

## Decision appealed to the District Court- CIV-2016-004-2182 Bell v Lu

Before the Building Practitioners Board  
At Auckland

### BPB Complaint No. C2-01207

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

Jeffrey Bell, Licensed Building Practitioner  
No. BP 123644

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### **DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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#### **Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 12 June 2015 in respect of Jeffrey Bell, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent had, in relation to building work at [omitted]:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with Carpentry and Site, Area of Practice 1 Licences issued 18 December 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations).
- [5] The following Board Members were present at the hearing:

Richard Merrifield	Deputy Chair (Presiding)	Licensed in Carpentry and Site Area of Practice 2
Brian Nightingale	Board Member	Registered Quantity Surveyor and Registered Construction Manager
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer

Catherine Taylor	Board Member	Lay Member.
Bob Monteith	Board Member	Licensed in Carpentry and Site Area of Practice 2

[6] The matter was considered by the Board in Auckland on 29 September 2016 in accordance with the Act, the Complaints Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Marija Ulrich	Counsel for the Registrar
Gemma Lawson	Board Secretary
Jeffrey Bell	Respondent
Alan Light	Respondent's Representative – Registered Building Surveyor
[Omitted]	Witness for the Respondent
[Omitted]	Complainant
[Omitted]	Witness
[Omitted]	Witness
Marc Barton	Witness, Auckland Council

Members of the public were present.

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### **Board Procedure**

[9] The "form of complaint" provided by the Complainant satisfied the requirements of reg 5 of the Regulations.

[10] On 28 January 2016 the Registrar of Licensed Building Practitioners prepared a report in accordance with reg 7 and 8 of the Regulations. It was prepared under delegation and it included a report from a Special Adviser appointed under reg 7(4) of the Regulations. The Board considered that report on 11 February 2016 and resolved to proceed with the complaint under reg 10(1)(b) of the Regulations. The matter was set down for a hearing on 5 May 2016.

[11] On 14 April 2016 Allan Light, on behalf of the Respondent, made a submission to the Board as regards the Registrar's Report of 28 January 2016. On 18 April 2016 the Board adjourned the hearing to allow it to consider the submissions and in a written decision of 11 May 2016 it decided to set aside its decision of 11 February 2016 to proceed and directed the Registrar to prepare a new report under reg 7 and 8 for consideration by the Board.

[12] On 5 July 2016 a new report was prepared in accordance with reg 7 and 8 under delegation from the Registrar and by a different delegated author from the report of

28 January 2016. The Special Adviser report referred to in the report of 28 January 2016 was not used or referred to in the new report. The Report of 5 July 2016 and the information put before the Board as part of it included a response to the Report from Alan Light on behalf of the Respondent.

- [13] On 4 August 2016 the Board considered the report of 5 July 2016 and, in accordance with reg 10(1)(b) of the Complaints Regulations it decided to proceed with the complaint on the disciplinary grounds that the Respondent:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
  - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).
- [14] On 8 August 2016 the Board issued a minute noting that:
- (a) the Respondent by way of Mr Light had raised procedural issues with the second Registrar's Report; and
  - (b) advising that the matters raised by the Respondent could be put to the Board for consideration at the hearing.
- [15] A Notice of Hearing dated 25 August 2016 setting out the disciplinary charges and the witnesses required for the hearing was sent to the Respondent. On 29 August 2016 a further notice was sent to the Respondent setting out the time, date and location of the hearing. The notice also set out information relating to the procedures that would apply leading up to and at the hearing.
- [16] The Board's normal procedure is to hold a prehearing teleconference prior to the hearing to ensure those attending are prepared and to discuss required witnesses and the procedures on the day. A prehearing conference was scheduled. The Respondent was not able to attend and as such a prehearing document dated 14 September 2016 was prepared and sent to the Respondent and his Representative.

### **Pre Hearing Submissions Received**

- [17] Prior to the hearing Mr Light made several submissions to the Board challenging its processes and its decision to proceed. He claimed prejudice against the Respondent and/or breaches of natural justice. A summary of each of those submissions follows.
- Submission of 3 September 2016
- [18] The submission raised various alleged procedural and fairness matters and requested that a separate hearing be held prior to the substantive hearing to consider and decide on those issues. The Board responded on 13 September 2016 by way of a minute from the Chair advising that:
- (a) *the hearing would commence with a preliminary hearing to address the matters contained in Mr Light's submissions and such other preliminary matters as the Respondent or Mr Light wish to put to the Board;*

- (b) *the Board would consider the submissions received at the pre hearing in private and will make a decision on whether the substantive hearing will proceed, or not;*
- (c) *an oral decision on the submissions received and applications made would be given at the hearing. Reasons for the Board's decision on the preliminary matters would be provided to the Respondent following the conclusion of the hearing; and*
- (d) *if the substantive hearing proceeds, the Board's procedures would apply and the hearing would proceed as per the Notice of Hearing provided.*

