

Before the Building Practitioners Board

	BPB Complaint No. C2-01797
Licensed Building Practitioner:	Dean Hassall (the Respondent)
Licence Number:	BP 116153
Licence(s) Held:	Carpentry and Site AOP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	On the Papers
Hearing Date:	9 August 2018
Decision Date:	22 August 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

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 a disciplinary offence under section 317(1)(b), 317(1)(d), 317(1)(da)(ii) and 317(1)(h) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	3
Procedure	3
Evidence	3
Board's Conclusion and Reasoning	7
Negligence and/or Incompetence	7
Not Licensed to Carry Out or Supervise Restricted Building Work.....	11
Contrary to a Building Consent.....	11
Record of Work.....	12
Misrepresentation or Outside of Competence.....	12
Penalty, Costs and Publication	13
Penalty	13
Costs.....	14
Publication	14
Section 318 Order	15
Submissions on Penalty, Costs and Publication	16
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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
 - (c) 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);
 - (d) 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

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

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

(e) breached section 314B of the Act (s 317(1)(h) of the Act).

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 Respondent was served with the Complaint but did not respond to it. As such, and on the basis that there was no contradiction to the evidence put forward in support of the complaint and to a Technical Assessor’s report obtained the matter proceeded as a hearing on the papers. The Respondent was advised that he could seek to attend or to be heard. Again no response was forthcoming.

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 received the documentary evidence.

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

- [8] The Respondent was engaged to carry out an extension of approximately 15m² to an existing dwelling under a building consent to create a new living area.
- [9] The building work included a new nominally pitched roof area clad with plywood and a butyl membrane, fibre cement external cladding over a cavity, one new bi-folding aluminium door and an external timber deck area with external timber stairs, being the main private stairs into the dwelling.
- [10] In relation to the exterior area, a timber deck was constructed and the external stairs are located at the end of the deck area. The timber deck is less than 1 metre from finished ground level. The Technical Assessor noted that the deck construction differs from the approved consented plans and that no as-built amendment was present on the Council file.
- [11] Upon completion of the works and after the Code Compliance Certificate was issued it was alleged that the door leaked from time to time. The Complainant stated the Respondent returned to site to remediate the bi-fold door installation so as to attend to the leaks, but the Complainant alleged the doors still intermittently leaked and that the Respondent has failed to address the leaking and cannot be contacted.
- [12] The Board appointed a Technical Assessor to review the building work and provide an opinion. The Technical Assessor spoke with the Respondent who advised him that another qualified builder, who was not licensed, was working for him at the time of construction and that the Respondent was responsible for supervising and undertaking the building work for the living room extension. The Respondent stated he was on-site every day for an estimated period of half of each working day and that building work was completed in accordance with the building consent plans.
- [13] The Respondent informed the Technical Assessor that:
- (a) there were discussions at the time of construction between the roofer and the Complainant regarding the additional concentration of surface moisture from the new butyl roof into the existing guttering. The Respondent noted that most of the poor weather in the area is from the north, the doors face that direction and the leaking occurs only in one location;
 - (b) it was the Rylock installer (door manufacturer) who provided the idea of installing the flashing under the door and that deck joists required trimming back to install the flashing;
 - (c) the doors still leaked after the new flashing was installed;
 - (d) the architrave around the door had previously been removed and the air-seal appeared to have been disturbed and that this may have been where the leaking was coming from;
 - (e) other persons had, potentially, been looking at the door to try and establish what the cause of the leaking was;

- (f) the external doors require removal to establish the cause of the leaking;
- (g) the leaking could potentially be coming from the roof and/or gutters; and
- (h) the Respondent would like to establish the cause of the leaking and rectify the issue.

[14] The Technical Assessor commented on the building work in relation to the timber deck and external stairs and the detailing of the cladding at its base.

[15] In respect of the deck and stairs he noted:

Other than the fixing of the balustrade, it is unclear what the designers intentions were for the construction of the stairs in relation to connections.

In absence of the (adequate) details, either additional details could have been requested from the Designer or in this instance, an approved method of fixing through the cladding could have been adopted as detailed in Acceptable Solution E2/AS1, External Moisture, figure 15, dated August 2011.

The as-built differs from the approved building consent documentation, in that a timber deck the full width of the extension has been constructed instead of a 600mm wide landing the width of the doors. Main private stairs have still been constructed with handrails either side.

The new deck is less than 1 metre from finished ground level and therefore would not have required a building consent if constructed separately, however a minor variation or as-built should have been provided to the Council to reflect the altered construction as the deck and stairs were inspected at final inspection stage as part of the consent.

