Before the Building Practitioners Board

	BPB Complaint No. C2-01799
Licensed Building Practitioner:	Murray Harman (the Respondent)
Licence Number:	BP 102440
Licence(s) Held:	Carpentry and Site AOP 2

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	Christchurch
Hearing Type:	On the Papers
Hearing Date:	15 November 2018
Decision Date:	3 December 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design 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 offences under sections 317(1)(b) and 317(1)(h) of the Act.

Contents

Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate were that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[2] The matter was originally set down to be heard on 9 May 2018. At the hearing new evidence was adduced that may have related to other grounds of discipline. The Board resolved to adjourn the hearing to initiate an inquiry into those matters. A Registrar's Report was called for.

[3] The Board, on receipt of that report, resolved under regulation 22 to hold a hearing and investigate whether the Respondent had breached section 314B(b) of the Act (s 317(1)(h) of the Act).

Function of Disciplinary Action

[4] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

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

[6] 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.

Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[8] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Murray Harman	Respondent
[Omitted]	Complainants
John Rennie	Technical Assessor
[Omitted]	Witness, [Omitted]
[Omitted]	Witness for the Respondent, [Omitted]

[9] The Complainants contacted the Respondent to extend an existing deck at the residential property and to construct a veranda. The Complainants stated that the Respondent advised against obtaining a building consent for the building work. The Respondent stated that he recommended that one be obtained. The work proceeded without a building consent.

[10] On completion the Complainants sought a code compliance certificate. Enquiries showed that whilst the house had an existing deck that deck did not form part of the original plans for the home. They engaged a designer to develop plans to submit to the Council. The designer advised that the deck had not been built to the

[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

requirements of the building code. The designer liaised with the Council and an engineer to establish what remedial work was required. It was decided that the deck should be demolished and rebuilt. The Respondent was not part of that decision. He submitted that demolition was not necessary and that the deck could have been made compliant with minimal remedial work. The Complainants gave evidence that the Respondent was reluctant to engage over the matter.

[11] In his response to the complaint the Respondent stated:

> *... I would like to firstly say that I will acknowledge that I made a mistake by agreeing to do work without a building consent when a building consent was required".*
>
> *From my recollection the consent requirement is only brought about by a section of the deck being 1.5m or higher above ground level. In this case being too high.*
>
> *I knew then that it was not the correct thing to do but found myself pressured at the time and I foolishly agreed to continue without a building consent. This is out of character for me and my beliefs as I have always done work to be proud of and have always instilled the same work ethic to anyone I have worked with or employed now or in the past.*

[12] The Respondent reiterated his acceptance that a building consent was required at the hearing.

[13] The Respondent submitted in his response that:

> *Just because the structure has not been built entirely to NZS3604, this does not mean it does not comply with the New Zealand Building Code as per the clauses mentioned above. NZS3604 is not the only means of complying with the NZ Building Code contrary to what [Omitted] have been led to believe.*

[14] The Respondent considered that the deck additions had been built to be structurally sound and to comply with the New Zealand Building Code. He noted:

> *The deck has been constructed with my many years of experience in what I know works and has stood the test of time. To date there have been no issues with the structural integrity of the deck that was existing and remained in place nor the area of which we extended. The entire structure has remained unchanged in the past two years under normal use by the [Omitted] and has withstood all weather conditions.*

[15] The Board sought the opinion of a technical assessor as regards the building work completed. He confirmed the requirement for a building consent for the deck and that the veranda was exempt from the requirements for a building consent under Schedule 1 of the Act.

[16] The Technical Assessor summarised his findings in a table. In addition to the building consent issue he identified four compliance issues. They were:

1. The extension of the deck, subject to the complaint, did not include any subfloor bracing;

2. No structural design or calculations have been observed that demonstrate compliance of the alternative method adopted for the construction of the deck sub- structure which has been bolt fixed through the existing timber pile foundation structure. Additionally it has been suggested that the joist spacings were excessive.

3. The balustrade, installed to the new deck, had been constructed to an alternative method than that specified within NZS 3604.

4. The canopy roof on the rear elevation allows moisture ingress at its junction with the existing house roof.

[17] At the hearing the Respondent provided a design certificate which he submitted showed that the deck as built met structural requirements. The certificate used joist spacings at 1.9 metres whereas the maximum span measured on site was 2.2 metres.

[18] The Respondent also submitted that the areas that were not compliant were limited to the outermost edge of one corner. With regard to the balustrade the Respondent submitted that it could have been remediated. The Technical Assessor noted that deconstruction would have been required to remediate.