#### Submission of 14 September 2016

[19] The submission sought clarification of the Board's minute, resubmitted matters raised in the 3 September 2016 submission and raised issues and queries in respect of the prehearing document. The Board again responded to the new submission by way of a minute from the Chair noting the decisions and directions already made and reaffirming those and further noting:

- (a) *The Board does not consider a separate hearing date is required. The Board is capable of dealing with both matters on the date allocated. It will, as has been stated in its earlier Minute, provide written reasons for its decision following the hearing. The written decision will be in respect of the preliminary matters as well as the disciplinary charges if they proceed.*
- (b) *Mr Bell has been given adequate notice of the disciplinary charges which will be dealt with and has had adequate time to prepare to respond to those charges. Mr Bell should be prepared to deal with the substantive matters and the disciplinary charges set out in the notice of hearing on 29 September 2016. Whilst Mr Light may not agree with those charges he and Mr Bell should, nevertheless, be prepared to deal with them.*

[20] The submission also requested an appearance by the Registrar and Registrar's Delegate at the hearing. The Board advised that Counsel for the Registrar would be present and would be available to respond to questions as regards the process used by the Registrar and/or his delegate.

#### Submission of 26 and 27 September 2016

[21] The submission of 26 September challenged the non-appearance of the Registrar and/or his delegate. The submission of 27 September 2016 contained various queries and challenges to Counsel for the Registrar's Opening Summary for the Registrar dated 23 September 2016. A minute from the Board Chair advised the Respondent and his Representative that questions raised would be responded to at the hearing.

[22] With respect to the prehearing submissions received and the approach taken by the Board to deal with them it should be noted that the Board is a part time entity and a quorum is required to make decisions on substantive as opposed to procedural issues. As such, practicalities weighed against interlocutory hearings and/or decisions being made.

### **The Preliminary Hearing – Procedural Issues**

[23] The preliminary hearing commenced at 10.25 a.m. The Respondent and his Representative Mr Light were advised that the Board would hear submissions, would

not be taking evidence as part of the preliminary hearing but that Counsel for the Registrar was available to answer questions as regards the Board's processes. Mr Light was invited to speak to his various written submissions and was questioned by the Board.

[24] Mr Light sought permission to make a recording of the proceedings. The Board advised him that the proceedings were being recorded and that the Respondent would be entitled to a copy of the Board's recording but that Mr Light could not make his own recording.

[25] Mr Light addressed his submissions noting, in summary:

- (a) the Registrar had repeated the mistakes in the second report that had led to the Board setting the first report aside and in particular had gone beyond the remit of reg 7 of the Complaints Regulations by carrying out actions not contained in reg 7 which amounted to investigations and:
  - (i) a charge in relation to the non-provision of a record of work which was not a matter identified in the original complaint has been added to the disciplinary charges;
  - (ii) the Board could have instigated an inquiry in relation to the record of work matter as opposed to including it in the disciplinary hearing;
  - (iii) the Respondent only replied to enquiries about a record of work as the impression given was that the enquiries were of an administrative nature;
  - (iv) the Registrar's delegate approached a witness and sought information which was contrary to the limits of the Registrar's role under reg 7; and
  - (v) the investigation function was one that was reserved for the Board;
- (b) for a ground of discipline to proceed it must have been raised by the complainant in the original complaint. The processes during the Registrar's report phase should not be a fishing expedition and should not result in additional charges not referred to or raised in the complaint;
- (c) the Registrar should only deal with matters contained in reg 9 which covers why a hearing should not proceed and should make an affirmative statement as regards each of the items set out in reg 9;
- (d) the Registrar should not form or express a view or opinion as to why a matter might proceed to a hearing under reg 10(1)(b);
- (e) a complaint should be considered as vexatious under reg 9 if other proceedings between the complainant and the licensed building practitioner are in play;
- (f) a complaint against a licensed building practitioner is a serious matter which is not to be taken lightly;
- (g) it was easy for persons to make complaints but the potential repercussions for the licensed building practitioner were manifest with their livelihood and those of their employees being put at risk; and
- (h) there was a requirement for the Board to maintain its independence especially as regards those persons who support it in the process.

- [26] Mr Light made reference to the District Court decision of *Beattie v Far North Council*<sup>1</sup> an appeal from a Board decision. He submitted that Judge McElrea has set out in the decision that the Registrar in preparing a report for the Board can do “no more and no less” than is provided for in the Complaints Regulations. In his view there were too many mistakes in the Registrar’s report and process and the matter should be abandoned.
- [27] An objection was also made to Mr Bell being referred to as the “Respondent” stating it had negative connotations.
- [28] The Board, on receiving the submissions, went into committee and considered the submissions received, both written prior to the hearing and at the hearing. The Board noted that the written submissions covered the matters above albeit in more detail and the Members had, prior to the hearing, taken the opportunity to review those submissions.
- [29] The Board reconvened and advised the Respondent that the hearing would continue and that the Board would hear evidence on the substantive matters.

