

## Before the Building Practitioners Board

	BPB Complaint No. CB25169
Licensed Building Practitioner:	Tony Pryce (the Respondent)
Licence Number:	BP 109432
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	New Plymouth
Hearing Type:	In Person
Hearing Date:	15 October 2020
Decision Date:	23 October 2020

#### Board Members Present:

Chris Preston, Chair (Presiding)  
David Fabish, LBP, Carpentry and Site AOP 2  
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.

#### Disciplinary Finding:

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

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**Summary of the Board’s Decision**

[1] The Respondent has carried out and supervised building work in a negligent manner, has carried out and supervised building work that was not in accordance with the building consent and has failed to provide a record of work on completion of restricted building work. He is fined \$5,000 and ordered to pay costs of \$2,000.

**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 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; and

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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.

- (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.

- [3] The Board gave notice that the matters it would focus on and further investigate at a hearing were those outlined in the report from *[Omitted]* dated 20 March 2019 including that building work requiring an amendment to the building consent may have been carried out prior to the amendment being granted.

### Function of Disciplinary Action

- [4] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [5] 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.”*

- [6] 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<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.*

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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

- [7] 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.
- [8] 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**

- [9] 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.
- [10] 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**

- [11] 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.
- [12] The Board sought agreement for consolidation of this matter with Board Inquiry number CB25419. The consent of all those involved was forthcoming. The two matters were consolidated.

### **Evidence**

- [13] 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.
- [14] 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.

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

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

Tony Pryce	Respondent
<i>[Omitted]</i>	LBP, Roofing, respondent in CB25419
<i>[Omitted]</i>	Complainant, summonsed witness
<i>[Omitted]</i>	LBP, Design AoP 2, summonsed witness
<i>[Omitted]</i>	Witness for the <i>[Omitted]</i> , Director of Central Roofing

[16] The Respondent confirmed that he supervised a number of builders on-site and that one of them had approximately six years' of experience. The supervision he undertook consisted of site visits most days for approximately half an hour to two hours to discuss progress and any issues the team were having.

[17] The work his team was responsible for, and which was complained about, included the installation of the windows, the installation of stacker doors with no WANZ bar, and barge boards that were installed with tek screws directly into the wall cladding.

[18] In addition to the above, the Board raised the issue of a lack of structural connections used to secure the roof framing. This evidence was provided just before the hearing. The Presiding Member sought the Respondent's consent to deal with the matter at the hearing. The Respondent agreed to it being dealt with and, based on the evidence before the Board, accepted that there was a lack of structural connections and that it was not compliant with the Building Consent or the Building Code.

[19] The Respondent gave evidence that he thought his team had only tacked windows in place so they could be removed to allow the cladding and flashings to be installed by the roofer, *[Omitted]*, but that he could not be sure of this.

[20] *[Omitted]* gave evidence that the windows were permanently fixed and that foam sealant had been fitted. He stated that there had been a sequencing issue with respect to the installation of the windows which made it very difficult to fix the cladding and flashings in a compliant manner, and that it was hard to contact the builder to get this issue resolved.

[21] In the case of the WANZ bar the Respondent gave evidence that the home owner had asked for the window to be pushed out from the building line and that he had used some packers to do this but that some of the window was still resting on, and was supported by, the foundation. He felt this would provide sufficient support for the window.

[22] The Respondent also accepted that he had not installed any sill flashings or waterproof membrane under the external doors and that building wrap was not installed over the head flashings as shown on the consented drawings.

- [23] The Respondent stated that while he had arranged for *[Omitted]* to quote and arrange for the installation of the roofing and cladding, which was then subcontracted to *[Omitted]*, he had little or no contact with them in regards the work they undertook.
- [24] With regard to the record of work the Respondent said he was working to resolve the issues with the homeowners and, as such, the work had not been completed and that he was, therefore, not required to provide a record of work. He accepted that resolution was not possible and that some time had elapsed from that point (in or about late August 2017) and that he still failed to provide a record of work. One was not provided until 21 March 2019.

