

Before the Building Practitioners Board

	BPB Complaint No. C2-01866
Licensed Building Practitioner:	Dale Kay (the Respondent)
Licence Number:	BP 121585
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	Tauranga
Hearing Type:	In Person
Hearing Date:	31 October 2018
Decision Date:	16 November 2018

Board Members Present:

- Richard Merrifield, LBP, Carpentry Site AOP 2 (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 a disciplinary offence under section 317(1)(b) of the Act.

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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 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 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.
- [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:
- | | |
|-------------------|---------------------------------|
| Dale Kay | Respondent |
| [Omitted] | Complainant |
| Stephen Alexander | Technical Assessor to the Board |
- [8] The Complainant contracted with [Omitted] to manufacture and install a lift in his home. [Omitted] contracted the Respondent to carry out the install. The Complainant was advised by [Omitted] and by the Respondent that a building consent would not be required for the building work.
- [9] The Respondent carried out preparation work including cutting into trusses, stair supports and the concrete floor. The Complainant became concerned about the extent of the building work being undertaken and whether a building consent was required. He made enquiries with the Territorial Authority and was advised that a building consent was most likely required.
- [10] The Complainant also sought an opinion from [Omitted], an independent Registered Building Inspector, who provided him with a Preliminary Lift Shaft Report dated 23 January 2018. As a result of the reported findings the Complainant made a complaint to the Board. The Lift Shaft Report noted the following issues:

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

- (a) *When viewed from the first floor door the right hand side wall of the lift shaft has been constructed using 75mm x 50mm timbers that have been laid on their side.*
- (b) *The rear wall of the lift shaft has been constructed using 100mm x 50mm timber framing. However, some of the joins are butt joins and not in accordance with Building Code requirements.*
- (c) *The left hand side wall of the lift shaft has been constructed using 75mm x 50mm timber framing. The lower section of this wall that is a structural wall supporting the stairs has had the timber framing that was initially 100mm x 50mm cut down to 75mm x 50mm in size. Again some of the framing joins are butt joins and not of sufficient strength.*
- (d) *I noted that the timber truss directly above this lift shaft has been cut.*
- (e) *The lift shaft is not plumb. When a 900mm long level was used to check the wall it was 11mm out of plumb.*
- (f) *The timber bottom plate is not secured to the concrete floor to prevent movement.*
- (g) *There is no waterproofing or strengthening to the hole that has been dug through the concrete floor and into the earth below however it could be argued that as this project is not finished.*

[11] The Respondent was asked to provide a response to the complaint. A response was received from [Omitted], a Director of [Omitted]. The response stated the Complainant was advised that standard lift could be installed without any apparent major changes to the structure, or to the weatherproofing of the house, in a void area between the existing stairs. The response also noted that:

In the contract, a clause specifically outlines that it is the full responsibility of the customer (Complainant) to make their own investigations and decisions as to whether a building permit/drawings are required for any remedial work to construct the lift shaft/well and any building alteration works undertaken by the builder they engage to construct the lift well to our specifications.

[12] As regards the Respondent the response stated:

(The Respondent) has been regularly contracted to complete work as required for [Omitted] and had completed work for the previous owners of our Company. In all instances, the work was completed without problem, the lifts certified as being fit for purpose, and in previous instances, the customers were left very satisfied.

[13] The response also discussed contractual matters that are not relevant to the Board's considerations.

- [14] The Board appointed a Technical Assessor to review the building work and provide an opinion. Stephen Alexander's report verified the observations in the lift Shaft Report and further noted:

This work clearly required a building consent because:

- (a) It involved an alteration to the structure of the house.*
- (b) The work involved breaking a hole in the existing concrete floor to install a lift sump that is structural work that would require waterproofing.*
- (c) The alterations were for the purpose of installing an elevator that would, by itself, trigger the need for a building consent application.*

- [15] The Technical Assessor further noted that the manufacturers standard drawings indicate that the framing that would be required to conform with NZS3604 but that work observed did not. Specifically:

