

Before the Building Practitioners Board

	BPB Complaint No. CB25578
Licensed Building Practitioner:	Ross Bell (the Respondent)
Licence Number:	BP 112216
Licence(s) Held:	Design AoP 2

Draft 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 Type:	On the Papers
Draft Decision Date:	2 September 2020
Final Decision Date:	6 November 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Bob Monteith, LBP, Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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 a disciplinary offence under section 317(1)(b) of the Act.

Contents

Summary of the Board's Decision..... 2

The Charges 2

 Regulation 9 Decisions 3

 Disciplinary Offences to be Investigated 3

Draft Decision Process..... 3

Evidence..... 4

Draft Conclusion and Reasoning..... 8

Draft Decision on Penalty, Costs and Publication 13

 Penalty 13

 Costs..... 14

 Publication 14

Draft Section 318 Order 15

Submissions on Draft Decision 16

Request for In-Person Hearing..... 16

Submissions Made..... 16

Final Decision..... 16

Final Section 318 Order 17

Right of Appeal..... 17

Summary of the Board's Decision

[1] The Respondent has been negligent in his supervision of design work by failing to take into account the impact of resource consent issues in the development of a design and its submission for a building consent. The Respondent is fined \$2,000 and ordered to pay costs of \$1,000.

The Charges

- [2] On 2 September 2020, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.
- [3] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

[5] The complaint to the Board also contained an allegation that the Respondent had 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)

[6] With regard to that allegation the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

(a) it does not come within the grounds for discipline;

[7] The Board noted that the design work and matters complained about predated the issue of a building consent. As such the ground of discipline does not apply. The conduct complained about will be considered as part of the Board's deliberations on negligence and/or incompetence.

[8] The complaint to the Board had a further allegation that the Respondent had, for the purpose of becoming licensed, either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular (s 317(1)(e)(i).

[9] With regard to those allegations, the Board decided that regulation 9(e) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

(e) there is insufficient evidence to warrant the investigation of the complaint;

[10] The Board noted that no supporting evidence was provided. Accordingly, the Board has not considered the allegation as part of its deliberations.

Disciplinary Offences to be Investigated

[11] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[12] Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

[13] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides

that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

- [14] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [15] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.
- [17] The Respondent was engaged to carry out design work for an alteration to an existing dwelling. His engagement was, in the first instance, as a subcontractor to Refresh Renovation who had a contract with the Complainant. That contract was brought to an end, and the Respondent was engaged (by way of his design business Future Plans Architectural Design⁴) by the Complainant to provide design services.
- [18] A design and building consent application was developed under the Respondent's supervision. The design estimate given to the Complainant dated 10 February 2017 stated that:

Preparation of Plans & Documentation to Comply with Local Council for Building Consent

Proposal does not include Building or Resource Consent Fees

- [19] The revised fee proposal included \$1,350 for "Resource Consent Documentation" noted as a "Planning Report". An email of the same date also stated:

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁴ The Companies Office notes the Respondent is the sole shareholder and director of Future Plans Limited

Our office didn't allowed to prepare Resource Consent application in our original estimate dated 13th October. After all the changes to the concepts which meets your satisfaction our office have noticed that the proposed development will encroaches height in relation to boundary therefore Resource consent will be required.

[20] An application for a building consent was on 24 July 2017 together with a Certificate Work from the Respondent. On 20 June 2018, the building consent was granted but with a notation that it was subject to a resource consent being granted for the proposed building work by way of a section 37 notice. The notification was sent to Future Plans Architectural Design and the Complainant noted and provided evidence to establish that the Respondent had been informed by the Council of the requirement for a resource consent as early as 15 August 2017 by way of the PIM. The Complainant stated that he was not informed by Future Plans or the Respondent of the requirement for a resource consent.

[21] An employee of Future Plans informed the Complainant on 20 June 2018 by email that the building consent had been granted. No mention was made of the resource consent requirement.

