

Before the Building Practitioners Board

	BPB Complaint No. C2-01932
Licensed Building Practitioner:	Matthew Biddle (the Respondent)
Licence Number:	BP 118856
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	Tauranga
Hearing Type:	In Person
Hearing Date:	31 October 2018
Decision Date:	22 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 disciplinary offences under sections 317(1)(b) and 317(1)(i) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	6
Negligence and/or Incompetence	6
Disrepute.....	8
Penalty, Costs and Publication	11
Penalty	11
Costs.....	12
Publication	13
Section 318 Order	14
Submissions on Penalty, Costs and Publication	14
Right of Appeal	14

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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.

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

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

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

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

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 the Respondent and the Complainant.
- [8] The Respondent was engaged on 8 March 2018 by the Complainant to develop plans and specifications for an alteration to an existing dwelling and to submit the same to the Building Consent Authority (BCA) to obtain a building consent. A deposit for the services was paid on the same day. The Complainant and Respondent corresponded over the following week over the proposed design.
- [9] On 13 March 2018 the Respondent emailed the Complainant attaching what he stated were the final plans. He stated that he would lodge the plans with the BCA on confirmation that the Complainant was happy with them and the full fee had been paid. The Complainant confirmed the plans and paid the balance of the Respondent’s fee on the same day.
- [10] The Respondent was asked if he considered that the plans and specifications were complete and ready to be submitted for a building consent. He stated that they were. The documentation provided included a Design Memorandum from the Respondent and one from an engineer. A Design Memorandum states that the provider has applied the skill and care reasonably required of a competent design

⁴ [2016] HZHC 2276 at para 164

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

professional in carrying out or supervising the Restricted Building Work (RBW) described in this form, and that based on this, the certifier states that the RBW complies with the building code, or complies with the building code subject to any waiver or modification of the building code.

- [11] Following full payment the Complainant found that the Respondent was difficult to reach by phone and email. The Complainant was seeking confirmation of the building consent being lodged and of progress with the same. A response was received from the Respondent on 17 March 2018 to an email of 15 March 2018 enquiring about lodgement. The Respondent stated:

Sorry, thought I had emailed plans are all in with Council

- [12] At the hearing the Respondent produced a print out of an email that he stated he had sent to the Complainant on 3 April 2018. The email stated:

My apologies for not replying to you text and phone calls Im just going through some personal stuff at the moment and am dealing with a lot right now. Please find attached all the documents to lodge for your project to lodge for consent. I am extremely sorry for the delay that my situation has created for you.

- [13] The Complainant gave evidence that the email had not been received. The Respondent was asked to provide an electronic copy of the email. He sent a PDF copy. He was asked to forward the email chain.
- [14] On 27 April 2018, after not being able to contact the Respondent, the Complainant contacted the BCA and was advised that a building consent had not been applied for. On 30 April 2018 the Complainant proceeded to lodge the documents received on 13 March 2018 for a building consent. On 15 May 2018 the BCA issued a Request for Further Information.

Main Building

Section 84 - 89 - Restricted Building Work

1. Please provide a design certificate for all of the internal alteration work not covered by the Engineer.

Wind / Earthquake / Corrosion Zone

1. Review identifies that the wind & corrosion zones for this site have not been correctly determined.

Please review and resubmit amended documentation that demonstrates compliance. BRANZ mapping specifies High Wind & Corrosion zone D.

B1 - Wall Framing

1. Framing: Further information is required to clarify:

1. Lintels over openings in wall framing have been sized appropriately given the building elements they support, their loaded dimension, and their span.

Please also provide lintel fixings to comply with 3604 or alternative solution, Lumberlok fixings.

2. Plates: Top and bottom plates are sized appropriately, as per 3604 table 8.16 & 8.17, have adequate strengthening where required & also detail fixings.

B1 - Wall Bracing

1. Brace Elements: Please provide construction details and fixings for new bracing elements.

B1 - Wall & Ceiling Lining Construction

1. Please provide specifications/details of interior linings for walls and ceiling.

B1 - Roof Frame

1. Load Paths: Please provide further information to clarify roof plan and loads remain supported with the removal of internal walls on the first floor.