- 6.7 Some of the framing was 75mm x 50mm rather than 100mm x 50mm. NZS3604 permits the use of 75mm x 50mm framing for interior walls (subject to specific heights and loaded dimensions). The 75mm x 50mm framing would likely be adequate in this situation depending on specific loading from the lift. It would not be acceptable fixed on its side.*
- 6.8 Some of the 75mm x 50mm framing was laid on its side; some of the wall framing had originally been 100mm x 50mm existing timber that was ripped or chiselled down to something less than 75mm x 50mm to match other new 75mm x 50mm timber in the same wall.*
- 6.9 There are many vertical timber studs that were inappropriately butt jointed, cut between nogs or discontinuous over the height of the space.*
- 6.10 The assembly of the framing did not conform to methods required by NZS3604 or to any recognised carpentry practice.*
- 6.11 In this case, the requirement for the lift shaft to be plumb would be governed more by the requirements for verticality of the lift operating components, rather than the tolerance levels for plumbness in NZS 3604 however for loaded components plumbness is important. The framed walls were at least partly out of plumb.*
- 6.12 The timber framing had been installed before the concrete lift pit had been formed. It would be theoretically possible to install the lift pit after the timber framing was in place, but substantially more difficult. The correct approach would have been to form the lift pit including ensuring there was continuity of the under-floor waterproofing*

membrane before the timber framing was placed on top of the concrete.

- 6.13 *The timber framing observed was unacceptable by reference to any standard and the only appropriate remedy was to completely remove the framing to start over.*

[16] The Technical Assessor also noted:

Had the work by Mr Kay continued and the lift installed, then there are two likely outcomes:

- (a) *The lift would probably be incapable of being installed due to absence of verticality, incorrect dimensions or inadequate fixings for guide rails and other components.*
- (b) *If the lift was installed, the enclosure for the lift would be unsafe.*

[17] The Technical Assessor's report included photographs of the building work discussed in it. The following photos show some of the building work that involved changes to the structure of the dwelling house.

Excavations to the Foundation



Cut Truss

- [18] At the hearing the Respondent submitted that obtaining a building consent was the owner's responsibility and that the building work would be inspected by an engineer prior to it being used. The engineer used was the same on each lift that he installed and that the aspects that did not accord with NZS 3604 would have been signed off by the engineer who would have provided producer statements.
- [19] The Respondent spoke of the methodology he used to install the lift shaft. He was questioned as to how he would ensure that the structural elements that were cut into would be dealt with so as to ensure that they complied with the Building Code. He stated he would have consulted with the engineer if necessary and that it would have been checked at engineer's final inspection.
- [20] The Technical Assessor, in questioning from the board, noted that from a consenting perspective it was important to also look at the effect the lift would have on the structure of the house and on load transfer from structural elements to the foundation.
- [21] The Board also questioned the Respondent on how he would have fixed the bottom plate of the lift structure whilst ensuring there was sufficient timber cover for the fixings given that the dimensioned timber was 50mm and 50mm cover was required on either side of a bolt fixing. He stated he would have angled the fixings but was not able to establish how cover would have been maintained.

Board's Conclusion and Reasoning

- [22] 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.
- [23] The Board found that the Respondent's negligence related to both his failure to obtain a building consent and the manner in which the building work was carried out.
- [24] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.*
- [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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [26] 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*⁹ it was stated as "*an inability to do the job*".
- [27] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [28] 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 Act¹¹. 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 practitioner¹².

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[29] 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.*

[30] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[31] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

Failure to Obtain a Building Consent

[32] 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.

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

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

[34] The Board has found in previous decisions¹⁶ 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 C2-01068¹⁷.

[35] More recently the High Court in *Tan v Auckland Council*¹⁸ 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.

[36] 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.

[37] The Board also considers that a licensed building practitioner cannot contract out of their responsibilities as was submitted by [Omitted]. The reasons why were made clear in the *Tan* decision above.

[38] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, 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.

