

Before the Building Practitioners Board

	BPB Complaint No. CB25296
Licensed Building Practitioner:	Gilbert Spencer (the Respondent)
Licence Number:	BP 107685
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
Draft Decision Date:	3 June 2020
Final Decision Date:	16 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
David Fabish, LBP, Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

Procedure:

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

Board Decision:

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

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Introduction

- [1] On 3 June 2020 the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] Having received the report the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [4] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- [5] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [6] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Respondent and the Complainant will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [7] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Function of Disciplinary Action

- [8] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [9] 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*⁵ 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."

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 which allow it to receive evidence that may not be admissible in a court of law.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

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

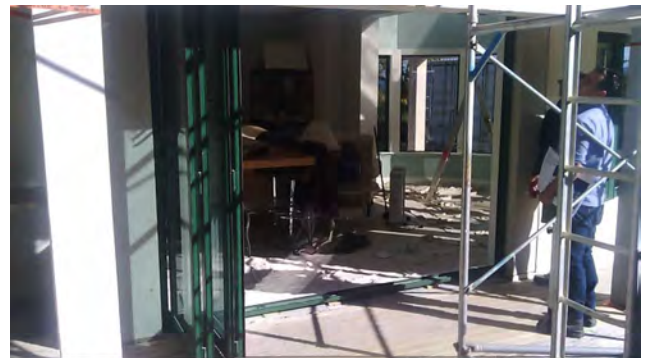
- [11] The complaint was made by the building consent authority. It related to the Respondent carrying out building work that required a building consent without one.
- [12] The building work to which the complaint related was an alteration to an existing dwelling. The complaint noted that a site visit was carried out after a complaint was received by the building consent authority about building work be carried out without a building consent. The site visit identified that large scale construction had been undertaken and was ongoing. The builder on-site stated that he was in the employ of and under the supervision of the Respondent.
- [13] A meeting was held on 9 May 2019 with the owners of the dwelling and the Complainant. The Complainant reported that the owners were surprised that there was an issue and that building consent was required. They noted that the Respondent had advised them they were allowed to do this work without first obtaining a building consent. The owners were able to produce a draft set of plans and an amended set which showed plans to extend the front elevation of the dwelling toward the street.
- [14] The Complainant, a building consent officer, noted that the work that had been carried out involved major structural and weather-tightness changes as well as changes to the building footprint. A Site Notice was issued. It noted:

Areas of identified work that have been completed will require an application for a Certificate Of Acceptance and supported by evidence of how work complies with the New Zealand Building Code as specified in the Building Act 2004

Observed Items requiring C.O.A include:

- Foundation footprint extended to accommodate new fireplace*
- New supporting structural steelwork/ portal to support existing framing around fireplace*
- New plumbing and drainage work carried out [Omitted], currently unlicensed as per PGDB register. Work includes bathroom, kitchen, and drainage work.*
- New bi-fold joinery unit installed to northern kitchen wall, this is a new opening supported by new steel portal construction. This is concealed - unable to establish any structure or weather-tightness details.*
- New structural post/ column concealed outside kitchen window on Northern elevation.*
- New bathroom to lower level including tiled shower.*
- Foundation footprint to Western corner has been extended with new cast in point-load fixings for proposed structural steelwork.*

- [15] The documentation provided to the Board included photographs taken in 9 May 2019. The photographs included the following which show the extent of the work undertaken:



- [16] Subsequent to the matter being brought to the building consent authority's attention, a Certificate of Acceptance was sought and issued as was a Building Consent for the building work that was still to be completed. The Certificate of Acceptance dated 31 July 2019 noted:

The certificate of acceptance enclosed with this letter has been qualified to the effect that only parts of the building were able to be approved.

The building works covered in this approval is linked to works covered by BCA0231/19.

The work was carried out prior to inspections by PCC inspectors so Council is relying on the PSI and site reports from [Omitted], statements from [Omitted], the Ardex warranty dated 12/5/2019, photos supplied by the applicant in approving the work listed

Because of the complexity of separating the work, you should note that further inspections and documentation maybe required for some of the building elements by the onsite inspection team prior to issuing the Code Compliance Certificate.

- [17] The work covered by the Certificate of Acceptance was as follows:

Acceptance of Compliance

The territorial authority named below is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it can ascertain, the building work described below complies with the building code: The territorial authority was only able to inspect parts of the building work and this certificate is qualified as follows:

ND01 - portal frame and raised hearth

Portal frame around the fire place and the structural steel placed in the fireplace hearth area

G13/19 bearing reinforcing and foundations fireplace area

Ground bearing, reinforcing and foundation to new column ND02, ND03,

Electrical work (wiring, lights and controls, extract fan) carried out by [Omitted]in ground floor bathroom

Plumbing works ground floor bathroom with the exception of the shower waste

Waterproof membrane ground floor bathroom covered by Ardex warranty

Nothing in this certificate limits the requirement that a person must not carry out building work except in accordance with a building consent, nor does it relieve any person from the requirement to obtain a building consent.

- [18] The Respondent provided a written response to the complaint. He noted his business and building experience and his relationship with the owners. He stated that he was not able to inspect the dwelling before the owners purchased it and that his initial understanding was that the owners just wanted a couple of windows altered. He was not aware of the existing construction detail before starting.

