

BPB Complaint No. C2-01494

IN THE MATTER OF

Under the Building Act 2004 (the Act)

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

AGAINST

Kevin Lynch, Licensed Building Practitioner
No. BP 116219

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 2 September 2016 in respect of Kevin Lynch, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [Omitted]:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 3 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:
- | | | |
|--------------------|------------------|---|
| 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 |

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Robin Dunlop Board Member Retired Professional Engineer

[6] The matter was considered by the Board in Christchurch on 28 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

Kevin Lynch Respondent

Warren Nevill Technical Assessor to the Board

[Omitted] Witness for the Respondent by telephone

[8] No Board Member declared any 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 17 January 2017 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. It included a report from Warren Nevill as a Technical Assessor to the Board.

[11] On 9 February 2017 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 or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) 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);

[12] On 6 March 2017 a pre-hearing teleconference was convened by Chris Preston. 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 Kingdom¹.

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

Substance of the Complaint

[20] The Complainant alleged poor workmanship as follows:

- (a) master bedroom cavity slider installed out of square, out of plumb and ceiling to accept door track is not level;
- (b) door frames to the master bedroom, second bedroom and powder room out of square and not plumb. Ceiling to the master bedroom entry door not level;
- (c) cavity slider to the powder room out of square, out of plumb and ceiling to accept door track is not level;
- (d) door frames to the internal garage door out of alignment;
- (e) door frame to front door incorrectly installed, out of alignment, out of plumb, out of square and unable to accommodate pivoting door;
- (f) wall and column structures to accommodate fire place out of alignment, out of plumb along with concrete hearth incorrectly installed;

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

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- (g) set out for concrete blockwork to sunroom incorrect;
 - (h) T&G ceiling boards cut short and unevenly to dining area ceiling;
 - (i) ceiling to master bedroom wardrobe packed down without consultation;
 - (j) ceiling to study area installed out of level;
 - (k) meterbox cover poorly constructed and installed; and
 - (l) fixings to the skylight hinges had not been installed resulting in the window detaching from the frame when opened.
- [21] The Complainant also noted a kitchen window had to be reinstalled as the kitchen bench would not fit.
- [22] There was also an allegation that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

- [23] 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.

- [24] 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*

⁴ [2009] 1 NZLR 1

matter, whether or not it would be admissible in a court of law.

- [25] The building work undertaken involved additions and alterations to an earthquake damaged building situated on the bank of the Avon River. The work involved removal and replacement of the existing cladding and roofing, the addition of a sunroom, new master bedroom/ensuite and garage along with modernisation of the full interior of the dwelling.
- [26] A report on the dwelling had been completed by Aurecon prior to the work being undertaken. The Respondent stated he was unaware of the report which noted variations in floor levels with the building being out of square and plumb. No releveling was carried out.
- [27] The Board directed a Technical Assessor be appointed. Warren Nevill was appointed and he produced a report. He noted the home had been built to a high specification and level of finish and that the Complainant would have been expecting a similar level of finish. The Board queried whether such a high level could have been achieved with a compromised building. The Technical Assessor gave his opinion that in some instances it may have been unrealistic such as where floor to ceiling doors had been installed but that notwithstanding this more care and attention could have been paid to their install.
- [28] In his report the Technical Assessor noted the following:

Description of defective work as claimed	Analysis of non-compliance	Implication of the non-compliance
Fireplace detailing. Installed in uneven and non-tradesman like manner. Adjacent column considerably out of plumb and alignment.	Does not comply with NZS 3604 table 2.1 tolerance limits. Fails to comply with levels of acceptable trade practice.	Aesthetic implications.
Lintel position to dining area bay window and jamb of living area window.	Fails to comply with consented detailing.	Aesthetic implications.
Kitchen window installation precluded sink bench installation Flashing detail not in accordance with cladding supplier's recommendations.	Complainant advised out of level window precluded sink bench installation Fails to comply with levels of acceptable trade practice.	Window required removal/reinstallation
Areas of wall and ceiling surfaces presenting out of level and/or plumb.	Exceed tolerance limits depicted in NZS 3604 table 2.1 and Gib fixing requirements. Fails to comply with levels of acceptable trade practice.	Aesthetic distractions to otherwise highly specified construction project,
Entrance door installed incorrectly	Fails to comply with levels of acceptable trade practice.	Entrance door required remediation builder for 2 days to rectify issues

