

Before the Building Practitioners Board

	BPB Complaint No. C2-01577
Licensed Building Practitioner:	Lawrence Dolan (the Respondent)
Licence Number:	BP 127793
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	Palmerston North
Hearing Type:	In Person – Consolidated with C2-01576 and C2-01588
Hearing Date:	19 March 2018
Decision Date:	4 April 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Robin Dunlop, Retired Professional Engineer
	Bob Monteith, LBP Carpentry and Site AOP 2

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 offence under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	3
Procedure	3
Evidence	3
Board's Conclusion and Reasoning	9
Negligence and/or Incompetence	9
Contrary to a Building Consent	11
Record of Work	12
Penalty, Costs and Publication	13
Penalty	13
Costs.....	14
Publication	14
Section 318 Order	15
Submissions on Penalty, Costs and Publication	15
Right of Appeal	16

Introduction

- [1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Procedure

[5] The matter proceeded, with the consent of the various Respondent’s, as a consolidated hearing with two other related complaints.

Evidence

[6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[7] The Board heard evidence from:

Lawrence Dolan	Respondent
[Omitted]	Co Respondent C2-01576, Licensed Building Practitioner – Site AOP 1 – Project Manager
[Omitted]	Co Respondent C2-01588, Licensed Building Practitioner – Roofing
[Omitted]	Witness for [Omitted]
[Omitted]	Expert for [Omitted]

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

[Omitted]	Witness, [Omitted]
Tony Kellerman	Building Consent Officer, Manawatu District Council
Chris Henry	Team Leader, Building Consenting, Manawatu District Council
Jon Astwood	Technical Assessor to the Board

- [8] The Respondent was engaged as a subcontractor to carry out the carpentry work on a new build.
- [9] The Complaint raised various issues and allegations with the quality and compliance of the building work and alleged it had been carried out in an incompetent manner and in a manner that was not in accordance with the building consent and that the workmanship was very poor.
- [10] The Complainant obtained a report from Kiwi Property Inspection. The report was based on a visual inspection carried out on 21 January 2017. It listed an extensive number of observations with supporting photographs. The Complainant provided a copy of the report with the Complaint.
- [11] The Registrar, as part of the preparation of the Registrar's Report, sought a report from Jon Astwood as a Technical Assessor to the Board. The Technical Assessor's report dated 6 April 2017 set out a chronology of the build and a table of issues raised in the Complaint together with the Technical Assessor's comments and observations on the allegations and the Respondent's responses to each of the allegations that pertained to him. The relevant aspects from that report are as follows:

Description of defective work /complaint	Consented plan requirements	Contravention or noncompliance with the Building Act or Building Code	Work compliant from Relevant LBP competency evidence supplied/site inspection?	LBP's response summation (Carpentry LBP only)	Technical Advisor comment/observation	Implication of the non-compliance
LBP's failed to use the consented plans while constructing the work.	N/A	Section 40 of the Building Act requires all work to be done as per approved building consent.	No	No response	Several major variations noted that do not comply with the consented plans including: Verandah roof pitch at 5 degrees, Missing slab control joint, Batt R-values on site were underspec, Missing gib bracing unit in scullery and diaphragm ceiling in garage. See photos 5, 25.	Non-compliant building constructed
Ecoply Barrier RAB substituted for Hardies RAB without approval from clients or Council	Plan page 05	Section 40 of the Building Act requires all work to be done as per approved building consent.	No	Carpentry LBP's contract with Homebuild has shown RAB (presumed Hardies)	Hardies HomeRab used on building is not suitable for EH windzone where the building is situated. Original spaced product Ecoply Barrier is rated for EH windzones. See photos 6, 7, 43, 45	Delay of project and potential for monetary loss to the complainant, Non-compliant building constructed
Roof purlins installed at differing heights	900 centres, see plan page 5	NZS3604/2011 Table 10.10 requires purlins/fixings at 900mm centres	Yes	Purlins were fitted as per instructions from Metalcraft rep.	Purlins where sighted were installed at 900mm centres or less.	N/A
Structural steel poles are not	N/A	NZS3604, table 2.1, requires a maximum of 6mm	No	Poles are plumb. Master Bedroom pole has 3mm twist.	Deviation in steel poles exceeds NZS3604 requirements. See	Unightly appearance of cladding, non

