

## Before the Building Practitioners Board

	BPB Complaint No. CB25364
Licensed Building Practitioner:	Steven Moke (the Respondent)
Licence Number:	BP 132945
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Hamilton
Hearing Type:	In Person
Hearing Date:	9 July 2020
Decision Date:	20 July 2020

#### Board Members Present:

Chris Preston, Chair (Presiding)  
Mel Orange, Deputy Chair, Legal Member  
David Fabish, LBP, Carpentry and Site AOP 2  
Bob Monteith, LBP, Carpentry and Site 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)(d) of the Act.

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## Introduction

- [1] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at *[Omitted]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
  - (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.
- [2] In further investigating the allegations under section 317(1)(b) and section 317(1)(d) of the Act the Board will, at the hearing, focus on the issues noted in paragraph 5.16 of the Registrar’s Report and those identified in the Notice to Fix that was issued.

## 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

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

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

- [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*<sup>4</sup> Collins J. noted that:

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

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

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

- [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 is 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.

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

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

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

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

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

**Evidence**

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

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

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

Steven Moke	Respondent
<i>[Omitted]</i>	Witness for the Respondent, LBP, <i>[Omitted]</i>
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	Summoned witness
<i>[Omitted]</i>	Summoned witness, remedial builder
<i>[Omitted]</i>	Summoned witness, building consultant

- [13] The Respondent was engaged to carry out the build of a pole shed with residential accommodation by *[Omitted]*. Following completion and the Respondent providing a record of work which stated that he had supervised all of the aspects of the build, a Notice to Fix was issued by the Council. It noted various concerns, supported by photographs. The listed issues were:

1. Roofing not as per approved plans, incorrect lap to roof lights (clear roofing sheets), which appears to be allowing water to enter.
2. Roofing building paper behind exterior wall cladding to open canopy area.
3. No head flashings to shed doors.
4. Internal corner flashings, no turn downs to cladding and back flashing as per approved plans.
5. No bird beak to barge flashings, as per approved plans.

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

6. Wall cladding/berge cover not as required.
7. Lap (roofing) not as per manufacturer's specifications. Product not suitable for the pitch of the roof.
8. No turn downs to roof, no birds beak to exterior (flashing) as per approved plans.
9. No tape to head flashings as per approved plans/manufacturer's specifications for Ecoply barrier.
10. Water sitting on top of roof building paper by roof light.
11. Windows not as per approved plans.
12. Window flashings not as per approved plans.

[14] Notwithstanding the issues noted the Council had not, during the build, identified the items listed above or failed the inspections that were undertaken by it.

[15] The Complainant also provided detail of issues noted with the build supported by photographs.

[16] At the hearing, the Board heard evidence that the Respondent supervised the set out of the shed but that the foundations were completed by *[Omitted]* who did not provide a record of work for his restricted building work. In setting out the shed, an error was made which resulted in the shed being one metre longer than designed or consented. This had a flow-on effect during the build as the materials ordered and supplied by *[Omitted]* were based on the consented design. Whilst direct evidence was not heard that the roofing and cladding materials were stretched to cover the extra metre it was apparent that this was the case as the laps on each sheet had been reduced which would have increased the coverage of the roofing and cladding materials.

[17] The Council witness noted that the increased dimensions should have been dealt with as a formal amendment to the building consent. The Respondent did not consult with the designer of the Council with regard to the change.

[18] The Respondent stated, with regard to materials, that he simply installed what was supplied by *[Omitted]*. He did not check that the materials reflected the building consent. This included not checking that the correct roofing material had been supplied or the correct garage door. With respect to the latter, the Respondent was aware that the door was incorrect as he made changes to the opening for the door.

[19] The Respondent did not carry out the work. He supervised up to eight employees who worked on-site. Three were qualified but not licensed builders; the others were hammer hands. He stated he visited the site two to three times a month and was otherwise in contact with on-site staff by phone and in meetings. Evidence was heard that the on-site staff did not have full copies of the building consent documents. The Respondent was not sure if he checked the building work completed

prior to Council inspections. He had 6-10 other jobs on at the same time, two of which he was also supervising.

[20] The Board heard evidence that *[Omitted]* dealt mainly with non-habitable sheds. The building for the Complainant was one of a few that they had completed.

[21] The Board questioned the witnesses as regards the compliance issues noted. The non-compliance of the building work was not disputed. The Respondent did take the position that he had not been given the opportunity to return and remediate the non-compliant building work but accepted that he could have provided better supervision.

### **Board's Conclusion and Reasoning**

[22] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent **and** 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 **should** be disciplined.

### Negligence and/or Incompetence

[23] The finding relates to the Respondent's supervision of non-licensed persons.

[24] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>7</sup> 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.*

[25] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>8</sup> test of negligence which has been adopted by the New Zealand Courts<sup>9</sup>.

[26] 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*<sup>10</sup> it was stated as "*an inability to do the job*".