[19] Further evidence was heard at the hearing that the retaining wall to which the deck was affixed was failing and that remedial work on it was required. It was noted by the Technical Assessor that the method of construction used was adding load to the retaining wall.

[20] The Complainants gave evidence that the rear elevation flashing in item 4 is still leaking. The Technical assessor noted that a longer flashing was required.

[21] At the hearing the Respondent stated he only supervised the work but that he had competent unlicensed persons on site. He organised and supplied materials and did check some of the work. He was always available by phone. The Complainants evidence was that the Respondent was only on site 3 times over a period of 2 months. The Respondent was not able to recollect what instructions he gave as regards how the work should have been carried out other than to match what was existing.

[22] The Respondent gave evidence that he was not, at the time, aware of updated requirements as regards decks that came into being with NZS3604:2011. He was working to his understanding of the previous version of the standard. He stated he was matching the methodology of the existing deck and, in general, doing what he thought would be compliant. He did not seek advice or consult reference material.

Board's Conclusion and Reasoning

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

(a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and

(b) breached section 314B of the Act (s 317(1)(h) of the Act);

and should be disciplined.

<u>Negligence or Incompetence</u>

[24] There were two matters that the Board was investigating with respect to negligence and/or incompetence. The first was with respect to whether the Respondent was negligent in failing to ensure a building consent was obtained for the building work. The second was in relation to the compliance of the building work carried out under the Respondent's supervision.

Building Consent

[25] 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.

[26] The onus is on the person carrying out the building work to show that one of the exemptions applies.

[27] The Board has found in previous decisions[6] that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068[7].

[28] More recently the High Court in *Tan v Auckland Council*[8] 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.*

[6] Refer for example to Board Decision C1030 dated 21 July 2014
[7] Board Decision C2-01068 dated 31 August 2015
[8] [2015] NZHC 3299 [18 December 2015]

[29] 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.

[30] 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 being negligent or incompetent.

[31] The building work that required a building consent was the construction of the deck. It required a building consent as it was over 1.5 metres in height and as such did not come within the relevant exemption for decks in Schedule 1. It was, at its highest point, 2.8 metres from the ground.

[32] This was not a case where it was only marginally above the maximum allowed height in the schedule 1 exemption. The Respondent accepted that a building consent was required. He also gave evidence that he had recommended to the Complainants that they obtain a building consent. This shows that at the time he commenced the building work he knew that a building consent was required.

[33] 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*[9] test of negligence which has been adopted by the New Zealand Courts[10].

[34] 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. A reasonable licensed building practitioner would have known of the requirement for a building consent and would not have proceeded with the building work without one.

[35] More than just negligence is needed to make a disciplinary finding. The conduct also has to be sufficiently serious. In *Collie v Nursing Council of New Zealand*[11] 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.*

[9] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[11] [2001] NZAR 74

[36] In the present case the consequence of the failing has been that the deck constructed has been demolished and rebuilt. This was not as a result of the failure to obtain a building consent but as a result of compliance issues with the deck which were such that a Certificate of Acceptance could not be applied for. This factor does, however, show why the failure to obtain a building consent is serious. Had a building consent been applied for then a design would have been developed by a qualified person. That design would have then been assessed by the building consent authority as to its compliance with the building code. Had this process been followed then it is very unlikely that the compliance issues that followed, which are discussed below, would have occurred. In other words the complaint and the need to demolish and rebuild the deck would not have arisen.

Compliance of the Building Work

[37] There were two areas where the compliance of the building work was called into question. These were the method of construction used for the deck and the installation of flashings in a veranda.

[38] The Technical Assessor noted five areas of non-compliance. He based his assessment of compliance on departures from acceptable solutions: NZS3604 in respect of the deck and E2/AS1 in respect of the flashing.

[39] Acceptable solutions are one way of achieving compliance with the building code. They are not the only way. Alternative solutions can be used. The difference between an acceptable solution and an alternative solution however, is that if an acceptable solution is used the building work is deemed to meet the requirements of the building code. If an alternative solution is used then further evidence is required to establish how the alternative solution meets the requirements of the building code. This is by way of a verification method. Verification needs to come from a suitably qualified person. The Respondent is not such a person.

[40] Under section 17 of the Act all building work, whether or not it is carried out under a building consent, must comply with the building code.

[41] The Respondent submitted that the methodology that he used for the construction of the deck still met the functional requirements of the building code. In support of the submission he noted that the deck had performed as expected for two years and he produced a design certificate for the deck joists which he submitted showed the joists were compliant. That design certificate did not, however, accurately reflect what was actually built.

[42] It is also to be noted that the Respondent was not, at the time the building work was carried out, aware that NZS3604 had been updated and that the requirements for decks had changed. He was, in essence, working to his understanding of an out of date standard.

