

Before the Building Practitioners Board

	BPB Complaint No. C2-01946
Licensed Building Practitioner:	Campbell Senior (the Respondent)
Licence Number:	BP 112492
Licence(s) Held:	Design AOP 2 and Site AOP 2

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	6 March 2019
Decision Date:	8 April 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Nikki McGill, Barrister and Solicitor for the Respondent

Procedure:

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

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent **has not** committed disciplinary offences under section 317(1)(d) or (i) of the Act.

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Introduction

[1] The hearing resulted from a complaint into 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 (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) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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.

Procedure

- [5] The matter was heard as a consolidated hearing with complaint number CB24698⁵.

Evidence

- [6] 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 which allow it to receive evidence that may not be admissible in a court of law.
- [7] 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.
- [8] In addition to the documentary evidence, the Board heard evidence at the hearing from:

Grant Senior	Respondent
[Omitted]	Complainant
Tim Watson	Technical Assessor to the Board

- [9] The Respondent’s company, BPM Contracts Limited (trading as Thermawise Homes) was contracted to design, supply and construct a new residential dwelling for the Complainant using structurally insulated panels.

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 A hearing can proceed as a consolidated matter under Regulation 13.

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

[10] The Complainant had previously engaged a different Licensed Designer to develop a design and specification for the dwelling using a more traditional framing and cladding method of construction. That design was issued with a building consent. Subsequent to the consent being issued the Complainant engaged the Respondent to convert the consented design so that structurally insulated panel could be used as a building material. An amendment to the building consent was sought and granted. The amendment used the same floor design parameters as the original design.

[11] The Respondent has a business that specialises in the construction of homes built out of structurally insulated panels. On 4 June 2015 he received advice from the Registrar of Licensed Building Practitioners as regards whether building with structurally insulated panels was restricted building work. The advice was that:

Thanks for your email and as was mentioned during our recent phone conversation if there no applicable LBP licence-class to cover certain aspects of 'restricted building work' (RBW) occurring on site that work is not considered RBW, that is, if the 'performance indicators' contained in a specific LBP licence class (in this case the carpentry class) do not accommodate the type of work in question, then it is not considered RBW. In simple terms LBPs should not provide a record of work for work they are not competent to supervise or perform. Much of this has been made clear a recent determination issued by MBIE (link provided below- please refer to parts 5.5 and 5.9 in particular).

<http://www.building.govt.nz/UserFiles/File/Building/Determinations/2014/2014-064.pdf>

It's worth noting many types of construction fall outside the LBP framework, for example- straw bale construction, tanking, rammed earth or natural stone masonry, but to mention a few. The LBP scheme has been set up in order to capture the vast majority of practitioners plying their trade across the country, but under the current 'performance based' settings there will always be exceptions where people do not hold a licence to do certain types of building work that would otherwise be restricted. We simply cannot occupationally license everyone who undertakes structural or weathertightness related work in the residential space.

[12] The advice was in response to an email query from the Respondent to the Registrar on 2 June 2015 that stated:

As discussed we construct houses from steel faced insulated panels. We have previously been advised that although any foundation work that involves conventional timber or concrete work requires a carpentry LBP, any panel construction work doesn't.

When applying for a code of compliance recently with the Manawatu District Council, we were advised that they required us to have a LBP carpenter sign off on the insulated panel work.

- [13] The construction proceeded on the basis that the Respondent considered, based on the advice received, that the only building work that was restricted building work was the construction of the foundation. The building work on the foundation was carried out by [Omitted] a licensed building practitioner with a Carpentry Licence. [Omitted] provided a record of work for the foundations. No issues were raised with the foundations.
- [14] The Respondent was questioned as to whether he considered other aspects of the build, such as the installation of windows and flashings were restricted building work. His position was that all aspects of the building work, excluding the foundation, formed part of a system that, on the basis of the advice received, was not restricted building work and was exempt.
- [15] Counsel for the Respondent accepted that, as a result of a decision of a Board decision in C2-01649⁷ that the Registrar's advice no longer applied but that at the time of the build it was reasonable for the Respondent to rely on the advice given.
- [16] The dwelling was constructed using staff provided by the Respondent's business. [Omitted], the Respondent in CB24698, carried out aspects of the building work. [Omitted] provided a record of work which stated he supervised internal walls. The Respondent provided a response on behalf of [Omitted] dated 13 July 2018. In it he stated that [Omitted] was involved in timber partitioning system installation, fitting internal doors and exterior windows. At the hearing the Respondent stated that [Omitted] did not carry out any work on the panels as he dislikes working with them and that he only carried out internal framing and internal bracing work. The Respondent stated that if [Omitted] did assist with other aspects it was not in his capacity as a licensed building practitioner.
- [17] Following the issue of a Code Compliance Certificate, the Complainant raised issues with the quality and compliance of the build. In particular he complained that the dwelling was leaking and that materials were beginning to rot less than two years after completion. He also complained that the Respondent had used non-licensed persons to carry out the building work. The Complainant engaged [Omitted], a trade qualified carpenter and member of the New Zealand Institution of Building Inspectors to carry out a review of the building work and provide a report. The report raised a number of specific issues.
- [18] A Technical Assessor was engaged to provide the Board with an opinion on the building work. His report set out various matters which were summarised in a table at Appendix B of the report. That appendix is attached as an appendix to this decision. The Board received written submissions from Counsel for the Respondent