### **Board’s Reasons for its Decision on the Preliminary Hearing Matters**

- [30] The Board considered the processes used by the Registrar under the Complaints Regulations had not exceeded the legislative framework and that the Respondent had not been prejudiced. Nor did it consider that the Respondent’s rights to natural justice had been infringed.
- [31] The Board is a statutory body established under the Building Act<sup>2</sup> and its capacity and powers are set out in s 342 and its functions in s 343 of the Act. Included is the function:

*to receive, investigate, and hear complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2*<sup>3</sup>

- [32] Complaints about licensed building practitioners can be made under s 315 of the Act. Under s 316 the Board is required to investigate complaints:

#### **316 Board must investigate complaints**

- (1) *The Board must, as soon as practicable after receiving a complaint, investigate the complaint and determine whether or not to proceed with it.*

- [33] Section 321 of the Act requires that the Board act independently. At the same time s 311 which sets out the functions of the Registrar which includes:

- (c) *to help the Board to receive and investigate complaints under sections 315 and 316; and*
- (d) *to provide other administrative support for the Board sufficient to enable the Board to perform its functions efficiently and effectively*

- [34] The Registrar may delegate any of the Registrar’s functions, duties and powers under s 312 of the Act.

<sup>1</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>2</sup> S 341 of the Act.

<sup>3</sup> S 343(1)(b)



[35] Further legislative directions are provided in the Complaints Regulations made under the authority of the Building Act<sup>4</sup>. The Complaints Regulations establish a process for dealing with complaints following their receipt. This process involves:

- (a) the preparation of a report by the Registrar;
- (b) consideration of the report by the Board to assess if reg 9 applies; and
- (c) holding a hearing on disciplinary charges if the Board decides to proceed with the complaint.

[36] The Respondent's submissions, in large, relate to the first part of the process and whether the Complaints Regulations have been complied with. The submission made is that the Registrar can do no more or no less than is prescribed by the Complaints Regulations.

[37] The only judicial consideration of the disciplinary provisions of the Act and the Complaints Regulations has been in *Beattie v Far North Council*<sup>5</sup>. Judge McElrea provided considerable guidance as to the application of the Complaints Regulations. The case itself involved a successful appeal from a decision of the Board where it was held that the cumulative effect of procedural errors was such that the Board's decision should be set aside. Judge McElrea stated:

*[31] In any event, the various statutory provisions that have been infringed against can be seen as a procedural counterweight to the extensive powers of the Board to receive evidence of any sort and to act in an inquisitorial manner. One must assume the legislature saw them as important in achieving a fair process for all parties.*

*[32] Had there been only one, or possibly two, such failing(s) it might in theory be possible to analyse its consequences as the events unfolded and to see whether it was likely to have made any difference to the outcome. Where, however, there are so many different concerns, and they all flow from a failure to follow the statutory procedures designed to protect the interests of building practitioners, it is not possible to do this. Cumulative procedural errors can rob the Board's process of integrity, or the assurance of integrity, in a way that cannot be overcome so easily - even if that course is open legally.*

*[35] As a result of these various problems, both the substance and the appearance of fair dealings with complaint have been seriously compromised and in the interests of justice a new hearing is required - if indeed the complaint is to continue.*

[38] Judge McElrea made reference, by way of a foot note, to a failure to follow a procedure laid down by the legislation as commonly being seen as an aspect of fairness<sup>6</sup> and to the following:

*"When a mandatory procedure is set out in a statute, it must be followed": de Smith's Judicial Review (6<sup>th</sup> ed, 2007) para 7-011, dealing with express statutory requirements, such as we have here. Of course, as the learned authors note at para 5-053, the whole language of "mandatory" versus "discretionary" requirements is now suspect, but as a matter of context the*

<sup>4</sup> Pursuant to s 402(1)(f), (h) and (k) of the Act.

<sup>5</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>6</sup> Michael Pordham *Judicial Review Handbook* 4<sup>th</sup> ed (2004) at para 60.1.10.

