Before the Building Practitioners Board

	BPB Complaint No. CB25207
Licensed Building Practitioner:	Franklin Maiava (the Respondent)
Licence Number:	BP 115777
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	Auckland
Hearing Type:	In Person
Hearing Date:	4 December 2019
Decision Date:	7 February 2020

Board Members Present:

Richard Merrifield, LBP, Carpentry and Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Rob 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.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

Contents

Introduction

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

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

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

[1] 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) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

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

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

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

[4] 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[5]:

> *… 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.

---

[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

[6] The commentary on the limitations of the disciplinary process are important to note in this case as the Board received a high volume of evidence and the complaint raised a number of allegations that did not meet the seriousness threshold. As such the Board's inquiries, and this decision, focused 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.

Evidence

[8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[9] 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.

[10] The Complainant had, as part of the complaint to the Board, raised an allegation of having brought the regime into disrepute contrary to section 317(1)(i) of the Act. The Registrar recommended, and the Board decided, that the evidence did not reach the threshold for disrepute. The charge was not included in the Notice of Hearing that was issued by the Board. In other words, the charge did not form part of the allegations that the Board would be further investigating at the hearing.

[11] Prior to the hearing the Complainant sought to admit further evidence some of which related to the allegation that the Respondent may have brought the regime into disrepute. The Board accepted the evidence that was relevant to the matters before it but excluded that which related to disrepute. The Board further noted that it would be contrary to the principles of natural justice for it to investigate disrepute at the hearing when the Respondent had not been given notice of that charge and provided with an adequate opportunity to respond to it.

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

[12] The Complainant should note that, as the allegation of disrepute has not been investigated by the Board, the Complainant may make a further complaint supported by the new evidence about those matters.

[13] In addition to the documentary evidence received by the Board heard evidence at the hearing from:

Franklin Maiava	Respondent
[omitted]	Complainants
[omitted]	*[omitted]*
[omitted]	Witness for the Complainant, *[omitted]*
[omitted]	Witness for the Complainant, *[omitted]*

[14] The complaint related to the construction of a renovation and extension to a residential dwelling by the Respondent for the Complainants under a building consent. The Respondent and Complainants were known to each other. The building work started on or about 20 August 2018 and came to an end on 3 May 2019 when the contract was cancelled by the Complainants. *[omitted]* carried on and completed the build.

[15] The Complainant's made a complaint about the quality and compliance of the building work carried out and/or supervised by the Respondent and that delays had caused consequential damage to the dwelling. They supplied photographs and descriptions of the noncompliant work in support of the complaint. They also complained that the Respondent had not provided them with a record of work following the cancellation of the Respondent's contract on 3 May 2019.

[16] As noted above the Board focused its investigations on the matters it considered reached the threshold for disciplinary action.

[17] The Respondent's position as regards the matters before the Board was that it was a contractual matter and that it did not come within the Board's jurisdiction and/or that the building work that was being complained about was incomplete.

<u>Piles</u>

[18] The complaint noted that the Respondent had not installed sufficient piles in an area at the back of the dwelling. The plans depicted three piles. The Respondent installed three piles as per the plans. The building consent authority passed the piles at an inspection.

[19] [omitted], who completed the build, stated that three piles was insufficient and that it was obvious that the span between piles was too long and that additional piles were required as the span fell outside of the maximum spans under NZS 3604. [omitted] stated that he made inquiries with the Designer who confirmed additional piles were required. The Designer advised him that he had not shown all of the required piles on the plans so as to avoid the plans becoming overly detailed.

Framing and Bracing

[20] The Complainant alleged the Respondent had used scrap timber for wall and roof framing, made changes to a window and had failed to install sufficient lintel support.

[21] The Board noted, in reviewing the photographs, that building wrap had not been installed and that, as the ribbon board for the soffit had been installed, the wrap could not be installed so as to run up and behind the ribbon board. The Respondent stated he had been installing building wrap where it did not go up and behind the ribbon board for 17 years and that the manner in which he installs the wrap is compliant with NZS 3604 as the area was a "shelter" as per figure 4.3(a) of standard.

