15 Stout Street, Wellington 6011
www.lpb.govt.nz

Before the Building Practitioners Board

	BPB Complaint No. CB25235
Licensed Building Practitioner:	Adam Campbell (the Respondent)
Licence Number:	BP 129813
Licence(s) Held:	Carpentry and Foundations AOP: Concrete or timber pile foundation, Walls and concrete slab-on-ground

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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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	On the Papers
Hearing Date:	6 December 2019
Draft Decision Date:	11 December 2019
Final Decision Date:	14 January 2020

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry and Site AOP 2
Mel Orange, Legal Member

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.

Contents

Introduction

[1] On 6 December 2019 the Board received a Registrar's Report in respect of a Board Inquiry into the conduct of the Respondent.

[2] Under regulation 22 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 21 of the Complaints Regulations applies.

[3] Having received the report the Board decided that regulation 21 did not apply. Under regulation 22 the Board is required to hold a hearing.

[4] The Board's jurisdiction is that of an inquiry. Board inquiries are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures[1]. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation[2]. As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

[1] Clause 27 of Schedule 3
[2] *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

[5] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.

[6] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

[7] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had 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

[8] 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*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

[9] The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

> *… 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.*

Evidence

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[11] The Board was provided with the Notes of Judge A D Garland on Sentencing of Adam Campbell Building Limited in the District Court at Greymouth[7] (the Sentencing Notes). The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is,

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[3] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[4] [1992] 1 NZLR 720 at p 724
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200
[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1
[7] Worksafe New Zealand v Adam Campbell Building Limited [2019] NZDC 2342

however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court[8].

[12] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are that:

(a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties[9];

(b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action[10];

(c) Issue estoppel can only be founded on findings which are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel, however definite the language in which they are expressed[11]; and

(d) The purpose of any estoppel is to work justice between the parties. It is therefore open to the courts to recognise that in special circumstances inflexible application of an estoppel may have the opposite result[12]. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: "A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice"[13].

[13] The Board considers, in this case, that estoppel applies and that it does not need to carry out any further inquiries with regard to the facts surrounding the Inquiry.

Background Facts

[14] The Board Inquiry related to the death of [Omitted]. The Sentencing Notes set out that [Omitted] died as a result of a workplace injury whilst in the employ of Adam Campbell Building Limited. [Omitted] was, at the time, working under the supervision and direction of the Respondent. The Respondent's company Adam Campbell Building Limited pleaded guilty to one charge of contravening sections 36 and 48 of the Health and Safety at Work Act 2015 for failing to ensure so far as was reasonably practicable the health and safety of workers who worked for the company.

[15] The Sentencing Notes set out:

> *[4] The building concerned was a bach on piece of land near the Paroa River Mouth. It was a small bach. It was sitting very close to the ground on damp land that was susceptible to flooding. The owner had engaged the defendant to lift and repile it. The*

[8] Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).
[9] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352
[10] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41
[11] *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce
[12] *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry
[13] *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

work commenced on 11 April 2017, digging base timbers into the ground at each of the pre-determined checking positions around the perimeter and placing the jack on top. The jacks were then raised to take the weight of the piles around the perimeter, so they could be disconnected. The workers then used jacks to raise the bach above the existing pile height. Blocks were then placed in position above the existing perimeter piles and the bach was lowered back down onto the blocks. The workers then starting jacking, disconnecting and blocking piles further under the bach at the direction of Mr Campbell. [Omitted], together with Mr Campbell and one other worker went under the bach to place the jacks and disconnect the piles during the course of the afternoon.

[5] Mr Campbell held a toolbox meeting before the work commenced. He instructed the workers to watch what they touched while underneath the bach and the maximum time to spend under the bach would, at any one time would be 30 minutes. They were to take five breaks throughout the day.

[6] There was heavy rain overnight and this delayed the work. The work started the following day due to the remote location and access difficulties. The workers arrived at the bach at approximately 12.30 pm. The meeting was held and Mr Campbell told Worksafe that he directed the workers not to go under the bach while it was on jacks as it would be unstable and unsafe as they were lifting it off the blocks.

[7] During this meeting, [Omitted] asked about the middle of the bach sagging and Mr Campbell told him that it was not a concern as it would not break and there was no need to push the middle up.

[8] Over the two days of work, the bach was raised 400 millimetres. Just prior to 2.00 pm on the second day, Mr Campbell observed [Omitted] under the bach trying to repack the adjust one of the jacks under the bach. He advised Worksafe that he told [Omitted] that it was not safe to be there and [Omitted] started crawling out. At approximately 2.00 pm, the bach shifted, twisted off the jacks and dropped. [Omitted] was still under the bach crawling towards the perimeter when it dropped. He sustained fatal crushing injuries from the impact of the bach falling on him and died instantly.

[9] The work that was being undertaken was inherently dangerous and presented significant risks. There was a risk of the suspended load shifting and dropping causing crushing injuries to workers underneath the building or in close proximity to the perimeter of the building. The likelihood of the risk being realised was high as effective temporary support was not in place in the area. Under the bach had not been isolated.

[10] A Worksafe investigation determined that the incident was not caused by jack failure. The jacks being used were fit for purpose. The work was not undertaken safely or in accordance with the hierarchy of controls. The duty holder had identified the building and suspended load collapse as a hazard.

