Before the Building Practitioners Board

	BPB Complaint No. CB25126
Licensed Building Practitioner:	Shaun Lawless (the Respondent)
Licence Number:	BP 122078
Licence(s) Held:	Design AOP 2

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	Wellington
Hearing Type:	In Person
Hearing Date:	23 October 2019
Decision Date:	20 November 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and 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)(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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3]*.*

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

[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] The matter was originally set down to be heard on 10 September 2019. Prior to the hearing the Board noted that the details provided to the Respondent had not correctly identified the issues that the Board would be investigating at the hearing. The matter was adjourned. The Respondent was advised that the Board be inquiring into whether the Respondent had been negligent and/or incompetent in advising that a building consent was not required.

Evidence

[6] 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.

[7] 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.

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

Shaun Lawless	Respondent
[Omitted]	Licensed Building Practitioner assisting the Respondent
[Omitted]	Complainant
[Omitted]	Complainant

[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[9] The Respondent was engaged by the Complainant to carry out design work in relation to minor alterations to a residential dwelling. There was disagreement as to the design brief, but the final design supplied by the Respondent involved moving a bathroom into what was a laundry and turning what was the bathroom into a separate toilet and internal laundry. As part of the swap a toilet was rotated in its existing location. A new Atlantis acrylic shower was installed in the new bathroom.

[10] The Respondent considered that the changes to sanitary fixings came within clause 35 of Schedule 1.

[11] The design also envisaged the creation of a new external access point to the dwelling and the closing off of an existing access point. The insertion of a new exterior door required a structural lintel and the closing off required infill framing and the installation of new exterior wall insulation. The Respondent accepted that the insertion of the lintel would have required a building consent. He did not consider that moving the door or installing new insulation required a building consent.

[12] The Respondent provided correspondence between himself and the Complainants during the design process, an email dated 16 September 2018 at the commencement of the design process. It included the following statements:

> *These drawings will enable us to meet and discuss the project and to make informed decisions in order to process the project and to make informed decision in order to progress the project diligently.*
>
> *I will pay special attention to avoiding moving the toilet very much as this can add additional expense (and moving windows) that would require a building consent which is time consuming and expensive.*
>
> *Also, as mentioned, I feel that moving the rear door off the kitchen would significantly enhance the useable space and flow to the exterior.*

[13] The email noted a fee for an initial concept which the Complainants paid.

[14] A second email and final invoice dated 26 September 2018 followed with completed drawings. It noted that the drawings would be provided to a third party to arrange for a site visit and costings. The email stated:

> *Great working with you. If you have queries please make contact.*

[15] The Respondent gave evidence that, as at the end of his engagement, he did not know whether the building work would proceed. He considered that if it were to proceed then it would have been the obligation of the licensed building practitioner engaged to carry out the work to ensure a building consent was obtained. He stated he would have expected the Complainants to come back to him to assist with obtaining a building consent if the work was to proceed. The Respondent did not refer to those matters in his written response to the complaint.

[16] Neither the design provided by the Respondent nor the email correspondence contained any cautionary notes or warnings as regards the purposes for which the design could be used.

[17] The Respondent believed he had advised the Complainants that a building consent was required for certain aspects of the work. The Complainants gave evidence that no such advice was received.

Board's Conclusion and Reasoning

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

[19] The Board's considerations in relation to negligence and/or incompetence relate to the failure to advise the Complainant's that a building consent would be required for aspects of the intended building work.

[20] The Respondent carried out design work. Under the definitions in the Building Act design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b), it comes within the Board's jurisdiction[6].

[21] All building work must also 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.*

[22] 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.*

[23] 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:

[6] Refer section 7 of the Act and clause 3 of the Building (Design Work Declared to be Building Work) Order 2007

> ***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.*

[24] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[25] The Respondent submitted that the building work that the design envisaged, with the exception of a lintel, came within Schedule 1. Specific reference was made to clause 35 of Schedule 1.