[22] On 24 July 2018, the Complainant informed Future Plans that the building consent fee had been paid. The Complainant enquired as to the next steps. An employee of Future Plans responded on the same day stating:

Pick up your plan from council office and start the building works.

[23] No mention was made of the requirement for a resource consent being required prior to any building work being undertaken.

[24] On 3 September 2018, the Complainant emailed Future Plans noting that the Council had stated that they were not permitted to undertake any works until a section 37 certificate was sorted.

[25] Correspondence from the Council (issued with the PIM) as regards the building consent application which was sent to Future Plans on 15 August 2017 was then disclosed to the Complainant. The letter from the Council noted:

The following issues have planning implications on your building consent:

- *Resource consent is required for building withing a flood plain*
- *Resource consent is required to infringe the height to boundary standard*
- *Resource consent is required for infringements of the front yard and riparian yard*

Further information is required as follows:

- *Please demonstrate compliance with the following standards from the Auckland Unitary Plan: H4.6.11 Outlook space; H4.6.12 Daylight and H4.6.13 Outdoor living space.*
- *Please provide a certificate from a registered surveyor. This is necessary to demonstrate compliance with the maximum height.*

Accordingly, your application for a Project Information Memorandum or Building Consent will be subject to a Building Act 2004 Section 37 Certificate until the above has been resolved, either by the granting of a Resource Consent, or by the appropriate amendments to the proposal.

The S37 Certificate means that you are not permitted to undertake any works, other than any expressly authorised by the Certificate, until you have received the necessary planning authorisation from Council. This letter is only in relation to the planning component of the processing of your project information or building consent.

- [26] As a result of subsequent inquiries of Future Plans about the requirement for a resource consent, the Respondent noted in an email dated 26 October 2018 stating:

Building Consent

We were asked to price for the building consent drawings back in Oct 2015 not for Resource consent.

This was not my design please see email it was what the [Omitted] design from [Omitted] ([Omitted]did make a few changers)

The Building Consent has been issued end of that contract.

- [27] On 29 April 2019, the Complainant engaged Sentinel Planning to carry out a planning review. Sentinel Planning noted multiple significant resource consent issues as well as an error by Future Plans:

Both the council's GIS and a search of the title for the Property (computer register NA62D/253) state the area of the site to be 971 m². We note that drawing A-002 Site and drainage plan states the "total nett site area "is 997 m². This is a difference of 26 m² and will affect all calculations that relate to the area of the site.

- [28] *[Omitted]* noted that a redesign to comply was the recommended course of action:

Redesign to comply

[45] *It is possible that the Development could be redesigned to entirely fall within the permitted activity limited of the AUP(OP) – but it would still be subject to the additional standards for permitted activities (i.e. the floodplain) that could trip it into needing a resource consent anyway.*

[46] *Because of this, we would recommend focussing any redesign on falling within the height standards. This would involve reducing the footprint of the upper floor addition to comply with the height in relation to boundary standard, and possibly also its ceiling height to comply with the requirements of the maximum height standard if it could not comply with the 9 m flexibility provision.*

[47] *We estimate this would involve approximately two days of work by the architect to redesign – subject also to engineering input for flooding.*

Conclusion

[48] *In our opinion, the council would likely consider any resource consent application for the Development to have effects on the neighbours at [Omitted] and [Omitted] that would require their written approval in order to be processed on a non-notified basis.*

[49] *If their written approval could be obtained, then it is possible the council may conclude the proposal could be granted consent.*

[50] *If their written approval could not be obtained, the application would have to be processed on a limited notified basis. This would involve the council giving formal notice to the neighbours, giving them an opportunity to make written submissions (presumably in opposition), and then considering the application at a formal hearing run by a panel of independent hearing commissioners. The outcome is difficult to predict, but we think without neighbour's approval ultimately the odds would be weighed against a grant.*

