

## Before the Building Practitioners Board

|                                 |                                  |
|---------------------------------|----------------------------------|
|                                 | BPB Complaint No. CB25228        |
| Licensed Building Practitioner: | Timothy Horrell (the Respondent) |
| Licence Number:                 | BP 125036                        |
| Licence(s) Held:                | Carpentry                        |

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

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|----------------------------|-----------------|
| Complaint or Board Inquiry | Complaint       |
| Hearing Location           | Invercargill    |
| Hearing Type:              | In Person       |
| Hearing Date:              | 5 February 2020 |
| Decision Date:             | 10 March 2020   |

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
David Fabish, 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 disciplinary offences under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

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## Introduction

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; The hearing will focus on the matters set out in correspondence from the Complainant to the Respondent dated 10 October 2018 (Board file document 2.1.13), the report from *[Omitted]* dated 6 November 2018 (Board file reference 2.5.1) and an allegation that changes to the building consent may not have been dealt with in an appropriate manner;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act. The hearing will focus on the matters set out in correspondence from the Complainant to the Respondent dated 10 October 2018 (Board file document 2.1.13), the report from *[Omitted]* dated 6 November 2018 (Board file reference 2.5.1) and an allegation that changes to the building consent may not have been dealt with in an appropriate manner; and

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

- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

### Function of Disciplinary Action

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

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>4</sup> Collins J. noted that:

*“... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*

- [4] In a similar vein the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>5</sup>:

*... 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.*

- [5] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

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

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

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

<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

[6] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

[7] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges and it decides what evidence is required at a hearing to assist it in its investigations. In this respect the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[10] 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.

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

|                  |            |
|------------------|------------|
| Timothy Horrell  | Respondent |
| <i>[Omitted]</i> | Witness    |

[12] The Respondent was engaged by the Complainant to carry out a new residential build under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in January 2018. His work on it ceased in late 2018 as a result of an ongoing commercial dispute.

[13] The Complainant made a complaint to the Board about various quality and compliance matters. In particular he complained about the manner in which roofing and cladding material had been installed.

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [14] The Board was provided with an inspection report compiled by *[Omitted]* of *[Omitted]*. It set out issues with the roof and wall cladding (long run iron) and the associated flashings including those around windows and doors. He provided an extensive list of issues. At the hearing *[Omitted]* confirmed his experience and his report. He expressed his opinion that the work would not have met the requirements of Clause E2 of the Building Code.
- [15] The Respondent accepted that the work had not been completed to an acceptable standard. He stated that, at the time, he was trying to get the dwelling weathertight to protect the flooring from the elements and that his usual roofer was not available. He accepted that he had limited experience in installing long run iron as a wall cladding and that he did not have the knowledge and skill to install the flashings.
- [16] The Board also received evidence that the wall cladding had been changed. The consented plans specified a combination of iron and board and batten detailing around selected window openings. This was changed on site to flashed long run iron detailing. The building work was carried out prior to any form of change process, as regards the building consent, being carried out.
- [17] The complaint included evidence of other changes to the building consent that had been carried out by the Respondent. A Southland District Council Inspection Outcome Notice dated 18 March 2019, which was issued in lieu of a Notice to Fix, noted that a citing variation, an addition of a bathroom on the ground floor, the change to the cladding system and the change from cavity to direct fixed cladding and location of the same, and the change of opening sizes and sill levels for window openings was outside of the minor variations regulations.
- [18] The Respondent accepted that he should not have carried out building work that differed from the building consent prior to an amendment to the consent being granted.
- [19] The Complaint included a list of items noted by a Council Inspector in a site inspection carried out in February 2019. The Respondent was questioned about the list. He noted that the associated building work was approximately two weeks from being ready for a pre-line inspection. Following receipt of the list, which was mostly incomplete work, he attended to many of the items. He accepted that some of the items were not done completed to an acceptable standard.
- [20] The Respondent was questioned as to why he had not yet provided a record of work. He noted that he was not sure if he would be returning to complete any further work and that he was concerned about being held responsible for work completed by others post his involvement.
- [21] The Respondent spoke to the financial and personal impact the complaint had on him and his building business.

### Board's Conclusion and Reasoning

[22] 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.

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

#### Negligence

[24] 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*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[25] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>9</sup>. 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.

[26] 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<sup>10</sup>. 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<sup>11</sup>.

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

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<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

### 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.*

[28] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>12</sup> and be carried out in accordance with a building consent<sup>13</sup>. 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.

[29] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>14</sup> 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.*

[30] The Board finds that the Respondent had carried out the wall and roofing cladding in an unacceptable manner. The manner in which it was installed was not in accordance with acceptable industry standards. The manner in which the roof and wall cladding, and in particular the manner in which the flashings were installed, would not have met the requirements of Clause E2 of the Building Code. Clause E2 deals with the management of external moisture and is integral to the long-term structural integrity of a home and the health and wellbeing of its occupants.

