

## Before the Building Practitioners Board

	BPB Complaint No. CB25394
Licensed Building Practitioner:	Tristan Burford (the Respondent)
Licence Number:	BP 132365
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 Type:	On the Papers
Draft Decision Date:	30 September 2020
Final Decision Date:	2 February 2021

#### Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)  
Robin Dunlop, Retired Professional Engineer  
Rob Shao, LBP, Carpentry and Site AOP 1  
Frank Thomas, LBP, Roofing

#### 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.

#### Draft Disciplinary Finding:

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

**Contents**

**Summary of the Board’s Final Decision**..... 2

**The Charges** ..... 2

**Disciplinary Offences Under Consideration** ..... 3

**Function of Disciplinary Action** ..... 4

**Evidence**..... 4

**Draft Conclusion and Reasoning**..... 6

    Negligence and/or Incompetence ..... 6

    Contrary to a Building Consent..... 8

    Record of Work..... 9

    Misrepresentation or Outside of Competence..... 10

**Draft Decision on Penalty, Costs and Publication** ..... 11

    Penalty ..... 11

    Costs..... 12

    Publication ..... 12

**Draft Section 318 Order** ..... 13

**Submissions on Draft Decision** ..... 13

**Request for In-Person Hearing**..... 14

**Submissions Made**..... 14

**Final Decision**..... 14

**Final Section 318 Order** ..... 15

**Right of Appeal** ..... 15

**Summary of the Board’s Final Decision**

[1] The Respondent has carried out building work in a negligent and incompetent manner and in a manner contrary to a building consent. He has also worked outside of his competence and has failed to provide a record of work on completion of restricted building work. He is fined \$3,000 and ordered to pay costs of \$1,000.

**The Charges**

- [2] On 30 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 did not apply. Under regulation 10 the Board is required to hold a hearing.

- [5] 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 procedures<sup>1</sup>. 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 legislation<sup>2</sup>. 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.
- [6] 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.
- [7] 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 Respondent and the Complainant 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.

#### **Disciplinary Offences Under Consideration**

- [8] On the basis of the Registrar’s Report, the Respondent’s conduct that the Board resolved to investigate were that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
  - (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act).
- [9] The matters under consideration related to two properties, one at [Omitted] and one at [Omitted].

---

<sup>1</sup> Clause 27 of Schedule 3

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

### Function of Disciplinary Action

[10] 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*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.

[11] 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*<sup>5</sup> 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.”*

[12] 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 persons<sup>6</sup>:

*... 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.*

[13] 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.

[14] The above commentary on the limitations of the disciplinary process are 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.

### Evidence

[15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. Under section 322 of the Act, the Board has

---

<sup>3</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

<sup>6</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [16] The Respondent was engaged to carry out building work on two new residential dwellings and detached garages under building consents. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in late October 2018 and came to an end on or about 15 February 2019. A record of work for [Omitted], dated 27 March 2019, was provided to the owner on the same date (but not to the territorial authority). A record of work was not provided for [Omitted]. Requests for separate records of work were not accommodated.
- [17] The dwellings and garages were kit sets. The Respondent represented that he was skilled and able to complete the builds. The Complainant alleged that, in respect of [Omitted], the foundations were not square and that they had to be dismantled and rebuilt. Correspondence from [Omitted] of [Omitted] who supplied the kit sets noted *"The worst part is the piles are the part that is not square. This will ideally need completely removing and redoing"* and *"Long story short, we would ideally need a complete restart of the build"*.
- [18] The Complainant also raised a number of other issues with the build noting that the final inspections for code compliance certificates had been aborted by the Inspector due to obvious deficiencies. Specific allegations included:
- (a) bracing panels on both of the garages were not installed, which resulted in a code compliance certificate inspection failure. The cladding panels had to be removed to install the bracing;
  - (b) garage panels were, except for the front two panels, not installed correctly in that fixings were visible when they should have been hidden under cladding laps; and
  - (c) flashings including barge flashings were not installed correctly.
- [19] An email from [Omitted] which detailed required remedial work noted:
- *Remove floor panels, steel posts, timber beams, all aluminium skirting's, and steel bearers. Trim around 85% of the timber piles by up to ( but not exceeding ) 25mm.*
  - *Replace DPC and fix steel bearers back to the timber piles. Relay floor panels down and fix in the correct manner.*
  - *Re-fix aluminium skirting and fix with rivets and bolts.*
  - *Install Galv perimeter sheets and check everything is Square, plumb and level. Stand all walls, and run conduit for cables through the walls.*
  - *Completely rivet and silicone seal external silver angles.*
  - *Install steel posts and timber beam correctly and bolt through to steel bearers underneath. Install all external windows and doors correctly with rivets and correct silicone sealant.*

- *Put the roof on and install silicone correctly between panel joins. Run 1.5mm purple non-migratory cable through roof to all the lights.*
- *Install ridge, barges, and silicone seal all external panel joins on the roof. Tack rivet in place 99% of aluminium trims and skirting inside the house. Empty the remains of the 40ft container into the garage or house itself.*

[20] The Respondent did not provide any form of response to the complaint and allegations. The Board received advice that the Respondent had moved to Australia in late 2019. It is noted that the Respondent has an obligation under the Act to maintain his contact details on the Register of Licensed Building Practitioners.

### **Draft Conclusion and Reasoning**

[21] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act);

and **should** be disciplined

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

### Negligence and/or Incompetence

[23] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>8</sup> 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.*

[24] 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

---

<sup>8</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*<sup>9</sup> test of negligence which has been adopted by the New Zealand Courts<sup>10</sup>.

