

## Before the Building Practitioners Board

	BPB Complaint No. CB25906
Licensed Building Practitioner:	Chinara Sharshenova (the Respondent)
Licence Number:	BP 131855
Licence(s) Held:	Design AOP 2 and 3

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

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	4 October 2022
Decision Date:	25 October 2022

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2  
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 building work in a negligent manner. The Respondent’s licence is restricted to Design AOP 2 until such time as she applies for and satisfies the Registrar that she meets the competency requirements for a Design AOP 3 licence. The Respondent is also ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

## The Charges

[2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [OMITTED], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act), in that:

- (a) she may have incorrectly interpreted and applied property lines data contained on page 44 of the Board’s file (Complainant document 2.2.5) in developing a Proposed Site Plan (page 43 of the Board’s file, Complainant document 2.2.4); and

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

- (b) if the Respondent did incorrectly interpret and apply the property data lines, whether she took appropriate action on being informed of the same.

### 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

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

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

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

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

[6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[7] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

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

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

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

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

### **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 committed<sup>6</sup>. 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:
- The Respondent;
  - [OMITTED], the Complainant; and
  - Ron Pynenburg, Special Advisor to the Board
- [13] On 6 October 2022, after the conclusion of the hearing, the Respondent submitted further information consisting of two threads on forums discussing the use of Revit and property lines data. These further submissions were received and considered by the Board in reaching its decision.
- [14] The Complainant explained that the issue was discovered by [OMITTED], the company engaged by the client to build the consented plans provided by the Respondent. When the site set out was done, discrepancies between the Respondent’s site plan and the site survey were discovered. This resulted in the building encroaching into the one-metre setback, which was not reflected in the Respondent’s plans.

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

- [15] The Complainant explained that on raising the issue with the Respondent, she denied she had made any mistakes. The Complainant then had two surveyors confirm the discrepancies and the Respondent then *“agreed that the dwelling would have to be moved”* (Document 2.1.8, Page 20 of the Board’s file), but after the relationship broke down the amended plans were provided by another designer (Document 2.2.1, Pages 40-41 of the Board’s file).
- [16] The Respondent stated that at the time of doing the work in question, she held a Design AoP 2 licence, and she now had a Design AoP 3 licence. At the hearing, the Respondent’s position was that *“no error was made by me”*.
- [17] The Respondent explained her methodology as creating the Property Data in Revit (Document 5.1, Page 1680 of the Board’s file) from the topographical plan of [OMITTED] (Document 5.1, Page 1679 of the Board’s file) and then using that Property Data in Revit to create the Proposed Site Plan (Document 5.1, Page 1681 of the Board’s file).
- [18] Mr Pynenburg, Special Advisor to the Board, confirmed his report (Document 5.1, Pages 1660-1687 of the Board’s file). He explained that discrepancies appeared between the [OMITTED] topographical plan and the Proposed Site Plan, created by the Respondent. These discrepancies were represented in diagrams in appendices F, G and H of Mr Pynenburg’s report (Pages 1682 – 1687 of the Board’s file).
- [19] Mr Pynenburg’s report stated that *“if, as the Respondent says, the Property Line Data is taken from the Revit model used to create the Proposed Site Plan, then all of the Property Line Data should be reflected on the Proposed Site Plan- but it is not”* (Document 45.12, Page 1663 of the Board’s file). At the hearing he said, *“the Property Line data has changed when taken into the Proposed Site Plan, for whatever reason.”* He elaborated that he did not know how the variance between the Property Data Line and the Proposed Site Plan had occurred.
- [20] Mr Pynenburg pointed to 3 differences and used a whiteboard to explain their impact on the site plan –
- (a) Line 2 has 1° 10’ variation of bearing
  - (b) Line 4 has 0° 32’ variation of bearing
  - (c) Line 6 is not shown.
- [21] Mr Pynenburg stated it was *“prudent”* and good practice to do a check of the drawings against the Surveyors’ graphics created to ensure the data has been translated correctly.
- [22] The Respondent had no explanation for the three differences pointed out by Mr Pynenburg and confirmed that she did not do the overlay of the Proposed Site Plan against the [OMITTED] topographical survey as Mr Pynenburg had done in his report. The Board put to her the differences in numbers between her Property Lines Data and her Proposed Site Plan as set out in Mr Pynenburg’s diagram (Document 5.1,

Page 1662 of the Board's file). The Respondent agreed that these were her figures but said that although the numbers differed between the two documents, they were correct.

- [23] The Board put to the Respondent the Property Lines Data at page 44 of the Board's file, and she confirmed these were the numbers she entered into Revit. The document raised an issue –*“Survey data often contains some slight imprecision. The current data indicates a gap of 97.4 S1°, 44' 51"E. Press “Add line to close” to close the property line or press “ok” to treat as closed.”*
- [24] Mr Pynenburg explained that this message meant the property was not “closed” as Line 6 from the [OMITTED] survey had not been included and *“this was the root of the problem”* and *“caused Lines 2 and 4 to be out of orientation”*.
- [25] The Respondent said that *“any errors were Revit's miscalculations”* but then also said she *“changed the data from Revit to compensate for the missing Line 6.”* She further stated that I *“know you cannot rely on Revit...we do to the best of our knowledge”*. In her written response the Respondent said *“Nevertheless, the Revit model and the survey would never be 100 per cent accurate and should or could be adjusted on site.”* (Document 2.2.2, Page 40 of the Board's file).
- [26] The Respondent further explained that the missing Line 6 did not matter because the bearings were correct. In attempting to demonstrate this on the white Board the method of calculation, she treated the “minutes” as decimals and not based on 60 seconds in a minute. Mr Pynenburg demonstrated that this method of calculation was incorrect. The Respondent did not accept this.
- [27] Mr Pynenburg's stated opinion in his report was that:
- (a) The Property Lines data was not correctly interpreted and applied to the Proposed Site Plan, with there being three variations as noted;
  - (b) The Proposed Site Plan, as drawn, would have resulted in an encroachment into a setback as it located the eastern boundary further to the east than if it had been located according to the Property Lines data or the [OMITTED] Surveyor's topographical plan; and
  - (c) The implications of the encroachment into the eastern boundary setback for the building and/or design were the need for either an amendment to the Resource Consent or an alteration of the house.
- [28] At the end of the hearing, the Respondent maintained her position that there had been no errors. She had *“used this method for many properties and never had issues.”*
- [29] The Complainant told the Board that the error had significant implications in time and cost for the client, requiring a redesign to pull the building back on the site in order to clear the side boundary minimum setback and an onsite minor variation.