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

- [25] 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);
  - (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.

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

#### Negligent Building Work.

- [27] The Board's decision that the Respondent has been negligent relates to both the manner in which building work was carried out and to his supervision of un-licensed persons.
- [28] 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>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

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<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [29] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>9</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.
- [30] 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>10</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>11</sup>.
- [31] 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.*

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

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

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>12</sup> Section 17 of the Building Act 2004

<sup>13</sup> Section 40(1) of the Building Act 2004

- [33] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>14</sup> the Court noted, as regards the threshold for disciplinary matters, that:

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

- [34] The building work that the Board found had been carried out in a negligent manner was the lack of structural connections in the roof amounted to negligent building work, the failure to install building wrap and the lack of support for stacker doors where WANZ bars should have installed, or as a minimum more packing to support very heavy doors should have been installed.

- [35] In terms of supervision, the term is defined in section 7<sup>15</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.*

- [36] 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 of supervision required will depend on a number of circumstances including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

- [37] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

- [38] 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>16</sup>. The

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<sup>14</sup> [2001] NZAR 74

<sup>15</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.*

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.”*

- [39] The Respondent gave evidence that he visited the site most days for approximately half an hour to two hours to check on progress and answer questions from his team. The Board was of the view that this was not sufficient time to provide supervision of the work being undertaken. The Result was poor sequencing of the work and the permanent fixing of the windows prior to the cladding being fixed, the barge board being fixed prior to the cladding being fixed and the lack of strapping of the lack of structural connections to the roof.
- [40] As the responsible licenced person, it is expected that adequate supervision is provided to make sure critical aspects of the building work are done correctly , to the Building Code and the Building Consent.
- [41] 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

- [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.*
- (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*

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<sup>16</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

*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] 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.
- [45] 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 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 established<sup>17</sup>.
- [46] In this case, the missing structural connections in the roof did not comply with the Building Consent. Moreover, this was only discovered when the cladding had been removed and, as such, it was a serious contravention. The lack of structural connections could have created a serious risk to the integrity in the case of high winds and was, therefore, a safety issue.

#### Record of Work

- [47] 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<sup>18</sup>.
- [48] 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.
- [49] The Board discussed issues with regard to records of work in its decision C2-01170<sup>19</sup> 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

<sup>17</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>18</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>19</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [50] 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.
- [51] 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*<sup>20</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [52] As to when completion will have occurred is a question of fact in each case.
- [53] 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. Completion occurred, at the latest, in August 2017. A record of work was not provided until March 2019. On this basis, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [54] 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.
- [55] In this instance, there was an ongoing dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [56] The Respondent should also note 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.

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

- [57] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an

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<sup>20</sup> [2018] NZHC 1662 at para 50

opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

[58] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>21</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.*

[59] 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[60] Based on the above, the Board’s penalty decision is that the Respondent be fined the sum of \$5,000. The Board was of the view that the penalty should be at the higher end given the lack of supervision, the disregard for other trades on site in terms of sequencing of the work and the very real risk to safety due to the the lack of strapping to the roof.

### Costs

[61] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

[62] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>23</sup>.

[63] 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:

<sup>21</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

<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

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

- [64] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. The Board's scale for a half-day hearing is \$3,500. Given that the matter was consolidated the Board decided to reduce the costs to \$2,000. This is less than 50% of actual costs.

#### Publication

- [65] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the 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.*

- [66] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [67] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 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>.
- [68] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public 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.
- [69] Based on the above, the Board will not order further publication.

#### **Section 318 Order**

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

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<sup>25</sup> Refer sections 298, 299 and 301 of the Act

<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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$5,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[71] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

#### **Submissions on Penalty, Costs and Publication**


[72] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **02 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.

[73] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

## Right of Appeal

[74] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>i</sup>.

Signed and dated this 11<sup>th</sup> day of November 2020



**Chris Preston**  
Presiding Member

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<sup>i</sup> **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.