[29] The Respondent initially provided an oral response, he stated the Complainant was advised that a resource consent was required, and that the Complainant was happy with that. The Respondent also supplied time sheets with regard to the work and correspondence with regard to a civil claim. Included was a statement that:

According to the time sheet on 26th of January, 2017 the project architectural designer [Omitted] did inform [Omitted] (owner) that resource will be required for the infringement to height in relation to boundary in accordance with the concept. A written approval will be required from the affected building owners. However, advised [Omitted] that we wait until he gets section 37 letter from Auckland Council to ensure there is no other planning restrictions/infringements. The owner advised [Omitted] that he will engage the services of a planner once he receives section 37 letter from council. Also, an email sent to [Omitted] on 10th of February by [Omitted] advising [Omitted] that resource consent will be required for infringement to HIRB.

On 3rd of the September, 2018 [Omitted] called to our office and discussed with [Omitted] on section 37. Our office had no idea until we received a call

from the Owner. According to the section 37 letter from council the letter was attention to [Omitted], but we didn't receive any letter and our office had no idea of content of the section 37 letter.

- [30] The response was at variance to the correspondence sent to the Respondent's office on 15 August 2017 note above in paragraph [25]. The Respondent went on to discuss pricing for completion of a resource consent application.

Draft Conclusion and Reasoning

- [31] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and **should** be disciplined.
- [32] The Board's considerations as regards negligence and/or incompetence are in respect of the Respondents design work.
- [33] Under the definitions in the Building Act, design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b) it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

3 Design work declared to be building work

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

- [34] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.
- [35] Turning to negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁵ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

- [36] 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, in this case a Licensed Building Practitioner with a design license. This is

⁵ Judge McElrea, DC Whangarei, CIV-2011-088-313

described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.

- [37] 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*⁸ it was stated as "*an inability to do the job*".
- [38] 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.
- [39] 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.
- [40] 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:*

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

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

- (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.*

[41] The Board also notes the provisions of section 14D of the Act which states:

14D Responsibilities of designer

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[42] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design¹².

[43] The Board also notes, as regards the allegations that were before the Board, that the competencies a licensed designer is expected to be able to demonstrate in order to obtain a licence are set out in Schedule 1 of the Licensed Building Practitioners Rules 2007. Those competencies include:

Competency 1: Comprehend and apply knowledge of the regulatory environment of the building construction industry.

1.2.4 Demonstrate knowledge of the Building Act and Resource Management Act consent processes.

Includes knowledge of when consent is required, and knowledge of the application, inspection and compliance processes relevant to the design process.

Competency 3: Establish design briefs and scope of work and prepare preliminary design.

3.2.4 Document environmental and social impacts when developing design solutions.

May include but not limited to – understanding of environmental and social impacts, context, and use of resources.

¹² Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

Competency 4: Develop design and produce construction drawings and documentation

4.2.4 Co-ordinate and integrate design information provided by others.

May include but not limited to RMA consultants, surveyors, services specialists, consulting engineers, manufacturers, the Ministry for Business, Innovation and Employment, and building consent authorities.