[26] It was clear to the Board that aspects of the building work did require a consent as they did not come within Schedule 1. Specifically:

<u>Sanitary fixtures</u>

[27] Part 2 of Schedule 1 deals with Sanitary plumbing and drainlaying carried out by person authorised under Plumbers, Gasfitters, and Drainlayers Act 2006. Clause 32 allows for repair, maintenance and replacement. There are conditions that attach. One is that under clause 32(2):

> *(a) a comparable component or assembly is used; and*
>
> *(b) the replacement is in the same position.*

[28] The rotation of the toilet would have come within this provision. The movement of the shower would not have as it was not in the same position.

[29] The Respondent stated reliance on clause 35 which states:

> ***35 Alteration to existing sanitary plumbing (excluding water heaters)***
>
> *(1) Alteration to existing sanitary plumbing in a building, provided that—*
>
> *(a) the total number of sanitary fixtures in the building is not increased by the alteration; and*
>
> *(b) the alteration does not modify or affect any specified system.*

[30] The Respondent also referred to a Ministry of Business Innovation and Employment (MBIE) Guidance Document: Building work that does not require a building consent. It provides examples of when clause 35 might apply including:

> *Repositioning or replacing sanitary fixtures (eg a bath, bidet, wash hand basin, shower or toilet pan) within an existing bathroom in a dwelling.*
>
> *Moving a toilet pan from a toilet compartment into an adjacent existing bathroom in a dwelling.*

[31] The movement of the shower from one room to another potentially comes within the examples given. The Board notes that there is an inherent conflict between the provisions of clauses 32 and 35 and the interpretation placed on clause 35 by the MBIE Guidance Document. The examples given in the Guidance Document involve replacement that is not in the same position and as such they are contrary to clause 32.

[32] A Guidance Document can be issued under section 175 of the Act. Under section 175(2)(a) it is guidance only. The note to the Guidance Document states:

> *This document is issued as guidance under section 175 of the Building Act 2004. While the Ministry has taken care in preparing the document it should not be relied upon as establishing compliance with all relevant clauses of the Building Act or Building Code in all cases that may arise. The Document may be updated from time to time and the latest version is available from the Ministry's website at www.building.govt.nz.*

[33] Notwithstanding reliance on erroneous advice from an official can be a defence. In *Wilson v Auckland City Council (No 1)*[7] the appellant, was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*[8] Holland J found that where a person committed a crime believing it to be lawful on the grounds of "officially induced

[7] [2007] NZAR 705 (HC)
[8] (1994) 11 CRNZ 132

error" it was in the public interest as well as being just that the person should not be held criminally liable.

[34] The Board considers the Respondent relied on official by way of the Guidance Document and whilst the Board does not agree with the interpretation given in that Guidance Document it does consider that it may have been reasonable for the Respondent to rely on it.

New external access point

[35] The Respondent accepted that the insertion of a new lintel was structural work that would have required a building consent. He did not refer to any provisions of schedule 1 which might apply to other aspects of the building work.

[36] The Board notes that clause 8 allows for building work in relation to windows and exterior doorways in existing dwellings and outbuildings. It comes within a sub-part entitled: Existing Buildings: additions and alterations. It provides an exemption for:

> *Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys*

[37] The guidance document refers to replacement of original windows and exterior openings. The examples provided, however, include installing a roof window and removing and closing in a window.

[38] It is noted, however that other provisions of schedule 1 also come into play. Clause 11 provides an exemption for internal walls provided that they are not structural. There is no equivalent for exterior walls. Clause 13 provides an exemption for thermal insulation, but it excludes its installation in external walls. Clause 1, general repair, maintenance and replacement also contains the requirements that the building work use a comparable component or assembly in the same position.

Was a building consent required?

[39] What can be noted from the above discussion is that finding a pathway through Schedule 1 is not easy. A licensed building practitioner with a Design AOP 2 licence would, however, be expected to be aware of the limitations of Schedule 1 and of the uncertainty that can exist in certain circumstances.

[40] They should also know that the starting point is that a consent is required for all building work unless it can be shown that one is not required. A cautionary approach is recommended.

