

Before the Building Practitioners Board

	BPB Complaint No. CB25698
Licensed Building Practitioner:	Fraser Scatchard (the Respondent)
Licence Number:	BP 132330
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	Tauranga
Hearing Type:	In Person
Hearing Date:	24 November 2021
Decision Date:	30 November 2021

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, BPB Chair
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

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 a disciplinary offence under section 317(1)(b) 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. He is fined \$2,500 and ordered to pay costs of \$3,500.

The Charges

- [2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s317(1)(b) of the Act), in that:
 - (i) building work may have been carried out prior to a building consent being granted; and
 - (ii) foundations and framing (including roof framing) may not have been completed in a compliant manner or to an acceptable standard (as further identified in an Engineering Inspection Statement issued by

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

[Omitted] dated 28 October 2020 (Document 2.2.13, Page 90 of the Board's files); and

- (iii) a failure to install the correct type of plasterboard behind a bath; and
 - (iv) a failure to connect a wing wall to structural framing; and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s317(1)(d) of the Act) in respect of the matters above.

Function of Disciplinary Action

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

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

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

[5] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

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

[6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

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.
- [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 committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that 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 it, the Board heard evidence at the hearing from:

Fraser Scatchard	Respondent
[Omitted]	Complainant
Ed Morris	Wizebuy Building Inspections 2012 Limited
Allan McKerchar	Civil Engineering Central Limited
[Omitted]	Licensed Building Practitioner (Carpentry BP129965)

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

- [13] The complaint related to a new residential build. The Respondent was engaged to carry out the construction of the dwelling as a subcontractor to [Omitted]. The building work was carried out under a building consent and included restricted building work. The Respondent was the only Licensed Building Practitioner on the site. He had two employees who had 3 and 2 years experience respectively. The Respondent said that he was on site every day and supervised his workers and checked their work.
- [14] The Board stated at the commencement of the hearing that only the issues set out in the Notice of Proceeding dated 1 July 2021 would be dealt with at the hearing. Subsequent to that Notice, the Complainant had raised further issues, providing photographic evidence and further reports from [Omitted] dated 30 July 2021 and 7 September 2021. These additional matters were not addressed at the hearing as the Respondent had not had an opportunity to consider and respond to them. To the extent that Mr Morris' additional reports related to the original issues in the Notice of Proceeding they were considered by the Board.
- [15] The Complainant made an opening statement in which he noted that work on the house commenced in December 2019 and that there were workmanship issues right from the start. He stated that, despite meetings to address the issues, they were brushed aside and not adequately fixed. He considered that there had been a lack of reasonable skill and care throughout the entire build.
- [16] The Respondent stated in his opening statement that he was contracted to [Omitted], that work had commenced on 2 December 2019, and his last day on site was 20 July 2020. He noted that his work passed all Council inspections.

Issue One – Was any building work carried out before the building consent was issued?

- [17] Matamata Piako District Council issued a building consent (BC No. 2019.7644) for the project on 20 December 2019 (Document 4.2; Page 252 of the Board's file). The Respondent stated that he began work on 2 December 2019 when he set out the foundations and set up boxing. A photograph dated 17 December 2019 showed the amount of work completed as of that date (Document 2.5.65; Page 228 of the Board's files). The Respondent agreed when it was put to him that a considerable amount of building work was carried out before the building consent was granted.
- [18] Additionally, the Complainant stated that the floor pad was ready to be poured before 20 December 2019. The Respondent accepted this was the case.
- [19] The Respondent stated that the building consent documentation was not on-site, and that he only found out afterwards that the consent had not been issued when he commenced the building work. He stated that he generally did not do this (start without a consent), but, in this case, he did not check that the stamped consented plans were on site.