[31] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has

<sup>12</sup> Section 17 of the Building Act 2004

<sup>13</sup> Section 40(1) of the Building Act 2004

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

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.

### Contrary to a Building Consent – Building Consent Changes

[32] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

[33] 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.*

(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.*

[34] Building consents are granted under section 49 of the Act. A building consent can only be granted 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.*

[35] 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.*

[36] In *Tan v Auckland Council*<sup>15</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[37] 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.

[38] 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.*

[39] 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.

[40] 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.

[41] 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

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<sup>15</sup> [2015] NZHC 3299 [18 December 2015]

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.

[42] 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.*

[43] 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.

[44] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption it does not 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.*

[45] In the present case there were multiple changes to the building consent that were carried out by the Respondent prior to the changes being notified to and dealt with by the building consent authority. These were outlined in the Council Inspection Outcome Notice dated 18 March 2019. They all required building consent amendments prior to them being carried out by the Respondent. Given this there was clear evidence that the Respondent had carried out building work contrary to a building consent and that he had, therefore, committed a disciplinary offence under section 317(1)(d) of the Act.

## Record of Work

- [46] 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<sup>16</sup>.
- [47] 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.
- [48] The Board discussed issues with regard to records of work in its decision C2-01170<sup>17</sup> 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.
- [49] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [50] 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 ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>18</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [51] As to when completion will have occurred is a question of fact in each case. 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.
- [52] in the present case the building work came to a premature end. The Respondent thought he might have been returning to carry out further building work. He had no evidence of this. Counter to this the Complainant has made a complaint about the Respondent’s work and a considerable period of time has elapsed. In such circumstances the Board considers that, from the perspective of a record of work, completion has occurred, and a record of work is due.
- [53] On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

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<sup>16</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>17</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>18</sup> [2018] NZHC 1662 at para 50

- [54] The Respondent has noted that he was unsure as to when to provide a record of work as he did not want to take responsibility for what others might have done after him. In this respect the Respondent should note that an accurate and detailed record of work can be used to state not only what has been done but also what has not been done.
- [55] The Respondent should also note that a record of work is not a statement as to the quality or compliance of restricted building work. It is simply a statement of who did or supervised what in the way of restricted building work. In this respect it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability, that would not otherwise exist as section 88(4) provides:
- (4) A record of work given under subsection (1) does not, of itself,—  
create any liability in relation to any matter to which the record of work  
relates; or give rise to any civil liability to the owner that would not otherwise  
exist if the licensed building practitioner were not required to provide the  
record of work.*
- [56] 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.
- [57] In this instance there was an ongoing 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.
- [58] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

### **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<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [60] The Respondent made submissions at the hearing as regards penalty, costs and publication.

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*<sup>19</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>20</sup> the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do 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 noted that the Respondent displayed a lack of regulatory knowledge. Given the mitigating factors present and the submissions heard the Board decided that it should order specified training to be undertaken. The Respondent is to complete the following modules, at his expense and to the satisfaction of the Registrar within one year of this order through the Building and Construction Training Organisation:

- (a) unit standard 20745 – duties and responsibilities on a site;
- (b) unit standard 27160 – roles and documentation; and
- (c) unit standard 26778 – contract drawings and specifications.

Costs

[64] 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."

[65] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>21</sup>.

<sup>19</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>21</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

[66] In *Collie v Nursing Council of New Zealand*<sup>22</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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

[67] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$3,000 toward the costs of and incidental to the Board's inquiry.

#### Publication

[68] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>23</sup>. 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.*

[69] 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.

[70] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>26</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>27</sup>.

[71] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>28</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

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<sup>22</sup> [2001] NZAR 74

<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(e) of the Act, the Respondent is ordered to undertake and complete the following training to the satisfaction of the Registrar within one year of this order:

(a) unit standard 20745 – duties and responsibilities on a site;

(b) unit standard 27160 – roles and documentation; and

(c) unit standard 26778 – contract drawings and specifications.

If the Respondent fails to complete the training specified in this order then pursuant to section 318(1)(b) of the Act, the Respondent's licence will be suspended until the earlier of the Respondent completing the training to the satisfaction of the Registrar or the expiry of a period of 12 months and the Registrar will be directed to record the suspension in the register of Licensed Building Practitioners.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (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.

[74] 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.

## Right of Appeal

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

Signed and dated this 10<sup>th</sup> day of March 2020



**Chris Preston**  
Presiding Member

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<sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

<sup>ii</sup> **Section 330 Right of appeal**

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

**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.*