Before the Building Practitioners' Board
At Auckland

BPB Complaint No. C2-01410

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	Chao Chen, Licensed Building Practitioner No. BP 120294

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 16 May 2016 in respect of Chao Chen, Licensed Building Practitioner (the Respondent).

[2] The complainant alleged the Respondent has, 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);

(b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[3] The Respondent is a Licensed Building Practitioner with a Site Licence Area of Practice 2 issued 1 May 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 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
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Brian Nightingale	Board Member	Registered Quantity Surveyor and Registered Construction Manager
Dianne Johnson	Board Member	Registered Building Surveyor

[6] The matter was considered by the Board in Auckland on 1 November 2016 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:

Gemma Lawson	Board Secretary
Chao Chen	Respondent
Peter Zhang	Legal Counsel for the Respondent
[Omitted]	Complainant
[Omitted]	Support Person for Complainant
Paul Northover	Witness, Compliance Officer, Auckland Council

Members of the public were not 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 the Regulations.

[10] On 10 August 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 1 September the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint 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

(a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[12] On 17 October 2016 a pre-hearing teleconference was convened by Mel Orange. The Respondent was present, the hearing procedures were explained and his attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

[13] 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].

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

[14] 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.*

[15] 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."*

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

[17] It must also be noted that the Board has jurisdiction only 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

[18] The hearing commenced at 1 p.m.

[19] At the hearing an Opening and Summary provided by Counsel for the Registrar was read into the record.

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

[21] At the conclusion of oral evidence and having received submissions from the Complainant and Respondent the Board adjourned the matter and allowed each time in which to submit further evidence and submissions. Additional evidence was also sought from the building consent authority.

[22] Both the Complainant and the Respondent provided further submissions. The Board reconvened on 12 December 2016, considered those submissions and made its decision.

[23] **Substance of the Complaint**

[24] The central allegation made was that the Respondent supervised excavations for a foundation which were not in accordance with the building consent and/or a resource consent issued for the build.

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

[3] [2016] HZHC 2276 at para 164

Evidence

[25] 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.*

[26] The Respondent and his business Mega Homes NZ Limited were contracted by the Complainant to build two residential dwellings on two adjoin lots – Lot 1 and Lot 2 at [omitted].

[27] The Complainant arranged the plans and stated he provided a complete set of consent documents to the Respondent on or about 5 March 2016. He stated the pack provided included the resource consents associated with both Lot 1 and Lot 2. The Respondent acknowledged receipt of the package but stated the resource consent for Lot 2 was included but not that for Lot 1.

[28] The Complainant considered the consented plans showed a boundary excavation cut at 2.2 metres from the boundary on Lot 1. The cut was to accommodate for a retaining wall behind the dwelling.

[29] The resource consent for Lot 1 was required as the proposed excavations for the retaining wall would infringe the District Plan (North Shore) as follows:

> *District land use consent under rule 9.4.1.3(i) for excavations deeper than 1.5 metres within the yard, being a maximum depth of 2.8 metres from the western boundary as a discretionary activity.*

[30] The resource consent was issued on 22 December 2015 with the following notation:

> *The proposed 2.8m deep excavations will be supervised by a suitably qualified engineering professional which will ensure that any instability effects generated by the proposed earthworks will be avoided.*

[4] [2009] 1 NZLR 1

[31] The Respondent's contractors proceeded with the excavations. He claimed he was unaware of a resource consent condition that applied to Lot 1.

[32] During the excavations Paul Northover an Auckland Council Building Compliance Investigator attended the site on 23 March 2016. A Building Compliance Officer had asked him to attend and view the excavations being undertaken. He expressed concerns as to vertical angle of the excavations on the rear boundary and gave verbal instructions for the angle and depth of the excavation not be increased.