*cumulative effect of these requirements in this case can only be what the law has previously called "mandatory".*

- [39] The Board views the Complaints Regulations as supporting the provisions of the Act. In any legislative framework the enabling statute prevails over any regulations created under it. Regulations cannot operate to limit the scope of an act. Nor can they restrict the intention of Parliament as stated in the enabling legislation.
- [40] Within the context of the Building Act and the Complaints Regulations the Board does not perceive any conflict between them. It does, however, consider that the Act provides the Board, and the Registrar when assisting the Board, with wider powers than those laid out in the Complaints Regulations. In essence the latter should not be interpreted so as to fetter those powers as has been suggested by the Respondent.
- [41] At the same time the Board considers the provisions of the Complaints Regulations must be complied with. However, contrary to the submissions received, it considers those Regulations are a set of minimum requirements to be complied with, not a restrictive framework which the Registrar and the Board cannot step outside of. In other words they can do no less but they can do more, provided that what they do is in accordance with the provisions of the Act.
- [42] The Board has taken this position on the basis that the Act quite clearly states the Board is to investigate<sup>7</sup> a complaint and the Registrar can help<sup>8</sup> with that investigation. The phrase "investigate" is not defined in the Act. A common definition though is:
- Carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth<sup>9</sup>.*
- [43] Taking a purposive approach to the interpretation of the requirement to investigate<sup>10</sup> it is clear to the Board that, if it will assist it with making a decision as to whether to proceed with a complaint and if so on what charges and that investigations over and above those laid out in the Complaints Regulations are not only envisaged but are necessary to ensure fairness to all those involved in a complaint.
- [44] In this respect it should be noted that complainants are often ill equipped from a technical and compliance perspective to fully understand what it is that they should be complaining about. They do not have the same level of industry and or regulatory knowledge to fully state what conduct of the licensed building practitioner ought to be investigated or to fully understand the ramifications of what has or has not been done as regards the building work. To require that a complainant be able to fully express all of the negligence, non-compliance or other matters that the Board should investigate in their complaint would be to require them to be an expert in the field or to engage one prior to making their complaint. This cannot have been the intention of Parliament. Rather the Board believes that it is enough that they express a ground of discipline and that the Board be able to then investigate to determine the extent of the possible disciplinary offending.
- [45] This power in turn flows from the Board to the Registrar through the statutory provision in s 311 in that the Registrar can assist the Board with its investigation.

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<sup>7</sup> S 316 of the Act

<sup>8</sup> S 3111 of the Act

<sup>9</sup> Oxford dictionary definition.

<sup>10</sup> A purposive approach is required under s 5 of the Interpretation Act 1999



- [46] Moreover approaching the process in the above manner, that is of meeting the requirements of the Complaints Regulations but also carrying out further investigations, gives the licensed building practitioner an early opportunity to put forward their explanation and for the Board to take that into consideration in making its decision under reg 10 of the Complaints Regulations as to whether to proceed to a hearing or not. If the matter does proceed then it gives the licensed building practitioner notice of the matters that will be dealt with by the Board at the hearing enabling them to prepare themselves for that hearing.
- [47] It is for the above reasons that the charge under s 317(1)(da)(ii) in relation to the record of work has been included in the disciplinary charges and why the Board considers it was appropriate for it to be included.
- [48] Turning to the submission that the Registrar's Report failed to meet the requirements of reg 8(1)(c) of the Complaints Regulations in that it did not deal with each aspect of reg 9 the Board finds that the Registrar's report has met the requirements.
- [49] Regulation 8(1)(c) states:
- (1) *The Registrar's report to the Board must—*
  - (c) *indicate whether, in his or her view, regulation 9 applies to the complaint*
- [50] The Report itself states:
- 12. Registrar's View in Relation to Regulations 9 and 10**
- 12.1 *The Registrar does not consider that Regulation 9 applies to the complaints that the Board may want to consider further investigation in relation to the following ground(s) for discipline under s 317(1) of the Act:*
- [51] There is therefore an unequivocal statement in 12.1 that the Registrar does not consider reg 9 applies. The report then goes on to state reasons for the Registrar's view and whilst these focus on the recommendation that the matter proceed to a hearing and possible disciplinary charges, this is in itself an affirmation of why reg 9 does not apply and in particular that reg 9(a) does not apply.
- [52] Regulation 9 provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (a) *it does not come within the grounds for discipline; or*
- (b) *it does not meet the requirements of regulation 5; or*
- (c) *it is frivolous, vexatious, or not made in good faith; or*
- (d) *its subject matter is [minor or] trivial, or both; or*
- (e) *there is insufficient evidence to warrant the investigation of the complaint; or*
- (f) *the investigation of it is—*
  - (i) *not practicable; or*
  - (ii) *unnecessary; or*
  - (iii) *not possible (for example, because [the licensed building practitioner] has died or cannot be located); or*
- (g) *its subject matter has been considered previously by the Board, and the Board—*

- (i) *considered that the complaint did not warrant further investigation, because 1 or more of paragraphs (a) to (f) applied to it; or*
- (ii) *otherwise made a decision on the complaint.*