Issue Two – Foundations and Framing

- [20] Mr Morris is a Registered Building Surveyor and Member of the New Zealand Institute of Building Surveyors. He was engaged by the Complainant. Mr Morris affirmed his reports and gave expert evidence on the workmanship of the Respondent.
- [21] In his report dated 6 July 2020, Mr Morris provided photographs taken by the Complainant of the concrete floor and commented that the edge of the concrete was broken in many places and the surface of the floor was not flat. This had the consequence of not fully supporting the wall framing and causing gaps between the bottom plate and the concrete floor (Document 2.1.44, 2.1.45, 2.1.50; Pages 58, 59, and 64 of the Board's files).
- [22] In Mr Morris' further report dated 7 September 2021, Appendices 4 and 5 showed the measurements he recorded showing the extent of floor surface deviations and wall framing out of plumb (Document 8.1.3.1, Pages 561 and 562 of the Board's files). At the hearing, Mr Morris explained how these measurements were taken and concluded that the floor was out of level.
- [23] Mr McKerchar is a civil engineer and a director of Civil Engineering Central Limited. He was engaged by the Main Contractor, [Omitted] and gave expert evidence on the structural perspective. Mr McKerchar's report of 28 October 2020 concluded –
- “The bottom plate appears to have been lain on an uneven concrete surface. This has resulted in gaps under the bottom plate that a steel ruler could readily pass under and secondly where holding down bolts have been tightened the bottom plate has been pulled away from the prefabricated frame.”*
- “In terms of the framing inspected where the brick veneer had been removed, I found that while the situation is not ideal, the ultimate structural effectiveness of the bracing that these frames provides remains.”*
- [24] At the hearing, Mr McKerchar stated that there was a combination of framing and flooring problems and that the *“gaps involved were caused by insufficient care during the building process”*. He also stated, *“it was a likely conclusion to say that the areas of Mr Morris' report showing the brick rebates out of level, up to 25mm, would be reflected in the floor levels being out by an equal amount and this would have also contributed to the wall framing issues.”*
- [25] In evidence at the hearing, the Respondent had *“no explanation for the variances”*. It was his evidence that he did the set-out and some boxing work but did not lay the floor and was not present on-site when it was poured. The boxing was old boxing timber that had been reused. The rebate was formed by using ripped down gauged timber. He stated that he did use a laser when setting the foundation levels but not for the rebate and that he rechecked the levels prior to the floor being poured.

- [26] The Respondent agreed that he placed the framing on top of broken out areas of concrete, and this was only 2-3 days after the concrete was poured and was because of time constraints imposed on him. He did not do anything to promote the curing of the concrete, and it was not his usual practice to do anything. The boxing was stripped the day after the concrete was poured.
- [27] The Respondent advised that he did not initially identify the gaps between the bottom plate and the concrete floor until it was pointed out to him by the Complainant. He considered that the issue was then solved by him strapping the studs to tie in the bottom plate and adding quite a few extra bolts. Mr McKerchar advised that this was an acceptable solution.
- [28] There were various other issues highlighted in Mr Morris' report of 6 July 2021. (Document 2.1.25 – 2.1.43, 2.1.53 – 2.1.58; Pages 39-57 and 67 – 72 of the Board's files).
- [29] [Omitted], a Licensed Building Practitioner (Carpentry) who completed roofing repairs on the project from 20 September 2020 to 20 October 2020, said *"there were three or four areas where the roofing had to be removed to inspect and remedy areas of framing and fixing that were not compliant."* [Omitted] also stated that some walls were not particularly plumb or straight but that they were easily fixed. In his view, there were a few issues in the *"could have been done better"* category, but they were not serious.
- [30] After the Respondent's involvement in the building work came to an end various areas of the brick cladding were taken down (three elevations) and gaps under the framing were identified. Those gaps required packing under the bottom plate to ensure the framing was compliant.
- [31] Some WANZ bars were noted as being incorrectly installed and fixed at incorrect centres (8-9 of 27 windows with bars affixed at 900mm and set too high), some vents were filled with foam, and perf rods may not have been installed. The Respondent stated that some WANZ bars were installed after the windows were installed as that was the only practical way of installing them. He stated that perf rods were installed and that the foam may have blown through holes.
- [32] The Respondent described how he set out stood frames and installed trusses. There were two areas where trusses were inadequately supported. The Respondent completed remedial work, including installing nogging and strapping. Mr McKerchar considered the strengthening was adequate. There were also three unsupported purlins that were remediated with small cantilevers. The areas of framing complained about were described by the remedial builder, [Omitted], as compliant with the building code, notwithstanding that it could have been done better.
- [33] The Board also heard evidence as regards the positioning of plumbing waste pipes in the foundations that the plumber was responsible for those matters.

Issue three – plasterboard behind the bath

[34] The Complainant advised that when the brick veneer was stripped to investigate the framing, it was revealed that there was no gib board behind the bath underneath the framed cradle that supported the bath. The Respondent confirmed that he did this work. He said that this was an oversight only, that he did not check the work, and that he had done it properly on previous projects.

Issue four -connection of wing wall to structural framing in the bathroom

[35] The Complainant gave evidence that when there were issues in the bathrooms, the walls were stripped, and they discovered that the wing walls were different lengths, did not line up and were not framed onto the walls.

