Before the Building Practitioners Board

	BPB Complaint No. C2-01902
Licensed Building Practitioner:	Kumar Vasist (the Respondent)
Licence Number:	BP 133299
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	16 January 2019
Decision Date:	8 February 2019

Board Members Present:

Chris Preston (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

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.

Contents

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at the following address under multiple building consents:

Location	**Address**	**Building Consent Number**
Site 1	[Omitted]	[Omitted]
Site 2 – House 1	[Omitted]	[Omitted]
Site 2 – House 2	[Omitted]	[Omitted]
Site 3	[Omitted]	[Omitted]

[2] The alleged disciplinary offence the Board resolved to investigate were that the Respondent 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

[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

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

public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

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

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

Evidence

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

[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 before the Board heard evidence at the hearing from:

Kumar Vasist	Respondent
Raymond Buist	Complainant
Tim Watson	Technical Assessor

[9] Prior to the hearing the Respondent provided the following reasons for the issues he faced on the building sites and the actions he took.

<u>Site 1 –</u> [Omitted]

[10] In respect of [Omitted]the issues raised by the Council were:

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

- 18 January 2018: Site 1 passed the first inspection, pre-pour;
- 22 February 2018: Site 1 failed the second inspection, pre-wrap. This was because the work was not ready to be inspected at the time. Thor Construction had tried to cancel the inspection but there was a miscommunication and the inspector still came;
- 1 March 2018: Site 1 failed the third inspection, pre-wrap. Mr Vasist said this was because the required documentation was not on site as the site manager (who had the documentation) was running late. All other issues previously identified by the inspector had been rectified;
- 6 March 2018: Site 1 failed the fourth inspection, pre-wrap. This was because the external bottom plate hold-downs were not complete, the concrete was not flush cut to maintain the 20mm cavity system and the fascia details were incomplete. An engineer was consulted and the problems were rectified. Building consent was also amended for a change to the cladding – this was approved by the Council;
- 16 March 2018: Site 1 failed the fifth inspection, pre-wrap. This was because a minor alternation had been made to the design part of the pre-nail work and so the Council required further information from the engineer regarding the design, in a PS1. This was rectified by the engineer doing a site visit and providing the requested PS1;
- 5 April 2018: Site 1 failed the sixth inspection, pre-clad. This was because there was weather damage to the pre-wrap tape system. This was rectified by replacing all flashing tape; and
- 12 April 2018: Site 1 failed the seventh inspection, pre-clad. This was because there had been weather damage to the flashing tape two days earlier. This was rectified by replacing the flashing tape.

<u>Site 2, House 1 –</u> [Omitted]

[11] In respect of the issues raised by the Council for Site 2, House 1:

- 22 February 2018: House 1 failed the first inspection, pre-wrap. This was because the work was not ready for inspection. They tried to cancel the inspection but there was a miscommunication and the inspector still came;
- 6 March 2018: House 1 failed the second inspection, pre-wrap. This was because:
  - The framing pre-nail construction was not in accordance with the plans. This was because the designer's plans and consented site plans were different (the designer had changed the angle of the house to better fit the site) and the Respondent was using the consented plans;
  - The concrete slab needed cutting up to 90 mm in places;

- The inspector was unable to inspect the purling fixings due to safety issues. The safety issues were addressed, and inspection of the purling fixings was carried out at a subsequent inspection; and
- Fascia details were required. The fascia details were added to an amended building consent that was subsequently approved by the Council;

- 16 March 2018: House 1 failed the third inspection, pre-wrap. This was because there were structural changes to the roof. The engineer subsequently addressed the issues and a PS1 was issued;
- 6 April 2018: House 1 failed the fourth inspection, pre-wrap. This was because:
  - Of the connection to foundations under beam for uplift. This was fixed by installing correct connections to foundation to prevent uplift;
  - There were undersized joist hangers. The engineer inspected the undersized joist hangers and approved them as sufficient;
  - The framing did not meet the specified 6mm overhand. The concrete was then flush cut professionally to meet the 6mm overhand;
  - The outriggers needed Z nails installed. The outrigger Z nails were subsequently installed;
  - The double lintels appeared undersized. The correct lintels were then installed; and
  - Soffit/wall junction flashings were required. These were subsequently installed.

