Before the Building Practitioners Board
At Christchurch

BPB Complaint No. C2-01387

	Under the Building Act 2004 (the Act)
IN THE MATTER OF	A complaint to the Building Practitioners Board under section 315 of the Act
AGAINST	Joseph Heslop, Licensed Building Practitioner No. BP 104196

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 11 April 2016 in respect of Joseph Heslop, Licensed Building Practitioner (the Respondent).

[2] The complaint alleged that the Respondent has, in relation to building work at [Omitted] carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[3] The Respondent is a Licensed Building Practitioner with Carpentry and Site (Area of Practice 2) Licences issued 3 December 2010.

[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 Regulations).

[5] The following Board Members were present at the hearing:

Chris Preston	Chair(Presiding)	Layperson
Richard Merrifield	Deputy Chair	Licensed in Carpentry and Site Area of Practice 2
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer

[6] The matter was considered by the Board in Christchurch on 29 March 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

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

Leia McEvoy	Board Secretary

Joseph Heslop	Respondent
Andrew Marsh	Legal Counsel for the Respondent
[Omitted]	Complainant
Warren Nevill	Technical Assessor to the Board
[Omitted]	Witness for the Respondent, Builder
[Omitted]	Witness for the Respondent, Engineer by way of a brief of evidence post the hearing
[Omitted]	Witness for the Respondent
[Omitted]	Witness called by the Complainant

[8] No Board Member declared a conflict of interest in relation to the matters under consideration.

Board Procedure

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

[10] On 24 May 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

[11] On 7 June 2016, post the completion of the Registrar's Report the Respondent provided further information which was placed before the Board.

[12] On 9 June 2016 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[13] The Board further resolved to appoint a Technical Assessor to provide a report on the building work. Warren Nevill was appointed and his report of 8 August 2016 was circulated to the Complainant and the Respondent.

[14] On 8 July 2016 notice was sent to the Respondent that the matter had been set down to be heard on 7 September 2016. On 21 July 2016 the Respondent made a request for an adjournment citing medical grounds. An adjournment was granted.

[15] The matter was then set down with a new hearing date of 15 February 2017. A further request for an adjournment by the Respondent was received and was granted.

[16] On 28 February 2017 the Respondent was notified of a third hearing date of 29 March 2017.

[17] On 6 March 2017 a pre-hearing teleconference was convened by Chris Preston. The Respondent and his legal counsel Andrew Marsh were present. The hearing procedures were explained and the Respondent's attendance together with his counsel at the substantive hearing was confirmed.

Function of Disciplinary Action

[18] 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[1].

[19] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]:

> *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.*

[20] In *McLanahan and Tan v The New Zealand Registered Architects Board*[3] 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."*

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

[22] It must also be noted that the Board 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.

The Hearing

[23] The hearing commenced at 9.20 a.m.

[24] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[25] It is alleged by the Complainant that the Respondent "carried out or supervised building or building inspection work negligently" in as much as "was incompetent in the supervision of the building of a 316m^2 foundation ... in that he failed to check the dimensions of the foundation so that they were the same as the permit plan." The Complainant further alleges that the Respondent failed to provide adequate supervision to his staff as he was never seen by the Complainant on site after the initial set out.

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

[2] [1992] 1 NZLR 720 at p 724

[3] [2016] HZHC 2276 at para 164

Evidence

[26] 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*[4] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[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.*

[27] It is to be noted that under s 322 of the Act the Board has relaxed rules of evidence:

> ***322 Board may hear evidence for disciplinary matters***
>
> *(1) In relation to a disciplinary matter, the Board may—*
>
> *(a) receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the disciplinary matter, whether or not it would be admissible in a court of law.*

[28] The Respondent was engaged as a subcontractor to construct a 316m^2 concrete floor slab for a somewhat complex residential dwelling on a flat rural section. The Board's Technical Assessor described the floor layout as two angularly interconnected, complex, multi stepped and re-entrant faceted residential layouts. The building work carried out was restricted building work and as such had to be carried out or supervised by a licensed building practitioner.