[33] A written site instruction was issued by email to the Respondent by Paul Northover on 23 Mach 2016. It stated:

> *Hi Frank, that you for your time, please take the following as a site instructions and acknowledge receipt.*
>
> 1. *I believe the cut has an approximate grade of 1 to .65, although not a preferred gradient for the upcoming weather, it is better than a vertical cut and this combined with your methodology for weather protection and further work sounds solid.*
> 2. *You are to maintain monitoring over the long weekend and notify council of any threat to the stability of the cut.*
> 3. *You are to cover the cut with polythene to protect from rain.*
> 4. *You are to provide safety tape to the upper side of the fence (in the Church grounds) to prevent person from approaching the fence and/or climbing it.*

[34] Mr Northover gave evidence at the hearing from notes he took at the time of the 23 March site visit. He noted:

(a) he attended the site at 1320 hours and expressed concern over the slope of the cut and he expected them to stop the dig;

(b) he told the Respondent the cut was as far back as it should go and the Respondent explained to him how he would go about the rest of the excavation;

(c) the Respondent set out that he would drill through the buttress for the piles and then excavate around them and he indicated some way down the cut slope where he would drill, buttress and then excavate;

(d) he advised the Respondent that the methodology would be okay and that he could proceed as outlined; and

(e) he would have concerns if the cut went any further.

[35] A further site visit was undertaken by Mr Northover on 30 March 2016. He noted the excavations had increased in depth and the angle of the cut had increased to almost vertical. The cut went almost up to the boundary of the neighbouring property, the natural buttress had been removed and the cut was to a depth of 3.2 metres. He called in Tonkin and Taylor as consulting engineers who assessed the site and recommended steps to be taken to make the site safe.

[36] A stop work notice was issued by way of a Notice to Fix under the Building Act by Auckland Council on 1 April 2016. It noted the following noncompliance issues:

> *Clause F5 Construction and Demolition Hazards – there has been a large cut to the western boundary and this poses a risk to workers on site and to users of the property immediately next to the cut.*
>
> *Clause B1 Structure – there has been a vertical cut of 3.2 metres in depth to the immediate boundary with the property at 313 Sunset Road and this has been carried out without any battering or other support.*

[37] It also notated the steps to be taken to make the site safe which included installing a metal buttress to stabilise the cut and install a child proof safety fence to the neighbouring property.

[38] An Environmental Infringement Notice was also issued by Auckland Council on 11 April 2016. It noted:

> *Resource consent [omitted] allowed an excavation greater than 1.5 meters in depth to be located 2.2 metres away from the western boundary. During an inspection on 30 March 2016 it was observed that the excavation was less than 2.2 metres away from the western boundary.*

[39] The additional evidence and submissions received from the Complainant stated that the two consents issued clearly identified that they related to two separate lots and the Respondent ought to have known which was which.

[40] The Respondent's submissions summarised the evidence and submitted there were no disciplinary charges to answer. The submissions noted at paragraph 16:

> *The Respondent conceded that he misinterpreted Mr Northover's instructions and methodologies discussed at the construction site on 23 March 2016. However, there has been no element of intent of the Respondent to have proceeded excavation recklessly as the excavation calculation required the cut to be made to extent it was on 30 March 2016.*

[41] The additional information obtained from the building consent authority included the building consents and resource consents for the development. The building consent did not refer to, or incorporate the resource consent requirements.

Boards Conclusion and Reasoning

[42] 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*

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

> *shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[43] 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.*

[44] There were various aspects of the Respondent's conduct which could come within the definition of negligence but the conduct the Board is interested in is that relating to safety matters connected with the excavations undertaken.

[45] The Board accepts there was some confusion over the resource consent requirements and the building consent and that the Respondent may not have been given notice of the resource consent. As such the Board will not pursue the positioning of the cut or it being carried out contrary to the resource consent as a matter of negligence or incompetence.

[46] The Board does find, however, that the Respondent, in carrying out and in continuing to carry out building work when instructed by the building consent authority to stop, put the safety of others at risk. In doing so he has been negligent and fallen below the standards reasonably expected of a licensed building practitioner. Unlike the positioning of the retaining wall and associated cut the Respondent was put on notice that the way in which he was proceeding would create a safety risk and, notwithstanding this, he proceeded to exacerbate the situation.

[47] The photographs provided by the building consent authority at the hearing show a near vertical cut with workers at the bottom of it. Those workers were placed at risk and extensive work had to be undertaken to make the site safe. This was therefore a serious matter and a disciplinary outcome is warranted.

Contrary to a Consent

[48] 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.

