Before the Building Practitioners Board

	BPB Complaint No. C2-01858
Licensed Building Practitioner:	Timothy Cameron (the Respondent)
Licence Number:	BP 110424
Licence(s) Held:	Design 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	Auckland
Hearing Type:	In Person
Hearing Date:	16 October 2018
Decision Date:	9 November 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Hugh King, Barrister and Solicitor, for the Respondent

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) 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 offences 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).

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:

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

> *"… 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.

Evidence

[5] 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.

[6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Timothy Cameron	Respondent
[Omitted]	Witness for the Respondent, [Omitted]
Gavin Spaabaek	For the Complainant
[Omitted]	Witness for the Complainant
[Omitted]	Summonsed Witness

[8] The complaint was made by the Kaipara District Council as the Building Consent Authority (BCA) for a new residential build. The Respondent was the designer who developed the plans and specifications that were issued a building consent by the BCA.

[9] The Respondent's design that was submitted for a building consent included an engineered foundation designed by [Omitted]. The foundation design was based on a geotechnical investigation of the land by [Omitted]. The design used concrete piles.

[10] Prior to the building consent being issued but after its submission for consent a decision was made to change the foundation design from concrete to wooden piles. [Omitted] were instructed to prepare a new engineered design.

[11] The building consent was issued on 7 December 2017. The consent was based on the original foundation design using concrete piles. It subsequently transpired that the

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

engineered design was not based on an updated geotechnical investigation for the site.

[12] A new foundation design was issued on 14 December 2017. The new design was based on driven wooden piles in substitution for concrete piles. The foundation designer acknowledged that the updated geotechnical report had not been used when completing the original foundation deign. The new design was based on the up to date geotechnical report and information.

[13] The new foundation design required a higher number of driven piles, a raft foundation. The Complainant noted the following changes:

> *The approved foundation plan shows thirty concrete shear piles around the perimeter of the floor with one HD12 bar centrally. Constructed is thirty nine timber driven piles around the perimeter and another fifteen timber driven piles under rib/ground beam intersections within the floor.*
>
> *Added are approximately forty five metres of ground beams 300mm x 300mm with a HD12 four bar cages within with R6 stirrups at 150mm centres have been added to the internal floor area. Approved was 100mm wide ribs with one HD12.*
>
> *Also added approximately ninety six metres of typical 100mm wide rib beams have had one extra HD12 bar added to them. Two instead of one.*

[14] Counsel for the Respondent submitted that the design was different but was still comparable to the original design.

[15] On 20 December 2017 the owner of the property asked the Respondent by emails whether the new foundation design had been submitted to the BCA for a variation to the building consent. Specifically he enquired:

> *Hi Tim, I assume this is the final foundation plan now. Please confirm this has been submitted to Council for variation.*

[16] The Respondent replied on the same day stating:

> *The Kaipara Council do not have* a *minor variation form. The revised engineering design has not been submitted to Council. The change in engineering design of the concrete slab foundation to what has been approved can be dealt with on site, by* [Omitted], *the Engineer and the Council Inspector. You will need to have the revised documentation and correct Producers Statements and site notes on site for the building inspector.*

[17] At the hearing Mr Spaabeck gave evidence that the BCA does have a minor variation form but that he did not know whether the form was available in 2017 but that there is no requirement to have a form and that it could have been communicated by other means.

[18] The building work started on 9 January 2018 when the site was cut. Construction of the foundations proceeded.

[19] On 5 February 2018 inspections of the foundation were carried out by [Omitted] and the BCA. The inspection [Omitted] site report noted:

> *Apply for Council approval before concrete pour* (as *the revised drawings haven't been approved).*

[20] The BCA failed the inspection on the basis that unconsented building work had been carried out. The BCA required that a Certificate of Acceptance for unconsented building work be applied for.