[22] The consented plans showed a double layer of wrap with one layer running down from the top plate down behind the ribbon board.

[23] The Respondent noted that he was trying to get the roof on as fast as possible to weatherproof the residence indicating that work was being completed out of the normal sequence.

[24] Photographs showed:

(a) used timber being used as structural framing in areas where structurally graded timber with approved connections was mandated. The Respondent stated the work was only temporary;

(b) offcut blocks installed under purlins. The Respondent stated that the existing rafters were bowed and that the blocks were installed so as to straighten the purlins; and

(c) three stud support members for a steel beam were installed where the plans required five. The Respondent stated that the work was not complete.

Window Change

[25] The Complainants noted that a 2-metre opening shown on the plans as a bifold was changed to a 1.4-metre window by the Respondent. They gave evidence that the Respondent stated he would change it back to a bifold once the building consent authority had signed off on the work.

[26] The Respondent stated that change was necessary as the Designer had not completed a site measure and that as a result changes to the design were required. Those changes resulted in changes to the bracing plan such that the install of the bracing elements as per the amended plans meant that the 2 metre bifold could no longer be installed.

[27] The Respondent did not undertake any form of change process to make the change from a 2 metre bifold to a 1.4 metre window. He stated that he was going to process the change as a minor variation after the change had been completed.

[28] The Respondent was asked if he had considered consulting with the Designer on bracing changes rather than changing the opening. He stated that bracing changes would have required new calculations and so it was not pursued as an option.

Sub-Floor Load Points

[29] The issue arose as a result of the living room being 1.7 metres longer than was shown on the consented plans. This required reassessment of the locations of the associated point loads. The Respondent stated that he had carried out the work and that the Designer was working on a minor variation in relation to it. Mr Lithgow from the Council considered that the change might have required an amendment as opposed to minor variation. The Respondent was asked if he had considered what might have occurred if the changes he made had not been accepted and approved by the building consent authority. He stated that he had taken all the risk factors into account in deciding to proceed with the work prior to the change being processed and approved.

Sequencing and/or Incomplete Work

[30] [omitted] outlined issues that he noted when he took over the build. He gave evidence of missing framing, missing fixing points on a steel beam and work that was out of sequence making future work more difficult. In particular he noted missing framework around a door. The Respondent stated the door was only inserted as a temporary security measure. It was noted that the roof had been installed and that it would have been difficult to complete the work and that partial demolition would have been required to complete the work around the door in a competent manner. The Respondent stated that the roof was installed out of sequence for weatherproofing purposes. With regard to the steel beam the Respondent stated he completed it as per the engineering design.

Record of Work

[31] The Respondent provided his record of work at the hearing. He stated he had not provided it sooner as he thought he might be going back. He thought this might have occurred even though the contract had been cancelled and he had been trespassed from the site.

Closing Submission

[32] The Respondent reiterated that the work was not complete and noted that he had been prevented from returning to deal with or rectify issues.

[33] The Complainant noted the impact the Respondent's action had on them and on their financial wellbeing.

Board's Conclusion and Reasoning

[34] 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); and

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

and should be disciplined.

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

Negligence and/or Incompetence

[36] 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*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[37] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[9]. 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.

[38] 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[10]. 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[11].

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

> ***3 Purposes***
> *This Act has the following purposes:*

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

> *(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.*

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

[41] Turning to seriousness in *Collie v Nursing Council of New Zealand*[14] 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.*

[42] The Board considered the Respondent had been negligent in how he had carried out building work and in respect of how he managed changes to the building consent.

[43] In terms of the building work whilst there were design issues that were noted by the Board there were, notwithstanding, issues with the manner in which the building work was carried out by the Respondent as follows:

> (a) Piles – the Board considered that a reasonable practitioner would have identified that the span between them was too great and that additional piles were required. The Respondent should have contacted the Designer and sought instructions prior to proceeding with the work and installing bearers; and

[12] Section 17 of the Building Act 2004
[13] Section 40(1) of the Building Act 2004
[14] [2001] NZAR 74

(b) Sequencing – the Respondent submitted that work complained about was either temporary or incomplete. The Board accepts that, at times, work can be temporary in nature. In this instance it did not accept that the work shown was either. The manner in which the work had been carried out meant that more work that would have been required to complete it correctly in the first instance would have been required. The manner and sequence in which the work was carried out was not logical. The Board did not accept that there was an intention, in all instances, to put it right.