- [25] 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*<sup>11</sup> it was stated as “*an inability to do the job*”.
- [26] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>12</sup>. 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.
- [27] 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<sup>13</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>14</sup>.
- [28] 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:*

<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>13</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>14</sup> *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.*

[29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>15</sup> and be carried out in accordance with a building consent<sup>16</sup>. 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.

[30] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>17</sup> 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.*

[31] There was clear, unchallenged evidence, of building work that had not been completed to an acceptable standard. The foundations for one of the dwellings were not square, the bracing elements for both garages were not installed, and cladding had not been installed as per manufacturers' specifications. Square foundations are critical to a build. Foundations that are out of square will have a knock-on effect on the balance of the building work. Bracing elements are critical to the structural integrity of a building. Cladding that is not completed in accordance with manufacturer's specifications carries the risk of not being weathertight. All these matters are serious departures from acceptable standards.

[32] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not only departed from what the Board considers to be an accepted standard of conduct but has also failed to demonstrate the expected skill or ability to carry out the work. The Board further finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

#### Contrary to a Building Consent

[33] 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.*

---

<sup>15</sup> Section 17 of the Building Act 2004

<sup>16</sup> Section 40(1) of the Building Act 2004

<sup>17</sup> [2001] NZAR 74

- (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.*

[34] 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.

[35] 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 must be established<sup>18</sup>.

[36] There were clear contraventions of the building consent, as noted in paragraph [31] above. Given those matters the Board finds that the offence has been committed. The Board does, however, note the commonality of the offending under section 317(1)(b) and 317(1)(d) of the Act. The Board will take that into consideration when considering penalty.

#### Record of Work

[37] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>19</sup>.

[38] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

[39] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[40] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>20</sup> “... the only relevant

---

<sup>18</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>19</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>20</sup> [2018] NZHC 1662 at para 50

precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [41] As to when completion will have occurred is a question of fact in each case.
- [42] In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion.
- [43] In this instance, completion occurred on or about 15 February 2019. A record of work was provided for one dwelling on 27 March 2019. It was not provided to the territorial authority. A record of work was not provided for the second dwelling. On this basis, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [44] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [45] In this instance, there was an ongoing dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [46] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

#### Misrepresentation or Outside of Competence

- [47] The final matter relates to the Respondent working outside of his competence. Section 314B(b) of the Act provides:
- A licensed building practitioner must—*
- (b) carry out or supervise building work only within his or her competence.*
- [48] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence.
- [49] The Board finds that this was the case in the present situation. The Respondent carried out the construction of kitset dwellings but, given the compliance issues that

arose, it was clear to the Board that he did not have the required competencies to carry out the work.

### **Draft Decision on Penalty, Costs and Publication**

- [50] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [51] 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

- [52] 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*<sup>21</sup> 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.*

- [53] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>22</sup> 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.
- [54] The Board notes that it has not heard from the Respondent and that the matter has been dealt with on the papers. It has taken those factors into account as well as that there is a degree of commonality between the offences under sections 317(1)(b), 317(1)(d) and 317(1)(h).
- [55] The Board has decided that a fine would be appropriate. It has set the amount at \$3,000, noting that its normal fine for a record of work matter alone is \$1,500.

---

<sup>21</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>22</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

### 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 case<sup>23</sup>.
- [58] In *Collie v Nursing Council of New Zealand*<sup>24</sup> 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] 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

- [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 Act<sup>25</sup>. 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 1990<sup>26</sup>. The Criminal Procedure Act 2011 sets out

---

<sup>23</sup> *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.

<sup>24</sup> [2001] NZAR 74

<sup>25</sup> Refer sections 298, 299 and 301 of the Act

<sup>26</sup> Section 14 of the Act

grounds for suppression within the criminal jurisdiction<sup>27</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>28</sup>. 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*<sup>29</sup>.

[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 interest<sup>30</sup>. 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.

#### **Draft 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 \$3,000.

**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(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.**

[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 Draft Decision**

[67] 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.

[68] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 19 January 2021. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication.

---

<sup>27</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>28</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>29</sup> *ibid*

<sup>30</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new compelling evidence that was not available at the time the regulation 9 decision not to proceed was made then a further complaint in respect of the matter may be made .

- [69] If submissions on the Board's Conclusion and Reasoning or on matters relating to penalty costs and publication are received, then the Board will meet and consider those submissions.
- [70] 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.
- [71] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

#### **Request for In-Person Hearing**

- [72] 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.
- [73] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 19 January 2021.

#### **Submissions Made**

- [74] The Respondent contacted the Board Officer dealing with the file by email on 11 December 2020 asking that he be called as he does not do emails. He was resident in Australia. The Board Officer advised she was not able to call him. The Respondent emailed back stating:

*Hey I was hourly rate on that job. They had the building licence.*

- [75] No further submissions were received.

#### **Final Decision**

- [76] The Respondent, as a licensed person, is responsible for his own work and for any work of unlicensed persons that he supervises. That is one of the fundamental principles of the licensing regime. He cannot hide behind someone else's licence. He cannot absolve himself of responsibility by paying an hourly rate contractor.
- [77] The Respondent has not provided any evidence of any other licensed person who was responsible and has not addressed the specific matters dealt with in this decision.
- [78] Given the above, the Board affirms its draft decision and penalty.

### Final Section 318 Order

[79] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,000.

**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

[80] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 5<sup>th</sup> day of February 2021



**Mel Orange**  
Presiding Member

---

### <sup>i</sup> 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.*