[21] A Certificate of Acceptance was applied for on 12 February 2018 and issued on 13 February 2018. The application was made by and paid for by the Respondent. It was granted on the basis of the following:

> *Type of Work: Forming of Rib raft foundation slab with polystyrene infill and reinforcing on blinding on hardfill complete with limber driven piles ready to take concrete.*
>
> *Based on the following information:*
> - *Geotechnical investigation report ref 17279 dated 16/10/17* [Omitted]
> - *Geotechnical Addendum report dated 5/12/17 by* [Omitted]
> - *Geotechnical site observation report dated 30.01.18 by* [Omitted]
> - [Omitted] *Geotechnical field notes received from* [Omitted]
> - *PS4 - Construction review in respect of compaction of hardfill and driving of timber piles*
> - *PS1 - Design in respect of Reinforced concrete foundations dated 15/12/17 received from* [Omitted]
> - *Revised foundation design and drawings dated 14/12/17 [Omitted]*
> - *Certificate of design work declaration for foundations dated 14/12/17, signed by* [Omitted]
> - *Site inspection report received dated 5/02/18 from* [Omitted]
> - *Declaration report dated the 9/02/18 stating that the reinforcing steel is in accordance with amended Engineering drawings and design as received from* [Omitted] *signed by* [Omitted]
> - *Site visit carried out by* [Omitted] *Compliance Inspector on the 8/02/18*

[22] The Respondent provided a response to the complaint by way of his legal counsel. The response submitted that:

- *the revised foundation design was a minor variation or, at the very least, it was reasonable for him to assume that the Council would treat the revision to the foundation design as a minor variation;*
- *minor variations are commonly dealt with by Council Inspectors on site, provided all documentation is in order; and*

- *he was not involved with the construction work on site; his engagement was limited to design (other than the design of the foundations) and the procuring of the building consent on the homeowners behalf.*

[23] The submissions noted that he was not involved in on site construction and that he was not the main contractor. Legal Counsel further submitted that:

> *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
>
> *Here, the revised foundation design retained a rib-raft floor system supported by piles. It did not entail a different foundation system altogether, such as a change from a rib- raft floor system to a timber sub-floor foundation.*
>
> *I believed that the revised foundation design was not a significant deviation, and that no amendment to the building consent would be required. I believed, reasonably, that the revision was a minor variation to the original foundation design, and that the Council would treat it as such. I believed the Council would be able to deal with the revision on site, provided the client and builder had all the necessary documentation.*
>
> *My view that the revision to the foundation was a minor variation is supported by* [Omitted]*, whose independent opinion I sought when I was notified of this complaint.* [Omitted] *report is annexed and marked 'J'.*
>
> *Even if the Board takes a different view on whether the revision was a minor variation, the fact that* [Omitted] *shares my view means, in my submission, that my assumption was one a reasonably competent architectural designer could make.*
>
> *Councils commonly address minor variations on site, provided appropriate documentation is in order.*

[24] The Respondent provided an opinion from [Omitted] in support of the submission. The opinion stated:

> *In my opinion:*
>
> *1. The revised foundation design did involve building work that needed to comply with the Building Code.*
>
> *2. The revised foundation design:*
>
> *a. comprised a substitution of comparable system in similar position/manner namely the substitution of timber piling for the consented concrete piling; and*

b. did not change the footprint of the building, did not change the location of internal load bearing supports, and did not change fire safety aspects.

3. The revised foundation design:

a. Likely complied with the Building Code, given that it was designed by [Omitted]*, supported by a PS1 and given the Kaipara District Council who ultimately issued a Certificate of Acceptance in respect of the foundation works;*

b. Reflects common appropriate industry practice and standards. There is nothing inappropriate or uncommon about using driven timber piles and providing additional steel reinforcement to the rib-raft foundation where it was required.

c. Did not change the likelihood of performance failure or property damage.

Applying the above criteria as set out in the MBIE guidance note, it would have been appropriate, in my opinion, for the Kaipara District Council, (subject to receiving the required amended plans and (PS1) to have treated the revised foundation design as a minor variation.

[25] Counsel for the Respondent questioned Mr Spaabeck about and made submissions with regard to the application of section 45A of the Act and the application of the "Minor variations to building consents: Guidance on definition, assessment and granting" issued by the Ministry of Business Innovation and Employment. In particular he submitted that the Requirements of "How BCAs should assess and process minor: Assessing a proposed minor variation" had been met.

[26] Counsel also noted that all of the required information had been provided to the builder and the owner and it was their responsibility to deal with and process the change. The Respondent did accept that he was noted as the agent on the building consent application.

[27] Counsel for the Respondent further submitted that if the Board decided that the change was not a minor variation then the Respondent's conduct was not serious enough to warrant a disciplinary outcome.

Board's Conclusion and Reasoning

[28] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

Was the change minor?