⁷ Board decision dated 28 March 2018

and questioned the witnesses present as regards the matters set out in the table and in particular with regard to weathertightness issues, window installation and roof installation.

- [19] With regard to weathertightness issues, the Board heard evidence that the levels of internal moisture exceeded those that could be expected from internal moisture sources and that the locations of the higher levels of moisture were consistent with the sources being external, not internal. The Technical Assessor also gave evidence about building work carried out as part of the build that could have caused, or contributed to, water ingress.
- [20] Evidence was also heard as regards window heights. In particular the evidence was that the original consented plan had irregular window heights and that those same window heights were repeated in the amended consent. It was noted that the fascia that was installed was meant to be temporary to allow for the eventual over-clad of the panels by the Complainant. The fascia, which was temporarily fixed, had failed in places exposing the underlying flashing tape which had a 90-day durability rating when exposed.
- [21] The roofing product used was also a panel product. Varying evidence was heard as to its suitability, but it was the consented product. It was accepted by the Respondent that one over flashing had not been completed as per the consent.
- [22] Allegations were made as regards over reliance on silicone for weathertightness and whether it would meet durability requirements. The Respondent gave evidence that there was also silicone under elements that had visible silicone and that the visible silicone was applied on a “belts and braces” basis to provide additional protection. Photographs provided showed inconsistent application of silicone.
- [23] With regard to the Respondent’s involvement in the building work he completed the design for the amended building consent based on instructions to replicate the original design in structurally insulated panel. He had a site foreman who was not licensed. He was questioned as to why not all of the inspections required under the building consent had been carried out. He stated not all inspections are required, that there had been a verbal acceptance by the Building Consent Authority of a lesser number of inspections, and that it is an accepted practice to provide evidence of compliance rather than have inspections of certain aspects.

Board’s Conclusion and Reasoning

- [24] 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
- [25] The Board has also decided that the Respondent **has not**:
- (a) 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); or

- (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

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

Negligence and/or Incompetence

- [27] The Board's finding as regards negligence do not relate to his conduct as the holder of Designer AOP 2 and Site AOP 2 Licences. The Board accepts that he did not carry out any physical work on site. Nor did he supervise the restricted building work. His classes of licence do not authorise him to supervise such work⁸.
- [28] The Board also accepts that the Respondent, in assessing that the building work on the structurally insulated panels was not restricted building work, was relying on the advice of the Registrar and that such reliance was reasonable in the circumstances. The Board affirms its findings in C2-01649 that the building work was, notwithstanding the advice, restricted building work.
- [29] The Board does consider, however, that the Respondent took that advice further than was intended and further than it could reasonably have been taken. The Respondent liberally applied the advice to building elements that, even with the advice, should have been treated as restricted building work. In this respect the Board finds that the Respondent was negligent in his interpretation of the Registrars advice.
- [30] The Board also finds that the Respondent was negligent, as the holder of a Site Licence, in his coordination and oversight of the project.
- [31] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [32] The New Zealand Courts have stated that 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.
- [33] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own

⁸ Refer clause 5 of the Building (Designation of Building Work Licensing Classes) Order 2010

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)

assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹². 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.

[34] 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.*

[35] 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.

[36] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁶ 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.