[29] The consented plans for the build did not include a detailed foundation plan but did have dimensioned floor plans. The Respondent developed his own hand drawn dimensioned floor plan to provide onsite detail for the set out of the foundation. He gave evidence that this is his standard practice and that he has extensive experience in drawing plans.

[30] The Technical Assessor noted that:

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[4] [2009] 1 NZLR 1

Aspects of dimensioning vary between the consented floor plans and the Respondent's prepared foundation plan, particularly with respect to the width of the lounge, and both width and length of the 3rd bedroom.

[31] The Board heard extensive evidence as regards various aspects of the foundation that either varied from the consented plans or were outside of the tolerances noted in NZS3604:2011 Timber-framed buildings. The Respondent argued the applicable tolerances were those specified in NZS3109:1997 Concrete construction.

[32] Remedial work for "excessive slab overhang and bottom plate overhanging the slab" was required. This was done under the instruction of an engineer with the approval of the building consent authority. The Respondent described it as approximately five lineal metres of trimming of up to 10mm of concrete. An adjustment to timber framing was also made in bedroom three where the constructed wall was 90mm short (3.510m versus 3.6m).

[33] The Complainant alleged the Respondent and his staff had a "close enough is good enough" attitude and approach and that their policy was to adjust the finished product if they did not get it right. The Respondent, in turn, claimed he requested that the Complainant verify the measurements entered on the Respondent's working plan, and again on the actual formwork prior to the day of the concrete pour. The Complainant did not accept this.

[34] At the hearing the focus of the evidence was on the error in bedroom three which the Respondent described as a mistake which was contributed to by the lack of a foundation plan and or dimensions on the floor plans and whether tolerances had been exceeded. Submissions on the latter revolved on what the applicable standard against which the tolerances should be measured was.

[35] The Technical Assessor was of the opinion that there was sufficient information and dimensions on the consented plans to construct the foundation with the correct dimensions and that NZS3604 was the applicable standard as regards tolerances.

[36] The Respondent had intended calling a witness to give evidence as to the applicability of NZS3109. The witness was not available and as such leave was given for a brief and submissions to be filed. [Omitted] a structural engineer from [Omitted] provided a letter in which he gave his opinion that NZS3604 applied to the timber elements whereas NZS3109 applied to concrete elements. In support of this he noted section 2.6 of NZS3604 states "concrete shall comply with NZS3104 for manufacture and with NZS3109 for construction". On this basis he considered the foundations were within tolerances.

[37] [Omitted] also submitted that as the reinforcing steel in the foundation had been changed from two D12 bars to one D16 bar there would have been sufficient cover for the reinforcing notwithstanding it being shaved back. The Complainant noted that additional work and cost resulted from the foundation errors.

[38] The Respondent also called evidence from another foundations contractor to attest to the Respondent's experience and capability in carrying out foundation work.

[39] Counsel for the Respondent submitted that the Respondent's mistake as regards the dimensions in bedroom three was not serious enough to warrant a disciplinary outcome and that the Respondent had not been negligent in his supervision.

Board's Conclusion and Reasoning

[40] 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*[5]. 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.*

[41] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[6] as regards the threshold for disciplinary matters:

> *[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.*

[42] There are two matters for the Board to consider. The first is whether the foundations exceeded allowable tolerances. The second is the dimensional error in the foundation for bedroom three.

<u>Tolerances</u>

[43] In terms of tolerances the Respondent submitted NZS3109 applied.

[44] Section 40(1) of the Act states "a person must not carry out any building work except in accordance with a building consent". In this instance the building consent required that construction be carried out in accordance with NZS3604. The Board was not directed to any specific reference in the consented documentation to NZS3109. The Respondent's expert has submitted it applies by way of its incorporation in NZS3604 and in particular in section 2.6.

[45] NZS3604 is set out in various sections. Sections relevant to the matter before the Board are:

(a) Section 2 – General;

(b) Section 6 – Foundation and Subfloor Framing; and

(c) Section 7 – Floors.