- [53] The Board notes, from the numerous reports received from the Registrar, that when reg 9 is considered to apply the Registrar does make specific reference to the applicable sub-regulation and provides reasons why. To require the Registrar to specifically deal with all seven items listed would not, if they are not applicable, be of assistance to the Board.
- [54] As regards the Registrar expressing a view on possible grounds of discipline which might proceed under reg 10(1)(b) the Board accepts that this is not required under reg 8 which sets out the contents of the Registrars report but, as stated above, the Board sees the Complaints Regulations as the minimum requirements and that they do not prevent the Registrar from providing further assistance under s 311 of the Act.
- [55] The important thing is that the Board makes the decision on whether to proceed or not. When it does so it is provided with all the information and documentation received by the Registrar and it then forms its own view on whether or not to proceed. The Board's view is often different to that of the Registrar both on whether to proceed and, if a matter is to proceed, the grounds of discipline that are applicable.
- [56] The Board has acted independently as per s 321(1) of the Act and the above shows this. Moreover persons involved by way of the Registrar and or his delegates in certain parts of the process have not been involved in others as per the requirements of s 321(2) of the Act<sup>11</sup>.
- [57] The Respondent has also submitted that if other proceedings between the complainant and a licensed building practitioner are underway the Board must treat the complaint as frivolous and vexatious. In this instance a disputes tribunal application had been made by the Complainant against the Respondent. The Board rejects this submission.
- [58] Vexatious proceedings are those which are improperly motivated such as where they lack merit or are instituted primarily to distress, annoy or embarrass rather than to obtain the remedy sought. There may, in any complaint made about a licensed building practitioner, be elements of the complaint being made so as to distress, annoy or embarrass or of it having this effect. This of itself is not, however, enough to make it vexatious. The complaint needs to have been made predominately for this purpose and to lack merit. This is not the case with the matters before the Board.
- [59] Dealing with the final matters in the submissions the Board accepts that a complaint against a licensed building practitioner is a serious matter and that it is relatively easy for a person to make a complaint. The Board considers though that it should be relatively easy for complaints to be made and in this respect the Functions of Disciplinary Action noted below need to be taken into consideration.
- [60] Counterbalancing this are the protections afforded the Respondent through natural justice and the requirements for the Board to take into consideration what can be

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<sup>11</sup> S 321(2) provides "The Registrar must ensure that any staff that the Registrar provides by way of administrative support for the Board have not been involved in assisting the Registrar to perform the functions of the Registrar under this subpart".

termed the seriousness threshold for disciplinary offences. This was noted by Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>12</sup> as follows:

*[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.*

- [61] There is a divergence of judicial opinion as to whether seriousness is a matter to be taken into account when deciding whether a matter should proceed to a hearing, or at a hearing. In *Owen v Physiotherapy Board*,<sup>13</sup> Goddard J. applied a test that a professional person should not be subject to disciplinary proceedings unless a prima facie case was established. This was adopted by Young J. in *Dallison v Complaints Assessment Committee*<sup>14</sup>. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>15</sup> however Collins J. applied a no real prospect of success test as opposed to the prima facie case test. In this respect though it must be noted that the process used in relation to complaints before the Architects Board is vastly different to that in the Building Act and Complaints Regulations and involves an investigating committee. As such the Board considers the prima facie test applies to its process and that seriousness is a matter that the Board needs to take into consideration in its deliberations following a hearing.
- [62] Finally as regards Mr Bell being referred to as the Respondent the Board notes it is no different to the conventions used in court when referring to defendants. It is terminology used, as is the phrase complainant, to distinguish persons and the parts they play and does not imply any pre-determination of the matter.

### **The Substantive Hearing**

- [63] The substantive hearing commenced at 11.30 a.m.
- [64] The Board was assisted by Counsel for the Registrar.
- [65] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.
- [66] Mr Light, on behalf of the Respondent, advised that they had not prepared for the substantive hearing as they were confident it would not proceed. The Respondent and Mr Light did, however, confirm that they were confident that they were in a position to be able to respond to the complaint and allegations.

### **Function of Disciplinary Action**

- [67] 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<sup>16</sup>.

<sup>12</sup> [2001] NZAR 74

<sup>13</sup> [1997] 3 NZLR 600

<sup>14</sup> HC Wellington CIV-2003-484-2183, 10 November 2005

<sup>15</sup> [2016] HZHC 2276 at paras 127 to 129

<sup>16</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

[68] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>17</sup>:

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[69] In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>18</sup> Collins J. noted that:

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

[70] The same applies as regards the disciplinary provisions in the Building Act.

[71] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

### **Substance of the Complaint**

[72] The Respondent was engaged by the Complainant to complete alterations to the Complainants’ home. Work commenced on 15 December 2014. The Respondent is alleged to have left site on or about 22 May 2015. The envisaged scope of work was not complete when the Respondent left as a result of the contractual relationship coming to an end.

