

Before the Building Practitioners Board

	BPB Complaint No. CB25594
Licensed Building Practitioner:	David Keith (the Respondent)
Licence Number:	BP 104961
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	Palmerston North
Hearing Type:	In Person
Hearing Date:	12 May 2021
Decision Date:	27 May 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Legal Member
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1

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.

Disciplinary Finding:

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

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Summary of the Board’s Decision

[1] The Respondent has committed a disciplinary offence under section 317(1)(b) of the Act by carrying out roofing work in a negligent manner. He is fined \$2,500 and ordered to pay costs of \$3,500.

The Charges

[2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act). The specific issues the Board resolved to further investigate were:

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

- (a) a building consent may have been required for the building work given the number of piles installed; and/or
- (b) piles may not have been installed to a depth that met the requirements of the Building Code; and/or
- (c) the installation of the roof, as detailed in the NZ House survey report may not have been completed to an acceptable standard.

Function of Disciplinary Action

[3] 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.

[4] 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.”

[5] 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 persons⁵:

... 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.

[6] 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.

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [7] 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

- [8] 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.
- [9] 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

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [11] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from:

David Keith	Respondent
[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner, Design AoP 2, Registered Building Inspector [Omitted], [Omitted]
Derek Dykstra	Senior Building Consent Officer and Technical Lead, Rangitikei District Council

- [13] Prior to the Board receiving evidence, the Respondent queried whether the Board had a conflict of interest with regard to [Omitted]. The Respondent stated that [Omitted] was well known to the Ministry of Business Innovation and Employment

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

(MBIE). The Board noted that it is an independent decision-making body, that MBIE provides it with support services but that it is not part of the Board's decision-making process and that [Omitted] is not known to the Board. It was established that there was no conflict.

- [14] The Board was investigating three matters. They were whether a building consent was required for re-piling, whether piles had been installed to a compliant depth, and whether a roof had been installed in a manner that met quality and compliance requirements.
- [15] The Respondent did not, during the Registrar Report phase of the investigation, responded to the substantive allegations contained in the complaint. A hearing was, therefore, required.

Building Consent

- [16] The Respondent stated that the foundation did not include a ring foundation and that he replaced approximately 33 piles or 25% of the total piles supporting the dwelling. In assessing the total area of the dwelling, the Respondent took into account a concrete garage foundation and floor that was attached to the dwelling. The evidence from the witnesses present was, however, somewhat inconsistent as to the extent of the work that was undertaken.
- [17] The Respondent stated he was on site when the work was carried out, but his evidence during the hearing as to the extent of the work that he carried out or directly supervised versus that which was completed by his staff was also inconsistent.
- [18] The Respondent noted that he had extensive building experience, including extensive experience with re-levelling foundations having worked in Christchurch post the Christchurch earthquakes. The Respondent submitted that whether re-pilling work was substantial or not⁷ was a matter of opinion and that, in his opinion, the building work he undertook was not substantial.
- [19] The Respondent also submitted that section 112 of the Building Act applies. It states, in short, that building work on existing buildings does not have to be any more compliant than it was prior to the building work being carried out⁸.
- [20] Mr Dykstra noted that an exemption under clause 2 of Schedule 1 can be sought from a territorial authority but that one was not sought. He referred to a Ministry of Business Innovation and Employment Determination⁹ and to superseded guidance

⁷ The building consent exemption in Clause 1 of the Schedule 1 of the Building Act does not apply to a complete or substantial replacement of any component or assembly contributing to the building's structural behaviour.

⁸ The section must also be reconciled with section 17 of the Act which requires that all building work must meet the building code.

⁹ Determination 2013/071

documentation which indicated that a building consent is required if more than 20% of the piles are replaced.

- [21] Mr Dykstra and the Complainant gave evidence that the Council had indicated that a building consent was required but that a notice to fix was not issued as it would have been issued against the Complainant, which was not what she wanted. Mr Dykstra also stated that the Council had not taken any other action and that it did not have the resources to follow up on matters like this.
- [22] The Respondent was asked if he had made any inquiries with the local building consent authority as to whether a building consent was required prior to him undertaking the work. He stated that he had not but that he had spoken to the Council when the work was 90% complete.

Pile Depth

- [23] The allegation as regards the depth of piles came from a report completed by [Omitted] who had based his assessment on the amount of soil that was in and around 6 piles that he considered were or should have been anchor piles.
- [24] The Respondent submitted that, under section 112 of the Act, there was no requirement for anchor piles as none were in place prior to the work being carried out, and that the piles were at sufficient depth. He stated that soil had been removed from under the house. The Complainant noted that there was a soil pile in the garden with soil that had been removed from under the house.

