

## Before the Building Practitioners Board

	BPB Complaint No. C2-01471
Licensed Building Practitioner:	Rodrigo Alarcon (the Respondent)
Licence Number:	BP 117127
Licence(s) Held:	Carpentry and Site Area of Practice 2

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	26 April 2017
Decision Date:	15 May 2017
Board Members Present	Chris Preston (Presiding) Mel Orange Robin Dunlop Bob Monteith

#### Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

#### Board Decision:

The Respondent:

1. **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act; and
2. **has not** committed a disciplinary offence under section 317(1)(b) or 317(1)(d) of the Act.

Contents	
<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Background to the Complaint</b> .....	3
<b>Evidence</b> .....	4
Completion Estimate .....	6
Inspections .....	6
Supervision .....	7
Cave In .....	7
Concreted Posts.....	7
Water Proofing .....	8
Contrary to the Consent .....	8
Record of Work.....	8
<b>Board’s Conclusion and Reasoning</b> .....	8
Negligence and/or Incompetence .....	9
Contrary to a Building Consent .....	10
Record of Work.....	11
<b>Penalty, Costs and Publication</b> .....	12
Penalty .....	12
Costs .....	13
Publication.....	13
<b>Section 318 Order</b> .....	14
<b>Submissions on Penalty, Costs and Publication</b> .....	14
<b>Right of Appeal</b> .....	15

## Introduction

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (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); and

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<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar under in accordance with the Complaints Regulations.

- (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).

### **Function of Disciplinary Action**

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>4</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.”*

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

### **Background to the Complaint**

- [5] The complaint alleged negligence and or incompetence in the carrying out of the building work and that aspects of it did not comply with building consent issued in that:
  - (a) an estimate of 5 weeks for completion was given but the building work took 11 months;
  - (b) no inspections by the building consent authority were called for during the 11 months of building work;
  - (c) some of the workers were unlicensed and unsupervised;
  - (d) unprofessional work practices caused a foundation cut cave in;
  - (e) supporting temporary posts were concreted into the slab;

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<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

- (f) damage was caused to the house as a result of incompetent building practices;
  - (g) the site was unsafe and dirty; and
  - (h) the foundation was poured in stages which compromised the waterproofing.
- [6] There was also an allegation that the Respondent failed to provide a record of work on the completion of restricted building work.
- [7] The Complainant provided supporting photographs and statements from witnesses in support of the complaint.

### **Evidence**

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [9] The Board had obtained a report from William Hursthouse as a Technical Assessor which set out noncompliance issues and his opinion as regards the requirement for a building consent. Mr Hursthouse was to appear at the hearing to answer questions but was not able to as a result of a family bereavement. The Board asked the Respondent whether he would consent to the hearing proceeding in his absence and on the basis that any questions the Respondent had of the Technical Assessor could be put to him in writing following the hearing. The Respondent had no objections to the matter proceeding and, following evidence being heard, had no questions to put to him.
- [10] The building work undertaken by the Respondent involved the temporary support of a suburban house while the area under it was excavated, the preparation and installation of new perimeter foundations and perimeter block wall and the preparation and pouring of sections of internal concrete flooring adjacent to the new perimeter walls.
- [11] The Respondent provided an initial written response to the complaint. In it he set out:
- (a) he was engaged to carry out the excavation, footings, propping of the house, blockwork and slab only;
  - (b) the work was affected by rain, poor ground quality and poor access and the work had to be put on hold to allow the ground to dry;
  - (c) a bank collapse was caused by rain and poor ground quality;
  - (d) when the slab was poured 8-10 pockets were left for propping of the house;