[73] The Registrar’s Report provided an overview of the complaint and the response from the Respondent. In general the Complainant alleged deficient, negligent and or non-compliant building work in relation to window and slider sizing and installation, door and door hardware installation, membrane application in a bathroom and flooding as a result of a drain pipe penetration not being sealed.

[74] The Registrar’s report also raised an allegation of the Respondent failing to provide a record of work on completion of restricted building work.

### **Evidence**

[75] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>19</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

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<sup>17</sup> [1992] 1 NZLR 720 at p 724

<sup>18</sup> [2016] HZHC 2276 at para 164

<sup>19</sup> [2009] 1 NZLR 1

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

- [76] The Respondent was the second of three builders that were involved in building work for the Complainants in relation to an ongoing project.
- [77] At the hearing the Respondent stated that he stood by his work which he said was done in a competent and diligent manner. He stated that it was incomplete as a result of his having to do other work for cash flow reasons and that he was, at the time, committed to completing the work. Intervening disputes with the Complainant prevented this from occurring. His position was that others have picked holes in what he did and that had he been given the opportunity to discuss his methodology with the Council Inspector who reviewed it, he would have been able to show how it met the performance criteria of the building code. He also noted that work complained of such as the drainage was work that the Complainants were responsible for as they engaged the plumber and drainlayer and that the flood complained of was as a result of incomplete work by that tradesperson.
- [78] In general the Respondent and Mr Light submitted that the matters complained of were of a minor nature and did not reach the seriousness threshold for a disciplinary outcome.
- [79] In relation to specific matters and focusing on the conduct that comes within the grounds for discipline, the Respondent in his response of 2 July 2015 stated:
- (a) his reading of the exterior moisture regulations indicates the procedure he chose to install and finish the windows was compliant;
  - (b) when the inspector raised an issue about the windows, he intended to go back and fix the issues. However his dismissal from the job prevented him doing so;
  - (c) the delay in completing the drainage works was due to delay and difficulty in engaging a drainlayer due to contractor unavailability;
  - (d) the photographs provided by the complainant are of a work in progress. His dismissal prevented the completion of the work;



- (e) the stall for the shower was too high and a replacement unit had been arranged but his dismissal prevented the completion of this work; and
- (f) he was not involved with the construction of the kitchen.

[80] A further response was received dated August 2015 was received. It stated:

- (a) the exterior door was installed and functional in March 2015;
- (b) the existing plaster rebate surrounding the door area is not level which makes the door joinery appear crooked;
- (c) he accepts there is a small discrepancy with an internal wall but this does not affect the entire wall and is only cosmetic. The wall is non bracing and not load bearing;
- (d) regarding the door hardware hole it is standard builder's practice to do a 60mm or 70mm backset on a door and he chose to do 70mm. He believes the door hardware chosen has the incorrect backset rather than the hole being incorrectly drilled in the wrong place;
- (e) regarding window sizing he explained to the client that the windows would be made 10mm smaller than the aperture, so that any imperfections would be accounted for, also leaving room for the window dressing tape;
- (f) an inspection of the waterproofing membrane was not required because the plans show existing waterproofing and that no extra was required;
- (g) he applied two coats of waterproofing compound behind the toilet area and laundry up to 1m and the full area behind the shower down to the floor edge;
- (h) he also responded to the issues raised by the subsequent builder [Omitted]. The responses were similar to those above.

[81] Further evidence heard at the hearing included:

- (a) the out of plumb wall could easily be fixed, it was not negligent nor incompetent work;
- (b) normally items that need remediation are picked up and dealt with at the end of the job;
- (c) he would have provided a record of work had he been asked for one.

[82] The Complainants outlined the project and that they had no experience in building and relied on the Respondent. They gave evidence as to contractual matters and delays and that they had asked the council to review the work when the Respondent's involvement was coming to an end. They also gave evidence as to the stress and financial pressure placed on them as a result of the matters that they have complained to the Board about.

[83] The Complainants confirmed in questioning that they had three builders, one who did work upstairs, the Respondent who did a deck and most of a downstairs conversion and a third builder, [Omitted], who completed work.

[84] Marc Barton from Auckland Council gave evidence. He stated he would not have installed the window joinery the way it had been installed with a jamb liner and plaster. He accepted the timber may have just been a facing but considered a rebate had to be formed prior to window insertion. He noted that the work could have been done as per the building consent and that he did not have the consented documents with him to verify. He discussed his preferred methodology.



