Before the Building Practitioners Board

	BPB Complaint No. CB24899
Licensed Building Practitioner:	Shane Jefferies (the Respondent)
Licence Number:	BP 132300
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	Tauranga
Hearing Type:	In Person
Hearing Date:	10 July 2019
Decision Date:	23 July 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Bob Monteith, LBP Carpentry and Site 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)(b), 317(1)(d) and 317(1)(da)(ii) 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);

(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

(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

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

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*[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.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[6] 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.

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

Shane Jefferies	Respondent
[Omitted]	Witness for the Respondent
[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner – Carpentry
William Hursthouse	Technical Assessor to the Board

[8] The Respondent was a contractor to Debee Holdings Limited trading as Landmark Homes Bay of Plenty supplying labour to two adjacent residential builds – a new main residence at what came to be known as [Omitted] and what was described as a

[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] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

cottage at [Omitted]. Part way through the build DeBee Holdings went into liquidation. At this point in time the roof had been installed on the main residence. The Respondent entered into negotiations to continue the build as the main contractor. Building work continued under the supervision of the Respondent whilst those negotiations proceeded.

[9] During the build the Respondent's business was also providing approximately 20 persons to a commercial build and it had several other residential projects that it had taken over from Debee Holdings underway. The Respondent gave evidence that he was personally almost exclusively engaged in the commercial build and that he spent very little time on the build at [Omitted].

[10] At [Omitted] the Respondent, during the period when Debee Holdings was the main contractor the Respondent had one qualified but unlicensed builder ([Omitted]) and two hammer hands on site. [Omitted] had worked for the Respondent for about a year and the Respondent was familiar with his work. After the Respondent became the main contractor [Omitted] was moved to other jobs and a new employee ([Omitted]) was taken on to carry on with the build. [Omitted] was described as an unqualified but experienced builder. He had not worked for or with the Respondent prior to his engagement. The Respondent stated issues with quality and compliance started to occur when [Omitted] took over.

[11] Following the Respondent taking over with the build contractual issues and issues with quality and compliance of the build developed. The Respondent was ordered off site, but work continued under his direction. Matters came to a head and the Complainant engaged a new builder ([Omitted]) who completed the build. [Omitted], on taking over the job, in conjunction with the engineer to the build, identified a number of quality and compliance issues. It was noted that various connections between building elements that required producer statements from the engineer had been covered or concealed as a result of the building work progressing without the required observations being undertaken. Many of the connections were noted as having been completed in a manner that was substandard and not in accordance with the building consent.

[12] The Board instructed Mr William Hursthouse to review the issues identified by [Omitted] and to obtain a response to each from the Respondent. Mr Hursthouse provided the Board with a report summarising the issues and responses. He also noted the number of remedial hours of work expended by [Omitted] to rectify the issues.

[13] At the hearing the Board questioned the witnesses with regard to the issues identified. Certain items were noted as being serious, namely:

(a) the installation of windows was not completed as per E2/AS1 or the consented details. A PEF rod was not used which meant expanding foam was not contained creating the potential for a capillary pathway for water. Packers were not used which resulted in windows reveals bowing. The windows had to be removed and reinstalled which was difficult because of the expanding foam. A total of 98 hours was expended in remediating the issue. The Respondent stated that his instructions to staff was to just make the property weathertight by way of a temporary install but that they went further than that;

(b) steel connections were not completed as per the consented engineer's specifications. The connections had been covered up by subsequent building work. When revealed it was ascertained that 6mm not 10mm plates had been used and that the connections had been bolted whereas they were to be welded. Evidence was heard that the Respondent was aware of the issues by way of an email from the engineer but that no action was taken to rectify them before building work progressed. Remediation took 32 hours;

(c) missing and/or poor fixings in various areas with an estimated 10-15% being affected. The Respondent described it as incomplete work. 31 hours remediation over various issues was required;

(d) columns at the front of the property which had been specified as being full length studs for structural strength were constructed in two pieces. 16 hours remediation;

(e) reverse flashings not installed/missed. Remediation took 12 hours; and

(f) framing wrapped prior to frames being straightened. The Respondent noted that the framing had been wrapped to protect it from the elements. Building work had progressed with cavity battens nailed with bright nails installed without the timber frames being straightened. Remediation took 50 hours. A further 92 hours of remediation was expended on removing and reinstalling cavity battens and head flashings.

[14] [Omitted] also noted that there were issues with the foundation which was oversized in places and had to be ground back so that frames sat over it. Mr Hursthouse noted issues with a failed foundation inspection that did not seem to have been dealt with.

[15] The Respondent was questioned as to why building work that was not compliant was covered over and not dealt with. The Respondent was not able to explain why other than that issues started once [Omitted] came on site. He accepted that his lack of supervision had been a contributing factor and that his supervision had fallen below an acceptable standard. He noted that his business had grown too quickly and that he was spread too thinly.

[16] In a written response to the Technical Assessor's enquiries the Respondent noted that a lot of factors had contributed to the issues including the failure of Debee Holdings. He stated:

> *4- I SHOULD OF STOPPED ALL WORKS ONCE ORDERED OFF BOTH SITES.*
>
> *5- I DIDNT TAKE MY LICENSE SERIOUSLY I HAVE LEARNT A VALUABLE LESSON OVER THIS.*

[17] With regard to the record of work the Respondent did not provide one for either site. The Respondent noted a payment dispute. He stated:

> *WE WERE HAPPY TO SIGN A MEMORANDUM ONCE WE HAD PAYMENT, BUT CLIENT HAD NEW BUILDER TO DO THIS SO I HEARD??*

[18] The Respondent gave evidence as to financial and payment issues that arose as a result of the failed contract.