[39] As noted above the starting point is that a building consent is required unless an exemption can be established. In the present case the Clause 11 of Schedule 1 may have applied. It states:

11 Internal walls and doorways in existing building

Building work in connection with an internal wall (including an internal doorway) in any existing building unless the wall is—

(a) load-bearing; or

(b) a bracing element; or

(c) a fire separation wall (also known as a firewall); or

¹⁶ Refer for example to Board Decision C1030 dated 21 July 2014

¹⁷ Board Decision C2-01068 dated 31 August 2015

¹⁸ [2015] NZHC 3299 [18 December 2015]

- (d) *part of a specified system; or*
- (e) *made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar.*

- [40] The building work clearly involved changes to structural and/or bracing elements. In particular the concrete floor, which is a structural element, was penetrated and the penetration was greater than that allowed for in Clause 14 of Schedule 1. A truss was also altered. A truss is an engineer designed structural element.
- [41] The Technical Assessor also noted that the installation of a lift into the building would impact on the structure and overall performance of the building.
- [42] Given the above factors a building consent was required. The Respondent should have known this, especially as he had to cut into structural elements to carry out the preparatory work. It was not enough to say that an engineer would check and certify the work. An assessment of the impact the building work would have had on the structure of the house was required. A building consent would have ensured that this occurred.
- [43] 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.
- [44] The Board does note that the lift manufacturer has contributed to the perception that a building consent was not required. The Respondent should have known better but the role of the manufacturer will be taken into consideration in determining the correct penalty.
- [45] The manufacturer [Omitted] is also cautioned that more care needs to be taken when giving information to clients. They are the experts and their customers will inevitably rely on what is presented to them.

The Building Work

- [46] The building work that the Respondent carried out was sub-standard. Both the Lift Shaft Report and the Technical Assessors report noted numerous items that did not comply with NZS 3604 the standard for timber framed buildings and workmanship issues. The Technical Assessor went as far as to say that if the lift was installed with enclosure as constructed, the lift would be unsafe.
- [47] These departures are, in themselves, sufficient for the Board to find that the Respondent displayed a lack of reasonably expected care and as such was negligent.
- [48] It should be noted, as regards departures from NZS 3604 that it is, under the Act, an acceptable solution which is a method of establishing compliance with the Building

Code¹⁹. Alternative means to obtain compliance with the Building Code can be used. When they are it is imperative that a verification method or alternative solution is used to establish compliance with the building code. It is not acceptable, as was the case here, to carry out the work and seek advice once complete as to its compliance with the Building Code. A reasonable licensed building practitioner would consult on the alternative to be used and ensure its compliance prior to carrying out the associated building work. Failure to do so can mean that substantial remedial work is required to ensure what has been done has been completed to code. In essence the process is to check the compliance of the alternative prior to carrying it out.

- [49] It should also be noted that had a building consent been applied for then the alternative used would have been further assessed by the building consent authority. Departures from acceptable can be undertaken but when they are for use in establishing compliance with building code
- [50] Given that the Respondent's process was to complete building work that was not consistent with an acceptable solution and then have it checked the Board, which includes persons with extensive experience and expertise in the building industry, has once again found that he has been negligent.

Penalty, Costs and Publication

- [51] 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.
- [52] 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

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

¹⁹ Section 19(1)(b) of the Act.

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

- [54] 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.
- [55] The matters before the Board were serious. The fundamental safety objective of the Act was potentially put at risk. The Respondent had little appreciation of the seriousness of his conduct or of the requirement for a building consent.
- [56] The Board does accept that the relationship with and involvement of [Omitted] was a mitigating factor. It has taken this into account.
- [57] Based on the above the Board's penalty decision is that the Respondent be fined the sum of \$3,000. The fine has been reduced on the basis of the mitigation heard.

Costs

- [58] 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."
- [59] 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.
- [60] 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.*
- [61] 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

- [62] 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 Act²⁴. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

²⁴ Refer sections 298, 299 and 301 of the Act

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.

- [63] 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.
- [64] 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.
- [65] 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.
- [66] Based on the above the Board will order further publication. Building consents are the cornerstone of the compliance system in the Act. It is important that other licensed building practitioners are made aware of the circumstances of the case and the learnings from it. An article on the case will be published in Code Words.

Section 318 Order

- [67] 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 \$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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

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

- [68] 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.

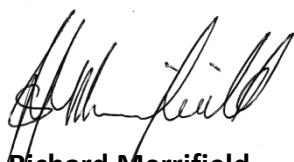
Submissions on Penalty, Costs and Publication

- [69] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **10 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.
- [70] 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

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

Signed and dated this 16th day of November 2018



Richard Merrifield
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.*