

Before the Building Practitioners Board

	BPB Complaint No. CB25583
Licensed Building Practitioner:	Stephen Wilson (the Respondent)
Licence Number:	BP 107818
Licence(s) Held:	Carpentry and Site AoP 2

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	2 February 2021
Decision Date:	25 March 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr R Dunlop, Retired Professional Engineer
Mr B Monteith, LBP, Carpentry and Site 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.

Disciplinary Finding:

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

Contents

Summary of the Board’s Decision	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Board’s Conclusion and Reasoning	6
Negligence and/or Incompetence	6
Contrary to a Building Consent – Building Consent Changes	8
Penalty, Costs and Publication	11
Penalty	11
Costs.....	12
Publication	12
Section 318 Order	13
Submissions on Penalty, Costs and Publication	14
Right of Appeal	14

Summary of the Board’s Decision

- [1] The Respondent has committed a disciplinary offence under section 317(1)(d) of the Act and has been fined \$1,000 and ordered to pay costs of \$3,500. There will be no publication except for the note in the Register and the Respondent being named in this decision.

The Charges

- [2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [3] The Board advised that in further investigating the above matters the Board’s inquiries would be in respect of changes made to the building work and the building

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

consent processes used to make those changes in relation to a retaining wall, fixings to a deck, exterior cladding and the roofing materials.

Function of Disciplinary Action

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

[5] 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.”

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

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

[7] 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.

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

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

Inquiry Process

- [9] 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.
- [10] 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

- [11] 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.
- [12] 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.
- [13] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|----------------|---------------------|
| Stephen Wilson | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness ([Omitted]) |
| [Omitted] | Witness ([Omitted]) |
| [Omitted] | Witness ([Omitted]) |
- [14] In looking at the evidence the Board's focus was on three areas being, the retaining wall, the changing of the roofing material from .55-gauge to .4-gauge, and the cladding that appeared to be resting on the footings.
- [15] In the case of the decking evidence was received that it was installed by [Omitted] and not by the Respondent.
- [16] In respect to the retaining wall, the Respondent claimed that he had discussions with and approval from the engineering company [Omitted] for the changes he had

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

proposed, and that these were reflected in a change to the building consent. The Board asked [Omitted] if this was the case.

- [17] [Omitted]'s reply was unclear. The Board directed that the Respondent provide additional evidence by way of a documentation trail that supported the Respondent's position that he had, at all times, consulted with the engineer and followed subsequent changes to the building consent.
- [18] In regard to missed inspections it was also unclear as to the inspections that were missed, as claimed by [Omitted], which formed the reason for them not issuing a PS4. The Board sought more evidence of the inspections being missed from the witness's present.
- [19] A minute from the Board dated the 4th day of February 2021 was issued covering the additional evidence that was sought.
- [20] On the 3 February 2021, the Respondent provided an email setting out the timeline and providing the documents as requested. The email noted:

Document 1 is the initial [omitted] site inspection record dated 26/1/17. After this inspection, & once a design review was requested of [omitted], no further works took place on the retaining wall until TCDC had approved the amended design.

Document 2 is the final [omitted] retaining wall design in line with what I had recommended from early on in the project. This is stamped as approved by TCDC on the 4th sheet as at 28/11/2019.

Document 3 is the final [omitted] site inspection record dated 21/1/20. This was the only other retaining wall inspection that was requested by [omitted]. The physical works were carried out the day prior to the inspection, approx. 7 weeks after the revised design was approved by TCDC.

Document 4 is a record of all [omitted] & TCDC inspections. TCDC also inspected the wall at the same time as the [omitted] initial inspection.

Document 5 is the request from [omitted], via [omitted] for my PS3 for retaining wall construction, which I provided the same day, to allow for the issue of the PS4 & subsequently the CCC on 5/8/20.

I reiterate that all decisions in relation to the retaining wall were made by me with the client's best interests & common sense in mind, & I am satisfied significant savings were achieved & due process was followed.