- [29] The Board questioned the Respondent as regards the building work he carried out and the list of items in paragraph [20] above were worked through. It was noted that

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he installed door frames and carried out preliminary work but his engagement in the work came to an end prior to doors being installed and there was evidence that the framing he had installed had been realigned by a subsequent contractor. He stated he had aligned the frames in such a way as to take into account the out of square and plumb nature of the building and would have carried out "tweaking" when doors were installed so as to make the work aesthetically acceptable.

[30] The Technical Assessor noted:

It is the Assessor's view that while many of the above items are visually distracting they also illustrate a lack of accuracy of the underlying framing installation, likely involving either timber or hollow steel section posts or a combination of both. The resultant construction, exhibiting a lack of attention to detail and failure to measure up to acceptable levels of trade practice, especially in a highly specified alteration. The wisdom of choosing to install floor to ceiling doors in an earthquake damaged building is considered questionable, however, whilst possibly presenting additional difficulties, within reasonable parameters, this should not be outside the capability of a qualified tradesman.

[31] He did, however, modify his view, based on the evidence heard outlined in the table below.

[32] The Respondent's responses to specific allegations were:

Item	Alleged Deficient Work	Respondent's Evidence
A	Master bedroom cavity slider installed out of square, out of plumb and ceiling to accept door track is not level	Door frames were installed by him but not tracks or doors
B	Door frames to the master bedroom, second bedroom and powder room out of square and not plumb. Ceiling to the master bedroom entry door not level	Door frames were installed by him but not tracks or doors
C	Cavity slider to the powder room out of square, out of plumb and ceiling to accept door track is not level	Door frames were installed by him but not tracks or doors
D	Door frames to the internal garage door out of alignment	Extended frames to ceiling but did not install doors
E	Door frame to front door incorrectly installed, out of alignment, out of plumb, out of square and unable to accommodate pivoting door	Door frames were installed by him but not tracks or doors. The Technical Assessor noted that a pivot door would be very difficult to get correct if the ceiling and or floor were not level and/or plumb

Item	Alleged Deficient Work	Respondent's Evidence
F	Wall and column structures to accommodate fire place out of alignment, out of plumb along with concrete hearth incorrectly installed	Carried out the work but noted that the plans were not clear. Did not carry out the plaster board install or the plastering. Owner contracted those trades.
G	Set out for concrete blockwork to sunroom incorrect	Carried out the set out but not the blockwork
H	T&G ceiling boards cut short and unevenly to dining area ceiling	Was going to be a negative detail but this was taken out of scope. Plasterboard was to be installed up to the T&G which would have overcome the visual aspects complained of
I	Ceiling to master bedroom wardrobe packed down without consultation	Carried out so as to match master bedroom height
J	Ceiling to study area installed out of level	Not the Respondent's work
K	Meterbox cover poorly constructed and installed	Installed but issues with cabling required its installation in that way
L	Fixings to the skylight hinges had not been installed resulting in the window detaching from the frame when opened	Some screws were missing

- [33] As regards the kitchen window the Respondent stated he would have been able to "tweak" the window and bench to enable the install of the bench and that the window was manufactured 50mm out of winding. He stated the windows were site measured by the manufacturer.
- [34] The Respondent was not able to fully explain what the term tweaking involved.
- [35] The Respondent also noted that the scope of the work was reduced and that the Complainant accepted that the resultant work would be compromised but he did not obtain any documentation to that effect.
- [36] The Respondent stated he did not provide a record of work as he had not been paid and would not be doing so until he was.

Boards Conclusion and Reasoning

Negligence and/or Incompetence

- [37] 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.

- [38] 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.

