Before the Building Practitioners Board

	BPB Complaint No. CB24639
Licensed Building Practitioner:	Joseph Jacob (the Respondent)
Licence Number:	BP 111788
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	7 August 2019
Decision Date:	15 August 2019

Board Members Present:

Mel Orange, Legal Member (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

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 **has** committed a disciplinary offence under section 317(1)(d) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) of the Act

Contents

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[1] 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); and

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

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

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[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*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … 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] Included in the documentation provided to the Board for the hearing was evidence from an adjudication under the Construction Contracts Act 2002 and the adjudicator's determination. Under section 68 of that Act proceedings are confidential as is the determination itself[5]. Consent can be given by all concerned to disclosure which was given.

[6] The Board noted that the purpose of and matters under consideration in the Construction Contracts Act determination were not the same as those under consideration in the hearing and that, as such, the documentation was of limited value.

Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[8] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Concrete Structures (NZ) Ltd v Inframax Construction Ltd* HC Hamilton CIV-2010-419-909
[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[9] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Joseph Jacob	Respondent
[Omitted]	Witness, Licensed Building Practitioner, Design AOP 2
[Omitted]	Witness, Council Inspector

[10] The Respondent was engaged to carry out an extension to an existing dwelling under a building consent. The building work commenced in late June 2018. The Respondent did not complete all of the envisaged building work as a result of a commercial dispute that resulted in the contract for services being terminated on or about 13 August 2018.

[11] The Complainant raised issues with the quality and compliance of the building work and with the management of building materials that were demolished which contained white asbestos[7]. The Complainant also provided photographs of building work he considered was substandard.

[12] Included in the material the Complainant provided to the Board was a report completed by [Omitted] of Property Reports Limited. He noted:

> *The partial construction of consented works has several defects which are not consistent with building plans provided and also the process to which they should have been constructed to.*
>
> *A subsequent visual inspection carried out appears to show ground clearance defects, studs not at full height from ground to ceiling, and a guttering channel where the 2 roofs intersect which is not adequately flashed or sealed (and is not sighted in the building plans).*

[13] A Council inspection of the building work on 22 August 2018 was noted as a failure due to ground clearance issues.

[14] The Respondent gave evidence at the hearing that the designer, [Omitted], had experienced difficulties with the Complainant and that he had been reluctantly convinced to carry out the work. He noted that no issues had been raised with the quality or compliance of the building work prior to 22 August 2018 and that he had not been given an opportunity to attend to any issues raised as a result of the contract being brought to an end.

[15] The Board inquired about three issues:

(a) a change to a roof junction;
(b) ground clearances;
(c) changes to foundations; and

[7] The Board was provided with test results which showed that white asbestos was contained in ceiling materials that had been removed from the dwelling.

(d) removal of asbestos.

[16] The Board also reviewed the photographs provided.

Roof Junction

[17] The consented plans showed a junction between the existing roof line and the extension as a continuous plane. What was constructed differed from what was consented. An existing gutter was not removed. An internal valley over it was constructed with the intention of creating an internal gutter. The designer was not consulted about the change. Nor was the building consent authority consulted.

[18] [Omitted] expressed his opinion that the change was significant and that an amendment to the building consent would most likely have been required.

[19] The Respondent stated that the change had been discussed with the owner and roofer and that they had accepted the change.

Ground Clearances

[20] The Board was provided with photographs of weatherboards that did not meet clearance requirements as well as Council inspection records that noted the issue. The weatherboards were above a poured concrete paved area. It was noted that the issue had come about as a result of a design issue with the set out of weatherboards which were to match existing weatherboard heights which were also failed to meet clearance requirements.

[21] The Respondent stated that he had not consulted the designer about the issue. He considered that it would be easily remediated by lowering the existing paving. [Omitted] agreed that it was a matter that could be easily resolved but that the only way of doing it was to remove the existing paving.