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (e) waterproofing membrane work was carried out by a specialist contractor in conjunction with another builder who was doing the framing and he was not responsible for any related issues; and
  - (f) his services were terminated before he was able to complete the intended scope of work.
- [12] The Respondent also set out his arrangement with the Auckland Council as regards using an engineer to sign off on building work as opposed to calling for building consent authority inspections. He noted:
- (a) he had been using engineers to sign work off since 2003;
  - (b) the arrangement to use an engineer and not to have Auckland Council inspections until the slab was poured was confirmed by phone with Greg Ballam a building consent officer; and
  - (c) an engineer attended for each pour and was used due to the weather conditions and availability with the contention being that building consent officers are difficult to get on site at short notice.
- [13] The Respondent also included documentation to support his response to the complaint and a statement from [Omitted] the engineer who had carried out site observations during the building work. [Omitted] also gave evidence at the hearing. In his letter he set out that:
- (a) he carried out site observations with his first visit being on 14 April 2015;
  - (b) the ground conditions during all visits were quite wet;
  - (c) his last inspection related to the perimeter masonry walls and it was around 26 November 2016;
  - (d) the work was undertaken in short segments to minimise problems with collapsing soils and his observations were typically of footings and first and second masonry lift for each segment;
  - (e) Council inspections were discussed and he was advised that they were not being called for due to the work being carried out in segments and the uncertain nature of the soils. He noted the difficulty in getting on demand inspections; and
  - (f) his observations were that the works were correct for the respective areas and workmanship was “generally OK but a bit dependent on the conditions underfoot – cover was always satisfactory”.
- [14] The Engineer provided a Producer Statement PS4 covering 14 site observations. These were included in the Auckland Council file.
- [15] The Engineer commented on why the detail at the top of the block walls was changed. He noted that as the house had not been lifted it was not practicable to

place a top block and fill it. He stated that “a detail that is often used is to pour the top course with concrete formwork arranged so concrete can be placed from the outside”.

- [16] At the hearing the Board heard further evidence as regards the items which related to the disciplinary conduct listed in paragraph [5] above. The Respondent also made a general opening statement in which he noted that it was a difficult site with steep access and Waitemata clay which performs poorly when wet. He had recommended that the project be delayed until November to allow for better soil and weather conditions but this recommendation was not accepted.

#### Completion Estimate

- [17] As regards the time to completion the Respondent’s evidence was that the estimate was a best case scenario based on a run of good weather and good soil conditions and he made reference to other similar projects that were completed within the timeframes estimated for this project.
- [18] Overall he submitted that time delays were as a result of sub surface soil conditions creating hydrostatic pressure and seepage to the point where pumps had to be used to remove water. The Engineer noted that whenever he was on site soil conditions were poor to the point where gumboots were necessary.

#### Inspections

- [19] The Respondent was questioned as to his arrangement with Greg Ballam. He gave evidence that the conversation referred to took place in 2011 and that it was a common practice. In about four of every six of his excavation jobs he used engineers as opposed to council inspections and this was necessitated by the type of work and the availability of an engineer as compared to an inspector.
- [20] Greg Ballam provided the Registrar with a statement in which he noted that he did not recall a conversation with the Respondent about using engineers but he did note that:

*Due to bad weather council will allow work to continue without inspections with an agreement that engineers site notes left on site to be collected by inspectors at later inspections.*

- [21] The Respondent’s evidence at the hearing was that he did not have any contact with the Auckland Council as regards inspections for the specific job. He was working from a general understanding.
- [22] The Technical Assessor noted, as regards council inspections, that the conditions issued with the building consent stated, as regards engineer inspections:

*Sometimes, due to the nature of design, your engineer may have identified aspects of construction that they wish to monitor. In these instances, both council inspectors and engineers may be involved in the inspection; each party*

*will be looking at specific aspects in those aspects may differ between Council and the engineer. In all instances work must not proceed until Council approval has been given.*

- [23] The Board also heard evidence from John Parker an Auckland Council Building Control Officer who carried out inspections at the site following the Respondent's involvement. He noted that it was preferable for the Council to be involved in inspections but if that was not feasible then they would rely on site observations and undertake a site meeting with the engineer and other persons involved to determine compliance. He also noted that when determining compliance with the building code and a building consent the Council was required to apply the reasonable grounds test under section 94 of the Act and that a Producer Statement PS4 could be acceptable for that purpose.
- [24] Mr Parker stated that the Auckland Council has since accepted [Omitted] Producer Statement PS4 and observations as being sufficient for the issuing of a code compliance certificate as regards the building work undertaken by the Respondent.

#### Supervision

- [25] The Respondent gave evidence that he was on site when the building work was undertaken but during the long periods of inactivity he was sending his staff to site several times a week to check that measures left in place to deal with rain and subsoil moisture were still in place and were functioning.