- [39] The Board notes most judicial comments as regards seriousness relate to the medical disciplinary jurisdiction and a charge of professional misconduct where the threshold is considered to be higher than that for negligence or incompetence. Some lean toward it being a matter for consideration in penalty whilst others see it as a factor in determining liability. The more recent judicial statements, however, tend toward the latter. For example in *Pillai v Messiter (No 2)*⁷ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [40] On this basis the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.
- [41] The Board's view of the Respondent's work is that whilst aspects of it could have been done better it did not meet the seriousness threshold as outlined above. The Respondent should note, for the future, that when he is engaged in a situation such as this it would be advisable to obtain the client's written acceptance of changes to scope which might result in sub optimal outcomes.

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

⁶ [2001] NZAR 74

⁷ (1989) 16 NSWLR 197 (CA) at 200

Record of Work

- [42] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁸.
- [43] Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [44] The Board discussed issues with regard to records of work in its decision C2-01170⁹ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [45] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder).
- [46] 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 ...”. 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.
- [47] In the current case the intended work was not completed but it was clear the relationship was at an end and that no more building work, restricted or otherwise, would be carried out by the Respondent. In such circumstances the restricted building work was technically complete and a record of work was due. One has still not been provided and the Respondent has stated he will not be providing one until such time as he has been paid.
- [48] Section 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [49] The only possible good reason put forward is non-payment. The Board has repeatedly stated that a record of work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine. As such non-payment is not a good reason and the disciplinary offence has been committed.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Board Decision

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

Disciplinary Penalties

- [52] 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 Act¹.
- [53] 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.
- [54] 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 in this was the non-payment which is both a mitigating and an aggravating factor in that the Respondent should have known it was not a reason he could withhold a record of work.
- [55] 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 a further matters which the Board should take into consideration.
- [56] As stated earlier the purposes 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.
- [57] The Board does note that the High Court in *Patel v Complaints Assessment Committee*¹⁰ 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.

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [58] In *Lochhead v Ministry of Business Innovation and Employment*¹¹, 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).

- [59] Whilst the non-provision of a record of work is not the most serious of disciplinary conduct the Board has undertaken an extensive education and communication programme to ensure licensed building practitioners are aware of their obligations and responsibilities as regards records of work. That the Respondent is either still ignorant of his obligations or is willing to ignore them is disappointing and an aggravating factor.
- [60] In all the circumstances the Board considers a fine of \$1,500 is appropriate. This is consistent with fines awarded by the Board for record of work matters with similar aggravating and mitigating circumstances.

Costs

- [61] 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.”
- [62] 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*¹² 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

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

¹² HC, Wellington, AP23/94, 14 September 1995

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.”

[63] The judgment in *Macdonald v Professional Conduct Committee*¹³ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹⁴ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[64] In *Collie v Nursing Council of New Zealand*¹⁵ 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.

[65] A hearing was required as was the engagement of a technical assessor. The Respondent was not, however, found to have carried out work in a negligent or incompetent manner and as such some of those costs should not be imposed on him. Taking those factors into account the Board considers a contribution toward the costs of the investigation and hearing of \$1,000 is reasonable. This is significantly less than the 50% of actual costs the Courts have stated is an appropriate starting point.

Publication of Name

[66] 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.

[67] 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.

[68] 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.

[69] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal

¹³ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹⁴ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁵ [2001] NZAR 74

¹⁶ Section 14

¹⁷ Refer ss 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive¹⁸. In *N v Professional Conduct Committee of Medical Council*¹⁹ 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.*

[70] 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 interest²⁰. 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.

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

Penalty, Costs and Publication Decision

[72] 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 \$1,000 (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 him being named in this decision.

Submissions on Penalty Costs and Publication

[73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **9th May 2017**.

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

[75] 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.

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

²⁰ *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

Non Payment of Fines or Costs

- [76] 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

- [77] The right to appeal Board decisions is provided for in s 330(2) of the Actⁱⁱ.

Signed and dated this 13th day of April 2017.



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) do both of the following things:*
 - (i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) order that the person be censured:*
 - (e) order that the person undertake training specified in the order:*
 - (f) order that the person pay a fine not exceeding \$10,000.*

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- (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.*