the building consent. He has not done so. In essence he has proceeded to make changes to the building consent without ensuring that the changes were approved and would meet the requirements of the building code. In failing to do so the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.

[43] 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.

[44] Turning to supervision it is defined in section 7¹⁴ of the Act. The definition states:

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 term, in the context of the Building Act, has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁵. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work

¹⁴ 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.*

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.

- [46] The Board notes that much of the building work undertaken was restricted building work and that under the Act such work has to be carried out or supervised by a licensed building practitioner. The Respondent was that person for this job.
- [47] The evidence before the Board was that he had minimal involvement in the day to day building work that was being completed and that in phase 2 he left an apprentice to run the job. That person had to turn to an ex-employee for advice and direction. Given these facts the Board finds that the Respondent has not completed his responsibilities and in doing so has fallen below the expected standards and has been negligent.

Contrary to a Building Consent

- [48] As noted above 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.
- [49] In *Tan v Auckland Council*¹⁶ 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.*
- [50] The building work on the replaced wall was not as per the building consent. The Board accepts though that had the wall been constructed as per the building consent then it would not have met the requirements of the building code. As such the Board does not consider it appropriate to make a finding that the Respondent has built contrary to the building consent.
- [51] The Board also notes that it has dealt with consent changes as negligence and as such a further finding is not required.

¹⁶ [2015] NZHC 3299 [18 December 2015]

Record of Work

- [52] 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 work¹⁷.
- [53] 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.
- [54] The Board discussed issues with regard to records of work in its decision C2-01170¹⁸ 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.
- [55] 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.
- [56] 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 ...”.
- [57] 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. Completion occurred in June 2016 when the contract was terminated. A record of work was not provided until December 2016, some six months later. 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.
- [58] 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.
- [59] In this instance there was an ongoing 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.

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

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 Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [61] The matter was dealt with at a hearing but the Respondent did not appear. Included in the papers before the Board was information relevant to penalty, costs and publication and the Board 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*¹⁹ 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*²⁰ 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.
- [64] The Board notes that the Respondent has previously appeared before the Board. It accepts though that the conduct complained about in this case occurred prior to the findings in the other case being made and as such it is not an aggravating factor. That said the other case also involved changes to a building consent and the Board therefore notes a pattern of such behaviour.
- [65] The Board notes the impact the Respondent's conduct has had on the Complainant and the efforts he has had to go to in order to get the unconsented work remediated. The matters are clearly serious.
- [66] Taking into account all of the factors the Board has decided that a fine is the appropriate penalty. It is set at \$3,000.

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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 case²¹.
- [69] In *Collie v Nursing Council of New Zealand*²² 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. This is significantly less than 50% of actual costs incurred.

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 Act²³. 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.*
- [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 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. The High Court provided

²¹ *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.

²² [2001] NZAR 74

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *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*²⁷.

- [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 interest²⁸. 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 order further publication. It is important in this respect that other licensed building practitioners are educated about the need to adhere to building consents and to follow the correct processes when they are to be departed from.

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 \$3,000.

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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

- [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.

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 **26 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 Actⁱⁱ.

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 4th day of July 2018



Mel Orange
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.*