[36] In response, the Respondent said that it was a difficult area to gib, and a decision had to be made. His solution was to install the plasterboard and then tie the framing for the wing walls through the plasterboard. He accepted, when it was put to him by the Board, that this was an odd decision, and he admitted that it was not good practice and not to the building consent. He noted that it was a solution developed by another builder who was on site.

[37] The Respondent made a closing statement that every issue had been dealt with, all work passed Council inspection, and he did not do anything intentionally.

Board's Conclusion and Reasoning

[38] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.

[39] The Board made its findings that the Respondent has breached section 317(1)(b) of the Act on the basis of the Respondent's acknowledgements and the expert evidence before it in respect of carrying out building work prior to a consent being issued, the foundation and framing issues as they related to the bottom plate and the failure to tie a wing wall into structural framing in a compliant manner

[40] With regard to the remaining issues, the Board found that the conduct was not sufficiently serious enough to warrant a disciplinary finding (excluding the plumbing issue, which was the responsibility of a registered and licensed plumber). This finding was made on the basis of the Court's directions on professional disciplinary matters. For example, in *Collie v Nursing Council of New Zealand*⁷, 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.

⁷ [2001] NZAR 74

[41] The Board has also decided that the Respondent **has not** breached section 317(1)(d) of the Act.

Negligence – Carrying out building work prior to a building consent being issued

[42] In relation to the failure to ensure a building consent was in place prior to the building work commencing the Board notes, under section 40 of the Act:

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

[43] As a consent had not issued when the building work started, the provision had been breached. Essentially, unconsented work took place.

[44] 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 as set out in section 3:

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.*

[45] In *Tan v Auckland Council*⁸ 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.

[46] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[47] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[48] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is in place prior to building work being carried out. It follows that failing to do so can fall below the standard expected of a licensed building practitioner.

Negligence – carrying out building work

[49] Turning to the finding of negligent building work, 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 Bolam⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

[50] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.

⁸ [2015] NZHC 3299 [18 December 2015]

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [51] 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 Act¹² noted in paragraph [43] above. 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 practitioner¹³.
- [52] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.
- [53] With regard to the issues before the Board where it found the Respondent had been negligent, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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.
- [54] In particular, the manner in which the foundations were completed, which were outside of acceptable tolerances, the failure to address tolerance issues when installing framing and the failure to tie a wing wall in compliantly, would not have met the requirements of clause B1 of the Building Code and were not completed to an acceptable standard.

Contrary to a Building Consent

- [55] The Board decided that whilst the building consent may not have been strictly adhered to, there was no work where there had been deliberate departures from the building consent and that the finding of negligence was sufficient.

Penalty, Costs and Publication

- [56] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [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 opportunity to provide further evidence or submissions relevant to the indicative orders.

¹² Martin v Director of Proceedings [2010] NZAR 333 at p.33

¹³ McKenzie v Medical Practitioners Disciplinary Tribunal [2004] NZAR 47 at p.71

¹⁴ Section 17 of the Building Act 2004 14

¹⁵ Section 40(1) of the Building Act 2004

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*¹⁶ 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*,¹⁷ 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] The matter was at the mid-range of seriousness. The Board considered that a fine was appropriate. It adopted a starting point of \$2,500. It did not consider that there were any mitigating factors that would warrant a reduction. As such, the fine is set at \$2,500.

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 case¹⁸.

[63] In *Collie v Nursing Council of New Zealand*,¹⁹ 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.

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁸ *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.

¹⁹ [2001] NZAR 74

[64] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁰ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

[65] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate in complexity. Adjustments based on the High Court decisions above are then made.

[66] 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 hearing of this type and is significantly less than 50% of actual costs.

Publication

[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 Act²¹. 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.

[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 1990²². The Criminal Procedure Act 2011 sets out

²⁰ CIV-2011-485-000227 8 August 2011

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.

[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 interest²⁶. 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: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

[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 Friday 18 February 2022. 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.

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

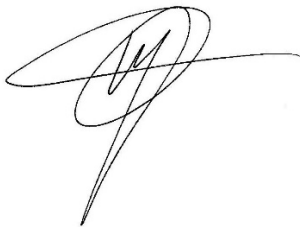
²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[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/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 Actⁱⁱ.

Signed and dated this 28th day of January 2022.



Mr M Orange
Presiding

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.*

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- (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.*