[16] With regard to the cladding he noted:

No specific details were provided on the approved plans for the “base” termination of the cladding, in particular under the door or the connection of the deck (stairs) to the dwelling.

The specification also forms part of the approved building consent documentation. Included in the specification is the Axon technical literature. Reference to the construction of the cavity closer/vermin strip at the base of the system could be referenced from Figure 4 in the Axon technical literature and applied where the cladding terminated past the timber bearer by 50mm. However, it is noted Figure 4 specifically relates to a concrete foundation detail.

In the absence of a specific detail at the base of the cladding, additional information could have been requested from the designer, or alternatively Acceptable Solution E2/AS1 could have been referenced ...

- [17] The Technical Assessor was not able to determine the cause of the leak in the bi-fold door. He did, however, note:

Elements of the work have been constructed in a manner that may not meet the requirements of the Building Code and will require further verification to determine the exact cause of the leaking, in particular the following clauses: B1: Structure and E2: External Moisture.

- [18] The Technical Assessor also noted that remedial work was undertaken after the issue of a code compliance certificate and that this building work would have required a design and a building consent:

When substantial replacement or substantial works are undertaken, and there has been a failure of building code clauses, including durability, then in these instances a building consent is required as the works would not meet the definition of normal repairs and maintenance described in Schedule 1 of the Building Act. Further design and licensed building works would be necessary in order to rectify defective works.

Remediation of the door at the Complainant's property in this instance falls outside of repairs and maintenance and is not considered to be exempt building works. A Building Consent for remedial works is therefore required before any remedial works can be undertaken.

At the time the remedial work was undertaken, there was another opportunity for the Respondent to "read and interpret working drawings, specifications..."¹ Had this been undertaken, then the Respondent ought to have identified the original work had not been completed in accordance with the approved design, specification and details available in acceptable solutions.

The Respondent installed the direct fixed fibre cement cladding under the door joinery and the full-length flashing to the affected elevation. The remedial works were also not in accordance with the original approved building consent documentation.

In undertaking these remedial works that have not been detailed on the original consented plans, the respondent has in effect become the designer for the alternative methodology used in the construction. We note that design works falls outside the license class of the Respondent.

- [19] The Technical Assessor also provided a table which detailed non-compliant building work and the implications of the same. In particular he noted:

The pre and post CCC works, including the untested method of installing cladding and flashings under the joinery, lack of air seals to the sills and deck finished level that likely resulted in moisture ingress via momentum with the

potential for premature failure of the structure and non-compliance with the Building Code in respect clauses B2 and E2.

The remediation will include removal of the joinery and potentially sections of the internal plasterboard wall linings to assess the cause of the moisture ingress.

Irrespective of the cause of the moisture ingress, which could potentially be from roof level, the joinery should be remediated to the details in the approved plans, specifications and Acceptable Solutions.

- [20] With regard to a record of work the Register's Report writer contacted the Complainant to enquire as to whether one had been provided. The Complainant responded on 5 December 2017 that they had not seen nor received one and that the Respondent had not mentioned anything about a record of work. The building work had been completed, at the latest, in May 2016. The building work disclosed in the consented plans included restricted building work in relation to structure and weathertightness.

Board's 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 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 Board has also decided that the Respondent **has not** carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act).

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

Negligence and/or Incompetence

- [24] The Board's finding of negligence relates to the Respondent's failure meet acceptable standards and with respect to his carrying out building work without a building consent.

- [25] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [26] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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 Act⁹. 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 practitioner¹⁰.
- [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:*
- (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.*

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹ and be carried out in accordance with a building consent¹². 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] The evidence from the Technical Assessor, an independent expert, was that there were compliance and workmanship issues and that aspects of the building work may not have meet the requirements of the Building Code.
- [31] Given this the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and has, therefore, been negligent.
- [32] The Technical Assessor also noted that building work carried out by the Respondent post the issue of a code compliance certificate required a building consent:
- Remediation of the door at the Complainant's property in this instance falls outside of repairs and maintenance and is not considered to be exempt building works. A Building Consent for remedial works is therefore required before any remedial works can be undertaken.*
- [33] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
- [34] The most common exemption in Schedule 1 is that within clause 1 which provides for general repair, maintenance and replacement. Ordinarily the type of work carried out would fall into this exception. There is, however, a condition that attaches to clause 1, that is that it does not apply to any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code.
- [35] That is what has occurred here. A Code Compliance Certificate has issued and as such the building consent that the original work was completed under has come to an end. The building work has then failed the weathertightness requirements of the building code and remedial work has been undertaken. This work required a building consent.
- [36] The Board has found in previous decisions¹³ that a licenced person who commences or undertakes building work without a building consent, when one was required, can

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ Refer for example to Board Decision C1030 dated 21 July 2014

be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068¹⁴.