Roofing

- [25] [Omitted] report contained observations about the roofing work that had been carried out. It was supported with photographs of the work observed. The following issues were noted at page 10 of the report:
1. *The roof appears to have been haphazardly fitted and screwed off in a random manner. The roofing screws have never been completed and several hundred screws remain to be fixed in place.*
 2. *A sheet pan over the rear right of the house has been cut approximately 50mm too short.*
 3. *The length of the roofing iron appears to have been measured too long and now hangs too far into the plastic PVC guttering so that the guttering cannot be practically cleaned.*
 4. *Graphite marks from a carbon pencil have been left on the roof and should have been rubbed off, as this will react with the Zinalume coating of the roof and cause deterioration.*
 5. *Off-cuts of the roofing have been left over the roof and can cause deterioration where these react.*

6. *The ridge flashing is the worst I have seen in 35 years of construction, with large gaps exceeding 20mm in size allowing wind driven water to enter beyond this area.*
7. *The ridge flashing joints remain unsealed, not riveted or adequately screwed in place and will definitely leak.*
8. *Missing barge flashings to both the front and rear left are currently allowing moisture to enter the structure of the dwelling.*
9. *Various crests of the new roof have been damaged and dented - presumably by heavy foot traffic. Additional crests have had Tek screws overtightened and have deformed and dented the crests.*
10. *Various unfinished, incomplete, poorly formed, and missing flashings exist to all 4 sides of the garage and is currently allowing weather to penetrate this structure.*
11. *Broken plastic PVC spouting is visible to the dwelling over the garage; however, it is unknown if this was damaged prior to engagement of the new roof or prior.*
12. *Spare roofing sheets have been left uncovered at the front of the site, and have the potential to cause damage by being blown into the air. Furthermore, these sheets are now no longer fit for purpose for installation as early corrosion is beginning.*

[26] [Omitted] confirmed the observations in his report.

[27] The Respondent gave evidence that it was the first roof that the workers he used to complete the work had done as a team. He took the position that he installed a higher-grade material roof than was required, that the roof was not complete with approximately one day's work left, and that the work was carried out in the manner that it was to accommodate for weather conditions and budget constraints. The Complainant gave evidence that weather was not an issue and that there were not any budget constraints. The Respondent stated that the contract was brought to an end prior to him being able to complete the roof.

[28] The Respondent also gave evidence that the roofing material used allowed for a span of 1,000mm between purlins, that roofing materials would have been trimmed back, and that silicone would have been used to ensure flashings that had gaps were sealed. Evidence was heard that new building paper was installed over the old paper, but again the evidence was inconsistent on this matter.

[29] The Respondent was questioned as to why the electricity to the premises had not been disconnected when the work was carried out and why full scaffolding was not installed. The Respondent noted that danger he was in when completing the work with the power connected but did not give a reason as to why it was not disconnected other than time and budget constraints. The Respondent stated that

he supplied his own scaffolding and that it was moved around the house as sections of the roof were completed.

- [30] The Complainant gave evidence that she had remedial work carried out, which took two days to complete.

Board's Conclusion and Reasoning

- [31] 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.

- [32] The Board's finding only relates to the manner in which roofing work was carried out.

Building Consent

- [33] With respect to the question of whether a building consent was required for the piling work the Board finds that there was insufficient evidence for it to make a decision that, on the balance of probabilities, a building consent was required.

- [34] As the Respondent noted, the exemption from the requirement to obtain a building in under Schedule 1 of the Act, does not apply to the complete or substantial replacement of any component or assembly contributing to the building's structural behaviour¹⁰. There is a degree of judgement in determining what is "substantial". MBIE does maintain guidance documentation. The most current version notes:

Replacing old rotten wooden piles under a house with new treated timber piles in the same positions, as long as the work is not a complete or substantial replacement.

- [35] The guidance documentation also states:

MBIE has also issued relevant determinations under the Building Act 2004 that include discussion about what is considered complete or substantial replacement, and what is meant by comparable materials, components or assemblies.

Determination 2013/071, which considered the compliance of proposed repairs to an earthquake damaged foundation.

- [36] The guidance documentation does not otherwise define substantial. Determination 2013/017 discusses the term substantial and how it might be interpreted but does not state specific thresholds.

- [37] On the basis of the evidence before the Board, it was not able to determine whether, on the basis of the guidance documentation, the building work was or was not substantial. The Board also took into account that the territorial authority had not

¹⁰ Clause 1(3)(b) of Schedule 1 of the Act

taken any action with respect to the matter. In such circumstances, it is appropriate that it finds that the allegation is not upheld.