- [85] The Respondent countered this evidence by stating there were timber jamb liners elsewhere and he was attempting to make it look like the rest of the home. He also noted he had completed one and no issues were raised with it. The second window over which issues were raised was incomplete. There were no signs of leaks. Mr Barton considered that there was a risk of failure over time which goes to durability of the method used.
- [86] Evidence was also heard that Mr Barton was called to the site and issued a failed inspection note as a way to highlight issues. He called this an administrative fail. There was no scheduled inspection as per the building consent requirements that was completed. It was an out of sequence ad hoc inspection at the Complainant's request.
- [87] Mr Barton accepted that the notations on plans could be interpreted as meaning no further waterproofing was required in the bathroom as there was existing waterproofing. There was no requirement for a membrane inspection.
- [88] [Omitted], the final builder, also gave evidence. He outlined difficulties he had with the Complainants and he noted the work he took over was incomplete and he doubted it would have been left that way had the Respondent been given the opportunity to finish. He noted the owners were doing work themselves and that he did not fully complete as the relationship with the Complainants broke down.

## Boards Conclusion and Reasoning

### Negligence or Incompetence

- [89] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>20</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[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.*

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [90] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>21</sup> as regards the threshold for disciplinary matters and, as outlined above, it considers these are matters which are to be considered at the hearing:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by*

<sup>20</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>21</sup> [2001] NZAR 74

*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.*

- [91] There were elements of the building work which were incorrect such as a wall being out of plumb. Other work may have been incorrect or non-complainant but as it was not complete it was difficult for the Board to determine whether the final product would have been correct and compliant.
- [92] Overall the Board considers that the conduct of the Respondent has not reached the seriousness threshold and as such the ground of discipline is not upheld.

### **Contrary to a Consent**

- [93] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [94] In *Tan v Auckland Council*<sup>22</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

*[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).*

- [95] The Board notes its findings above as regards negligence or incompetence and it considers the same applies as regards s 317(1)(d). There were elements which may not have met the consent but the evidence before the Board was insufficient for it to make a determination that, on the balance of probabilities, work had been carried out that did not meet the requirements of the building consent.

### **Record of Work**

- [96] There is a statutory requirement under s 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>23</sup>.
- [97] Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [98] The Board discussed issues with regard to records of work in its decision C2-01170<sup>24</sup> and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be

<sup>22</sup> [2015] NZHC 3299 [18 December 2015]

<sup>23</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>24</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [99] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out by a licensed building practitioner (other than as an owner-builder).
- [100] Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [101] Mr Light has submitted that in this instance a record of work was not required as the restricted building work that was carried out was work that could have been done under Schedule 1 of the Building Act<sup>2526</sup>. His submission was that if work under a building consent could have been done under Schedule 1, without a building consent, then a record of work is not required irrespective of the existence of the building consent. Mr Light made reference to the relevant provisions of s 401B of the Act which states:

**401B Order in Council declaring work to be restricted building work**

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*

- [102] The specific wording which supports the submissions is “*other than building work for which a building consent is not required*”.
- [103] The Board does not agree with this submission. Its interpretation is that where there is a building consent, regardless of whether the restricted building work to be undertaken under it could have been done under Schedule 1, a record of work is required. The Board believes this is the correct interpretation based on what it considers to be Parliament’s intention<sup>27</sup> in bringing restricted building work and records of work into being.
- [104] The Board also considers the restricted building work framework would be defeated if the interpretation the Respondent has put forward was accepted. The reason is that consideration has to be given to what a record of work is for.
- [105] The legislative history of the record of work provisions show that they are designed to create a documented record of who did what in the way of restricted building work under a building consent. A record of work avoids uncertainty in situations where a single lead contractor (who may or may not be licensed) has engaged with the owner and/or territorial authority by going beyond those persons to all those that are carrying out restricted building work. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.
- [106] It is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability, that would not otherwise exist as s 88(4) provides:

<sup>25</sup> Windows can be replaced in certain circumstances in an existing building under clause 8 of Schedule 1.

<sup>26</sup> The Board did not necessarily agree with Mr Light’s interpretation of schedule 1 in this respect but given the Board’s overall findings it is not necessary to go into this aspect.

<sup>27</sup> In accordance with s 5 of the Interpretation Act 1999 the Board is required to interpret legislation so as to give effect to Parliament’s intention.

- (4) *A record of work given under subsection (1) does not, of itself,—*
- (a) *create any liability in relation to any matter to which the record of work relates; or*
  - (b) *give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

[107] Notwithstanding this, if building defects do emerge then the record of work becomes useful historical knowledge for owners (both present and future), or other parties involved in defective building cases, who wish to pursue litigation. In this respect though it is not just about whom to bring an action against but also who will be able to give evidence as to the restricted building work carried out.

[108] Again if the interpretation given to the provisions by the Respondent was accepted the creation of the record as outlined above would not be achieved. There would, in essence, be gaps in the information.