- [19] The Respondent stated:

As I knew it was involving structural work I got the Stirlings to engage [Omitted]– Engineer – to come and look at what we were doing and advise us on what we should do. The architect seemed to take forever to produce any

drawings, but [Omitted] produced drawings for us to work immediately. Any structural work we did on the house was on the supervision of [Omitted], and anything that needed inspecting by the Council we left uncovered so that it could be seen when the architect finally gave us some plans to take to the Council.

This I do realise went further than I would have liked, but I needed to employ my workers as they have families to feed. Everything we did before the permit was issued has now been covered off by a Porirua City Council Certificate of Acceptance.

I hope this explains the whole situation to you, and at no time were lives or the building put at risk. My history speaks for itself, in that there have never been concerns about this type of building before, and I do not intend for this to happen again.

Conclusion and Reasoning

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

[21] The Board's considerations in relation to negligence and incompetence relate to the failure to ensure a building consent was in place prior to the building work being carried out.

[22] There was clear evidence that significant building work that required a building consent had been carried out under the Respondent's direction and supervision. Under section 40 of the Act, all building work must be carried out in accordance with a building consent:

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.*

[23] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 Grant of building consent

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[24] 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.*

[25] In *Tan v Auckland Council*⁷ 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.

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

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

⁷ [2015] NZHC 3299 [18 December 2015]

[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.

[28] The *Tan* case related to the prosecution of a project manager. 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.

[29] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[30] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[31] In this respect, section 45(4) of the Act states:

- (4) *An application for an amendment to a building consent must,—*
- (a) *in the case of a minor variation, be made in accordance with section 45A; and*
 - (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[32] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[33] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (3) *This section—*
- (a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
- (b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

- [34] 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 (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [35] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent or incompetent.
- [36] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
- [37] 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.
- [38] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*¹¹ it was stated as "*an inability to do the job*".
- [39] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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 Judge McElrea, DC Whangarei, CIV-2011-088-313

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 *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [40] 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 purposes of the Act¹³ which are outlined 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 practitioner¹⁴.
- [41] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:
- [21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*
- [42] The Board noted, from the building consent authority documentation provided, that significant building work had been undertaken. It should have been immediately apparent to a licensed building practitioner with a Carpentry Licence that a building consent was required for the work.
- [43] It is not acceptable to simply state that work progressed further than the Respondent would have liked or that the design was taking too long. It should not have been started in the first place. It is also not acceptable to try and excuse the decision to carry on with the work based on continued employment of staff. The building consent requirements in the Act exist for a reason. They are to ensure that there is independent verification that the design and subsequent work will meet Building Code requirements. The Respondent's actions put the objectives and purposes of the Act at risk.
- [44] The Respondent implied that he was working under the supervision of an engineer. The Respondent should note that an engineer is authorised to carry out or supervise design work. Engineers are not authorised to carry out or supervise restricted building work. Again, the involvement of the engineer does not excuse the conduct. Moreover, the involvement of an engineer was no more than what was required for the design and review of structural elements.
- [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. The Board further finds that the Respondent, in failing to identify that a building

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁵ [2001] NZAR 74

consent was required, has been incompetent in that the Respondent has failed to display the required knowledge and skills expected of a licensed Carpenter.

Decision on 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 Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [47] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board 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*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.

- [49] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*¹⁷. The High Court, when discussing penalty, stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

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

¹⁷ [2012] NZAR 481

- [50] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [51] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [52] The conduct was serious. The Building Consent process is at the heart of the compliance regime within the Building Act. It is the primary means by which compliance with the Building Code is ensured. Failure to adhere to the requirements in the Act puts the compliance regime at risk. Licensed building practitioners are expected to not only uphold but actively promote the compliance regime in the Act.
- [53] There are few mitigating factors. The Board notes that a Certificate of Acceptance was granted and that the building work was engineer designed and appeared to meet the requirements of the Building Code. It has taken those factors into account.
- [54] At the same time, the Respondent does not, from the response received, appear to be willing to accept that his conduct was wrong or to take responsibility for it.
- [55] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [56] Taking all of the above factors into account, the Board considers that a suspension of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct. The Respondent will be suspended for a period of six months.
- [57] The Board has also decided that a fine is appropriate. The fine is set at \$2,000. The amount is consistent with penalties imposed on other licensed building practitioners for similar conduct.
- [58] The Respondent should note that during the period of suspension, he can still carry out building work that is not restricted building work. He can also carry out restricted building work under the supervision of an appropriately licensed person. He will not, however, be able to carry out or supervise restricted building work.

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

¹⁸ 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 case¹⁹.

- [61] In *Collie v Nursing Council of New Zealand*²⁰ 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] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

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 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.

- [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 1990²². The Criminal Procedure Act 2011 sets out 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

¹⁹ *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.

²⁰ [2001] NZAR 74

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

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

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁵.

- [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 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.
- [67] Based on the above, the Board will order further publication. The publication will be by way of an article in Code Words.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of six [6] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.

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 \$1,000 (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 be action taken to publicly notify the Board's action, in addition to 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.

²⁵ *ibid*

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

Submissions on Draft Decision

- [70] The Board invites the Respondent and Complainant to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [71] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **15 July 2020**.
- [72] If submissions are received, then the Board will meet and consider those submissions.
- [73] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [74] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [75] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [76] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **15 July 2020**.

Right of Appeal

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

Signed and dated this 24th day of June 2020


Chris Preston
Presiding Member

This decision and the order herein were made final on 16 July 2020 on the basis that no further submissions were received.

Signed and dated this 16th day of July 2020



Chris Preston
 Presiding Member

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.*