Description of defective work /complaint	Consented plan requirements	Contravention or noncompliance with the Building Act or Building Code	Work compliant from Relevant LBP competency evidence supplied/site inspection?	LBP's response summation (Carpentry LBP only)	Technical Advisor comment/observation	Implication of the non-compliance
plumb		deviation per 2.4m of vertical framing at corners.			indicative photo 27.	compliance with E2 where adjacent windows are not sealing against cladding because walls are not straight.
Shadowclad not installed as per manufacturers specification	Shadowclad manufacturer details provided in plans. Pages 16-20.	Section 40 of the Building Act requires all work to be done as per approved building consent.	No	Suppliers at fault for not providing correct nails for cladding. Now agrees should not have been used. Did not supervise employees correctly when cladding, over zealous nailing. Cut all cladding sheets himself. Some sheet joints manufactured by LBP and treated with clear Metalex. Cladding bottom edge where not level was to be remediated.	Non-compliances noted include: D-head nails used, incorrect nailing patterns, sheets nailed through sheet grooves, nails driven deeper than flush through sheets, various sheet nailing not into studs or dwangs, sheets not 50mm below FFL, inaccurate sheet cuts around head flashings. Installed over bowed and un-levelled walls. See photos 8, 9, 10, 12, 13, 15, 20, 21, 23, 24, 27, 36, 37, 38, 40, 41.	Potential failure of cladding to prevent water ingress, long term failure with B2 requirements.
Window flashings not installed correctly	E2 compliant window flashing details provided on plan page 18.	Section 17 of the Building Act requires all work to comply with the Building Code.	No	Flashings were supplied by joiner and therefore accepted as fit for purpose. Stopends are provided, as per plan using cavity battens. Gaps between windows and cladding were to	Non-compliances noted include: Head flashings with excessive overhang, inconsistent and incorrect gaps between cladding and head flashings, missing head flashing stop-ends, missing in-seal	Potential failure of flashings to prevent water ingress, long term failure of external joinery with B2

Description of defective work /complaint	Consented plan requirements	Contravention or noncompliance with the Building Act or Building Code	Work compliant from Relevant LBP competency evidence supplied/site inspection?	LBP's response summation (Carpentry LBP only)	Technical Advisor comment/observation	Implication of the non-compliance
				be closed by scribes. No scribes were wanted by owners.	tape at window jamb/cladding junctions, large gaps between joinery extrusions and cladding. Wanz bars not supporting full length of joinery units. See photos 10, 11, 13, 14, 15, 16, 18, 19, 22, 28, 36,	requirements.
Windows not fixed properly	No specific reference noted	B1 and WANZ guidance specification	No	Further plumbing/squaring of joinery was to take place but site was closed before this could happen.	Reveal fixings not at centres specified in WANZ guidance specification. Windows and doors not adequately packed and fixed. Windows and doors not installed plumb, level or straight in multiple areas. See photos 3, 4, 22, 36, 40	Long term failure of external joinery with E2 & B2 requirements. Binding of opening sashes/doors.
Gib Board not installed to manufacturers specification	Winstones Gib literature included in the specification	Section 40 of the Building Act requires all work to be done as per approved building consent.	No	Gib work around windows and doors is unsatisfactory and agreed to replace.	Winstone's installation requirements have not been followed: Gib sheets hard on concrete floor, flushbox penetrations within 90mm of sheet edges, screw fixings not flush with sheet and over penetrate, excessive gaps between sheets, Braceline unit missing between scullery & dining room. Garage ceiling diaphragm not completed. See photos 30, 32, 39.	Uneven and unsightly appearance of internal walls. Non-compliance with B1.

Description of defective work /complaint	Consented plan requirements	Contravention or noncompliance with the Building Act or Building Code	Work compliant from Relevant LBP competency evidence supplied/site inspection?	LBP's response summation (Carpentry LBP only)	Technical Advisor comment/observation	Implication of the non-compliance
Many walls not plumb or straight	No specific reference noted	NZS3604, table 2.1, requires a maximum of 5mm deviation per 2.4m of vertical framing and 5mm per 10m of horizontal framing.	No	Framing was plumbed and levelled.	Multiple walls have deviations that exceed NZS3604/2011 requirements by a large margin. Refer to photos 17, 23, 24, 27, 30, 36, 40, 44, .	Uneven and unsightly appearance of external & internal walls.
Workmanship is very poor with little or no quality control	No specific reference noted	NZ3604 table 2.1 (tolerances) MBIE guide to tolerances, materials and workmanship in new residential construction 2015	No	N/A	Complaint verified by on site inspection. HFAR opinion matches complainant's concerns. See all photos.	Delay of project and potential for monetary loss to the complainant, Non-compliant building constructed

- [12] At the hearing further evidence was heard from the Respondent including, in relation to incorrect building materials, that he installed whatever was supplied and, in relation to quality and compliance issues that the majority of the building work was carried out under his supervision.
- [13] The Respondent noted that the majority of the issues occurred over a period between mid-December 2016 and mid-January 2017 including during a short period when he was on leave. He accepted that his supervision had been poor and that he had placed too much faith in those who were carrying out the building work and that the work was carried out with too much emphasis on speed and not enough on quality.