[41] In the present case a consent was required for the lintel. There was, in the Board's opinion, some doubt as to whether a consent was required for other aspects of the building work. An advisable approach would have been to issue a caution to the client that the territorial authority should be approached and in this respect clause 2 provides for a discretion for a territorial authority to provide an exemption from a

building consent. This is because it is better that enquiries be made than to be advised, once the work is underway, that a consent was required and to have to seek a certificate of acceptance under section 96 of the Act.

<u>Was the Respondent negligent in not advising that a building consent was required?</u>

[42] In *Tan v Auckland Council*[9] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[43] 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.*

[44] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[45] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[46] The question for the Board was whether that duty extended to giving advice to the Complainant's that a building consent would have to be obtained prior to the building work in the design being carried out.

[47] In the Respondent's correspondence of 16 September 2018, it is clear that he was aware that a consent may have been required if certain paths were taken (moving the toilet or a window) but has then not applied the same logic to moving a shower or an external door. A fair reading of the email indicates that the Respondent was looking at ways of avoiding a building consent having to be applied for and it would have been reasonable for the Complainants to have implied from it that one was not required.

[9] [2015] NZHC 3299 [18 December 2015]

[48] The final design and email accompanying it contained no notes or warnings. Either or both could, and should have, been notated that the design was not for construction purposes or was for costing purposes only. Both the design and email should have contained a notation to the effect that, at the least, inquiries should be made as to whether a building consent was required.

[49] It is on the basis of these failings that the Board has decided that the Respondent has been negligent. It was also noted by the Board that the Respondent saw that the duty to consider whether a building consent was required lay with other licensed persons but not with him. In this respect the position taken by him was incongruous. The duty lies with all licensed building practitioners and to their respective roles in the process.

[50] 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*[10] test of negligence which has been adopted by the New Zealand Courts[11].

[51] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[12]. 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.

[52] 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 purposes of the Act[13] which are outlined above. 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[14].

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[10] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[13] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[14] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[53] The Board also notes the provisions of section 14D of the Act which states:

> ***14D Responsibilities of designer***
>
> *(1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
>
> *(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[54] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design[15].

[55] The Respondent is a Design AOP 2 licensed person. He is the person who is best placed within the building process to advise on building consent matters. He should, as part of the design process, be advising on building consent matters. In this instance the Board does not accept his evidence that he gave a verbal warning. It finds that there was a positive duty to issue written instructions and advice as regards building consenting requirements. As such the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has departed from what the Board considers to be an accepted standard of conduct.

[56] The Board has also found that the conduct was sufficiently serious enough to warrant a disciplinary outcome. Consenting is at the heart of the compliance regime within the Building Act. The process ensures independent checking and verification. In this instance it may well have picked up and dealt with issues that occurred when the building work was carried out. It also provides assurance to an owner. The Respondent's failure to advise the Complainants with regard to consenting compromised those features and, as such, it was a serious failing.

Penalty, Costs and Publication

[57] 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.

[15] Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

[58] 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

[59] 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*[16] 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.*

[60] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[17] 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.

[61] The Board noted that the negligence was at the mid-range of the scale. The Board's typical penalty for behaviour such as that which has occurred is to impose a fine. The sum of $2,000 is considered to be appropriate and in line with other penalties imposed. It should be noted that the Board did not consider that there were any mitigating nor aggravating features and, as such, it has not modified the fine its starting point.

Costs

[62] 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."

[63] 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[18].

[16] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[17] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[18] *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.

[64] In *Collie v Nursing Council of New Zealand*[19] 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.*

[65] The matter required hearing at which evidence was received. It was not an overly complex matter. As such and 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.

<u>Publication</u>

[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[20]. 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.*

[67] 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.

[68] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[21]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[22]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[23]. 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*[24].

[69] 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[25]. 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.

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

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[19] [2001] NZAR 74
[20] Refer sections 298, 299 and 301 of the Act
[21] Section 14 of the Act
[22] Refer sections 200 and 202 of the Criminal Procedure Act
[23] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[24] ibid
[25] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[71] 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 $2,000.**

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.

[72] 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

[73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 11 December 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.

[74] 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

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

Signed and dated this 20th day of November 2019

Richard Merrifield
Presiding Member

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

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

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

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

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

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

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

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.