[37] Looking at the conduct in question the Board has noted that the Respondent's interpretation of the Registrar's advice was negligent. The query the Respondent

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

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ [2001] NZAR 74

made of the Registrar was with regard to panel construction work. The Registrar wrongly referred to performance indicators as a determinative of what is and is not covered by a class of licence. He referred to various construction methods not covered by the performance indicators. Notably installation of pre-formed elements is a performance indicator so structural panels should have been noted as restricted building work, even on the basis of the Registrar's advice.

- [38] That aside, it was clear from the advice given by the Registrar that other building elements that were to be completed as part of the build did come within the performance indicators. The installation of windows, roofing, flashings, the completion of internal structural walls and bracing were all restricted building work. The Respondent should have known this. Rather he chose to take a liberal interpretation to the advice received and in doing so defeated the purposes of the licensing scheme which is to raise the standards of residential building work and residential dwellings.
- [39] The Board holds that the Respondent was negligent in his management of the construction phase of the project, as a licenced Designer, and in his coordination and oversight of the project, as the holder of a Site Licence. The Board notes that the performance indicators for both licences include elements that cover those aspects.
- [40] Co-ordination and oversight are not defined terms. The Licensed Building Practitioners Rules 2007 (the Rules) does, however, provide some guidance and whilst those Rules use the term supervise and supervision throughout the Board does not interpret this as the supervision of restricted building work for the reasons outlined above.
- [41] Competency 3 of the Licensed Building Practitioners Rules 2007 (the LBP Rules) for a Site Licence AOP 2 Licence includes the following performance indicators:
- 3.1.3 *Establish a building site and manage ongoing operations.*
- 3.1.4 *Monitor construction site performance.*
- [42] Competency 4.2 covers includes monitoring performance, application of time management and quality assurance.
- [43] Competency 5 includes¹⁷:
- 5.2.4 *Supervise the installation of all structural elements of a building.*
- Structural elements include but not limited to – foundations, floors, walls, beams and lintels, bracing, ceiling, roof framing, structural steel, pre-cast concrete, engineered wood systems, work carried out by other trade and specialist licence holders.*

¹⁷ It should be noted that whilst the competencies refer to supervise the term does not, for the purposes of the Act, have the same meaning as the defined term "Supervise". It is limited to coordination and oversight only.

5.2.5 *Supervise the installation of the external envelope, including roofing, windows, cladding systems and subfloors.*

May include but not limited to – waterproof and water resistant membrane systems, flashings, building wrap, typically used wall cladding systems (including cavity systems), drain vented cavities, air seals, durability of componentry, balconies, parapets.

5.2.6 *Coordinate junctions, interfaces and penetrations in building work.*

5.2.7 *Apply knowledge of the work of all trades to monitor the process of integration of building components by tradespeople.*

- [44] Whilst the competencies are used as a means of determining whether an applicant for a licence has the required competencies to be granted one, and not to define the limits of a licence, they are instructive as to what is expected of a licensed building practitioner. Taking that into consideration and, looking at the overall quality and compliance of the building work, the Board considers that the Respondent's conduct fell below an acceptable standard. There was clear evidence of substandard building and noncompliant building work. The most serious of which was water ingress into the dwelling. The Board considers that closer and more attentive coordination and oversight by the Respondent, as the principle of the company and the person who sold, designed and coordinated the build, should have been provided. His failure to do so has contributed to the issues that have since arisen.
- [45] 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

- [46] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [47] The Board notes that the Respondent did not carry out or supervise the building work. He did provide coordination and oversight and the Board has made a finding of negligence in that respect. The Board also notes that a Code Compliance Certificate was issued. In such circumstances the Board finds that the disciplinary charge has not been proven.

Disrepute

- [48] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The

Board considered the disrepute provisions in Board Decision C2-01111¹⁸ and discussed the legal principles that apply.

- [49] The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁹ and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²⁰ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²¹

- [50] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions²²;
- honest mistakes without deliberate wrongdoing²³;
- provision of false undertakings²⁴; and
- conduct resulting in an unethical financial gain²⁵.

- [51] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [52] Given the above factors and taking into account the evidence heard the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has not brought the regime into disrepute.

Penalty, Costs and Publication

- [53] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether

¹⁸ Board decision dated 2 July 2015.

¹⁹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

²⁰ [2012] NZCA 401

²¹ [2012] NZAR 1071 page 1072

²² *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁴ *Slack, Re* [2012] NZLCDT 40

²⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

the Respondent should be ordered to pay any costs and whether the decision should be published.