[46] Within section 2 there are 7 sub sections:

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

[6] [2001] NZAR 74

(a) Section 2.2 – Tolerances. It states “tolerances shall be as given in Table 2.1”. Table 2.1 is entitled “Timber framing tolerances”; and

(b) Section 2.6 – Concrete. It states “concrete shall comply with NZS3104 for manufacture and with NZS3109 for construction”.

[47] Neither Section 6 nor 7 contain any detail on tolerances other than in relation to piles. The table 2.1 tolerances are, as regards “deviation from line in plan”, 5 mm in any length up to 10 metres and 10 mm total in any length over 10 metre. The deviations were greater than those stipulated.

[48] Within NZS3109 Section 5 deals with Formwork. Clause 5.3 deals with Tolerances. It states:

> *The tolerances required by tables 5.1 and 5.2 are the least strict which will ensure that structures designed in accordance with NZS3101 will meet the requirements of the New Zealand Building Code.*

[49] NZS3101 is the standard for Concrete Structures. It deals with Design of Concrete Structures and specifies minimum requirements for the design of reinforced and pre-stressed concrete structures. The building in question was not a concrete structure but a timber framed building to which the requirements of NZS3604 applied.

[50] It is also to be noted that C5.3 of NZS3109 states:

> *Tighter tolerances may need to be specified to meet objectives other than those of NZS3101. Such tolerances will be outside the scope of this Standard as a means of Compliance with the New Zealand Building Code.*

[51] The question for the Board then is whether the general statement in clause 2.6 that NZS3109 applies to concrete construction transfers through to Section 6 and 7 of NZS3604.

[52] In considering this question the Board has also had reference to the Ministry of Business Innovation and Employment’s Guide to tolerances, materials and workmanship in new residential construction 2015. Guidance information can be published by the chief executive under s 175 of the Act to assist persons to comply with the Act.

[53] The guidance document notes, as regards concrete floors, in 2.2 it notes:

> *Deviations in the floor plane are within the applicable tolerances set in NZS3109:1997: Concrete Construction.*

[54] The “floor plane” refers to the horizontal levels of the floor, not to the dimensioned width of the floor. No reference is made to dimensioned tolerances for concrete foundations.

[55] On the basis of the analysis above the Board does not accept the submission that the tolerances in NZS3109 apply only to the floor plan. It does not apply to measured dimensions of the foundation. The applicable tolerances for foundations dimensions are those in table 2.1 of NZS3604 and, on this basis, the building work as originally completed was outside of the acceptable tolerances. The Board therefore finds that the Respondent has been negligent in carrying out or supervising the building work.

<u>Bedroom Three</u>

[56] As regards bedroom three the Respondent accepted an error in the foundation dimensions in bedroom three. He submitted this had been contributed to by a lack of dimensions on the consented floor plan and the absence of a dimensioned foundation plan. He also gave evidence that the Complainant was asked to confirm all dimensions. The Complainant did not accept this.

[57] It is noted that the error arose, in part, as a result of the Respondent developing his own dimensioned foundation plan. In transcribing detail from the floor plan a mistake was made. He did not refer to the designer who produced the consented plans to obtain additional information as regards dimensions. The Respondent does not hold a design licence but has held himself out as being in possession of a degree of skill and ability as regards the development of plans. The dimensioning mistake was not picked up during set out or prior to the foundation being poured.

[58] The Respondent has submitted and the Board has held in previous cases that issues can arise during a build and it does not always follow that a licensed building practitioner has been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right first time and not to have to rely on remediation especially in relation to an element as critical as a foundation.

[59] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:

(a) the extent of the error, omission or noncompliance;

(b) whether failings by the Respondent in their planning and execution of the building work have contributed to the issue arising or not; and

(c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.

[60] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioner's attention it is more likely that a disciplinary outcome will follow but the Board will take into account the overall circumstances leading up to and after the issue occurring.

[61] When looking at the bedroom three error the Board notes the error arose as a result of the Respondent's misinterpretation of the consented floor plan when creating his own foundation plan and from his failure to seek advice or instruction from the designer who developed the consented plans. The error had a significant impact and was not picked up by the Respondent during his supervision of the work or his checks of it. The Board also notes the submissions as regards potential difficulties created by the plans but considers this is negated by the Respondent's claim that he is more than capable of carrying out design work.