#### Cave In

- [26] The Respondent stated that the cave in was caused by hydrostatic pressure caused by subsoil moisture levels. It was noted by the Board that National Institute of Weather and Atmospheric Research data showed that the rainfall during the period over which the work was undertaken was average or below average. The Respondent stated that given the type of clay and its ability to retain moisture and subsurface moisture normal winter climatic conditions were enough to affect the stability of the excavation cut. The Engineer agreed with this assessment.
- [27] Evidence was also heard as to the sediment control that was put in place. The initial response from the Respondent tended to indicate that sediment control had not been implemented. At the hearing he clarified that he had silt control in place from the commencement of the project although not in strict accordance with the consent as that was not feasible as it would have blocked access to the site on the driveway. He noted that he used a drain cut in above the excavations, Novacoil drains, pumps and plastic coverings over the excavation cuts. He had staff going to the site regularly to check on the provisions put in place.

#### Concreted Posts

- [28] The posts shown in photographs as being concreted in were Acrow Props. The Respondent stated that this was a common practice. The props were steel and the

intention was to cut and grind the props and then fill the hollow with an epoxy resin. The Engineer gave his opinion that this was a common and accepted practice. The Building Control Officer present also confirmed that this was acceptable.

#### Water Proofing

- [29] The Respondent noted that he was not engaged in the project when this work was carried out. With regard to the work being carried out in stages and its impact on the waterproofing he noted that staging the work was necessary to maintain structural support for the house. The Engineer supported this assessment.

#### Contrary to the Consent

- [30] The Technical Assessor's report noted the height of the perimeter walls was lowered on three out of four sides and one strip footing was changed to a small retaining wall footing and that these design changes were authorised by the Engineer, architect and Council.
- [31] At the hearing the Respondent and the Engineer gave evidence that the changes to the height of the retaining walls was done as there was no way the top course of the blocks could be filled given that the house had not been lifted. The Respondent stated that he contacted the designer to query how this could be dealt with but he had no solutions. The alternative the Respondent intended to use was to infill the gap with timber framing. What was shown in photographs was temporary propping. He was not involved in the final solution as the work was carried out by another contractor. The changes were accepted by the Auckland Council as a minor variation.

#### Record of Work

- [32] As regards the record of work the Respondent stated that he was not prepared to provide one, as his works were not complete, he was not prepared to sign off on the work of others and there was potentially illegal work on site. A record of work has still not been provided.

#### **Board's Conclusion and Reasoning**

- [33] The Board has also decided that Respondent has not:
- (a) carried out or supervised building work or building inspection 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).
- [34] The Board has decided that 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.

[35] The Board's reasoning for its decision is as follows.

Negligence and/or Incompetence

[36] 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>6</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.*

[37] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>7</sup> 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.*

[38] The Board considers that the Respondent was able to provide reasonable explanations for the issues raised in the complaint which related to negligence and/or incompetence. The time to complete was impacted by ground conditions, the Auckland Council has accepted the Engineer's observations and PS4 and the cave in of an excavation cut was more than likely caused by subsoil conditions. With regard to this last matter, whilst the pressure placed on the ground above the cut would have been impacted on by the movement of machinery as outlined in the complaint it was noted by the Board that there was difficult access and it would not have been practicable to carry out the excavations without some degree of pressure being placed on retaining soil above the cut. Other aspects of the build complained about were accepted by the Auckland Council and/or the Engineer as being acceptable.

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<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>7</sup> [2001] NZAR 74

- [39] Given the above the Respondent's conduct in relation to the above has not fallen below reasonable expected standards and the Respondent has not displayed a lack of competence.
- [40] With regard to Council inspections the Board considers the Respondent's conduct has not met the expected standards but that the matter is not sufficiently serious to warrant a disciplinary outcome. The Respondent was relying on a conversation with a building control officer in 2011. He had not made enquiries in relation to the specific job and was working on an assumption that the use of an engineer in place of council inspections would be acceptable. As matters transpired the Council did accept the use of an engineer to observe the building work but there was no guarantee that it would.

