

Before the Building Practitioners Board

	BPB Complaint No. CB25306
Licensed Building Practitioner:	Eric Belcher (the Respondent)
Licence Number:	BP 101405
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	Wellington
Hearing Type:	In Person
Hearing Date:	29 July 2020
Decision Date:	4 August 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer

Appearances:

Allan Knowsley for the Respondent

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

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

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Introduction

- [1] 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]*. 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 contrary to section 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) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [2] The Board identified, in its Notice of Proceeding, that the investigation of the disciplinary allegations under section 317(1)(b) and section 317(1)(d) would focus on

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

the information disclosed in the following inspection reports contained within the complaint documentation which are noted as “failed inspections”.

- [3] The Board noted that there was an error in the Notice of Proceeding which identified that the Board would further investigate conduct under 317(1)(c) of the Act. The error was identified and discussed at a prehearing conference.

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

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

[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 which 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 the Board heard evidence at the hearing from:

- Eric Belcher Respondent
- [Omitted]* *[Omitted]*, Wellington City Council
- [Omitted]* *[Omitted]*, Wellington City Council
- [Omitted]* *[Omitted]*, Wellington City Council
- [Omitted]* Onsite builder (unlicensed)
- [Omitted]* *[Omitted]*

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

- [14] The Respondent was engaged to carry out building work on an alternation and extension to a residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.

- [15] The complaint was made by the Wellington City Council. The Council witnesses present at the hearing stated it was made as a result of multiple failed inspections and concern of the level of direction that was having to be given to the Respondent to achieve compliance. Council witnesses stated that their perception was that the building consent documentation detailed what was required to achieve compliance but that the Respondent was not following what was detailed and that he struggled to understand the details as specified in the building consent documentation.

- [16] The Complainant provided an inspection history as follows. He also provided detail on who had booked the inspections. The records showed that the Respondent or his co-worker *[Omitted]* had, with the exception of a plumbing inspection, called for the inspections. Inspections on 21 June 2019 and 16 July 2019 were called for by the homeowner. The Respondent was noted as being involved in the inspection on 25 November 2019.

Inspection History for consent 422944				
Inspection Date/Time	Status	Inspection Type	Inspector	Notes
25/11/2019 3:18pm	Fail	Site report		Failed: Site report
25/11/2019 3:01pm	Fail	Post Clad/Weathertight		Failed: Post Clad/Weathertight
25/11/2019 2:58pm	Fail	Pre-Clad		Failed: Pre-Clad
26/07/2019 6:40am	Fail	Pre-Clad		Failed: Pre-Clad
25/07/2019 4:00pm	Fail	Post Clad/Weathertight		Failed: Post Clad/Weathertight
5/07/2019 9:44am	Fail	Residential Final - Pbg		Failed: Residential Final - Pbg
5/07/2019 9:23am	Pass	Sub Floor Drainage		
5/07/2019 9:18am	Fail	Post Clad/Weathertight		Failed: Post Clad/Weathertight
5/07/2019 8:39am	Fail	Pre-Clad		Failed: Pre-Clad
13/06/2019 2:15pm	Pass	Pre-Line-Bdg		Passed: Exterior cladding weathertight
13/06/2019 2:14pm	Fail	Pre-Clad		Failed: Pre-Clad
13/06/2019 8:32am	PassNC	Post Line	ALL OMITTED	Passed: Consented documents sighted
12/06/2019 2:54pm	Fail	Post Line		Failed: Post Line
12/06/2019 2:44pm	Fail	Pre-Clad		Failed: Pre-Clad
29/05/2019 4:26pm	Fail	Pre-Line-Bdg		Failed: Pre-Line-Bdg
29/05/2019 4:15pm	Fail	Pre-Clad		Failed: Pre-Clad
15/05/2019 10:21am	Fail	Pre-Line-Bdg		Failed: Pre-Line-Bdg
3/05/2019 11:16am	Fail	Pre-Clad		Failed: Pre-Clad
26/04/2019 11:40am	Pass	Pre-Roof		
26/04/2019 11:31am	PassNC	Pre-Clad		Passed: Consented documents sighted
12/04/2019 9:01am	Pass	Pre-Line-Pbg		Passed: Pipe type
12/04/2019 9:00am	Pass	Drainage		Passed: Work ready for inspection
8/04/2019 9:27am	Pass	Site report		Passed: Work ready for inspection
28/03/2019 12:14pm	Pass	Pre-Pour Foundn/footings		Passed: Work in accordance with approved building consent
28/03/2019 12:13pm	Pass	Pre-Wrap		Passed: Previous inspections passed and satisfactory
1/03/2019 10:30am	PassNC	Pre-Pour Foundn/footings		Passed: Work ready for inspection
25/02/2019 3:25pm	Fail	Pre-Pour Foundn/footings		Failed: Pre-Pour Foundn/footings

- [17] The early failed inspections noted issues with flashings and bracing. Some were supported with photographs of the alleged non-compliant work which were reviewed at the hearing. The later inspections focused on the compliance of roofing work.
- [18] The Complainant filed a written brief of evidence prior to the hearing and an updated brief at the hearing. It responded to each of the matters raised in the complaint.
- [19] The brief was noted and the Board heard evidence at the hearing that the non-compliance issues noted with roofing were, initially, in respect of temporary work and that a plumber had assisted with, and had then undertaken the work much of which took place whilst the Respondent and *[Omitted]* were working in Tonga. The roof was, as a result of a Notice to Fix being issued, replaced at the Respondent's expense.
- [20] Multiple pre-clad and pre-line inspection records noted non-compliant building work. A failed inspection of 3 May 2019 noted:

Head flashing & pre line inspection carried out.

