

Before the Building Practitioners Board

	BPB Complaint No. CB25304
Licensed Building Practitioner:	Stuart McArthur (the Respondent)
Licence Number:	BP 129234
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:	27 October 2020
Decision Date:	2 November 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member Chair (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site AOP 2
Frank Thomas, LBP, Roofing

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 disciplinary offences under section 317(1)(b) and 317(1)(d) of the Act.

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

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Summary of the Board’s Decision

[1] The Respondent has been negligent and has carried out building work contrary to a building consent. He is fined \$2,000 and ordered to pay costs of \$1,750.

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:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, he may have:
- carried out or supervised the building work identified in Part 4 of the complaint (page 17 of the Board’s file) in an unacceptable manner;

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

- failed to ensure all required building consent authority and engineer inspections were carried out, and all building consent authority directions were complied with including the requirement to have stamped plans on-site; and/or
 - failed to ensure building consent amendments and/or variations were managed in an acceptable manner;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act in respect of the matters identified above; and/or
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

Function of Disciplinary Action

[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

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

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.
- [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.

Consolidation

- [10] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the Licensed Building Practitioner in respect of each complaint agree to the consolidation.
- [11] The Board sought agreement for consolidation of this matter with Board Inquiry number CB25494. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [12] 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

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

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

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[13] 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.

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

Stuart McArthur	Respondent
<i>[Omitted]</i>	Licensed Building Practitioner, respondent in the consolidated matter
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	Engineer for the build
<i>[Omitted]</i>	Licensed Building Practitioner (Carpentry), remedial builder

[15] The Complainant engaged Stuart McArthur of McArthur Residential Limited to carry out an alteration and addition to an existing residential dwelling. A building consent had been issued for the building work.

[16] McArthur Residential subcontracted the work to *[Omitted]* of *[Omitted]*. The bulk of the work complained about was carried out by *[Omitted]*. The Respondent took the position that:

I understand that McArthur Residential Ltd and [Omitted] have financial issues to resolve, however this is not an LBP matter and I should not be penalised for work I did not complete. I believed that [Omitted] was a competent builder due to holding his own LBP registration and I assumed it wasn't necessary to check his work.

[17] It was on the basis of that response that the Board initiated a Board Inquiry into *[Omitted]*.

[18] The matters complained about, which the Board further investigated, were, as stated in the complaint:

- 1. Beam across the kitchen was undersized and not as per the engineers drawings, we subsequently had to install two new hispan beams adjacent to the beam installed by the previous builder and continue framing to pick up the ceiling runners that were loading onto the beam. We also had to put extra fixings through the wall structures including threaded rods and 15 kN hold downs at the lounge room end of the wall supporting the beam.*

2. *There was no pile under one end of the wall where another beam loaded down at the hallway end of the kitchen and as such we had to excavate for and install a pile for the point load of that beam. The engineer is [Omitted] who was the same engineer who did the design for the beams and he was satisfied with how we had completed the framing to meet his new requirements.*
3. *The plans showed that the wall framing was to have studs at 400mm centres but they had on most of the new walls been affixed at 600mm centres and as such we had to cut nogs, re route some electrics and fit extra studs to several of the walls. The bottom plate had been doubled up along most of the walls but did not have sufficient nailing and required extra nailing.*
4. *The new windows and doors and the relocated windows needed to be taken out as there was no gap under the sill flashing and in many cases no head flashings and the gap between the window jamb and the framing exceeded the 10-15mm threshold even up to as much as having 40mm gaps. In some cases the sill flashings had actually been nailed up to the underside of the window sills. The result in raising these windows ensuring the sill gaps between flashing and sill of 5mm was achieved required that all the weatherboards were removed above the windows to allow for head flashings to be installed correctly, new scribes and painting of new weatherboards and timber work.*

[19] At the hearing, the Respondent gave evidence that he did assist with the installation of beams, which were one of the matters complained about, and that he helped lift windows in place. Other than that building work, the Respondent stated he was involved in organising the job and the procurement of materials. The evidence before the Board was that he was also involved in on-site decision making and issuing directions as to how the work was to be carried out.

[20] The Board had also noted, in reviewing the documentation provided, that Council inspections had not been called for or carried out whilst the Respondent and [Omitted] were involved with the building work.

[21] [Omitted], who, as noted, carried out the bulk of the work, gave evidence that he did not have a copy of, or access to, the building consent. He stated that he asked the Respondent for it but it was not provided. [Omitted] evidence was that he had an old set of plans and the Engineer's preliminary drawings and that he carried out the building work in the manner which he considered was appropriate. [Omitted] stated that he did not call for inspections as he was not aware of the inspection schedule provided for in the building consent and did not have the building consent number and so could not book inspections. [Omitted] stated he was asking the Respondent to call for inspection. A Council inspection on 24 August 2018 noted:

Exterior cladding is weather tight however no pre wrap/pre clad inspections where carried out.

