Before the Building Practitioners Board

	BPB Complaint No. C2-01939
Licensed Building Practitioner:	Geresoma Revake (the Respondent)
Licence Number:	BP 128971
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	28 November 2018
Decision Date:	19 December 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

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

Contents

Introduction

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

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

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

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

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

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

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

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

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

Evidence

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

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

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

Geresoma Revake	Respondent
[Omitted]	Complainant
[Omitted]	Witness, Roofing Consultant
[Omitted]	Witness, Building Surveyor

[8] The Respondent was engaged by the Complainant to build an extension to an existing dwelling and to construct a minor dwelling under a building consent and to complete a partial reroof of the residence. The building work, which included restricted building work, commenced in September 2017. The Respondent's involvement in the project came to an end in or about mid-March 2018.

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

[9] The Complainant raised issued with the quality and compliance of the building work. The Complainant engaged [Omitted], Building Surveyors, to review the building work. [Omitted] completed a snag list. He noted the following issues:

Area	**Issues**
Roof Iron	• Badly scratched • Ridge capping not straight on unit • Ridge capping poorly finished on house relying on copious amounts of silicone • Metal valley sitting hard on membrane -will likely cut in time • New and old holes in roofing and capping relying on silicone end of ridge flashing poorly finished at roof edge • Base of valley poorly finished • End of soffit on unit not square/plumb Ends of fascia not mitred • Tops of barge boards not protected with flashing Ends of barge boards not protected with flashing
Existing Fascia Board	Not cut plumb on garden side
Barge flashing driveway side	Doesn’t match existing
Weatherboards	• Generally Overcut for head flashings Generally Gap above head flashing poorly cut • Overcut for sill flashing on main house laundry window Generally Overcut for waste pipe and other pipe penetrations Overcut for gas pipes and no boot flashing provided • Scribers pushed hard up against underside of head flashing causing it to bow • Weatherboards not aligned at jointer junctions Edges of boards broken in areas • Weatherboard(s) above new bifold has many punctured holes will need replacing
Joinery	• Jamb liners not purchased with required depth • New bifold not fitted into existing opening correctly
Corner boxes	• Cut to accommodate deck framing
Retention tank	• Pad not retained
General	• Eaves mould split and not continuous • Finish of existing soffit to new poorly carried out • Base boards smashed on comer as pocket lifted off track Existing weatherboard damaged on driveway side

Area	Issues
	• Lead flashing reused on vent pipe no back flashing under as required • Poor finishing of junction off new dining to existing room Deck framing doesn't appear level • New deck senton piles poorly cut to accept new deck bearer Joists not joist hung • Deck bearer/ribbon plate not 12mm of weatherboard Fence post footings undermined • Concrete pad hard up against cladding base Pantry cavity slider door and frame not plumb Kitchen end panel placed on uneven floor • Dining floor uneven

[10] The Board was also provided with the Auckland Council Site Meeting records of 19 April 2018 completed following the Respondent's involvement and prior to another builder taking the job over. It noted the following:

> *It appears that the box gutter has not been constructed to consented plans. The Viking enviroclad IPO membrane has not been installed as per the consent and proof that it is the consented product is required. The skylight has not been installed a minor variation is needed. The deck has not been constructed to the consented plans amended design is required. There has been a retaining wall constructed on the south and east boundary lines.*
>
> *Note the east wall is supporting the water tank, the railings are none compliant. The south side should be designed to 12kpa as there is a ROW next door. The box comers are not as per the consent. The connection details for the deck to the new and existing houses have not been followed. The area of decking has been increased amended plans needed.*
>
> *There has been an inspection carried out by [Omitted] I concur with most of the comments made.*
>
> *The standards of workmanship on this project is not up to a level one would expect of a LBP. The owner will need to get an engineer involved to redesign the two retaining walls. The box gutter will need to be reconstructed to conform to the building consent . The deck will need to be rebuilt to the consent, or amended plans forwarded for approval to council.*

[11] The Auckland Council record also noted the following issues which were supported by photographs:

- *Gap under the weatherboards by the power meter;*
- *Damage around the hose tap;*
- *Damage to the weatherboards under the water heater;*
- *No wash down gap;*