Board's Conclusion and Reasoning

- [14] 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);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and should be disciplined.

- [15] The reasons for the Board's decision follow.

Negligence and/or Incompetence

- [16] The Board's finding of negligence relates to the Respondent's supervision of the building work.
- [17] The Board accepts that the Respondent's role in the build was as the supervisor. The question for it is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.
- [18] Supervise is defined in section 7⁶ of the Act. The definition states:

⁶ 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.

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.

[19] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances but that ultimately the Board will need to consider whether the resulting building work met the requirements of the building code and if not the level of non-compliance.

[20] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992⁷. 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."

[21] The Board, in considering whether the Respondent has supervised building work in a negligent or incompetent manner also needs to have regard to the meaning of those terms. In *Beattie v Far North Council*⁸ Judge McElrea provided guidance on the their interpretation:

[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.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that

⁷ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [22] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁹ as regards the threshold for disciplinary matters:

[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.

- [23] There was clear evidence before the Board of multiple instances of incompetent building work and building work that did not comply with the building consent. The Respondent accepted that his supervision was below standard and that he should have paid more attention to how the building work was being carried out.
- [24] The seriousness of the matters and the consequences of the Respondent's failure to supervise adequately are borne out by the extent of the remediation that will be required to rectify the issues.
- [25] The Board, which includes persons with extensive experience and expertise in the building industry, therefore considers that the Respondent displayed a lack of reasonably expected care in his supervision of the building work.

Contrary to a Building Consent

- [26] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in section 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [27] In *Tan v Auckland Council*¹⁰ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [28] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process

⁹ [2001] NZAR 74

¹⁰ [2015] NZHC 3299 [18 December 2015]

Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

- [29] Whilst the Board found that the Project Manager for the job should have managed and processed building consent amendments and variations the Respondent had an on-site duty to ensure that what was being built complied with the building consent and that, if it did not, the appropriate steps had been taken to vary or amend the building consent. That did not occur. Accordingly the Board finds that the disciplinary offence has been committed.

Record of Work

- [30] 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 work¹¹.
- [31] 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.
- [32] The Board discussed issues with regard to records of work in its decision C2-01170¹² and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [33] 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.
- [34] 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 ...”.
- [35] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred when contractual arrangements came to an end and whilst the build may resume it will not, on the evidence heard, be with the Respondent as the carpenter. His involvement has therefore come to an end and a record of work has not been provided. On this basis the Board finds the disciplinary offence has been committed.
- [36] 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

¹¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹² *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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. No good reasons were heard.

Penalty, Costs and Publication

- [37] 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.
- [38] 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

- [39] 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*¹³ 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.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁴ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [41] The Board considers the matters before it to be serious and the level of negligence to have been high. It also finds that the Respondent carries the greatest degree of culpability of the three licensed building practitioners who have been disciplined in relation to the build. At the same time the Board accepts that it was an aberration and it believes the Respondent has learnt from the experience and will not offend in a similar manner again.

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

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

- [42] Taking all of the factors into account the Board considers a fine of \$3,000 is the appropriate penalty. The amount has been reduced from a starting point of \$4,000 on the basis of the mitigation heard.

Costs

- [43] 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.”
- [44] 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 case¹⁵.
- [45] In *Collie v Nursing Council of New Zealand*¹⁶ 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.

- [46] A hearing was required as was a Technical Assessors report. The hearing was, however, consolidated. On this basis the Board’s costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board’s inquiry.

Publication

- [47] 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 Act¹⁷. 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.

- [48] 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.
- [49] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁸. The Criminal Procedure Act 2011 sets out

¹⁵ *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.

¹⁶ [2001] NZAR 74

¹⁷ Refer sections 298, 299 and 301 of the Act

¹⁸ Section 14 of the Act

grounds for suppression within the criminal jurisdiction¹⁹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁰. 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*²¹.

[50] 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 interest²². 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.

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

Section 318 Order

[52] 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(1)(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.

[53] 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

[54] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **27 April 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

¹⁹ Refer sections 200 and 202 of the Criminal Procedure Act

²⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²¹ *ibid*

²² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 4th day of April 2018



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.*