<u>Site 2, House 2 In respect of the issues raised by the Council for House 2:</u>

[12] In respect of the issues raised by the Council for Site 2, House 2:

- 19 January 2018: House 2 passed the first inspection, pre-slab;
- 16 March 2018: House 2 failed the second inspection, pre-wrap. This was because there were no engineer's notes. This was rectified by the engineer issuing site notes;
- 6 April 2018: House 2 failed the third inspection, pre-wrap. This was because:
  - The Council requested clarification on the engineer's site notes. This was rectified by the engineer clarifying his notes;
  - The anchor screws were not achieving minimum cover. These were then installed correctly;
  - The double lintels appeared undersized. The double lintels were then replaced with the correct size; and

  - Soffit wall junction flashing was required. Soffit wall flashings were then installed;

- 18 April 2018: House 2 failed the fourth inspection, pre-wrap. However, the pre-wrap was given approval; and
- Status as of 10 August 2018: House 2 passed its last inspection. Thor Construction was three weeks away from the code compliance inspection.

Site 3 – [Omitted]

[13] On 3 January 2018, Thor Construction was engaged to construct a two-story duplex house, containing one two bedroom unit and one three bedroom unit.

[14] In respect of the issues raised by the Council for Site 3:

- 18 January 2018: Site 3 passed the first inspection, pre-slab;
- 1 March 2018: Site 3 failed the second inspection, pre-wrap. This was because:
  - The Council was concerned the outrigger overhang at the rear of the house was not in accordance with the plan. This was rectified by the engineer and by shortening the outrigger overhang;
  - The stud to top plate connections needed to be completed prior to roofing. The stud to top plate connections were subsequently installed;
  - The 16kn connections required 4x screws to each flange prior to roofing. The correct screws were then installed; and
  - There were also site access safety concerns;
- 6 April 2018: Site 3 failed the third inspection, pre-wrap. This was because:
  - The cantilevered floor over the garage entrance had no structural support and showed visual signs of failure. This was rectified by the engineer providing drawings of a cantilevered floor and a new support steel beam was installed;
  - There were site safety concerns with the scaffolding and fencing. Mr Vasist took steps to address the site safety issues with fencing and scaffolding installed by [Omitted] but was reliant on the knowledge of the certified scaffolder;
  - The brick rebates were the incorrect size. This was fixed by cutting the rebate to the correct measurements;
  - The steel beam fixing and supporting studs was not completed;
  - The bottom plate fixings were incomplete. This was rectified by installing the correct bottom plate fixings;
  - The previous site inspection issues had not been addressed;

  - He acknowledged some of the issues were missed due to care of duty, but these were rectified when they arose and dealt with accordingly;

- 13 April 2018: Site 3 failed the fourth inspection, pre-wrap.
  - The Council thought the engineer's design was insufficient. The engineer was required to undertake a comprehensive site assessment to assess all beams and connections. The Council also requested detailed engineer site notes be submitted before the next inspection. The engineer provided extra supporting evidence and site notes and undertook the comprehensive site assessment;
  - PCF lintels (x4) were not as consented;
  - The cantilevered lintel was not installed. These were then installed; and
  - A new designer was also engaged to complete brick rebate haunch with timber instead of mortar; and

- 11 May 2018: Site 3 failed the fifth inspection of the brick veneers. The inspection failed because the required cavity was not achieved as there was an issue with the professional bricklayer. These issues were ongoing and not resolved until after 16 May 2018. The Respondent does not accept any responsibility for the bricklaying.