- [38] The Board does, however, consider that licensed building practitioners should take a precautionary approach to the question of whether building work comes within a Schedule one exemption. A prudent course of action is to presume the building work requires a building consent until such time as the practitioner is satisfied, on reasonable grounds, that the building consent is not required. This is consistent with the provisions of section 40 of the Act, which states that all building work must also be carried out in accordance with a building consent.
- [39] There are various ways in which a licensed building practitioner can satisfy themselves that building work does not require a building consent. Experts can be consulted, as can the local building consent authority. Written statements as to whether an exemption applies for the specific circumstances can be obtained.
- [40] In this matter, the Respondent did little in the way of due diligence prior to proceeding with the work. Put simply, he relied on his own judgement. It would have been advisable for him to do more, and he is advised to do so in the future.

Pile Depth

- [41] The Board also finds that there was insufficient evidence before it to make a finding that the piles were not, on the balance of probabilities, installed to a compliant depth.
- [42] The Board accepted that in accordance with section 112 of the Act if the dwelling did not have anchor piles prior to the building work being undertaken that there was no requirement for them to be installed. More importantly, there was no clear evidence as to the actual depth of the piles. The allegation came about as a result of an inference that was drawn from the volume of soil removed when holes were dug. That evidence was contradicted, and it did not prove, on the balance of probabilities, that the piles were not at an adequate depth.

Roofing

- [43] The Board did find that the roofing work had not been completed in a compliant manner and that the Respondent conducted himself in a negligent manner with respect to the work that he carried out and supervised on it. The Board made the findings on the basis of the evidence provided in the [Omitted] report, and the evidence received at the hearing.
- [44] 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*¹¹ test of negligence which has been adopted by the New Zealand Courts¹².

[45] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹³. 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.

[46] 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 Act¹⁴. 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 practitioner¹⁵.

[47] 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.*

[48] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶, irrespective of whether a building consent has

¹¹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁵ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁶ Section 17 of the Building Act 2004

been issued. As such, when considering what is and is not an acceptable standard, the Building Code must be taken into account.

- [49] The evidence before the Board was that there were multiple quality and non-compliance issues with the roof. The Respondent's position was that it was not complete and that he had not been able to complete it. The Board, which includes persons with extensive building skills, knowledge and experience, found that whilst the work was not complete, the sequence and manner in which it had been carried out was not in accordance with acceptable industry and standards and that this had compromised a pathway to compliance.
- [50] The Board also considers that licensed building practitioners should be aiming to get building work right the first time. In this respect, during the first reading of changes to the Act around licensing,¹⁷ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [51] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁸:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

¹⁷ Hansard volume 669: Page 16053

¹⁸ Hansard volume 669: Page 16053

[52] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner include taking steps to ensure building work is carried out competently and compliantly as and when it is carried out. That was not the case in this matter, and the Board finds that the Respondent has, in this respect, departed from acceptable standards.

[53] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁹ 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.

[54] The matters noted in the report [Omitted] report were serious. They would have compromised the roofing membrane's ability to comply with Clause E2 of the Building Code – External Moisture Management. The work had not been completed in accordance with E2/AS1, an acceptable solution for code compliant external moisture management. In particular, the manner in which flashings had been cut and installed was serious. The issues noted would not have been easy to rectify and should have been completed correctly in the first instance.

[55] 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.

Penalty, Costs and Publication

[56] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[57] 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

[58] 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*²⁰ commented on the role of "punishment" in

¹⁹ [2001] NZAR 74

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.

- [59] 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [60] The conduct falls in the mid-range of conduct. The Board considers a fine to be the appropriate form of penalty. It adopted a starting point consistent with other matters of a similar nature that have come before it of \$2,500. The Board did not consider that there were any mitigating or aggravating factors. Accordingly, the fine is set at \$2,500.

Costs

- [61] 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.”
- [62] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²².
- [63] 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.*
- [64] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board’s inquiry. This is the Board’s scale sum for a hearing of this type. The amount of costs ordered is significantly less than 50% of actual costs.

²¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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

Publication

- [65] 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 Act²⁴. 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.*
- [66] 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.
- [67] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. 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.
- [68] 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 interest²⁹. 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.
- [69] Based on the above, the Board will not order further publication.

²⁴ Refer sections 298, 299 and 301 of the Act

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

Section 318 Order

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

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

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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(I)(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.

[71] 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

[72] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 23 June 2021. 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.

[73] 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/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 1st day of June 2021



Mr C Preston
Presiding Member

ⁱ **Section 318 of the Act**

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