Before the Building Practitioners Board

	BPB Complaint No. CB24240
Licensed Building Practitioner:	Tony Magele (the Respondent)
Licence Number:	BP 126358
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	Wellington
Hearing Type:	In Person
Hearing Date:	13 February 2019
Decision Date:	28 February 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
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) and 317(1)(h) of the Act.

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

Contents

Introduction

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

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

(b) breached section 314B of the Act (s 317(1)(h) of the Act);

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

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

[4] The Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

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

Tony Magele	Respondent
Ricky Kernohan	Complainant, Wellington City Council
Darrell Nichol	Witness, Wellington City Council

[8] The Respondent, the owner of a residential dwelling in Wellington, undertook substantial alterations to the dwelling without a building consent. The Wellington City Council complained to the Board about the Respondent's conduct in carrying out building work without a building consent or resource consent.

[9] The building work complained about commenced on or about 9 January 2018. It came to an end in 19 April 2018 as a result of stop work notices being issued by the Council. The building work was not complete. The Respondent is now working with

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

an architect and an engineer with a view to obtaining a Certificate of Acceptance for the building work that has been completed.

[10] The Respondent's building work came to the Council's attention on 14 March 2018 by way of an anonymous verbal complaint. On 13 April 2018 Council compliance staff visited the property to investigate but were refused entry by the Respondent. The Respondent's view, at the time, was that he had an email from the Council stating that he did not need consent for the works he was doing and therefore was not letting them on the site.

[11] The Respondent's belief that he did not require a building consent was based on an email he received from a Council Planning Technician dated 18 December 2017 in response to a planning query and relevant definitions. The Planning Technician had written:

> *Following on from our discussions, I am happy to confirm that the proposed 'repairs & maintenance' to the house at 8 Glendavar Street as I understand them as well as the widening of the vehicle access-way (including a widening of the garage door) should not require a Resource Consent if the vehicle access-way is no wider than 3.7m.*

[12] A definition of 'repairs & maintenance' and relevant parts of the Wellington District Plan General Provisions were provided for the Respondents' reference.

[13] On 19 April 2018 a Council Building Inspector undertook a site visit and observed building work undertaken without a building consent from the road and took photos of the same. The Inspector was unable to access the property, as the gates were locked.

[14] On 20 April 2018, as a result of the site visit, the Council issued a Notice to fix to the Respondent under sections 164 and 165 of the Act. The grounds noted on the notice were that a lower level addition, substantial replacement and alteration of the original building including its support structure, had been done without a building consent and that section 40 of the Act required that a building consent be obtained prior to undertaking any building work.

[15] On 20 April 2018, the property was inspected by a Council Consenting and Compliance Officer. He observed the building work carried out by the Respondent. On 24 May 2018 the Officer wrote to the Respondent and advised them the building work that had been completed required a Resource Consent. The Respondent was notified of a breach of the Wellington District Plan and section 9 of the Resource Management Act 1991. (RMA). An Abatement Notice was issued with the following reasons stated; the existing garage at the street edge had been removed entirely, with excavations extending under a newly constructed deck and under the front part of the existing dwelling. Other modifications to windows, weatherboards, changing the appearance of the property were recorded. The property, which is zoned inner residential under the Wellington City District Plan and was constructed prior to 1930,

was subject to the District Plan rule 5.3.6 in terms of demolition and removal of architectural features including the building's facade/exterior.

[16] On 11 May 2018, a second Notice to fix was issued, stating the required remedial action require and that the Respondent must apply for either a Certificate of Acceptance, or remove the building work within 4 months. Any additional work not yet undertaken must not be started until a building consent has been obtained.

[17] On 24 May 2018 an Abatement Notice under the Resource Management Act 1991 was issued. Correspondence sent with the Notice outlined the following breaches:

> *Earthworks*
>
> *You have excavated underneath your dwelling. Cuts need to be their own height away from buildings as per rule 30.1.1.1(a)(iii). By undercutting the dwelling you have failed to comply with this requirement and are in breach of this rule (a copy of all applicable rules are enclosed). Resource consent is required under rule 30.2.1.*
>
> *Site coverage*
>
> *By extending the lean-to at the rear of the dwelling and by placing a gazebo in the south-east corner you have increased site coverage. As the site coverage already exceeded the allowable 50%, you are in breach of standard 5.6.2-4 and require resource consent under rule 5.3-4.*
>
> *New deck*
>
> *The new partially cantilevered deck at the front of the property appears to sit higher than the garage roof deck did previously. This has been constructed within 2 metres of a side boundary and is over 1.5 metres in height. It is in breach of standard 5.6.2.2.9 and requires resource consent under rule 5.3-4.*
>
> *Building recession plane*
>
> *The balustrade on the newly constructed deck breaches the building recession plane along the western boundary. This is in breach of standard 5.6.2.8 and requires resource consent under rule 5.3.4.*
>
> *Pre-1930's primary elevation*
>
> *This property contains a pre-1930's dwelling and the street-front elevation is considered to be the 'primary' elevation. As per rule 5.3.6, you are unable to remove or demolish any architectural features from the primary elevation. The work you have done to the weatherboards and windows is in breach of this rule.*