[49] More recently the High Court in *Tan v Auckland Council*[7] Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[6] [2001] NZAR 74
[7] [2015] NZHC 3299 [18 December 2015]

[50] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those which have been consented can potentially put person and property at risk of harm.

[51] With regard to the contrary to a building consent matter, the Board finds that whilst there may have been some departure from the consent the consent documentation had conflicting detail and could not be built as drawn. This was demonstrated by way of drawings by the Respondent at the hearing and the Board accepts his explanation. The Board does note, however, that in such circumstances it would have been prudent for the Respondent to have reverted to the designer and or the building consent authority to seek clarification before proceeding with the building work.

[52] Given the above the Board finds that the Respondent has not committed a disciplinary offence in respect of s 317(1)(d) of the Act.

Disrepute

[53] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111[8] and discussed the legal principles that apply.

[54] The Act does not provide any guidance as to the types of conduct which would bring the regime into disrepute. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[9] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[10] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[11]

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

- criminal convictions[12];
- honest mistakes without deliberate wrongdoing[13];
- provision of false undertakings[14]; and
- conduct resulting in an unethical financial gain[15].

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[8] Board decision dated 2 July 2015.

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

[10] [2012] NZCA 401

[11] [2012] NZAR 1071 page 1072

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

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

[14] *Slack, Re* [2012] NZLCDT 40

[15] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

[56] The Board did not hear any evidence of conduct that would meet the above tests or that would reach the required seriousness threshold for a disciplinary finding.

Board Decision

[57] The Board has decided that Respondent has carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

[58] The Board has also decided that Respondent has not:

(a) 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); or

(b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Disciplinary Penalties

[59] 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].

[60] 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.

[61] 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.

[62] 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.

[63] 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.*[16]

[64] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[17]:

> *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*

[16] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[17] [1992] 1 NZLR 720 at p 724

> *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.*

[65] The High Court in *Patel v Complaints Assessment Committee*[18] 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.*

[66] More recently in *Lochhead v Ministry of Business Innovation and Employment*[19], 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).*

[67] In terms of the seriousness of the disciplinary offending as it relates to placing persons' safety at risk is a serious matter but the Board notes that no person was actually harmed. Where matters are serious the penalties will generally be at the upper end of the scale. In the present case, however, the Board considers the actual offending to be within the moderate range given the mitigation heard.

[68] On the basis of the above the Board considers a modest fine will be sufficient penalty. It orders a fine of $1,500 which is a reduced sum having taken the mitigation heard into account.

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

[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

Costs

[69] 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."

[70] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee* [20] 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."*

[71] The judgment in *Macdonald v Professional Conduct Committee*[21] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[22] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[72] In *Collie v Nursing Council of New Zealand*[23] where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. 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.*

[73] The Board notes the Respondent was cooperative and has decided that the Respondent should pay $1,500 toward the costs and expenses of, and incidental to, the inquiry by the Board. This is significantly less than the 50% guideline as to the level of costs outlined above.

Publication of Name

[74] 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.

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

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[20] HC, Wellington, AP23/94, 14 September 1995
[21] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[22] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[23] [2001] NZAR 74

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.

[76] 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.

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

Penalty, Costs and Publication Decision

[78] 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 $1,500.**
Costs:	**Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of $1,500 (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

[79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 20 January 2017.

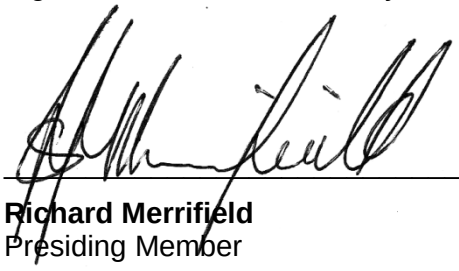
[80] If no submissions are received then this decision will become final.

[81] 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

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

Signed and dated this 20th day of December 2016



Richard Merrifield
Presiding Member

[i] ***Section 318 of the Act***
(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:
(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and
(ii) order that the person may not apply to be relicensed before the expiry of a specified period:
(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:
(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:
(d) order that the person be censured:
(e) order that the person undertake training specified in the order:
(f) order that the person pay a fine not exceeding $10,000.

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—
(a) within 20 working days after notice of the decision or action is communicated to the appellant; or
(b) within any further time that the appeal authority allows on application made before or after the period expires.