Foundations

[22] The foundations constructed in a kitchen extension included a nib wall that was not detailed on the consented plans. The Respondent stated that he used the detail provided in the plans for a nib wall in the garage for the kitchen foundation. He did not consult with the designer or the Council as the building consent authority prior to making the change.

Asbestos

[23] The Respondent, who had previously held certification for asbestos removal, accepted that he had not dealt with asbestos in an appropriate manner. He noted that he had relied on assurances from the owner that the materials removed did not contain asbestos but accepted that he should have made his own independent inquiries. He noted that had he been able to return to site he would have dealt with the safe removal of the materials along with other accumulated construction waste.

[24] The Respondent was given an improvement notice by WorkSafe with regard to how the materials containing asbestos were dealt with.

Photographs

[25] The photographs were reviewed with the witnesses. [Omitted] expressed his opinion that what was shown was either minor in nature or that there were no compliance issues with the work shown.

Board's Conclusion and Reasoning

[26] The Board has decided that the Respondent **has** 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 should be disciplined.

[27] The Board has also decided that the 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).

[28] The reasons for the Board's decisions follow.

Contrary to a Building Consent – Building Consent Changes

[29] The Board's decision that the Respondent has carried out building work that does not comply with a building consent relates to the changes made to the consented design to the roof structure and the inclusion of a non-consented nib wall in the kitchen. The Board finds that the changes to the roof structure and gutter system were significant and, most likely, required an amendment to the building consent prior to construction being carried out. It also finds that the change to the foundations in the kitchen most likely required, at the least, a minor variation. Neither a minor variation nor an amendment was obtained for either change prior to the associated building work being carried out. That is not the correct process.

[30] All building work must be carried out in accordance with a building consent. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[31] Building consents are granted under section 49 of the Act. A building consent can only be grated if the provisions of the Building Code will be satisfied. Section 49 provides:

> ***49 Grant of building consent***
>
> *(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[32] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

> ***3 Purposes***
>
> *This Act has the following purposes:*
>
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
>
> *(i) people who use buildings can do so safely and without endangering their health; and*
>
> *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
>
> *(iii) people who use a building can escape from the building if it is on fire; and*
>
> *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
>
> *(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[33] In *Tan v Auckland Council*[8] 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.*

[8] [2015] NZHC 3299 [18 December 2015]

[34] 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.

[35] Justice Brewer in *Tan* also noted:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[36] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[37] In this respect section 45(4) of the Act states:

> *(4) An application for an amendment to a building consent must,—*
>
> *(a) in the case of a minor variation, be made in accordance with section 45A; and*
>
> *(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[38] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[39] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably it states:

> ***45A Minor variations to building consents***
>
> *(1) An application for a minor variation to a building consent—*
>
> *(a) is not required to be made in the prescribed form; but*
>
> *(b) must comply with all other applicable requirements of section 45.*
>
> *(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
>
> *(3) A building consent authority that grants a minor variation—*

> *(a) must record the minor variation in writing; but*
>
> *(b) is not required to issue an amended building consent.*

[40] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly the building consent authority retains a discretion to refuse a minor variation[9]. To aid the process of applying for a minor variation most building consent authorities have a minor variation application form.

[41] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than precede the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought[10].

[42] It must also be noted, as regards a licensed building practitioner's obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of an breach of a building consent:

> ***89 Licensed building practitioner must notify building consent authority of breaches of building consent***
>
> *(1) A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
>
> *(a) the territorial authority in whose district the building is situated; and*
>
> *(b) the owner.*
>
> *(2) The notification must—*
>
> *(a) state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
>
> *(b) state how the building work does not so comply; and*
>
> *(c) be given as soon as practicable after the licensed building practitioner forms that view.*

[9] Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

[10] Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

[43] Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established[11]. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[44] As noted, the Respondent carried out building work on the roof structure, the gutter system and the kitchen foundations that was different to that which was consented. Both changes required some form of change process as regards the building consent. Neither was dealt with as a change. Rather the Respondent carried out the building work without consulting the designer or the Council. In doing so he put the building work at risk. Without the engagement of the appropriate professionals and the correct authorities there is a very real risk that work which does not meet the requirements of the Building Code, or work that compromises the overall integrity of a building, will be carried out.