E3 - Internal Moisture

1. Membrane System: Please provide the manufacturers installation specifications for the wet area membrane showing adequate protection is provided from water splash from open shower.

Please refer to E3/AS1, fig 5 for guidance.

G9 - Electricity

1. Please provide a note on plans/specifications to detail:

Electrical installation work to be carried out to conform with the Electricity (safety) Regulations 2010, AS/NZS 3000, AS/NZS 3008.1.2 and the New Zealand electrical codes of practice.

G13 - Foul Water

1. Please provide plumbing & drainage plan for the new ensuite layout. An AAV will be required if the new double sinks are sharing a single drain.

[15] The Complainant was not able to get another designer to deal with the Respondent's design. As such the Complainant abandoned the Respondent's design and instructed a new designer to obtain a building consent from scratch. An order for compensation was obtained against the Respondent in the Disputes Tribunal. The Respondent has stated he will appeal that decision.

[16] The Respondent did not acknowledge or respond to the complaint when it was served on him as part of the Registrar's Report phase of the investigation.

- [17] At the hearing the Respondent stated that a building consent had not been applied for due to personal and financial circumstances at the time including the liquidation of the company that he was using to trade. The Respondent sought to provide the Board with details of those personal circumstances in private which was granted. The Board sought independent verification from the Respondent of one of the circumstances put forward.
- [18] The Respondent also stated that he had issues with his email server and that he changed his addresses and phone numbers during the period but when questioned he was not able to substantiate those claims. His postal and residential address and phone numbers remained the same throughout the period. The Respondent stated he took no action to resolve email issues.
- [19] The Complainant stated that various methods of communication had been used including registered letters but no responses were received.
- [20] The Respondent accepted, in questioning, that the email of 17 March 2018 in which he stated that the plans had been lodged for a building consent was a lie.
- [21] On 7 November 2018 the Respondent sent various documents to the Board and the email chain for the email of 2 April 2018 that the Respondent claimed he had sent. The Respondent also submitted that a company was contracted not him personally.

Board's Conclusion and Reasoning

- [22] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in an incompetent manner (s 317(1)(b) of the Act);
 - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and should be disciplined.

Negligence and/or Incompetence

- [23] 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.*
- [24] 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

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

into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

- [25] 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*”.
- [26] 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.
- [27] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the 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.
- [28] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

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

(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.*

[29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³. As such, when considering what is and is not an acceptable standard, the Building Code must be taken into account. In respect of a design it is the extent to which the design meets the requirements of the Building Code.

[30] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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.

[31] The Board, which included a Design AOP 2 Licensed Building Practitioner, reviewed the design which was submitted by the Respondent as being ready for lodgement for a building consent. It did not consider that they were competently developed or that it would have obtained a building consent. The design and specifications lacked site specific detail which would have been available to the Respondent had he carried out a competent site investigation. There were aspects that would not have met compliance requirements and/or were not buildable. The number and type of requests for information from the BCA highlighted this.

[32] On this basis the Board found that the Respondent had been incompetent.

Disrepute

[33] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹⁵ and discussed the legal principles that apply.

[34] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*¹⁶ a company director, who, in the course of his duties as a director was charged with

¹³ Section 17 of the Building Act 2004

¹⁴ [2001] NZAR 74

¹⁵ Board decision dated 2 July 2015.

¹⁶ [2013] NZAR 1519

offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[35] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁷, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[36] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁸ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁹ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²⁰

[37] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions²¹;
- honest mistakes without deliberate wrongdoing²²;
- provision of false undertakings²³; and
- conduct resulting in an unethical financial gain²⁴.