- [54] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [55] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²⁶ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁷ 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.
- [57] The Board has made a finding of negligence. It considers that the negligence was at the lower end of the scale. It notes that there has been a commercial dispute between the Respondent and the Complainant. It has taken this into account.
- [58] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,000. This is consistent with penalties imposed by the Board in similar cases of negligence.

Costs

- [59] 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."
- [60] 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

²⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²⁸.

- [61] In *Collie v Nursing Council of New Zealand*²⁹ 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.

- [62] 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. This is significantly less than 50% of actual costs incurred.

Publication

- [63] 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 Act³⁰. 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.

- [64] 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.
- [65] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³³. 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*³⁴.
- [66] 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 interest³⁵. It is,

²⁸ *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.

²⁹ [2001] NZAR 74

³⁰ Refer sections 298, 299 and 301 of the Act

³¹ Section 14 of the Act

³² Refer sections 200 and 202 of the Criminal Procedure Act

³³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁴ *ibid*

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

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

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

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

[69] 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

[70] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **2 May 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.

[71] 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

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

Signed and dated this 8th day of April 2019


Richard Merrifield
Presiding Member

Description of defective work /complaint	Building Consent requirements	Contravention or non-compliance with the Building Act or Building Code	Relevant LBP competency	Work compliant from evidence supplied/site inspection?	Technical Advisor comment/observation	Implication of the non-compliance	Holmes Farsight photo reference
The house is leaking.	n/a	Section 17 of the Building Act requires all work to comply with the Building Code Clause E2.	Design 2, Site 2	No	Leak detected in NE corner of lounge (skirting moisture over 44%) Leak detected in NE corner of Utility room (skirting moisture over 35%) Both areas have little protection from soffits above (high walls) and are exposed to wind driven rain. Various unsealed penetrations at base of lounge wall & utility room walls. Wall panel tracks would also join in these areas.	Damp rooms. Short term rotting of skirtings in affected areas. Respiratory issues for owners. Longterm corrosion of SIPS panels. Unsightly appearance of internal linings.	6,7,8,9,10,11
[Omitted] (who Grant Senior had organised as supervising LBP) was unlicensed during the build.	n/a	Section 84B of the NZ Building Act 2004	Site 2, Carpentry	n/a	[Omitted] had his license suspended from 25/10/2016 - 18/07/2017. The time period of the building work was between 17/02/2016 - 07/07/2016	No comment.	n/a
Workmanship is substandard.	n/a	NZ3604 table 2.1 (tolerances) MBIE guide to tolerances, materials and workmanship in new residential construction 2015	Site 2	No	Numerous missing rivets in roof flashings and soffits, large beads of silicone used on roof as primary means of weathertightness and diverters at flashing junctions and terminations. Window and floor /wall junction fascias brad nailed at large & irregular centres. Fascias twisting and falling off dwelling. Large amount of unsealed nail penetrations through SIPS panels. External corner of SIPS panels fixed with galv nail-gun nails through alum ext corners. Significant damage to ceiling panels due to rough handling. Unsealed cut ends of roof SIPS panels at mitre junctions, starting to corrode. Silicone used as diverters at apron flashing ends.	Delay of project and potential for monetary loss to the complainant, Non-compliant building constructed.	9,13,19,20,25,27,28,29,30,33,34,35,40-46,52,53,54,55,57,60,62,65,66,68,71,74.

Description of defective work /complaint	Building Consent requirements	Contravention or non-compliance with the Building Act or Building Code	Relevant LBP competency	Work compliant from evidence supplied/site inspection?	Technical Advisor comment/observation	Implication of the non-compliance	Holmes Farsight photo reference
Windows not installed as per the building consent - differing head heights in Lounge and Kitchen.	Windows and doors shown as same height on Amended plan page 2524-2, 2425-5 and dimensioned as such on window schedule 2524-10a	Section 40 of the Building Act requires all work to comply with the Building Consent	Site 2	No	Over 30mm deviation between head heights of lounge external joinery. Over 80mm deviation between kitchen window units.	Unsightly appearance of window dimensions in lounge. Expensive to remediate due to opening dimensions in SIPS panels.	4, 14-18.
Tape covers for wall panel tracks not installed as per plan.	Fascia with a bevel top edge to be installed over taped junction between floor slab and wall panel. See detail on plan page 2524-9A	Section 40 of the Building Act requires all work to comply with the Building Consent	Site 2	No	Fascias with no bevel on top edge. Floor /Wall junction fascias brad or jolt head nailed at large & irregular centres. Fascias twisting and falling off dwelling. Large amount of unsealed nail penetrations through SIPS panels. Evidence of drill holes in bottom of SIP panels through flashing tape. Flashing tape exposed to weather- not in accordance with Branz guidelines for product - 90 days max exposure. Tape peeling in multiple areas.	Water ingress into panel and track holding wall panel in place. Potential for dampness to affect interior linings. Unsightly appearance of exterior walls.	19-22,24.
Window Fascias applied have been nailed into panels, perforating the weathertight membrane of the house.	See detail on plan page 2524- 8A	Building Code Clause E2 section E2.3.2	Site 2	No	Window installation does not match plan detail. Window Fascias have been nailed in multiple areas with no thought to holding ability of nail into SIPS panel. Fascias are warping or falling off leaving nail holes exposed to water ingress.	Water ingress into panel. Potential for dampness to affect interior linings. Unsightly appearance of exterior walls.	33,34,44,45,46,53,74