[15] The Board appointed a Technical Assessor to complete a report on the properties. He noted:

Description of defective work / complaint	**Technical Advisor comment/observation**
Repeated failed inspections for the same type of inspection	Multiple failed inspections recorded with the same failed items over 4 building sites/consents. From the inspections provided in the complaint attachments, there are at least 9 failed "prewrap" and 10 failed "preclad" inspections, not counting cancelled inspections. Repetitive site instructions ignored with months between inspections. New failed items occurring at each inspection. Supports PCC's statement that LBP was using the Council's inspections as quality control. Most builder's will pass failed items within 1 inspection, not 3-4. That this was occurring on all the LBP's building sites is to be noted.
The use of undersized lintels	Photos on inspection notes (12/07/18 for instance) confirm PCC allegation. Eventually rectified after PCC failed prewrap inspections. Builder should have known at a glance that lintels (badly undersize) were insufficient and should have rectified them before calling for the inspection.

Description of defective work / complaint	**Technical Advisor comment/observation**
Concrete slabs incorrectly squared with slabs protruding past external face of timber frames and not square	Photos on inspection notes (20/06/18 for instance) confirm allegation. Exposed steel where foundations cut back to achieve clearances required. Problem occurred on all sites. Non compliant building constructed.
Installing undersized beams compared to consented plan items	Photos on inspection notes (6/3/18 for instance) confirm allegation. Joints in beams not supported by point loads. Non compliant building constructed.
Construction differs from consented documents without amendments	Multiple references and requests made to builder to have unconsented work covered by an engineer, or have details approved by way of amendment after work had already been carried out. Non compliant building constructed.
Lack of knowledge of the installation of cavity systems and cladding installation	Agree with allegation, due to amount of failed preclad inspections. Also noted the comments at inspection dated 11/06/18: "Have provided builder on site with printed details from E2 and also the metal roofing code of practice. These are the same as what is specified in the consented documents." The LBP also states that he takes no responsibility for issues arising from the Bricklaying work, however many of the issues were directly related to the LBP's lack of care regarding brick rebate size created during the foundation pour.
Lack of knowledge of safe work practices	No safety nets appear to have been installed beneath the roof framing area to minimise injuries in the event of a fall from heights. See notes on inspection dated 6/03/18, 17 [Omitted]. Lack of safety fencing and scaffolding also noted 6/04/18, [Omitted]. Council should not have to raise these basic safety considerations.
Lack of knowledge of general building structures	Agree with allegation, due to amount of failed inspections over multiple sites and type of errors made: undersized lintels, undersized or missing fixings, foundations badly out of square, unsupported joints in beams, not obtaining amendments for work before construction. It is also unusual for someone with only 3-4 years' experience in

Description of defective work / complaint	Technical Advisor comment/observation
	the building industry (when these jobs commenced- see LBP's response letter) to be the main contractor on site, for four different sites, running concurrently.

[16] Mr Vasist submitted that:

- Where issues were raised with building work, he took necessary steps to fix the issues; and
- He cooperated with the Council inspectors and took many issues raised with the work seriously.

[17] At the hearing the Respondent confirmed that since he had eight jobs going at the same time, four others at a different site, his business had grown quickly and the fact that he did not have any other LBPs on the sites subject to this complaint he was not able to provide the level of supervision or quality control required.

[18] The Board has made it clear in the past that the Councils are not there to provide quality control or provide building advice to LBPs and that when LBP's rely on Councils to do this there is a risk of poor work going unnoticed. In addition, it is not acceptable to have multiple failures over several inspections as this shows a lack of care or knowledge and is an inefficient way to build.

[19] That he has now employed more skilled people including two LBP's and has put in place more systems, site safety and toll box talks.

Board's 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 or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.

[21] The finding of negligence relates to the Respondent's supervision of non-licensed persons the incompetence in respect to the knowledge and skill to pick up issues as they arose on the building site and have them addressed prior to inspection.

[22] 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*[6] test of negligence which has been adopted by the New Zealand Courts[7].

[6] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[7] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[23] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[8]. 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.

[24] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[9]. 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[10].

[25] 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.*

[26] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[11] and be carried out in accordance with a building consent[12]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be considered.