- *No joist hangers;*
- *Underside of the gutter not finished;*
- *Sheet lapped incorrectly existing; and*
- *Door jamb splayed and twisted.*

[12] The record also noted:

> *The owner will need to get an engineer involved to redesign the two retaining walls. The box gutter will need to be reconstructed to conform to the building consent.*
>
> *The deck will need to be rebuilt to the consent, or amended plans forwarded for approval to council.*

[13] The Complainant also obtained a report from [Omitted]. [Omitted]'s report of 25 June 2018 noted multiple issues with the coloursteel and membrane roofing and with the flashings. He summarised his findings as follows:

> 1. *The roof installation as it stands could not be considered as up to an acceptable industry standard both with regards to the standard of workmanship and compliance with the Building Code, E2/AS1 and the New Zealand Metal Roof and Wall Cladding Code of Practice.*
> 2. *Considerable remedial work is required with regards valley, ridge and barge flashings and replacing scratched sheets along with roofing with numerous sealant filled holes.*
> 3. *The standard of fixing the existing roofing along the northern side of the central gutter also requires repair work to ensure it remains watertight for the remainder of its practical, serviceable life.*
> 4. *The gutter has been lined with a grey butyl membrane as against the TPO in the Specification.*
>
>   *From the writer's experience, there appears no reason why this membrane should not perform satisfactorily or comparably with a TPO, but as discussed on site, the Council records would need to be updated to record the change.*

[14] The Complainant also noted that the Respondent had not provided a record of work. One was requested on 15 March 2018. The response received was as follows:

> *You got to remember you have ccc papers also to apply for. I hope the guys who did your list [[Omitted] Report] will sign it for you.*

[15] The Respondent provided the following as his response to the Complaint:

> *My apologies for the bad workmanship of installing the roof, there is no one to blame by myself which I supposedly supervising.*

I have acknowledged to the owner before the complaint that I will be reroofing what previously been installed.

I have offered to reroof but I was told not to go ahead.

[16] The Respondent did not provide a response to the allegation that he had not provided a record of work. At the hearing he stated that he did send the record of work when asked by email but only to the owner. A direction was given that he supply evidence of the record of work being sent by 30 November 2018. The Respondent provided a record of work dated 28 May 2018 and an email showing it was sent on 29 May 2018.

[17] At the hearing [Omitted] outlined his expertise, confirmed his report and findings and spoke to his report. [Omitted] also outlined his expertise and spoke to his findings noting that he had not been engaged to do a full report.

[18] The Respondent stated that it was a rush job and that as his regular roofer was not available he engaged an unlicensed contractor to do the work. The Respondent was working on another site when the roofing was carried out.

[19] The Respondent stated that he did carry out some of the carpentry work and that he had other staff onsite. He estimated he was on site approximately 80% of the time.

[20] The retaining wall for the tank was discussed. It was not part of the consent but it noted that there was a surcharge from a driveway above so a building consent would have been required.

[21] With regard to the deck the Respondent stated it was not part of the plans and that it was built to match an existing deck. The Respondent considered that as it was not part of the building consent, it did not have to meet the required standards and it just had not been correctly built. He also noted that it had not been finished and that there had been issues with the builder who was doing the work.

[22] The Respondent generally stated as regards the carpentry work that it was not complete and that issues would have been rectified as part of completion. He was not able to identify his process for establishing what was sub-standard or how he was going to address such issues.

[23] The Respondent also noted that the building work ended up being more than he had originally priced and that this impacted on his ability to complete it.

Board's Conclusion and Reasoning

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

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

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

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

and should be disciplined.

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

Negligence and/or Incompetence

[26] Negligence and incompetence are not the same. In *Beattie v Far North Council*[6] 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.*

[27] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[28] 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*[9] it was stated as *"an inability to do the job"*.

[29] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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[11]. 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

[6] Judge McElrea, DC Whangarei, CIV-2011-088-313
[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] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[11] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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[12].

[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[13] and be carried out in accordance with a building consent[14]. 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.