[11] The Worksafe investigation found that the defendant failed in two primary areas. It was reasonably practicable for the defendant to have implemented lateral bracing by maintaining sty block stacks under the building during jacking. Secondly, by isolating the area under the bach, for example, by using danger warning tape. As a result of the defendant's failures, the victim sustained fatal injuries.

[12] The guideline on the lifting of buildings is readily available online. The principles articulated are equally applicable to the lifting and repiling of small buildings in any location, particularly where the ground is unstable. Worksafe has produced a fact sheet entitled, "Lifting Earthquake Affected Buildings in Christchurch," which sets out general guidance on the hazards and temporary building support methods. Appropriate temporary support is also addressed in the feature EQC Safety Alert, dated 26 September 2013 which was available online and the Canterbury Rebuild Safety Forum House Lifting Protocol Document. The latter documents states that a method of or bracing and or lateral support system must be in place and must be suitable for purpose.

[16] The Respondent provided a response to the complaint in which he stated his involvement was both supervising and participating in the required building work including undertaking initial onsite induction and safety meetings to identify the site-specific hazards to each employee and the requirements of the job.

Draft Conclusion and Reasoning

[17] 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.

[18] 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*[14] test of negligence which has been adopted by the New Zealand Courts[15].

[19] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[16]. 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.

[20] 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[17]. 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

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

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

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

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

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[18].

[21] The Board notes that the purposes of the Act are:

> ***3 Purposes***
>
> *This Act has the following purposes:*
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> *(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*
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> *(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*
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> *(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.*

[22] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[19] and be carried out in accordance with a building consent[20]. 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.

[23] The Building Code includes clauses which have the objective of safeguarding people from injury, and other property from damage, caused by construction or demolition site hazards. It includes the functional requirement in clause F5.2 that construction and demolition work on buildings be performed in a manner that avoids the likelihood of objects falling onto people on or off the site.

[24] The District Court noted that a Worksafe investigation determined that the work was not undertaken safely and that there were two primary failures: a lack of lateral bracing by maintaining sty block stacks under the building during jacking and a failure to isolate the area under the bach. It was noted that the guidelines on lifting buildings was readily available online.

[25] Given the Worksafe investigation findings the Board has decided that the Respondent's conduct has fallen below that expected of a competent and responsible licensed building practitioner.

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

[19] Section 17 of the Building Act 2004

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

[26] When looking at the Board notes that in *Collie v Nursing Council of New Zealand*[21] 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.*

[27] The matter before the Board was serious. The conduct fell well short of that to be expected of a licensed building practitioner. As such the Board has decided that the Respondent has committed a disciplinary offence. In coming to its decision the Board has also taken into account the fact that whilst the Respondent's company has been convicted and ordered to pay reparation the Respondent's conduct was not dealt with in the Court. In this respect the Board considers, given the gravity of the matters, that a disciplinary outcome is recorded on the Register of Licensed Building Practitioners so the consumers can be informed of the Respondent's conduct when deciding to engage him as a licensed building practitioner.

Draft Decision on Penalty, Costs and Publication

[28] 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.

[29] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

<u>Penalty</u>

[30] 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*[22] 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.*

[31] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[23] 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

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[21] [2001] NZAR 74
[22] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[23] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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.

[32] The Board notes that the Respondent's company Adam Campbell Building Limited has been convicted in the District Court and was ordered to pay reparation.

[33] Section 318(3) prohibits the Board from imposing a fine if a respondent has been convicted by a court. That is not the case here as it was not the Respondent who was convicted. Notwithstanding the Board has taken the company's conviction and the reparation order into account. It has also taken into account the Respondent's submission that any form of penalty that impacts his licence will have a flow on effect to the company's ability to pay the reparation.

[34] The Board also notes, from the sentencing notes obtained, the personal impact the events have had on the Respondent. It has also taken this into consideration. The Board also taken into account that the Respondent has implemented health and safety changes within the business.

[35] Based on the above the Board's penalty decision is that the Respondent be censured. A censure is a formal expression of disapproval of the Respondent's conduct.

Costs

[36] 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."

[37] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[24].

[38] In *Collie v Nursing Council of New Zealand*[25] 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.*

[39] The Board notes the matter was dealt with on the papers. Ordinarily the Board would order costs of $500 for an on the papers hearing. Given the background to the matter the Board has, in the instance, decided that a costs order will not be imposed.

Publication

[40] 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[26]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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[24] *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.

[25] [2001] NZAR 74

[26] 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.*

[41] 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.

[42] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[27]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[28]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[29]. 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*[30].

[43] 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[31]. 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.

[44] There has been substantial publication of the matter. The Board does not consider that any further publication is necessary.

Draft Section 318 Order

[45] 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.**
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.

[46] 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 Draft Decision

[47] The Board invites the Respondent to:

(a) provide further evidence for the Board to consider; and/or

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

(b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[48] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **13 January 2020**.

[49] If submissions are received, then the Board will meet and consider those submissions.

[50] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[51] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[52] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.

[53] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **13 January 2020**

Right of Appeal

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

Signed and dated this 11th day of December 2019

Chris Preston

Chris Preston
Presiding Member

This decision and the order herein were made final on 14 January 2020 on the basis that no further submissions were received.

Signed and dated this 14th day of January 2020

Chris Preston

Chris Preston
Presiding Member

[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.