[43] The Board also heard further evidence at the hearing that the retaining wall that the deck was connected had, since it was constructed, started to fail and that it had to

be remediated in that its height was lowered and the backfill behind it reduced. It is likely that the additional loads placed on the retaining wall by the deck will have contributed to this.

[44] The Board therefore finds that the Respondent has departed from an acceptable standard in carrying out the building work. The question for the Board is whether the Respondent has been negligent and/or incompetent as a consequence noting that his role was as the supervisor of the building work.

[45] As noted above negligence is the departure by a licensed building practitioner from an accepted standard of conduct.

[46] 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[12]. 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[13].

[47] 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.*

[48] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[14] and be carried out in accordance with a building

[12] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[13] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[14] Section 17 of the Building Act 2004

consent[15]. As such, when considering what is and is not an acceptable standard, the Building Code must be taken into account.

[49] The Board has already found that the Respondent did depart from an acceptable standard. The evidence of this is as set out in the Technical Assessor's report.

[50] The Respondent's role in the building work was as the supervisor. As such it is not enough to find that the building work was carried out in a manner that was contrary to an acceptable standard. The Board needs to consider whether the Respondent has departed from an acceptable standard in his supervision of the building work in question.

[51] The building work was not carried out under a building consent. In Board Decision C2-01143[16] the Board found that the definition of supervise in section 7[17] of the Act must be interpreted in such a way as to give effect to the purpose of the legislation which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent.

[52] 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 including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[53] The level of compliance of the resulting building work must also be taken into account.

[54] 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 1992[18]. The definition of supervision in that Act is consistent with the definition in the Building

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[15] Section 40(1) of the Building Act 2004

[16] Board Decision dated 14 April 2016

[17] 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.

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

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."*

[55] The Ministry of Business Innovation and Employment has issued guidelines to assist practitioners with understanding their obligations and responsibilities as a supervisor[19]. Those guidelines reflect the above.

[56] The Respondent's answers to questions about his supervision showed that it was minimal. He gave few instructions and the Board does not accept that he was on site as frequently as he claimed. There were serious non-compliance issued with the building work noted in the Technical Assessor's report.

[57] Given the above factors 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 that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

<u>Outside of Competence</u>

[58] As regards working outside of one's competence 314B(b) of the Act provides:

> *A licensed building practitioner must—*
>
> *(b) carry out or supervise building work only within his or her competence.*

[59] 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. The Respondent holds a carpentry licence. The building work that was carried out was, in essence, designed by the Respondent. The design was not as per an acceptable solution such as NZS3604. An engineering load assessment was also required given that the deck was attached to a retaining wall.

[60] The Respondent has worked outside of his class of license[20] and outside of his personal competence. The Board has therefore found that the Respondent has have

[19] Guidance documentation can be issued under section 175 of the Act.

[20] Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

worked outside of his competence and that the non-compliance of the resulting building work is evidence of that lack of competence.

Penalty, Costs and Publication

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

[62] 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.

<u>Penalty</u>

[63] 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*[21] 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.*

[64] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[22] 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.

[65] The Respondent has been found to have committed two disciplinary offences. Both are serious. The consequences of the Respondent's failings are also serious. The deck has been demolished and rebuilt. This could have been avoided if the Respondent had followed correct processes. The board was also concerned that the Respondent has not kept himself current with compliance requirements. NZS3604:2011 has been operative for a considerable period. To not know of the changed requirements is not acceptable.

[21] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[22] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[66] In terms of mitigation whilst the Respondent accepted responsibility as regards not obtaining a building consent, he continued to maintain that the deck was built to an acceptable standard. As such the mitigation is limited.

[67] Based on the above the Board's penalty decision is that the Respondent pay a fine of $4,000. The Board hopes that the Respondent will keep himself up to date henceforth.

Costs

[68] 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."

[69] 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[23].

[70] In *Collie v Nursing Council of New Zealand*[24] 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.*

[71] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry.

Publication

[72] 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[25]. 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.*

[73] 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.

[23] *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.
[24] [2001] NZAR 74
[25] Refer sections 298, 299 and 301 of the Act

[74] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[26]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[27]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[28]. 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*[29].

[75] 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[30]. 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.

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

Section 318 Order

[77] 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 $4,000.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (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.

[78] 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

[79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **15 January 2019**. 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

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[26] Section 14 of the Act
[27] Refer sections 200 and 202 of the Criminal Procedure Act
[28] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[29] ibid
[30] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 3rd day of December 2018

Chris Preston
Presiding Member

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[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.