[38] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act

¹⁷ 24 September 2014

¹⁸ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁹ [2012] NZCA 401

²⁰ [2012] NZAR 1071 page 1072

²¹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²² *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²³ *Slack, Re* [2012] NZLCDT 40

²⁴ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

- [39] The alleged disrepute in the present case was the taking of funds without an intention to complete the agreed services and the manner in which the Respondent has dealt with his client. In essence the allegations were that the Respondent had been dishonest.
- [40] Within the context of honesty the Board found that the Respondent was not a reliable or truthful witness. He admitted to lying to the Complainants in his email of 17 March 2018. He stated he had not been aware of the attempts to contact him yet he was able to respond to those inquiries on 17 March, albeit with a falsehood. He stated his contact details had changed when they had not. He stated his email was corrupted but was able to respond to various email communications.
- [41] The Respondent provided an exculpatory email dated 2 April 2018 after having ignored the Complainant's various communications. The Board doubts the veracity of the email. It finds that it was likely created by the Respondent to try and explain his actions and that it was never sent. There were inconsistencies in the format, addressing and other heading text in the email. The electronic version the Respondent has provided differs in the heading material to the hard copy that was produced at the hearing. A comma, for example, after "April 2" on the electronic version is not present on the hard copy. The Complainants state that it was never received, the Board accepts their evidence.
- [42] The Board also accepts the Complainant's submission that the Respondent took the full fee for the promised work without intending to develop a design that would obtain a consent or to submit it for consent. The Board finds that he did enough to secure payment but that what he did was in no way sufficient to obtain consent and that he knew or ought to have known that this was the case.
- [43] The Board does not accept the Respondent's submission that personal circumstances prevented him from completing the services. Firstly he was able to provide documentation that he stated was sufficient to obtain a consent on 13 March 2018. He received payment and approval on the same day yet was then not able to carry out any further work. At no time did he disclose or advise that there were personal reasons for his inability to complete the work or offer to refund payments received. He ignored all communications and misled the Complainants into believing he had lodged for a building consent.
- [44] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [45] The conduct was serious and it reflected poorly on the licensing regime to the extent that the Board finds that the Respondent has brought the regime into disrepute.

Penalty, Costs and Publication

- [46] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [47] 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

- [48] 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*²⁵ 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.

- [49] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁶ 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.
- [50] In determining the appropriate penalty the Board has noted the Respondent's previous disciplinary history. In C2-01478 the Respondent was found to have been negligent and to have brought the regime into disrepute. The conduct occurred in 2016 and was similar to the conduct in the present case. The Board also notes that the Respondent did not pay the fine and costs imposed on that case in a timely manner. His licence was suspended as a result.
- [51] As this is the second time the Respondent has brought the regime into disrepute the Board considers a more serious penalty is necessary.

²⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [52] The Board also notes that the Respondent has been found to have been incompetent. Having made this finding it is appropriate that the Respondent's competence be assessed prior to his continuing to practice. There are two ways in which this can occur. The first is by way of training. The second is for his licence to be cancelled so that he has to prove his competence should he apply to be relicensed.
- [53] Given the seriousness of the disciplinary offending and the need to send a deterrence message to others the Board considers that cancellation is the only viable penalty option. With regard to deterrence the board notes that in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²⁷ the High Court stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [54] Based on the above the Board's penalty decision is that the Respondent's licence be cancelled and that he not be able to reapply to be licensed for a period of 18 months.

Costs

- [55] 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."
- [56] 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 case²⁸.
- [57] In *Collie v Nursing Council of New Zealand*²⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

²⁷ [2012] NZAR 481

²⁸ *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.

²⁹ [2001] NZAR 74

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.

- [58] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*³⁰ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [59] The Respondent did not engage in the disciplinary process until the hearing. This complicated the hearing process. Based on this and the above factors the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [60] 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 Act³¹. 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.

- [61] 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.
- [62] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁴. 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*³⁵.
- [63] 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 interest³⁶. It is,

³⁰ [2011] 3 NZLR 850.

³¹ Refer sections 298, 299 and 301 of the Act

³² Section 14 of the Act

³³ Refer sections 200 and 202 of the Criminal Procedure Act

³⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁵ *ibid*

³⁶ *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.

- [64] Based on the above the Board will order further publication by way of an article in Code Words.

Section 318 Order

- [65] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 18 months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (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.

- [66] 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

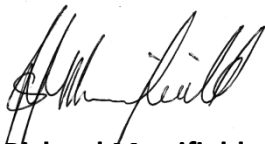
- [67] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 December 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions 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.

- [68] 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

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

Signed and dated this 22nd 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.*