[29] In coming to its decision the Board decided that the changes to the building consent did not come within section 45A of the Act in that they were not minor. Section 45A provides:

> ***45A Minor variations to building consents***
> *(1) An application for a minor variation to a building consent—*
> *(a) is not required to be made in the prescribed form; but*
> *(b) must comply with all other applicable requirements of section 45.*
> *(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
> *(3) A building consent authority that grants a minor variation—*
> *(a) must record the minor variation in writing; but*
> *(b) is not required to issue an amended building consent.*

[30] The Building (Minor Variations) Regulations 2009 were passed to provide further detail. Regulation 3 defines a minor variation:

> ***3 Minor variation defined***
> *(1) A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
> *(2) The following are examples of minor variations and do not constitute an exhaustive list:*
> *(a) substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
> *(b) minor wall bracing changes:*
> *(c) a minor construction change (for example, changing the framing method used around a window):*
> *(d) changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
> *(3) The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*
> *(4) To avoid doubt, a minor variation does not include any building work in respect of which compliance with the building code is not required by the Building Act 2004.*

[31] To assist persons applying for minor variations and those who grant them the Ministry of Business Innovation and Employment issued a guidance document under section 175 of the Act: Guidance on definition, assessment and granting (Minor Variation Guidance). Under section 175(2) a guidance document is only a guide and if used, does not relieve any person of the obligation to consider any matter to which that information relates according to the circumstances of the particular case.

[32] The Respondent submitted that, by applying the guidance document provisions the change was minor.

[33] The importance of the distinction between whether a change to a building consent is minor or not is that if the change is not minor then an amendment to the building consent is required. If an amendment is required then building work cannot occur until such time as the amendment is granted. If the change is minor building work can continue uninterrupted.

[34] It is important to note that the ultimate decision as to whether a change is minor or not lies with the BCA, not with those that propose the change. Sections 48 to 50 of the Act make this clear[6] as does the Minor Variations Guidance which states:

> *All proposed minor variations need to be communicated to the BCA before the building work is undertaken. Decisions about whether a change meets the definition of a minor variation and whether the minor variation can be granted are the responsibility of the BCA, not any other party. Following receipt of a minor variation proposal the BCA should advise the applicant whether the change will be assessed as a minor variation or is too significant a change from the consented building work and requires a formal application for an amendment to the building consent.*

[35] In the current case the building work was completed prior to the BCA being advised of the changes.

[36] Turing to the assessment of the change the Minor Variation Guide recommends a three-step process for a BCA to assess a proposed minor variation. The steps are:

1. *Does the proposed change involve building work that is required to comply with the Building Code?*

2. *Is the proposed change sufficiently minor that it comes within the definition of 'minor variation' contained in the Building (Minor Variations) Regulations 2009 and explained in this guide? A proposed change will generally come within that definition if it involves either, for example:*

    - *substituting comparable building products in the same or similar position/manner*
    - *any alteration that does not change the footprint of the building or the location of internal load-bearing supports, or does not change fire safety aspects*
    - *altering a room's layout (for example, the position of sanitary fixtures in a room).*

[6] Section 49: Grand of building consent; section 50: refusal of application of building consent

3. Does the proposed change:

- *comply with the Building Code*
- *reflect common appropriate industry practice or standards (for example, drainage or roof truss 'as-built' plan)*
- *not significantly increase the likelihood of a building element's performance failure or of damage to other property.*

[37] The first element above was satisfied. It is the second and third that require consideration.

[38] Considering the second element the Respondent submitted that the change was a product substitution. The Board does not agree.

[39] At a base level it may be able to be said that the change was concrete poles for wooden. Wooden poles do not, however, have the same performance characteristics as concrete. More importantly though, as noted in paragraph [13] above, the change was more than just a substitution of concrete for wooden poles. An additional fifteen timber driven piles under rib/ground beam intersections within the floor were added. The steel reinforcing design was also significantly different.

[40] If the change had just been wooden poles for concrete then the change may have come within the provisions of section 45A of the Act. The reality is it did not. The changes were more significant and substantial. As such the change was not minor.

[41] Looking at the third element subsequent verification has shown that the change did meet the building code. It is to be noted, however, that it was in no way guaranteed that they would and that the BCA, in making its decision, relied on the 11 documents noted in paragraph [21]. The fact that a high number of technical documents was required to substantiate the change as being compliant indicates that it was not minor.

<u>Was the Respondent negligent or incompetent?</u>

[42] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] Judge McElrea noted:

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

[43] 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

[7] Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*[8] test of negligence which has been adopted by the New Zealand Courts[9].