Board's Conclusion and Reasoning

[19] The Board has decided that the Respondent **has**:

(a) carried out or supervised building work or building inspection work in a negligent 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);

(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);

and should be disciplined.

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

<u>Negligence and/or Incompetence</u>

[21] The finding of negligence relates to the Respondent's supervision of non-licensed persons.

[22] 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 into. This is described as the *Bolam*[6] test of negligence which has been adopted by the New Zealand Courts[7].

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

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

[23] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[8]. 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.

[24] 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[9]. 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[10].

[25] 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:*
> *(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.*

[26] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[11] and be carried out in accordance with a building consent[12]. 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. In this respect there was substantial evidence of serious non-compliant building work that was carried out under the Respondent's supervision.

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[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[10] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[11] Section 17 of the Building Act 2004
[12] Section 40(1) of the Building Act 2004

[27] Supervise is defined in section 7[13] of the Act. The definition states:

> *supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
>
> *(a) is performed competently; and*
>
> *(b) complies with the building consent under which it is carried out.*

[28] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[29] As noted above the Board also needs to consider whether the work met the requirements of the building consent and building code and if not the level of non-compliance.

[30] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[14]. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

> *"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."*

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[13] Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[14] *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

[31] The Respondent accepted that his supervision had been lacking. He had hired an unqualified builder. He was not familiar with his competence or capability. The Respondent was not on site and was not checking the building work. He had a high volume of building work on the go and no other licensed persons to carry out or supervise that work. In essence the Respondent abdicated his responsibilities. He fell well below the acceptable standards of conduct.

[32] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] the Court's 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.*

[33] The Respondent's conduct was not mere inadvertence, oversight or carelessness. He overcommitted himself and, in doing so, simply did not supervise.

[34] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

<u>Contrary to a Building Consent</u>

[35] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. 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.*

[36] 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.

[15] [2001] NZAR 74

[37] 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.

[38] If changes are made to what is stipulated in the building consent and the correct process for the change is not used then the building work can be said to have not been completed in accordance with the building consent. 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 must be established[16]. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[39] There were substantial departures from the building consent. No variations or amendments were sought. Noncompliance issues were not dealt with. The building work continued beyond the point where it could easily be rectified. Breaches of the building consent were either covered over or ignored. Given these factors the Board has decided to uphold the ground of discipline.

[40] The Board does note that there is a degree of duplication between this charge and negligence. The Board will deal with this when considering penalty.

Record of Work

[41] There is a statutory requirement under section 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[17].

[42] Failing to provide a record of work is a ground for discipline under section 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.

[43] The Board discussed issues with regard to records of work in its decision C2-01170[18] 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.

[44] 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-

[16] *Blewman v Wilkinson* [1979] 2 NZLR 208
[17] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[18] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[45] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …".

[46] 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. That did not occur in the present case. The Respondent's work came to an end. Another licensed building practitioner took over. As a result the Respondent was not going to be able to carry out any further restricted building work. Completion, as far as the Respondent was concerned, had occurred. His record of work was due. It was not provided.

[47] The Respondent submitted that another licensed building practitioner could provide a record of work and this is what did happen. In this respect the Respondent should note that section 88 of the Act states "Each licensed building practitioner who carries out or supervises restricted building work …". The use of the word "each" makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did or supervised. This is so that there is a complete record of all the licensed persons who have been involved in the restricted building work. As such even if there is more than one licensed building practitioner carrying out restricted building work on the same element, they must both provide a record of work. Their records of work should delineate what each did.

[48] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced 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] In this instance there was an ongoing payment dispute. 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.

Penalty, Costs and Publication

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

[51] 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

[52] 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*[19] 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.*

[53] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[20]. The High Court when discussing penalty stated:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[54] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[21] 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.

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] [2012] NZAR 481
[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[56] The Respondent's conduct has fallen seriously below the standard to be expected of a licensed building practitioner. He has taken a reckless approach to supervision and in doing so he has put the objects of the scheme at risk. Given these factors the Board considered cancellation of the Respondent's licence but decided that a nine-month period of suspension together with a fine of $3,000 will suffice. In coming to this decision, the Board took into account the Respondent's cooperative attitude toward the investigation and hearing and his acceptance that he failed to adequately supervise. It has also noted the financial losses and the Respondent's statement that he has learnt from the matter.

[57] The Respondent should note that he can work on non-residential projects without a licence and that he can carry out restricted building work on residential projects under the supervision of an appropriately licensed person.

Costs

[58] 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."

[59] 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[22].

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

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

[61] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,500 toward the costs of and incidental to the Board's inquiry.

Publication

[62] 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[24]. 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.*

[22] *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.

[23] [2001] NZAR 74

[24] Refer sections 298, 299 and 301 of the Act

[63] 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.

[64] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[25]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[26]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[27]. 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*[28].

[65] 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[29]. 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.

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

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of nine [9] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners;**

And

Pursuant to section 318(1)(f) of the Act, the Respondent is ordered to pay a fine of $3,000.

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with 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.

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[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[68] 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

[69] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 August 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.

[70] 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

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

Signed and dated this 23rd day of July 2019

Richard Merrifield
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.*