[62] Given the above the Board finds that the Respondent has been negligent but only with regard to the error in bedroom three and that the negligence has been sufficiently serious enough to warrant a disciplinary outcome.

Board Decision

[63] The Board has decided that Respondent has carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) with respect to the dimensional error in bedroom three and should be disciplined.

Disciplinary Penalties

[64] 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[i].

[65] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

[66] 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. Included are the issues created by the absence of a dimensioned floor plan.

[67] 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.

[68] 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.*[7]

[69] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[8]:

> *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.*

[70] The High Court in *Patel v Complaints Assessment Committee*[9] has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

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[7] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

[8] [1992] 1 NZLR 720 at p 724

[9] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *[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.*

[71] In *Lochhead v Ministry of Business Innovation and Employment*[10], an appeal from a decision of the Board, the court in respect of penalty, noted:

> *[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*
>
> *[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

[72] The Board notes the Respondent was only found to have been negligent that there was a degree of mitigation. As such and in all the circumstances of the case the Board considers a censure will be an appropriate penalty.

[73] Whilst the Respondent has previously appeared before the Board on a disciplinary matter that was upheld, this has not been taken into consideration as an aggravating factor.

Costs

[74] 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."

[75] 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

[10] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

circumstances of each case. The judgment in *Cooray v The Preliminary Proceedings Committee* [11] 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."*

[76] The judgment in *Macdonald v Professional Conduct Committee*[12] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[13] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[77] In *Collie v Nursing Council of New Zealand*[14] 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.*

[78] The Board notes the Respondent was cooperative and his defence was partially successful. As such the order for costs will be reduced. Ordinarily a hearing requiring the appearance of a Technical Assessor will attract higher costs but in this instance costs of $1,000 are considered appropriate. This is significantly less than 50% of actual costs which the courts have indicated is an appropriate starting point.

Publication of Name

[79] 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.

[80] 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.*

[81] 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.

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[11] HC, Wellington, AP23/94, 14 September 1995

[12] HC, Auckland, CIV 2009-404-1516, 10 July 2009

[13] High Court, Auckland, CIV-2009-404-005245, 25 February 2010

[14] [2001] NZAR 74

[82] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[15]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[16]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[17]. In *N v Professional Conduct Committee of Medical Council*[18] the High Court pointed to the following factors:

> *The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*
>
> - *issues around the identity of other persons such as family and employers;*
> - *identity of persons involved and their privacy and the impact of publication on them; and*
> - *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[83] 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[19]. 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.

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

Penalty, Costs and Publication Decision

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

Penalty:	**Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is censured.**
Costs:	**Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of $1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with 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

[86] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **13 June 2017**.

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[15] Section 14

[16] Refer ss 200 and 202 of the Criminal Procedure Act

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

[18] ibid

[19] Kewene v Professional Conduct Committee of the Dental Council - [2013] NZAR 1055

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

[88] 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.

Non Payment of Fines or Costs

[89] The Respondent should take note that the Board may, under s 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. Section 319 provides:

> ***319 Non-payment of fines or costs***
>
> *If money payable by a person under section 318(1)(f) or (4) remains unpaid for 60 days or more after the date of the order, the Board may—*
>
> *(a) cancel the person's [licensing] and direct the Registrar to remove the person's name from the register; or*
>
> *(b) suspend the person's [licensing] until the person pays the money and, if he or she does not do so within 12 months, cancel his or her [licensing] and direct the Registrar to remove his or her name from the register.*

Right of Appeal

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

Signed and dated this 19th day of May 2017.

Chris Preston
Presiding Member

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

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

(a) do both of the following things:

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

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

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

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

(d) order that the person be censured:
(e) order that the person undertake training specified in the order:
(f) order that the person pay a fine not exceeding $10,000.

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

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

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

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

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

(2) A person may appeal to a District Court against any decision of the Board—
(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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