All head flashings to be installed as per plan and re-inspected. All head flashings to be visible at next inspection.

Not approved to proceed with pre line as insulation/air seals and hold down brackets are not installed.

Hold down brackets are required at each end of the bracing element and correct fixings to be used.

- [21] Failed inspections and Site Notices issued on 15 May, 29 May, 12 June and 13 June 2019 continued to note failures to carry out building work in accordance with the building consent and in a compliant manner in relation to flashings and bracing.
- [22] The Respondent noted, in his brief and at the hearing, that he attended to matters as quickly as possible, that multiple inspectors attended the property and that he was issued with conflicting instructions and that the owner called for inspections when building work was not ready to be inspected. The Council witnesses responded that, at each inspection, they were only seeking compliance as per the building consent documentation which they considered was clear and unambiguous.
- [23] With respect to the provision of a record of work, the Respondent gave evidence that the restricted building work had been completed about two weeks prior to the hearing when work on a foundation pile had been completed and that a record of work has now been provided to the territorial authority.

Board's Conclusion and Reasoning

[24] 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);

[25] The Board has decided that the Respondent **has not** 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).

[26] With respect to the record of work, the Board accepted that the restricted building work was not completed until shortly before the hearing and that a record of work had been provided.

[27] The reasons for the Board's findings with regard to 317(1)(b) and 317(1)(d) follow.

Negligence and/or Incompetence

[28] The Board's finding of negligence relates to the manner in which work on flashings and bracing was carried out. It is not with respect to issues with regard to roofing. The Board noted the involvement of other licensed persons in the roofing work and that work was carried out whilst the Respondent was not in New Zealand. Whilst the Board considers that the Respondent should have been more diligent in his oversight of the work it has decided that there is insufficient evidence to make a finding that he carried out or supervised the non-compliant roofing work.

[29] 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.

[30] The New Zealand Courts have stated that assessment of negligence and/or incompetence 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.

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)

[31] 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 Act¹⁰. 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.

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

3 Purposes

This Act has the following purposes:

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

[33] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. 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.

[34] The evidence before the Board was that there were multiple failed inspections and that non-compliance issues were not addressed in a timely manner.

[35] The Building Consent Authority's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

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

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

- (a) whether there is any form of system or process to identify quality and/or compliance issues;
- (b) the extent and seriousness of the non-compliance;
- (c) whether there is a pattern of continued non-compliance; and
- (d) what steps are taken when non-compliance issues are raised.

[36] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing¹⁴, it was noted by the responsible Minister:

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

[37] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention of the enabling legislation¹⁵:

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

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

¹⁴ Hansard volume 669: Page 16053

¹⁵ Hansard volume 669: Page 16053

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

14E Responsibilities of builder

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

[39] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[40] The Board noted, at the hearing, that the Respondent struggled to understand and answer the questions about compliance matters that were put to him and that he did not appear to grasp the issues that the failed inspections had noted. The issues with regard to flashings and bracing were not complex, were clearly articulated in the building consent documentation and were essential to compliance with clauses E2 and B1 of the Building Code. Notwithstanding they were not, over repeated inspections, completed in an acceptable and compliant manner.

[41] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁶ 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.

[42] There was a pattern of continued non-compliance. It was not inadvertent error or oversight. Rather the conduct verged on incompetence.

¹⁶ [2001] NZAR 74

- [43] 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*¹⁷ it was stated as “*an inability to do the job*”.
- [44] The Board, which includes persons with extensive experience and expertise in the building industry, stopped short of making a finding of incompetence. It did, however, find that the Respondent was negligent in that he 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

- [45] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act 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.*

- [46] 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.
- [47] Unlike negligence, contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence need be established¹⁸. The Council noted multiple instances of non-compliance. On this basis, the disciplinary offence is upheld.
- [48] The Board does, however, note the commonality of the finding with that of negligence under section 317(1)(b) of the Act. This will be taken into consideration as a factor when considering penalty.

¹⁷ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208

Penalty, Costs and Publication

- [49] 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.
- [50] 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

- [51] 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.

- [52] 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 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.
- [53] The Respondent has committed two disciplinary offences. The Board will, however, treat the matters as a single offence when considering what the appropriate penalty is.
- [54] The Board considers that level of the Respondent's negligence to be at the moderate level. Given the finding, the Respondent's age and his past experience it has decided that a fine will be the most appropriate penalty. The Board adopted a starting point of \$3,500 but has reduced the fine to \$2,500. This reflects the seriousness of the offending and is consistent with penalties imposed by the Board for similar matters. It also takes into account the mitigating factors present, which include the Respondent's good history to date and that the matters were, eventually rectified.

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

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

- [55] The Board recommends that the Respondent also take time to improve his regulatory and compliance knowledge. He should, at the least, obtain a copy of E2/AS1 which is available for free download and should study and become familiar with it.

Costs

- [56] 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.”
- [57] 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.
- [58] 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.

- [59] 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 half-day hearing of this type.

Publication

- [60] 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.

- [61] 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.
- [62] 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

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

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 guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁷.

[63] 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.

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

Section 318 Order

[65] 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 \$2,500.

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(l)(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.

[66] 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

[67] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 August 2020**. 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.

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

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

[68] 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.

Right of Appeal

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

Signed and dated this 10th day of August 2020



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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