[18] On 20 July 2018 an infringement notice was issued under the Building Act and the Council undertook an enforcement assessment to determine whether to lay charges against the owner and the Respondent. The Council, however, decided not to

proceed with prosecution on the basis that it would not meet the public interest test.

[19] The Respondent provided a written response to the complaint. In it he outlined his building experience and business activities. He stated that he and his wife saw the Council to ask what they could do with regard to renovations. He stated he was told that they could renovate within the footprint of the house and that it did not require consents. He acknowledged that he should have engaged the services of an engineer with regard to the collapse of a footpath during construction but that finances would not allow for this. The Respondent stated:

> *It would be fair to say that we took advantage of the work done on the house, plus with the urgency of the work required forced me to take a more direct action for which I truly regret.*
>
> *In saying that, to rectify the situation, we have acquired the services of an architect … and an engineer … . We have agreed to abide by using their guidance, expertise and instructions.*

[20] The Respondent's wife and joint owner also provided the Board with a written submission. She outlined the history of family ownership of the property and of her husband's building career. She reiterated their understanding that consents were not required.

[21] At the hearing the witnesses from the Council were queried as to whether the Council provided resources to assist individuals to ascertain whether a building consent or a resource consent was required. They noted that there is a technical queries line, staff in the office who deal with walk in or appointment enquiries, and online resources the Council and the Ministry of Business, Innovation and Employment provide.

[22] The Respondent made oral submissions at the hearing in which he accepted responsibility for what he had done. He stated he did not have much of an excuse other than that he could not afford to follow the proper procedures. He was questioned as to his practices around consenting on building work other than that which he owns and on his knowledge of the regulatory requirements around building consents and exemptions. He stated that he does not normally get involved in the consenting aspects of jobs but that he would always ensure the correct consent were in place.

[23] The Respondent was also questioned as to how he determined compliance with the Building Code on the building work that he undertook. He stated he did the building work on the basis of his knowledge and experience and that whatever he replaced he made stronger. He did not refer to or have a copy of NZS 3604.

[24] The Respondent acknowledged that he should have engaged the services of an engineer in respect of determining design aspects of the building work that he undertook.

[25] The Respondent stated he was prepared to do what was required to obtain a Certificate of Acceptance and the Council stated they were satisfied with the steps he had taken toward certification.

[26] The Respondent expressed his remorse for his actions and stated he would accept the whatever action the Board took with respect to his conduct.

Board's Conclusion and Reasoning

[27] 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); and

(b) breached section 314B of the Act (s 317(1)(h) of the Act).

[28] The Board has decided that the Respondent **has not** conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[29] The reasons for the Board's decisions follows.

Negligence – Carrying out Building Work without a Building Consent

[30] The Board's considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent and a resource consent.

[31] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.

[32] The onus is on the person carrying out the building work to show that one of the exemptions applies.

[33] The Board has found in previous decisions[6] that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068[7].

[34] More recently the High Court in *Tan v Auckland Council*[8] the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

> *[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.*

[6] Refer for example to Board Decision C1030 dated 21 July 2014
[7] Board Decision C2-01068 dated 31 August 2015
[8] [2015] NZHC 3299 [18 December 2015]

> *[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.*

[35] The Board considers the Court 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 obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[36] Similar considerations apply as regards resource consents. It is for the person who carries out an activity to establish that it comes within planning provisions.

[37] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent and/or a resource consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing being negligent or incompetent.

[38] Negligence and incompetence are not the same. In *Beattie v Far North Council*[9] Judge McElrea noted:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[39] 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].

[40] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[12] it was stated as *"an inability to do the job"*.

[41] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[13]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of

[9] Judge McElrea, DC Whangarei, CIV-2011-088-313
[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] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[13] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[42] 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[14]. 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[15].

[43] 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.*

[44] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[16] and be carried out in accordance with a building consent[17]. 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.