- [37] More recently the High Court in *Tan v Auckland Council*¹⁵ the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

[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.

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [38] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [39] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing been negligent or incompetent. In this instance the Board finds that the Respondent should have known that a building consent was required and that he was negligent in failing to obtain one prior to undertaking the remedial work.
- [40] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁶ the Court's noted, as regards the threshold for disciplinary matters, that:

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

- [41] The Board finds that conduct, with respect to both carrying out work to an acceptable standard and with respect to the failure to obtain a building consent for remedial work was sufficiently serious enough to warrant disciplinary action.

¹⁴ Board Decision C2-01068 dated 31 August 2015

¹⁵ [2015] NZHC 3299 [18 December 2015]

¹⁶ [2001] NZAR 74

Not Licensed to Carry Out or Supervise Restricted Building Work

- [42] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [43] The Respondent is a licensed building practitioner with Carpentry and Site Licences. There was an allegation that he had also carried out design work which requires a Design Licence. The Board considered, however, that the more appropriate charge in this respect is that of working outside of his competence under section 317(1)(h) and that, as such, the conduct should be dealt with under that charge.

Contrary to a Building Consent

- [44] 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 s 45A of the Act) must be submitted as an amendment 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.

- [45] In *Tan v Auckland Council*¹⁷ 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.

- [46] 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. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [47] In this instance there were two areas where the Technical Assessor noted that the design documentation was deficient and that the Respondent had completed the building work in a manner that is not consistent with acceptable solutions. His comments repeated at paragraph [19] of this decision highlight the seriousness of these matters. On this basis the Board finds that the Respondent has carried out building work that was contrary to a building consent.
- [48] The Board notes the design documentation provided with the building consent was inadequate and it will take this into consideration as a mitigating factor.

¹⁷ [2015] NZHC 3299 [18 December 2015]

Record of Work

- [49] 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 work¹⁸.
- [50] 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.
- [51] The Board discussed issues with regard to records of work in its decision C2-01170¹⁹ 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.
- [52] 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.
- [53] 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 ...”.
- [54] 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 in or about May 2016. As at December 2017 a record of work had still not been provided. 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.
- [55] 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. No good reasons have been put forward.

Misrepresentation or Outside of Competence

- [56] It has already been noted that the Board has decided that the Respondent has not carried out building work that he was not licensed to carry out. The charge was open to consideration on the basis that the Respondent may have carried out design work.

¹⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

This was noted by the Technical in Assessor in relation to the deck and the cladding when he developed his own solutions (which were not in line with acceptable solutions) and when he developed a remediation methodology for leaking around bi-fold doors.

- [57] The Board decided not to proceed on 317(1)(c) on the basis that a more appropriate disciplinary charge was section 317(1)(h) in that there was a breach of section 314B(b). This is that the Respondent carried out or supervised building work outside of his competence. The specific provision is:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [58] In this instance the Respondent has carried out building work that relates to design work when he developed his own solutions to issues with the decking, cladding and bi-fold doors. Those solutions did not meet acceptable solution requirements and were considered by the Technical Assessor to be deficient. Given this it was clear to the Board that the Respondent did not have the requisite skill set, knowledge base or experience to carry out design work and as such that he has worked outside of his competence.

Penalty, Costs and Publication

- [59] 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.
- [60] 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

- [61] 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*²⁰ 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

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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.
- [63] The Respondent has been found to have committed multiple disciplinary offences. They are, however, at the lower end of the disciplinary scale and the Board recognises that a deficient design has contributed to the situation and that the Respondent did try to remediate albeit without a building consent.
- [64] Having taken these factors into account the Board's penalty decision is that the Respondent pay a fine of \$3,000. The Respondent should note that the Board's starting point for a record of work matter alone is normally \$1,500.

Costs

- [65] 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."
- [66] 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 case²².
- [67] In *Collie v Nursing Council of New Zealand*²³ 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.

- [68] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. In setting the level of costs the Board has taken into account that the matter was dealt with on the papers. At the same time a Technical Assessor report was required and the Respondent has not cooperated with the inquiry process.

Publication

- [69] 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

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

²² *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.

²³ [2001] NZAR 74

Building Practitioners' scheme as is required by the Act²⁴. 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.

- [70] 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.
- [71] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. 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*²⁸.
- [72] 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 interest²⁹. 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.
- [73] Based on the above the Board will not order further publication.

Section 318 Order

- [74] 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 \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
Publication:	The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁸ *ibid*

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [75] 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

- [76] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **12 September 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.

Right of Appeal

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

Signed and dated this 22nd day of August 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.*