#### Contrary to a Building Consent

- [41] 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.
- [42] In *Tan v Auckland Council*<sup>8</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). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

- [43] 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 that have been consented can potentially put person and property at risk of harm.
- [44] The change from the building consent the Board was concerned about was the change in the height of the retaining walls. The evidence heard was that the walls were not taken to full height as it was not practicable to do so and that the actual change was completed by another contractor. On this basis the Board finds that the Respondent is not accountable for the eventual change. The Board does, however, consider the Respondent should have better processes in place for the management of consent variations. Such a process should ensure that the owner, designer and building consent authority are informed of and agree to the minor variation before it

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<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

is undertaken. In the present case, however, the work had not progressed to the point where the variation had actually been carried out.

#### Record of Work

- [45] 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>9</sup>. The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup>.
- [46] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.
- [47] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply state “on completion of the restricted building work ...”.
- [48] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. This has not been the case in the present matter. The record of work has still not been provided. The Respondent has stated the record of work was not provided as the work was not complete, he would not sign off on others work and there was illegal work on site.
- [49] The Board notes that disputes can lead to situations where the obligation to provide a record of work can arise even though the intended restricted building work has not been completed. This can result from a licensed building practitioner not being able to return to complete the work as has occurred here. In such circumstances the record of work will be due within a reasonable period of it becoming apparent to the licensed building practitioner that no further restricted building work will be undertaken.
- [50] On this basis the elements of the disciplinary offence have been satisfied. The Board must, however, consider whether the Respondent has established a “good reason” for failing to provide a record of work.
- [51] The Respondent has put forward that he could not sign off on others work. In this respect it should be noted that a record of work is not a compliance document. It makes no reference to the quality or compliance of the work, only to what restricted building work was carried out or supervised by whom. As such there was no impediment to the Respondent providing a record of work for what he did or supervised. The same applies to the alleged illegal work. If any was present the record of work would not create any liability for the Respondent as regards it.
- [52] 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

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<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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.

[53] The Board therefore finds that no good reasons existed.

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

[54] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[55] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

### **Penalty**

[56] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>11</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[57] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>12</sup> the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[58] The Board notes that a record of work matter is at the lower end of the disciplinary scale. At the same time there has been significant education programmes around licensed building practitioners' obligations as regards records of work and it is disappointing that practitioners are still not aware of their obligations.

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<sup>11</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>12</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [59] The Board normally imposes a fine for record of work matters and the starting point is \$1,500. The Board did not hear any evidence in mitigation which would warrant a reduction in this.

### Costs

- [60] 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.”
- [61] 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<sup>13</sup>.
- [62] In *Collie v Nursing Council of New Zealand*<sup>14</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.*

- [63] Based on the above the Board’s penalty decision is that the Respondent pay costs of \$500. Ordinarily the starting point for costs for a half day hearing is \$2,000. The Board recognises, however, that the only charge that has been upheld is that of failing to provide a record of work. Costs for a record of work matter are normally between \$500 and \$1,500 depending on whether the matter is heard on the papers or is defended. Whilst the present matter was defended the Board considers that if the only matter before it had of been the record of work that the complaint would most likely have been dealt with on the papers and as such it has decided that costs should be ordered on that basis.

### Publication

- [64] 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<sup>15</sup>. 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.*

- [65] 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

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<sup>13</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>14</sup> [2001] NZAR 74

<sup>15</sup> Refer sections 298, 299 and 301 of the Act

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

- [66] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>16</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>17</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>18</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>19</sup>.
- [67] 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<sup>20</sup>. 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.
- [68] Based on the above the Board's penalty decision is that further publication is not required.

### Section 318 Order

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

<b>Penalty:</b>	<b>Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.</b>
<b>Costs:</b>	<b>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.</b>
<b>Publication:</b>	<b>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.</b>  <b>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.</b>

- [70] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### Submissions on Penalty, Costs and Publication

- [71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **7 June 2017**.

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<sup>16</sup> Section 14 of the Act

<sup>17</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>18</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>19</sup> *ibid*

<sup>20</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### Right of Appeal

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

Signed and dated this 15<sup>th</sup> day of May 2017.



**Chris Preston**  
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 do both of the following things:*
- (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.*

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**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.*