- [22] In terms of the kitchen beams, evidence was received that, prior to their installation, an on-site meeting was held with *[Omitted]*, the Engineer. The meeting was called for by the Respondent. The ceiling structure had been exposed, and it was decided that the beam structure could be rationalised and that the install could be carried out in a manner which negated having the beams visible below the ceiling line. The beams that were installed were ordered by the Respondent following the meeting with *[Omitted]*.
- [23] *[Omitted]* gave evidence that the incorrect beams had been installed and that the lateral support was not as per his design and specifications, in that there was at least one missing end support strap. The form of complaint also noted threaded rods were missing. *[Omitted]* stated that two 150mm by 45mm timbers were, on his instructions, added to what had been installed. He noted that when the site meeting was held to discuss rationalising the beams, he did not agree to or issue instructions to reduce the timber sizes. The Respondent and *[Omitted]* noted that the missing strap was not difficult to rectify.
- [24] In his response to the complaint, the Respondent stated:
- I dispute that the beam was undersized. A visit from the engineer concluded that he was satisfied with the change of beam. This should be evidenced in his site reports.*
- [25] *[Omitted]* was not able to provide any site reports. *[Omitted]* noted that the undersized beams had bowed under the load they were carrying.
- [26] In a written response to the Board Inquiry into *[Omitted]* he noted:
- The beam - The beams were moved to get them into the ceiling cavity so that the ceiling could be at one level with no beams hanging down therefore I installed the beam as supplied by McArthur Residential Ltd and installed as per discussion with Stuart who advised that he had discussed this option with the owner and with the engineer . On the site visit with engineer he was shown the installed beam and he was quite happy with the size and position of the beam just needed a couple more tie downs which was done as requested. The engineer was to draw up a new plan to show the position of beams and new loadings.*
- [27] With regard to the record of work the evidence received was that the Respondent offered a record of work but that it was rejected by the Building Consent Authority.

Board's Conclusion and Reasoning

[28] 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) 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 **should** be disciplined.

[29] The Board has decided that the Respondent **has not** 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).

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

Negligence

[31] 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 Courts⁸.

[32] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁹. 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.

[33] 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 Act¹⁰. 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 practitioner¹¹.

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

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

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.*

[35] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. 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.

[36] In this instance the Respondent was responsible, as the lead contractor and as a Licensed Building Practitioner involved in the building work, for ensuring that the building consent was provided, was on-site at all times and that the building work was carried out in accordance with it. The Respondent should have also ensured that inspections were carried out. The Respondent did not ensure that any of these obligations or responsibilities were complied with.

[37] In this respect section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders and section 14E of the Act states:

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act;*
and
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[38] 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.

[39] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent had departed from what the Board considers to be an accepted standard of conduct when he failed to ensure the building consent was on-site and that the building work was carried out in accordance with it and when he failed to ensure inspection were called for as work progressed.

Contrary to a Building Consent

[40] 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.*

[41] 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.

¹⁴ [2001] NZAR 74

- [42] 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.
- [43] The Respondent carried out building work in relation to beams and framing that was not in accordance with the building consent. He also carried out work on windows, but the Board decided that there was insufficient evidence as regards the matter. In terms of the missing pile, the Board accepted that the Respondent was not aware of the requirement but notes that if had of had the building consent on site he would have.
- [44] Unlike negligence, contrary to a building consent is a 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 established¹⁵. On this basis, the Board finds that the disciplinary offence has been committed.
- [45] There is an element of duplication with the finding of negligence. That will be taken into account when considering penalty.

Record of Work

- [46] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁶.
- [47] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [48] The 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.
- [49] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁷ “... the only relevant

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

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ [2018] NZHC 1662 at para 50

precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [50] As to when completion will have occurred is a question of fact in each case. In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion.
- [51] In this instance a record of work was offered but was rejected by the Territorial Authority. One was required but based on the position taken by the Territorial Authority, the Board has decided it will not further consider the matter.
- [52] The Respondent should note, for the future, that the requirement is on the Licensed Building Practitioner to provide a record of work, not on the owner or Territorial Authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations. He should also note that a record of work is required from each and every Licensed Building Practitioner who carries out or supervises restricted building work, no matter how small or limited the work is.

Penalty, Costs and Publication

- [53] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [54] 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

- [55] 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.

- [56] 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

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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.

- [57] The Board considered that a starting point of a fine of \$2,000 was appropriate. The Board took into account that the Respondent was not the person who carried out the majority of the building work but that he was the overall head contractor.

Costs

- [58] 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.”

- [59] 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 case²⁰.

- [60] 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.

- [61] The Board’s scale of costs for a half-day hearing is \$3,500. The matter proceeded as a consolidated hearing. It is appropriate that each respondent pay one-half of the costs. Based on this and the above the Board’s costs order is that the Respondent is to pay the sum of \$1,750 toward the costs of and incidental to the Board’s inquiry, being half of the total costs of \$3,500.

Publication

- [62] 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 Act²². 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.

- [63] 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

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

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

- [64] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. 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*²⁶.
- [65] 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 interest²⁷. 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.
- [66] Based on the above, the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,750 (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.

- [68] 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.

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

²⁶ *ibid*

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

Submissions on Penalty, Costs and Publication

- [69] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Monday 7 December 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.
- [70] 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

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

Signed and dated this 16th day of November 2020



M.J. Orange
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.*

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- (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.*