Description of defective work /complaint	Building Consent requirements	Contravention or non-compliance with the Building Act or Building Code	Relevant LBP competency	Work compliant from evidence supplied/site inspection?	Technical Advisor comment/observation	Implication of the non-compliance	Holmes Farsight photo reference
Rivets used to fix flashings and roof panels are not sealed and are not applied at sufficient distances, silicone seals have detached as a result.	Consent specification section 2.3, pg 5 states "Aluminium sealed rivets as specified by Metalcraft Insulated Panel Systems."	NZ Metal Roof & Wall Cladding Code of Practise	Site 2	No	Bright alum rivets have been used- not colour coded. I could not determine if rivets were 'sealed' type. I did not locate any loose silicone sealant beads, however I did locate an obvious repair over bedroom 2. Spacings for rivets are irregular and as far as 2.4m apart in many areas. See photos. Thermawise PS3 issued by LBP states installation in accordance with NZ Metal Roofing & Cladding Association guidelines. Riveting is required at spacings no greater than 600mm as per section 7.4.6 of the code of practise.	Flashings can come loose and vibrate in high winds, compromising sealant and weathertightness of dwelling.	28,29,35,41,57,58.
Ends of flashings were not cut off, folded and fixed to the building. Flashings flapping in high winds.	No specific requirements.	MBIE guide to tolerances, materials and workmanship in new residential construction 2015	Site 2	No	Barge flashings left excessively long and viewed video on owners phone of excessive noise and vibration in strong winds.	Potential failure of cladding to prevent water ingress due to wind vibration and fixing failure, long term failure with B2 requirements.	40,54,62.
Irregular height windows were remediated poorly.	n/a	B1 and WANZ guidance specification MBIE guide to tolerances, materials and	Site 2	No	Lounge window sills not installed level or straight in multiple areas. Window and door joinery at differing heights in lounge and kitchen.	Unsightly appearance of window dimensions in lounge.	14-18.

Description of defective work /complaint	Building Consent requirements	Contravention or non-compliance with the Building Act or Building Code	Relevant LBP competency	Work compliant from evidence supplied/site inspection?	Technical Advisor comment/observation	Implication of the non-compliance	Holmes Farsight photo reference
Grant Senior passed company off as Licensed Building Practitioners, knowing work would be completed as unrestricted building work.	n/a	n/a	Design 2, Site 2	n/a	Website promotes company is LBP registered.	It is noted that RBW is usually concerned with "Primary Structure" & "Weathertightness". That a complete dwelling minus the floor can be constructed without a CODW, is unusual.	See appendix F
Did not provide contractual checklist as per law.	n/a	NZ Building Act 2004	Site 2	n/a	Email to owner from LBP with contract does not include "Prescribed Checklist" All works over \$30,000 require the "Prescribed Checklist"	No comment.	n/a
Disagreement over construction schedule as part of contract. Project ran over time period in work program.	n/a	n/a	Site 2	n/a	Program timing calendar provided in same email with contract to owner. No signed version provided by owner. Program shows work to complete at end of May. Owner claims work was completed 7/7/2016	Potential added costs for temporary housing for owner.	Appendix D
Removable scotia requested and not provided.	75mm Gib cove Scotia shown on plan page 2524-7B. No fixings shown or mentioned in specification.	Section 40 of the Building Act requires all work to comply with the Building Consent	Design 2, Site 2	n/a	Gib cove is fixed in place and is not easily removable. Plans do not specify removable scotias.	Difficulty of installation of any future services without substantial gib cove re-work	n/a

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.*