- [21] As regards the changing of the roof from a .55-gauge product to a .4-gauge, the Respondent accepted that this had not been discussed with the complainant and, in a post hearing email to the Board dated 3 February 2021, he went on to say:

In regard to making the profile & gauge change on this project without the client's permission or a building consent amendment, I unfortunately did not make clear to the board during the hearing the following:

-[Omitted] had already expressed to me on multiple occasions that she is unable to comprehend technical building issues in any way.

-The reduction in the roofing gauge was due to the change to a superior & stronger profile in True Oak (as opposed to the Trimrib specified). The reduced gauge is still more than adequate & has no bearing on durability. It is still essentially a long run roofing product spanning just 500mm.

- [22] At the hearing [Omitted], the Complainants [Omitted] and an LBP, gave evidence that he had observed cladding resting on the footing where he was completing work on an unfinished deck. He stated that it was not his job to fix the issue and took a photograph if it prior to installing the decking. He provided a copy of the photograph.

Board's Conclusion and Reasoning

- [23] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [24] The Board has also decided that the Respondent **has** carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act) **should** be disciplined.
- [25] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [26] The findings of negligence relate to the Respondent's failure to ensure changes to the building consent were dealt with in the appropriate manner.
- [27] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [28] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁹. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[29] 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 Act¹⁰. 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 practitioner¹¹.

[30] 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.*

[31] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[32] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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

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

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

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [33] There were three matters under consideration.
- [34] In respect to the cladding issue the evidence was not clear, but the Respondent is reminded to ensure that adequate clearance is provided as required under the Building Code.
- [35] As regards the retaining wall the Board evidence post the hearing of a number of communications between the Respondent and the engineers which showed that the Respondent had sought approval from the engineers for the change in design and had made sure that the correct signoffs were given during construction.
- [36] The change to the roofing gauge has been considered under section 317(1)(d) of the Act.
- [37] Given the above the Board has decided that the Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent – Building Consent Changes

- [38] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [39] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:
- 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.*
- [40] 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.

- [41] 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.*

- [42] In *Tan v Auckland Council*¹⁵ 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.

- [43] 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.

- [44] Justice Brewer in *Tan* also noted:

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

¹⁵ [2015] NZHC 3299 [18 December 2015]

[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.

- [45] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.
- [46] 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.
- [47] 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.
- [48] 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.*
- [49] 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.
- [50] 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.*

- [51] Turning to the building work in question, the change of roofing gauge, the Respondent submitted that, given the time frames required to get a change to the building consent, it was simply not practical to do so.
- [52] Whether the Respondent felt it was practical to do so or not, under section 40 of the Act, you must build in accordance with the building consent. He has not done so. In essence he has proceeded to make changes to the building consent without ensuring that the changes were approved and would meet the requirements of the building code. In failing to do so, the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.
- [53] In the case the roofing material this was changed from a .55-gauge product to a .4-gauge product without the required change to the building consent. The .4-gauge did not comply with the building consent.
- [54] The Board therefore finds that the Respondent has committed a disciplinary offence under section 317(1)(d) of the Act.

Penalty, Costs and Publication

- [55] 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.
- [56] 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

- [57] 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:

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

[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.

- [58] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [59] The Board considered a pecuniary penalty was appropriate. In setting the amount it has taken into account the penalties it has imposed for matters of a similar nature. It has also taken into account, as mitigation, that the product used was building code compliant and that a product warranty protecting the consumer was issued. On the basis of those factors the Board has reduced the fine from a starting point of \$2,000 to one of \$1,000.

Costs

- [60] 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.”
- [61] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁸.
- [62] In *Collie v Nursing Council of New Zealand*¹⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

- [63] 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.

Publication

- [64] 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 Act²⁰. The Board is also able,

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

¹⁸ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

¹⁹ [2001] NZAR 74

²⁰ Refer sections 298, 299 and 301 of the Act.

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.

- [65] 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.
- [66] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.
- [67] 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 interest²⁵. 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.
- [68] Based on the above, the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to \$1000.

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

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

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

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

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

- [70] 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

- [71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 28 April 2021. 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.
- [72] 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

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

Signed and dated this 6th day of April 2021



Mr C 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.