[45] Looking at the conduct in question the Respondent made enquiries of the local authority as regards resource consent matters. He was given some assurances but then undertook work that went beyond the advice that was given. The Respondent did not make any enquiries as regards building consents. He proceeded to undertake building work that clearly required a building consent. The Respondent accepted that he should not have done so. His explanation for his failings was that he wanted

[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
[17] Section 40(1) of the Building Act 2004

to save money. It is most likely that the conduct will have the opposite effect. The failure to obtain consents will most likely result in greater costs being incurred than would have been the case had the Respondent followed the correct processes.

[46] On the basis of the tests above the Respondent has been negligent. The Board needs to also consider whether the conduct was sufficiently serious enough. In *Collie v Nursing Council of New Zealand*[18] the Court noted, as regards the threshold for disciplinary matters, that:

> *[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[47] The Respondent's conduct here has had an impact on neighbouring properties. Moreover, the building work undertaken was extensive and substantial. It was not a case where it was a marginal call as to whether a building consent was required or not. Finally the Respondent most likely knew that a building consent was most likely required but chose to proceed irrespective on the basis that it was his own property and, the Board suspects, because he thought that he would get away with it.

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

<u>Misrepresentation or Outside of Competence</u>

[49] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)). It is the second aspect that the Board is inquiring into. Section 314B(b) of the Act provides:

> *A licensed building practitioner must—*
>
> *(b) carry out or supervise building work only within his or her competence.*

[50] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully

[18] [2001] NZAR 74

undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class[19] then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

[51] In this instance the Respondent has strayed into design work. He has carried out building work without reference to acceptable standards and has undertaken work that required specific design to ensure compliance with the Building Code. He does not profess any expertise or experience in design. As such he has worked outside of his personal competence as a Licensed Building Practitioner with a Carpentry Licence.

Disrepute

[52] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111[20] and discussed the legal principles that apply.

[53] The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[21] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[22] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[23]

[54] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[24];
- honest mistakes without deliberate wrongdoing[25];
- provision of false undertakings[26]; and

[19] Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.
[20] Board decision dated 2 July 2015.
[21] Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus,* search settings UK English, accessed 12/05/15
[22] [2012] NZCA 401
[23] [2012] NZAR 1071 page 1072
[24] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[25] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

- conduct resulting in an unethical financial gain[27].

[55] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

> *This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[56] In this case the Board has decided that the Respondent's conduct has not brought the regime into disrepute. It reached this decision on the basis that the Respondent is now taking a responsible approach to obtaining a certificate of acceptance and that the building work was carried out on his own property. If this were not the case the Board may well have found otherwise.

Penalty, Costs and Publication

[57] The matter was dealt with at a hearing. Included was information relevant to penalty, costs and publication and the Board 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*[28] 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.*

[59] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[29] 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.

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[26] *Slack, Re* [2012] NZLCDT 40
[27] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[28] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[29] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[60] The Board ordinarily imposes a significant fine for conduct of this nature. The Board does note, however, that the Respondent has taken a responsible approach toward the investigation of his conduct and that he has accepted responsibility for his conduct. The Board has taken these factors into account.

[61] The Board noted, as part of its inquiries, that the Respondent was lacking in regulatory knowledge including that relating to building consents. Given this the Board considered that a training order would be the most appropriate form of penalty. To this end it will order that the Respondent undertake and complete at his own cost and to the satisfaction of the Registrar Unit Standard 24364 – Demonstrate knowledge of compliance with building legislation.

[62] The Board ordered training is to be completed within six months of this order becoming final. Failure to meet this requirement may result in the Board carrying out further inquiries into the Respondent's conduct.

[63] The Respondent may contact the Ministry of Business Innovation and Employment to obtain assistance on how he can go about fulfilling the training requirement.

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[30].

[66] In *Collie v Nursing Council of New Zealand*[31] 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 $1,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs and the amount has been reduced from the amount the Board normally orders for a hearing of this nature on the basis that the Respondent has accepted responsibility for his conduct.

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

[30] *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.
[31] [2001] NZAR 74

Building Practitioners' scheme as is required by the Act[32]. 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[33]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[34]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[35]. 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*[36].

[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[37]. 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.

Section 318 Order

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

Penalty: **Pursuant to section 318(1)e) of the Building Act 2004, the Respondent is ordered to undertake and complete at his own cost and to the satisfaction of the Registrar Unit Standard 24364 – Demonstrate knowledge of compliance with building legislation by a date which is no later than six months after this order becoming final.**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

[32] Refer sections 298, 299 and 301 of the Act
[33] Section 14 of the Act
[34] Refer sections 200 and 202 of the Criminal Procedure Act
[35] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[36] ibid
[37] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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.

Submissions on Penalty, Costs and Publication

[75] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **21 March 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.

[76] 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

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

Signed and dated this 28th day of February 2019

Richard Merrifield
Presiding Member

[i] ***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.