## Board’s Conclusion and Reasoning

- [30] 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.
- [31] The Board’s considerations as regards negligence and/or incompetence are in respect of the Respondent’s design work.
- [32] Under the definitions in the Building Act, design work forms part of the wider definition of building work and, as such, in respect of section 317(1)(b), it comes within the Board’s jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it “includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act”. The Building (Design Work Declared to be Building Work) Order 2007 declared:
- 3      *Design work declared to be building work***
- (1)      *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2)      *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*
- [33] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.
- [34] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the Bolam<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.
- [35] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>9</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction or, in other words, whether the conduct was serious enough.
- [36] 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

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

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

<sup>9</sup> *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 Act<sup>10</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner.<sup>11</sup>

[37] 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.*

[38] The Board also notes the provisions of section 14D of the Act, which states:

### **14D Responsibilities of designer**

*(1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*

*(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

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<sup>10</sup>*Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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

[39] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design<sup>12</sup>.

[40] In terms of seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup>, 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.*

[41] In *Pillai v Messiter (No 2)*<sup>14</sup> the Court of Appeal stated:

*... 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.*

[42] The Board found that the Respondent was inconsistent in her evidence and many of her statements appeared to have been made for exculpatory purposes only. Even after extensive explanations from Mr Pynenburg as to the errors and miscalculations he uncovered, the Respondent did not accept she had made any errors. The Respondent believed Revit created the issue but nevertheless when Revit gave her a red flag, she ignored it and manipulated the numbers. The discrepancies and problems followed and were a consequence of the manipulation.

[43] The resulting mistakes in the Proposed Site Plan cannot be passed off as small errors. But for the Complainant being made aware of the error early in the construction process, the implications could have been significant. It was, in the end, fortunate that the solution was that the house could be repositioned and that the site could accommodate that.

[44] The Board finds that there was no cogent evidence which satisfied the Board that Mr Pynenburg's calculations and conclusions as to the discrepancies were not correct. The same could not be said of the Respondent's evidence and explanations.

[45] Given the above, 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.

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<sup>12</sup> Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

<sup>13</sup> [2001] NZAR 74

<sup>14</sup> (1989) 16 NSWLR 197 (CA) at 200

### Penalty, Costs and Publication

- [46] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [47] 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

- [48] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>15</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [49] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>16</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [50] The offending conduct was serious and had significant consequences which could have been much worse if the Complainant had not been made aware of the errors as early in the process as he was. An aggravating factor was the Respondent’s inability to accept she made a mistake and her lack of understanding of or willingness to accept Mr Pynenburg’s cogent and logical explanations.
- [51] Given the above factors the Board has decided that it will order a restriction on the Respondent’s licence to restrict her to a Design AoP 2 licence until such time as she satisfies the Registrar that she is capable of carrying out and supervising Category 3 Buildings. This may be done by way of a reassessment for a Design AoP 3 licence.

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<sup>15</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>16</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

### Costs

- [52] 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.”
- [53] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case.<sup>17</sup>
- [54] In *Collie v Nursing Council of New Zealand*,<sup>18</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [55] 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 and involved a half day hearing. Adjustments based on the High Court decisions are then made.
- [56] Based on the above, the Board’s costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board’s inquiry. This is the Board’s scale amount for a half-day hearing of this type and is significantly less than 50% of actual costs.

### Publication

- [57] As a consequence of its decision, the Respondent’s name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners’ scheme as is required by the Act<sup>19</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*
- [58] 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.

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<sup>17</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>18</sup> [2001] NZAR 74

<sup>19</sup> Refer sections 298, 299 and 301 of the Act

- [59] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>20</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>21</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>22</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>23</sup>.
- [60] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>24</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [61] Based on the above, the Board **Will Not** order further publication.

### Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(c) of the Building Act 2004, the Respondent's licence is restricted to carrying out or supervising of design work authorised under a Design Area of Practice 2 Licence and the Registrar is directed to record the restriction in the of Register of Licensed Building Practitioners by noting her licence as a Design Area of Practice 2 Licence.

The restriction is to remain in place until such time as the Respondent satisfies the Registrar that, on the balance of probabilities, she meets the requirements to hold a Design Area of Practice 3 Licence.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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<sup>20</sup> Section 14 of the Act

<sup>21</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>22</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>23</sup> *ibid*

<sup>24</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[63] 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**

[64] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **6 December 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.

[65] 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**

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

Signed and dated this 14<sup>th</sup> day of November 2022



**Mr M Orange**  
Presiding Member

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

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

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- 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.*