[33] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] 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.*

[34] The Respondent both carried out and supervised the building work. What was completed was done poorly and in a non-complaint manner. The Respondent's general position of the work not being completed and/or that it could have been fixed is not acceptable. The Respondent should have been aiming to ensure the building work should have been done right the first time. There is no logic to carrying out building work in a non-complainant or sub—standard manner and then having to

[12] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74

redo it so as to make it compliant. Additionally the Respondent did not identify the issues himself. He did not have any form of a process in place to ensure that the building work was completed to an acceptable standard. Therefore there is no substance to the claim that he would have made it right.

[35] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent in that he 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.

[36] The Board has also decided that the Respondent's supervision processes were inadequate and that he has been negligent with respect to his supervision.

[37] Supervise is defined in section 7[16] 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] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[17]. 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."*

[39] It was clear to the Board that the Respondent did not meet the above supervision requirements.

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[16] 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.

[17] *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Contrary to a Building Consent

[40] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[41] In *Tan v Auckland Council*[18] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[42] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[43] The building consent authority records that were before the Board showed several items where the building work had not been completed as per the building consent. There was also clear evidence in the records of departures from the building consent and a failure to obtain amendments and/or minor variations to the building consent. The disciplinary charge is therefore upheld.

Record of Work

[44] 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[19].

[45] 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.

[46] The Board discussed issues with regard to records of work in its decision C2-01170[20] 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

[18] [2015] NZHC 3299 [18 December 2015]
[19] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[20] *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.

[47] 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.

[48] 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 …".

[49] 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 in mid-March 2018. A record of work was not provided till 29 May 2018 and only after a complaint was made on 15 may 2018. 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.

[50] 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.

[51] In this instance there was payment dispute and correspondence from the Respondent which indicated he was withholding it. 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.

Penalty, Costs and Publication

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

[53] 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

[54] 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*[21] 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.*

[55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[22] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[56] The level of negligence found was high. The Respondent lacked any processes or systems to ensure that the building work was carried out to an appropriate standard and in accordance with the building consent. There were little in the way of mitigating factors present.

[57] The Board considers the case is one where a message needs to be sent to the profession. Deterrence was noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[23]. 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 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.*

[21] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[22] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[23] [2012] NZAR 481

[58] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[59] In considering sanctions to be imposed the Board is also required to view, in total, the fitness of a practitioner to practise, whether in the short or long term.

[60] Taking the above into account the Board did not consider that cancellation was warranted. It has decided that a period of suspension is. Suspension will ensure that the Respondent learns from his conduct and the matter as do other licensed building practitioners.

[61] Given the above the Board has decided, in respect of the negligence and contrary to a consent matters, that the Respondent's licence will be suspended for a period of 12 months.

[62] The Respondent has also failed to provide a record of work. Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of $1,500. There are no reasons to depart from this starting point. The Respondent will also be fined the sum of $1,500 in respect of the record of work matter.

<u>Costs</u>

[63] 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."

[64] 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[24].

[65] In *Collie v Nursing Council of New Zealand*[25] 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.*

[66] 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.

<u>Publication</u>

[67] 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[26]. The Board is also able,

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[24] *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.

[25] [2001] NZAR 74

[26] Refer sections 298, 299 and 301 of the Act

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.*

[68] 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.

[69] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[27]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[28]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[29]. 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*[30].

[70] 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[31]. 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.

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

Section 318 Order

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

Penalty: **In respect of the findings under sections 317(1)(b) and 317(1)(d) of the Act pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of 12] months and the Registrar is directed to record the suspension in the Register of Licensed Building Practitioners; and**

In respect of the finding under section 317(1)(da)(ii) of the Act pursuant to section 318(1)(d) of the Act the Respondent is fined the sum of $1,500.

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.**

[27] Section 14 of the Act
[28] Refer sections 200 and 202 of the Criminal Procedure Act
[29] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[30] ibid
[31] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.**

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

[73] 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

[74] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 January 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

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

Right of Appeal

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

Signed and dated this 19th day of December 2018

Chris Preston
Presiding Member

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

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

(a) do both of the following things:

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

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

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any

case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

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

(d) order that the person be censured:

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

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

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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