

Before the Building Practitioners Board

	BPB Complaint No. CB 25610
Licensed Building Practitioner:	Shamsher Ali (the Respondent)
Licence Number:	BP 100469
Licence(s) Held:	Carpentry; Site AOP 1

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:	5 May 2022
Decision Date:	26 May 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mr D Fabish, LBP, Carpentry and Site AOP 2
Ms J Clark, Barrister and Solicitor, Legal 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.

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

Contents

Summary of the Board’s Decision	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Further Submissions	6
Board’s Conclusion and Reasoning	7
Negligence.....	7
Contrary to a Building Consent.....	9
Penalty, Costs and Publication	10
Penalty	10
Costs.....	11
Publication	12
Section 318 Order	13
Submissions on Penalty, Costs and Publication	13
Right of Appeal	14

Summary of the Board’s Decision

- [1] The Respondent has carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He is fined \$2,000 and ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

- [2] The hearing resulted from a complaint about 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], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (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).

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

- [3] In further investigating the Respondent’s conduct under sections 317(1) (b) and 317(1)(d) of the Act, the Board resolved to inquire into:
- (a) the quality and compliance issues raised in a report completed by Mr [OMITTED] (Complaint documents 2.1.32 to 2.1.42, Pages 49 to 59 of the Board’s file); and
 - (b) the compliance issues raised in a final inspection completed on 12 May 2020 (Complaint documents 2.1.43 to 2.1.48, Pages 60 to 65 of the Board’s file).

Function of Disciplinary Action

- [4] 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.

- [5] 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.”

- [6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [7] Finally, 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. Those grounds do not include contractual breaches other than when the

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [8] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [12] 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.
- [13] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:
- Shamsher Ali, the Respondent
- [OMITTED], Licensed Building Practitioner, [OMITTED]
- Henry Yam, Building Consent Officer, Auckland City Council
- [14] The Complainant engaged [OMITTED] to construct a new duplex dwelling. [OMITTED] subcontracted the work to the Respondent's company, Shams Construction Works Limited. This was the first time the Respondent had worked with [OMITTED]. The Respondent stated that he was on-site full time, and he both carried

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

out and supervised the work. He had approximately five people on site including carpenters, hammerhands and labourers. He was the only Licensed Building Practitioner within the Shams Construction staff on-site.

[15] Due to contractual issues, the Respondent cancelled his contract with [OMITTED] on 6 March 2020 when the work was “70% – 75% completed”. He gave evidence that he did no further work on-site from some time in February 2020.

[16] Mr [OMITTED] is a licensed building practitioner with Carpentry, Site AOP 1 and Design AOP 2 licences (BP 136949). After the Respondent left the site, he was asked by the owners to assess the work that was needed to gain a code compliance certificate. He inspected the project on 14 May 2020 and produced a report (Document 2.1, Pages 34-42 of the Board’s file).

[17] Mr [OMITTED]’s report summarises his findings as follows-

“What had been described to me prior to assessing it for myself was a few issues with the exterior cladding that needed to be rectified and other small issues that needed remedying to pass its inspection.

What I discovered upon arrival was far worse. The laziness and poor workmanship of the builder that had taken advantage of this client was unbelievable. In over 14 years of residential building, I have never seen incompetence of this scale.”

[18] Mr [OMITTED] was then engaged by the owners to complete the necessary remedial work and he commenced work on 18 May 2020. At the hearing, Mr [OMITTED] confirmed his report. As he undertook the remedial work, Mr [OMITTED] discovered further issues with the original building work. He stated that the remedial work took about four days, using two workers for two days and four workers for two days.

[19] The Board put some of the issues identified in Mr [OMITTED]’s report and some of the matters raised in the Council inspection of 12 May 2020 (Document 2.1, Page 43 of the Board’s file) to the Respondent for comment.

[20] A double joist hanger around a beam supporting the cantilevered second storey had only one nail. Mr [OMITTED] identified the position of this issue (Document 8.3.1, Page 1553 of the Board’s file). In addition to the more general explanation the Respondent gave to many of the issues (as set out in paragraph [27] below), in this instance, the Respondent also said he personally checked every fixing and that this was inspected by a structural engineer and the Council without comment.

[21] Mr [OMITTED] contended that the barge flashings were incorrectly fixed with screws that did not have rubber washers, and instead of a fold into the rib of the roofing material the fold was crushed flat and screwed through. The Respondent claimed that this work was not done by him. However, the Respondent did proceed to do internal work before leaving the project. Mr Yam, an Auckland City Council building

officer, gave evidence that the Council would not allow the internal work to proceed unless the barge flashings had been done.