- [44] Looking at the design work in question, it was clear to the Board that the Respondent supervised the design work that was submitted for a building consent as it was submitted under his licence. It was clear that the possibility of a resource consent was contemplated as the design fee included a resource consent planning report. It was not clear whether one was actually completed. Notwithstanding the inclusion of the fee implies that it was considered by Future Plans as a potential requirement.
- [45] The Council is noted as advising Future Plans on 15 August 2017 of the need for a resource consent in respect of building within a flood plain, infringing the height to boundary standard and infringements of the front yard and riparian yard. This occurred when the PIM was issued, which was before the building consent being applied for. No action was taken, the Complainant was not advised, the design does not appear to have been adjusted to accommodate for the issues.
- [46] The Board would expect a Licensed Building Practitioner with a Design AoP 2 Licence to, at the very least, inform the client of the issues. That did not occur. Rather the design carried on and was submitted in circumstances where the Respondent knew that the design would not meet resource consent requirements.
- [47] The Board accepts that the Respondent may not have quoted for, or intended to carry out a resource consent application. Notwithstanding it is not acceptable to simply ignore them and carry on with a design that will not be able to be built, unless a resource consent, which may or may not be granted, is issued.
- [48] The Board would expect that, in such circumstances, a design concept would be submitted for consideration by the Council as part of a Project Information Memorandum (PIM) application before final building consent documentation is developed and submitted. The use of the PIM process would allow the designer to ensure that either the design is modified to negate the need for a resource consent or that a resource consent is applied for as part of the overall process. That did not occur. A building consent application was developed and submitted with no guarantee that what had been submitted would actually be able to be built.
- [49] Compounding the issue was the notice from Future Plans to the Complainant following the issue of the building consent that he could start building. That was not correct, and Future Plans, the Respondent's company and the staff member working under the supervision of the Respondent, knew it was not correct.

[50] The Board also noted that there was an error in the site measurements used by Future Plans. Again, the Board would expect a competent designer to identify the issue and to rectify it prior to a building consent application being made.

[51] As noted, the Respondent was the supervising Licensed Building Practitioner. It is with respect to that supervision that the Board considers that the Respondent has been negligent. He should, as part of his supervision, identify and deal with the above matters.

[52] Supervise is defined in section 7¹³ 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.

[53] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁴. 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 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."

[54] Within the context of the design work, the Respondent supervised. The Respondent should have been checking during the development of the design and building consent application and prior to its submission to ensure that the work met required standards. The Board, which includes persons with extensive experience and expertise in the building industry, did not consider that the Respondent carried out those checks.

¹³ 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.

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- [55] Given the above, the Board has decided that the Respondent has departed from what the Board considers to be an accepted standard of conduct and, accordingly, that he has been negligent.
- [56] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [57] The Board considers the conduct was serious. There was a complete disregard for resource consent implications on the design and the Respondent was on notice as regards those issues. He should have been aware of, and taken into account, their impact on the design. He did not.

Draft Decision on Penalty, Costs and Publication

- [58] 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.
- [59] The matter was dealt with on the papers. Included 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

- [60] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁶ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

¹⁵ [2001] NZAR 74

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

- [61] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [62] The negligence was at the mid-range. The Board considers that a fine is appropriate. The matter has been dealt with on the papers. There is an ongoing commercial dispute. Those factors have been taken into account in setting the penalty.
- [63] Based on the above, the Board's penalty decision is that the Respondent pay a fine of \$2,000.

Costs

- [64] 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."
- [65] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁸.
- [66] In *Collie v Nursing Council of New Zealand*¹⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [67] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [68] 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,

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

¹⁸ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

¹⁹ [2001] NZAR 74

²⁰ Refer sections 298, 299 and 301 of the Act

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.

- [69] 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.
- [70] 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.
- [71] 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.
- [72] Based on the above the Board will not order further publication.

Draft Section 318 Order

- [73] 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 \$1,000 (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(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.

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

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

²⁴ *ibid*

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

- [74] 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 Draft Decision

- [75] The Board invites the Respondent and the Complainant to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [76] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 23 October 2020.
- [77] If submissions are received, then the Board will meet and consider those submissions.
- [78] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [79] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [80] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [81] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 23 October 2020
- [82] If a hearing is requested this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Submissions Made

- [83] The Board received a submission from the Respondent dated 20 October 2020. The Respondent stated that he accepted the Board's Draft Decision. The submissions also provided further contextual information which is noted. That information does not, however, impact or change the Board's decision.
- [84] The Complainant also made a submission dated 22 October 2020 which supported the Draft Decision.

Final Decision

- [85] On the basis of the submissions received the Board affirms its draft decision and penalty.

Final Section 318 Order

[86] 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 \$1,000 (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(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.

Right of Appeal

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

Signed and dated this 19th day of November 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.*