[44] As regards building consent changes the Respondent had a duty, if the building work could not be carried out in in accordance with the consented plans, to consult with the designer and/or the building consent authority to establish if the proposed change would still meet building code compliance requirements. This can be done by way of an application for a building consent amendment or, if minor in nature, a minor variation under section 45A of the Act. In this respect section 89 of the Act states:

> ***89 Licensed building practitioner must notify building consent authority of breaches of building consent***
>
> *(1) A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
> *(a) the territorial authority in whose district the building is situated; and*
> *(b) the owner.*
>
> *(2) The notification must—*
> *(a) state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
> *(b) state how the building work does not so comply; and*
> *(c) be given as soon as practicable after the licensed building practitioner forms that view.*

[45] The Respondent indicated that minor variations were being sought for changes that had already been completed. There is a requirement under section 40 of the Act, to build in accordance with the building consent. The Respondent did not do so. In essence he proceeded to make changes to the building consent without ensuring that the changes were approved and would meet the requirements of the building code. In failing to do so the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.

[46] 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.

Contrary to a Building Consent

[47] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[48] 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.

[49] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[50] If changes are made to what is stipulated in the building consent and the correct process for the change is not used then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established[15]. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[51] In this instance building wrap was not installed as per the consent, a 2-metre bifold door was changed to a 1.4-metre window and sub floor point load positions were changed. No process was used to ensure the changes were consented. As such the work that was completed was not in accordance with the building consent.

[15] *Blewman v Wilkinson* [1979] 2 NZLR 208

Record of Work

[52] 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[16].

[53] 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.

[54] The Board discussed issues with regard to records of work in its decision C2-01170[17] 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.

[55] 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.

[56] 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 …".

[57] 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. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.

[58] This is what has occurred in the present case. The contractual relationship came to an end and the Respondent was trespassed from the site on 3 May 2019. Notwithstanding his statement that the Respondent thought he might return to complete building work the Respondent had no intention nor ability to return and carry out any further restricted building work. Moreover, the owners had contacted another builder to complete the work. Given these circumstances the Respondent's restricted building work had, in effect, been completed and a record of work was due from 3 May 2019.

[59] A record of work was not provided till the hearing in December 2019. On this basis the disciplinary offence has been committed.

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

[60] 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. No good reasons have been advanced.

Penalty, Costs and Publication

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

[62] The Board sought submissions from the Respondent as regards penalty, costs and publication. The Respondent did not make any submissions but did note that he was able to pay a fine. He noted that he had incurred losses as a result of the matter.

Penalty

[63] 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*[18] 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.*

[64] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[19] 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.

[65] The Respondent has committed three disciplinary offences. There are no aggravating factors. There is some mitigation. The Board adopted a starting point of $3,500 which was consistent with penalties imposed by the Board in similar matters. Taking the mitigation into account, including that there were design issues which impacted on the Respondent, the Board has reduced the fine to $2,500.

[18] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

[66] 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."

[67] 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[20].

[68] In *Collie v Nursing Council of New Zealand*[21] 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.*

[69] Based on the above the Board's costs order is that the Respondent pay the sum of $2,250 toward the costs of and incidental to the Board's inquiry.

Publication

[70] 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[22]. 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.*

[71] 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.

[72] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[23]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[24]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[25]. The High Court provided

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

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[26].

[73] 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[27]. 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.

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

Section 318 Order

[75] 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 $2,250 (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.

[76] 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

[77] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **28 February 2020**. 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.

[78] 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.

---

[26] ibid

[27] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 7th day of February 2020

Richard Merrifield
Presiding Member

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

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

(a) do both of the following things:

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

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

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

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

(d) order that the person be censured:

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

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

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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