[27] There was clear evidence by way of the Technical Assessor's report and the Council inspection records of non-compliance with acceptable standards.

[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[10] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[11] Section 17 of the Building Act 2004
[12] Section 40(1) of the Building Act 2004

[28] The Board notes that the building work failed numerous inspections and that the Respondent was, at times, reliant on the Building Consent Authority (BCA) identifying what needed to be done to achieve compliance. The BCA's role is only to check or inspect that the building work has been carried out in accordance with the building consent, not to direct how the building work is to proceed.

[29] It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation and it will not necessarily follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

(a) the extent and seriousness of the non-compliance;

(b) whether there is a pattern of continued non-compliance; and

(c) what steps are taken when non-compliance issues are raised.

[30] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. It is not enough to just turn up for inspections. Moreover, when compliance failings are identified at those inspections the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing[13] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[31] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[14]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*
>
> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops*

[13] Hansard volume 669: Page 16053
[14] Hansard volume 669: Page 16053

with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

[32] As the finding relates to supervision the Board needs to also consider whether the conduct has fallen below the acceptable standards as regards supervision.

[33] Supervise is defined in section 7[15] of the Act. The definition states:

> *supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
>
> *(a) is performed competently; and*
>
> *(b) complies with the building consent under which it is carried out.*

[34] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;
(b) the experience of the person being supervised;
(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
(d) the number of persons or projects being supervised; and
(e) the geographic spread of the work being supervised.

[35] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[36] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[16]. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

> *"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures*

[15] Section 7:
supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
(a) is performed competently; and
(b) complies with the building consent under which it is carried out.

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

are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."

[37] The Board considered two issues. As stated above there was the issue of supervision. The Respondent admitted that he was unable, due to other work he had on at the time, to provide the level of supervision required of relatively unskilled employees, none of which held an LBP licence.

[38] The Board has considered supervision before as set out above and when applying the test as set out in [29] and [30] above that the Respondent fell well short of the required standard of supervision expected in this case and in fact failed each of the criteria set out by the Board.

[39] The second issue was that of the Respondent having the required knowledge and skills to ensure that the work undertaken was done so correctly first time and that poor workmanship was picked up. Failed works were not being rectified by the next inspection, the engineer was not engaged for several inspections to look at failed construction.

[40] On questioning from the Board there were concerns that the Respondent did not have the basic skills and knowledge expected of a licenced LBP. There were issues around the inadequate support of the foundation boxing, the incorrect lintel sizes, flashing details and the rebate requirements for the brick cladding are all basic skills.

[41] The Respondent did not appear to have the knowledge of the brick cavity required.

[42] While it is accepted that errors are made on the building site the number of issues in this case has led the Board to require the Respondent to be reassessed.

[43] 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.

Penalty, Costs and Publication

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

[45] 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.

<u>Penalty</u>

[46] 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*[17] 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.*

[47] 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 penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[48] Based on the above the Board's penalty decision is to cancel the Respondents license for a period of one month. At the end of the cancellation the Respondent will need to reapply for a licence. The Board notes that the Respondent's competence, should he reapply for a licence, will be reassessed. This will ensure that he is able to meet the required competencies to hold a carpentry licence. He can, in the interim, carry out restricted building work under supervision. It is strongly recommended that he uses the time to upskill.

<u>Costs</u>

[49] 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."

[50] 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[19].

[51] 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:

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[17] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[18] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[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

> *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.*

[52] The base line for costs is around $5,000 for a hearing involving witnesses and an expert witness. 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.

Publication

[53] 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[21]. 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.*

[54] 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.

[55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[22]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[23]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[24]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[25].

[56] 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[26]. 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.

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

Section 318 Order

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

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

Penalty:	**Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of one [1] month.**
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.**

[59] 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

[60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 March 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.

[61] 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

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

Signed and dated this 8th day of February 2019

Chris Preston
Presiding Member

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

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

(a) do both of the following things:

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

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

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

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

(d) order that the person be censured:

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

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

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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