- [22] In response to Mr [OMITTED]'s criticism of the ridge capping, the Respondent said that it was left open because the barge flashings had not been done. The Board queried why he did not fold the ridge cap in on itself, and the Respondent replied that it was "*not my practice*".
- [23] The Respondent accepted that he had installed scribes instead of treated timber planted sills as required by the consented drawings (Document 8.3.12, Page 1557 of the Board's file). Mr Yam said that this change was not unusual but required a minor variation which the Respondent did not do.
- [24] Mr [OMITTED] alleged that the weatherboards were installed outside the manufacturer's specifications by not being nailed off correctly and being out of level. The Respondent pointed to photos he provided at the hearing (Document 9.1, Pages 1596 and 1598 of the Board file), which he said showed all nailing fixings were correct.
- [25] The Council inspection (Document 2.1, Page 47 of the Board's file) stated, "*fix damage fibre cement boards all around the house (holes filled with silicon, screw holes etc. Even damage parts were covered with masking tape*". The Respondent denied using masking tape.
- [26] Mr [OMITTED] pointed further to missing jointers and the scribes not being over the weatherboards around the windows with the gaps being filled with silicone. The Respondent pointed to his own photos (Document 9.1, Pages 1596 and 1598 of the Board file) to show that he used [OMITTED] weatherboard jointers and did not use masking tape.
- [27] The Board notes that the Respondent consistently gave the same responses to the issues put to him. He said the work was not complete when he left the site, was not his work, or was work done by others after he had left the site. In respect of a number of the photos put to him (in particular the roof clad fixings not in line, the missing corner soakers, and the double joist hangar with one nail). The Respondent claimed that the photos were not of his site and were of some other project. Mr [OMITTED] confirmed the photos were from the site at [OMITTED], Auckland.

Further Submissions

- [28] Following the hearing, the Respondent provided a further written submission dated 9 May 2022. Mr [OMITTED] (as requested by the Board at the hearing) provided dated photographs and a text exchange detailing the remedial work he was asked to do by the owners. The intention had been to provide photographs which were geotagged to the site location, but Mr [OMITTED] advised he was not able to do this. In response, the Respondent provided a further written submission dated 20 May 2022. This included photographs and descriptions of projects completed by the Respondent's company in the last three years.

[29] The Board considered these further submissions on 26 May 2022 and made its decision.

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); and
- (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 **should** be disciplined.

Negligence

[31] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[32] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁹. 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 or, in other words, whether the conduct was serious enough.

[33] 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.¹⁰ 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 practitioner¹¹

[34] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[35] In terms of seriousness in *Collie v Nursing Council of New Zealand*,¹² 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.

[36] In *Pillai v Messiter (No 2)*¹³ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[37] The Board accepts that some of the issues raised would have been dealt with by the Respondent had he remained on the project to its conclusion. However, there were significant workmanship issues which were not executed to a standard expected from a Licensed Building Practitioner. These included - weatherboards out of level and nailing out of line, using silicon and masking tape that was painted over instead of using the correct PVC jointer, and a double joint hangar secured by only one nail.

[38] In respect of the barge flashings, the explanation from the Respondent that the work was not done by him lacked credibility. Mr [OMITTED] pointed to the materials on the roof marked "Sham Construction", and the Board heard from the Council

¹² [2001] NZAR 74

¹³ (1989) 16 NSWLR 197 (CA) at 200

inspector that it would not have let the Respondent move to the internal work if the barge flashings had not already been done.

- [39] The Board found the Respondent's explanation that the photos produced by Mr [OMITTED] were from other sites to be farfetched. Mr [OMITTED] was a credible witness who had no reason to put forward photos from another project. The Respondent's assertion that others did work on the project after he left the site was not corroborated by any evidence.
- [40] The Respondent provided photographs of other projects his company had completed and made statements about his reputation. He made an assertion that "*we don't make errors and mistakes*" (Document 9.3, Page 1623 of the Board's file). It is on the basis that the Respondent has put his reputation and other projects in issue that the Board has taken note of the Respondent's previous appearances before the Board. To counter the Respondent's evidence, the Board noted that the Respondent has been disciplined on two previous occasions, one of which led to his licence being suspended.
- [41] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [42] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [43] 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 that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.

- [44] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [45] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.
- [46] Unlike negligence contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁴.
- [47] Given the above factors, and the workmanship issues discussed above (in particular, scribes installed instead of treated timber planted sills, for which a minor variation was not sought, and lack of jointers for the cladding which were required by the manufacturer's specifications), the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Penalty, Costs and Publication

- [48] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [49] 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

- [50] 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*¹⁵ 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:

¹⁴ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

[51] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁶ 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[52] The Board considers that the matter was at the lower level of seriousness and that a fine was appropriate. It adopted a starting point of \$2,000. The Board considered that there were factors which were both aggravating (previous offending) and mitigating (the Respondent was not able to complete the work). These balanced each other out, and, as such, the Board has set the fine at \$2,000.

Costs

[53] 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.”

[54] 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 case¹⁷.

[55] In *Collie v Nursing Council of New Zealand*,¹⁸ 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.

[56] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁹ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action

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

¹⁷ *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.

¹⁸ [2001] NZAR 74

¹⁹ CIV-2011-485-000227 8 August 2011

by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [57] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate in complexity. Adjustments based on the High Court decisions above are then made.
- [58] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

- [59] 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.

- [60] 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.
- [61] 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.

²⁰ Refer sections 298, 299 and 301 of the Act

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*

- [62] 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.
- [63] Based on the above, the Board **Will Not** order further publication.

Section 318 Order

- [64] 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 \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

- [65] 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

- [66] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **8 July 2022**. 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.
- [67] 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/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

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

Right of Appeal

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

Signed and dated this 15th day of June 2022



Mr C Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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