[45] In this respect it is to be noted that building work that has not been carried out in accordance with a building consent can only be approved by a building consent authority by way of a Certificate of Acceptance. The ability to grant a Certificate of Acceptance does not, however, relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

> ***96 Territorial authority may issue certificate of acceptance in certain circumstances***
>
> *(3) This section—*
>
> *(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
>
> *(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[46] Given the above the Board finds that the disciplinary offence has been committed.

Negligence and/or Incompetence

[47] Negligence and incompetence are not the same. In *Beattie v Far North Council*[12] Judge McElrea noted:

> *[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.*

[48] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired

[11] *Blewman v Wilkinson* [1979] 2 NZLR 208
[12] Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*[13] test of negligence which has been adopted by the New Zealand Courts[14].

[49] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[15] it was stated as *"an inability to do the job"*.

[50] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[16]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[51] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[17]. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[18].

[52] The Board notes that the purposes of the Act are:

> ***3 Purposes***
>
> *This Act has the following purposes:*
>
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
>
> *(i) people who use buildings can do so safely and without endangering their health; and*
>
> *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
>
> *(iii) people who use a building can escape from the building if it is on fire; and*
>
> *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

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[13] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

[14] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[15] Ali v Kumar and Others [2017] NZDC 23582 at [30]

[16] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[17] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

[18] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[53] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[19] and be carried out in accordance with a building consent[20]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[54] The building work that did not comply with the building consent has been dealt with under section 317(1)(d).

[55] The other matters, the cladding ground clearance and asbestos removal, were matters that the Board considered had not been carried out in accordance with acceptable standards. The Board, however, also found that the overall conduct of the Respondent as regards those contraventions was not sufficiently serious enough to warrant a disciplinary outcome. This is because of the judicial tests that have been laid down in this regard.

[56] In *Collie v Nursing Council of New Zealand*[21] the Court noted, as regards the threshold for disciplinary matters, that:

> *[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.*

[57] In *Pillai v Messiter (No 2)*[22] 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.*

[58] It is on this basis that the Board, which includes persons with extensive experience and expertise in the building industry, finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome. The ground clearance issue was minor and there was an element of inadvertent error with regard to the asbestos for which the Respondent has been dealt with by WorkSafe.

Penalty, Costs and Publication

[59] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether

[19] Section 17 of the Building Act 2004
[20] Section 40(1) of the Building Act 2004
[21] [2001] NZAR 74
[22] (1989) 16 NSWLR 197 (CA) at 200

the Respondent should be ordered to pay any costs and whether the decision should be published.

[60] 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

[61] 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*[23] 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.*

[62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[24] 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.

[63] The Board has made a finding under section 317(1)(d) of the Act. The level of offending was high, especially as regards the change to the roof structure and gutter system. A significant penalty is required. A starting point of a fine of $3,000 has been adopted.

[64] There are mitigating factors, including contractual issues and losses that need to be taken into consideration. In recognition of those the fine has been reduced to $2,500.

Costs

[65] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

[66] 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

[23] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[24] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[25].

[67] In *Collie v Nursing Council of New Zealand*[26] 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.*

[68] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

<u>Publication</u>

[69] 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[27]. The Board is also able, under section 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.*

[70] 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.

[71] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[28]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[29]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[30]. 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*[31].

[72] 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[32]. It is,

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[25] *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.
[26] [2001] NZAR 74
[27] Refer sections 298, 299 and 301 of the Act
[28] Section 14 of the Act
[29] Refer sections 200 and 202 of the Criminal Procedure Act
[30] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[31] ibid
[32] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[73] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $2,500.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (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 section 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.

[75] 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

[76] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **6 September 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. 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.

[77] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 15th day of August 2019

Mel Orange
Presiding Member

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

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

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