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<sup>7</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>8</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

<sup>10</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

- [27] The New Zealand Courts have stated that assessment of negligence and or incompetence in a disciplinary context is a two-stage test<sup>11</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [28] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>12</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>13</sup>.
- [29] 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.*

- [30] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>14</sup> and be carried out in accordance with a building consent<sup>15</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>14</sup> Section 17 of the Building Act 2004

<sup>15</sup> Section 40(1) of the Building Act 2004

- [31] There was substantial and detailed evidence of serious non-compliant building work by way of the Notice to Fix. The Board was satisfied that the work was non-compliant and that it was completed under the Respondent's supervision.
- [32] The Respondent took the position that he would, if given the opportunity, have rectified the non-compliance. The Board considers the non-compliance should not have occurred in the first place. It was also clear that much of it arose from the decision to not deal with the incorrect set out which added a metre to the dimension.
- [33] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing,<sup>16</sup> it was noted by the responsible Minister:

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

- [34] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation<sup>17</sup>:

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

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

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<sup>16</sup> Hansard volume 669: Page 16053

<sup>17</sup> Hansard volume 669: Page 16053

*authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

- [35] 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. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

**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.*
- (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.*

- [36] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from. This was clearly not occurring.

- [37] The Respondent was supervising, not carrying out. With regard to supervision, the term supervise is defined in section 7<sup>18</sup> of the Act. The definition states:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

- [38] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level

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<sup>18</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

of supervision required will depend on a number of circumstances, but ultimately the Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance. In this instance, there was a very high level of non-compliance.

- [39] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992<sup>19</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the Court are instructive. In the case Judge Tompkins stated at paragraph 24:

*“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

- [40] As noted above, the Respondent was ignorant of the issues that arose in the Notice to Fix. He failed, in a very fundamental way, in his duties as a supervisor. The on-site issues would have been patently obvious. Immediate action should have been taken but was not.
- [41] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has both departed from what the Board considers to be an accepted standard of conduct and that he has failed to display skills required to be a licensed building practitioner. The Board further finds that the Respondent’s conduct was sufficiently serious to warrant a disciplinary outcome.

#### Contrary to a Building Consent

- [42] 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.

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<sup>19</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- (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.*

- [43] 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.
- [44] The Notice to Fix noted serious non-compliance and failures to build in accordance with the building consent. As a result, the building was leaking. On this basis, the Board finds that the disciplinary offence has been committed.

### **Penalty, Costs and Publication**

- [45] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [46] 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

- [47] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>20</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [48] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>21</sup>. The High Court, when discussing penalty, stated:

*[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is*

<sup>20</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>21</sup> [2012] NZAR 481

*whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

- [49] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [50] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>22</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they 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.
- [51] The Respondent has committed two disciplinary offences. The Board does, however, note the commonality in the disciplinary offending in the negligence/incompetence finding and the finding as regards building contrary to a consent. As such, it will treat those as a single offence.
- [52] The most serious matter before the Board was the finding of incompetence. As noted above incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. The licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities.
- [53] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [54] The Respondent has failed to understand that as a Licensed Building Practitioner, he is responsible for his work as well as the work of those under his supervision. He has shown little if any understanding of the licensing regime under which he carried out restricted building work.
- [55] Taking all of the above factors into account, the Board considered cancellation or suspension. The Board noted, however, that the findings related to supervision and a

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<sup>22</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

lack of process and understanding of the role of a supervisor. Given this the Board considers that training in supervision would benefit the Respondent.

- [56] The training to be undertaken is the BCITO New Zealand Certificate in Construction Trades (Supervisor) Level 4. It is to be completed to the satisfaction of the Registrar and evidence of successful completion is to be provided to the Registrar as part of satisfying this requirement. The training is to be completed at the Respondent's own cost and within 18 months of this order being made.

### Costs

- [57] 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."
- [58] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>23</sup>.
- [59] In *Collie v Nursing Council of New Zealand*<sup>24</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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

- [60] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a half-day hearing of a matter of this type. It is less than 50% of actual costs.

### Publication

- [61] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>25</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

- [62] 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

<sup>23</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>24</sup> [2001] NZAR 74

<sup>25</sup> 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.

- [63] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>26</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>27</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>28</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>29</sup>.
- [64] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>30</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [65] Based on the above, the Board will order further publication by way of Code Words and the Board's website. The Respondent will be named.

### Section 318 Order

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

- Penalty:** In respect of the disciplinary offending under section 317(1)(b) and 317(1)(d) of the Act the Respondent is ordered to complete a specified course of training pursuant to section 317(1)(e) of the Act which shall be the BCITO Construction Trades (Supervisor) Level 4 qualification which is to be completed to the satisfaction of the Registrar within 18 months of this order; and
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.
- In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

- [67] 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.

<sup>26</sup> Section 14 of the Act

<sup>27</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>28</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>29</sup> *ibid*

<sup>30</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [68] The Respondent should note that if the Respondent fails to comply with the Board's training order within the time-frame indicated then it will suspend the Respondent's licence in accordance with section 318(1)(b) until the earlier of the training being satisfactorily completed or the expiry of a period of 18 months.

### **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 **04 September 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 Act<sup>ii</sup>.

Signed and dated this 14<sup>th</sup> day of August 2020



**Chris Preston**  
Presiding Member

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

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
- (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
- (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
- (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (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.*