[44] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[10] it was stated as *"an inability to do the job"*.

[45] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. 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.

[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:*

[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[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

> *(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] In the context of this matter the last item above is of importance. All of those involved in building process need to take responsibility.

[49] As noted above the Board has decided that the change was not minor. The question for the Board is whether the Respondent, in his dealings with the change to building consent, was negligent and or incompetent on the basis of the above tests.

[50] Looking at the facts, whilst the Respondent was not the person who carried out the building work on site, he was the agent for building consent purposes. He knew, prior to the building consent being issued, that the foundation design was to be changed and that the design submitted for consent had not been developed to account for the correct geotechnical detail.

[51] The revised foundation design was issued before the building consent was granted and prior to any building work being undertaken. Given this an amendment to the building consent could have been applied for prior to the building consent issuing or at least prior to the building work commencing. No steps were taken to seek an amendment by the Respondent.

[52] On 20 December 2017 the Respondent, in response to a query as to whether the revised foundation design had been submitted to the BCA for approval responded stating:

> *The Kaipara Council do not have* a *minor variation form. The revised engineering design has not been submitted to Council. The change in engineering design of the concrete slab foundation to what has been approved can be dealt with on site, by* [Omitted]*, the Engineer and the Council Inspector. You will need to have the revised documentation and correct Producers Statements and site notes on site for the building inspector.*

[53] The communication did not make it apparent that the approval of the BCA was required prior to the change being undertaken. The Respondent's advice was relied on. He did not consult with the BCA prior to giving his advice. He did note that a minor variation form was not available. The absence of a form should not be an impediment to the BCA being consulted. Other communication means could have been used.

[54] As matters transpired the BCA did not accept the change as minor. It required that a certificate of compliance be applied for.

[55] In summary the Respondent did not:

(a) seek an amendment to the building consent when there was an opportunity to do so;

(b) give due consideration to whether the changes were minor or not when issuing his advice; or

(c) consult with the BCA prior to issuing his advice.

[56] Given those factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent was negligent in that he departed from what the Board considers to be an accepted standard of conduct.

[57] The Board considers that a reasonable building practitioner with a Design AOP 2 Licence would have correctly assessed the building consent change as requiring an amendment. It also considers that reasonable building practitioner with a Design AOP 2 Licence would, if they determined a change was a minor variation, ensure that the BCA was consulted prior to any building work being undertaken so as to ensure their assessment was correct. The Respondent did not.

[58] Counsel for the Respondent has submitted that if the Board finds that the Respondent was found to have been negligent that the conduct was not sufficiently serious to warrant a disciplinary outcome.

[59] Seriousness was considered in *Collie v Nursing Council of New Zealand*[14] where the Court 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.*

[60] In *Pillai v Messiter (No 2)*[15] the Court of Appeal stated:

> *… the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[61] The Board considers that the conduct in this instance was sufficiently serious enough to warrant a disciplinary outcome. The Board notes that a certificate of acceptance had to be obtained due to the Respondent's failings. Whilst it transpired that the revised design met building code compliance requirements there was a risk that it may not have. The Respondent was cavalier in his approach to the consent change and in doing so he created the aforementioned risk.

[62] The board does, however, consider that the conduct was at the lower end of the scale as regards negligence. This will be taken into consideration in its deliberations as regards penalty.

[14] [2001] NZAR 74
[15] (1989) 16 NSWLR 197 (CA) at 200

Penalty, Costs and Publication

[63] 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.

[64] 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

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

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

[66] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[17] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[67] As noted the Board considered the matter was at the lower end of the negligence scale. Given this and taking into account that the Respondent was not the only person who was involved in the decision to proceed with the building work in the absence of consenting changes the Board has decided that a censure will be sufficient penalty. A censure is a formal expression of disapproval.

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

[16] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[17] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[18].

[70] In *Collie v Nursing Council of New Zealand*[19] where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

[71] 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.

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[20]. 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.

[74] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[21]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[22]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[23]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[24].

[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[25]. It is,

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[18] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.
[19] [2001] NZAR 74
[20] Refer sections 298, 299 and 301 of the Act
[21] Section 14 of the Act
[22] Refer sections 200 and 202 of the Criminal Procedure Act
[23] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[24] ibid
[25] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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)(d) of the Building Act 2004, the Respondent is censured.**
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.** **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 **3 December 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.

[80] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 9th day of November 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.