[109] Taken to the next logical stage the interpretation would also mean that what is currently considered restricted building work under a building consent would, if it could be claimed to come within Schedule 1, not have to be completed by a licensed person irrespective of the building consent. Again this would defeat the purposes of the licensing regime which, under s 282A of the Act includes:

*to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.*

[110] The Board also considers that the Schedule 1 exemptions were developed to allow for home handyperson type work, not for licensed persons to avoid restrictions and obligations under the Act. In this respect the following comments from Hansard during the first reading of the Building Amendment Bill (No 3) which introduced restricted building work are noted:

*The final key change included in the bill is an owner-builder exemption from the restricted building work regime in the Act. We are a nation of do-it-yourselfers, and the Government thinks it is unfair to stop Kiwis wielding a hammer on the weekend, which could happen under the restricted building work regime. But we still want to protect consumers from past shoddy work on their prime asset. The do-it-yourselfers will be exempt from the restricted building work regime. This means they will not have to employ licensed building practitioners to supervise or carry out restricted building work, but their work must still meet the requirements of the building code, and like professional builders they will still be accountable for the work that they do.<sup>28</sup>*

[111] Finally it would be administratively difficult and impracticable if the distinction was drawn as regards records of work between work which does and does not fall within Schedule 1.

[112] Having found that a record of work was required, the Board notes a record of work was not provided and as such the disciplinary offence has been committed.

[113] Whilst it was not raised the Board notes the intended work was not complete but, in accordance with its findings in previous cases when the point in time arises where a licensed building practitioner is not able to carry out any further restricted building

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<sup>28</sup> Volume:669;Page:16053

work, such as when a contractual relationship comes to an end, a record of work for what has been done will be due.

- [114] In this respect it must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [115] Section 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [116] The Respondent put forward that he was not asked for a record of work but he would have willingly provided it had he been. This is not a defence or a “good reason” but it may go to mitigation. It must be noted that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. The Respondent is required to act of his own accord and not wait for others to remind him of his obligations. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

### **Board Decision**

- [117] The Board has decided that the Respondent has not:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- [118] The Board has decided that the Respondent has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act) and should be disciplined.

### **Disciplinary Penalties**

- [119] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act<sup>i</sup>.
- [120] The Board’s Complaints Procedures allow the Board either to set out the Board’s decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [121] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration.



[122] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.

[123] The Board is aware that the common understanding of 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*<sup>29</sup>

[124] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>30</sup>:

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[125] The *High Court in Patel v Complaints Assessment Committee*<sup>31</sup> has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

*[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*

*[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.*

[126] In all the circumstances of the case and taking into account the mitigation presented the Board finds that a fine of \$500 is appropriate. The Respondent should note that the Board's normal starting point for a record of work matter is a fine of \$1,000 but this has been reduced to \$500 on the basis of the mitigation heard.

## **Costs**

[127] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[128] 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

<sup>29</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>30</sup> [1992] 1 NZLR 720 at p 724

<sup>31</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27



that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>32</sup> included the following:

*"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."*

[129] The judgment in *Macdonald v Professional Conduct Committee*<sup>33</sup> confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*<sup>34</sup> where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[130] In *Collie v Nursing Council of New Zealand*<sup>35</sup> 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.*

[131] The Board notes the matter was dealt with at a defended hearing. Ordinarily costs for a hearing would be in the order of \$1,000 to \$2,000 but the Board has reduced this to \$500 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board. This is the amount normally ordered by the Board when just a record of work matter is heard on the papers and as such the Respondent has not been disadvantaged as regards costs in terms of the Board findings on the disciplinary matters.

### **Publication of Name**

[132] 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 Licenced Building Practitioners' scheme as is required by the Act.

[133] The Board is also able, under s 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.*

[134] 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

<sup>32</sup> HC, Wellington, AP23/94, 14 September 1995

<sup>33</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>34</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>35</sup> [2001] NZAR 74

a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[135] The Board does not consider that any further publication is required.

### **Penalty, Costs and Publication Decision**

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

**Penalty:** Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$500.

**Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 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.

### **Submissions on Penalty Costs and Publication**

[137] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **21 November 2016**.

[138] The Respondent should note that the submissions are to be limited to matters relating to penalty, costs and publication. If the Respondent does not accept or disagrees with the Board's findings on other matters, he is reminded of his right to appeal as set out below.

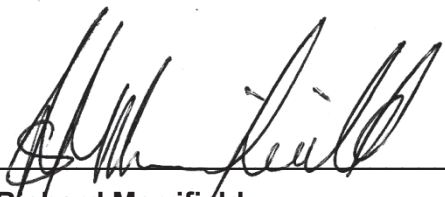
[139] If no submissions are received then this decision will become final.

[140] 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.

### **Right of Appeal**

[141] The right to appeal Board decisions is provided for in s 330(2) of the Act<sup>ii</sup>.

Signed and dated this 31<sup>st</sup> day of October 2016

  
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**Richard Merrifield**  
Presiding Member

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<sup>i</sup> **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."*

<sup>ii</sup> **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.*