

## Before the Building Practitioners Board

	BPB Complaint No. C2-01618
Licensed Building Practitioner:	Stefan Mortimer (the Respondent)
Licence Number:	BP 110170
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	11 October 2017
Decision Date:	25 October 2017
Board Members Present	Richard Merrifield (Presiding) Mel Orange Bob Monteith Faye Pearson-Green

#### 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 disciplinary offences under sections 317(1)(b), 317(1)(h) and 317(1)(i) of the Act.

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## Introduction

- [1] The hearing resulted from a complaint by the Christchurch City Council about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
  - (b) breached s 314B of the Act (s 317(1)(h) of the Act); and
  - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

## Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

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

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

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

### **Background to the Complaint**

- [5] The complaint made by the Christchurch City Council related to the construction of various buildings without building consents on a vacant section owned by the Respondent. The buildings were for him and his family to reside in. The Complainant alleged the buildings did not meet building code requirements in terms of structural integrity or sanitation. The Complainant also alleged that power was being provided to the property by way of an extension lead from neighbour's property, that water supply was by way of a garden hose from the neighbour's property and that grey and black water (from washing, laundry, and toilet) were being discharged onto the property leading to water pooling and unsanitary conditions.
- [6] On the basis of the above allegations a charge of negligence and/or incompetence under section 317(1)(b) of the Act with regard to the failure to obtain building consents was laid together with a charge of bringing the regime into disrepute under section 317(1)(i) of the Act.
- [7] As part of the investigation the Board noted that the Respondent may have carried out plumbing, drainage, gas fitting and electrical work which, if completed by him, may have been outside of this competence. Accordingly a charge under section 317(1)(h) was also laid.

### **Evidence**

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.

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

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

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

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[9] The Board heard evidence from:

Stefan Mortimer	Respondent
[Omitted]	[Omitted] witness for the Respondent
[Omitted]	Witness for the Respondent
Sally Pollock	Christchurch City Council
Richard Neale	Christchurch City Council
Robert Copeland	Christchurch City Council

[10] Counsel for the Registrar provided a time line and sequence. The Respondent accepted this as being accurate. It was as follows:

*The property has been the subject of on-going Council action, including District Court proceedings, over approximately the last 18 months:*

- (a) *Between 14 April 2016 and 14 October 2016, three Notices to Fix were issued by the Council to Mr Mortimer. These were not complied with.*
- (b) *On 4 October 2016, the District Court issued a Non-Occupy Order over the property.*
- (c) *On 7 November 2016, the District Court warned Mr Mortimer about continuing to reside at the property.*
- (d) *On 29 November 2016, the Council obtained a Court Order allowing Council Officers to enter the property and take action to convert the building to one suitable for storage or garden use only.*
- (e) *Mr Mortimer was sentenced to 5 days imprisonment.*
- (f) *On 8 December 2016, the Council entered onto the property and converted the building. Mr Mortimer and his family were absent.*
- (g) *By 14 March 2017, Mr Mortimer and his family had moved back into the property and further non-consented building and drainage works had occurred (the property again had access to electricity and water).*
- (h) *By April 2017, a second building had been erected on the property, also without consent.*
- (i) *On 5 April 2017, another Notice to Fix was issued by the Council to Mr Mortimer.*
- (j) *On 23 May 2017, the District Court issued orders for the demolition of the original structure, and an injunction preventing further work on the second building on the property.*

- (k) *On 12 June 2017, the District Court issued further orders for the demolition of the second building by the Council.*
- (l) *Between 12 and 16 July 2017, Mr Mortimer responded to this complaint. He advised that he carried out work without building consent to urgently provide somewhere for his family to live, as they were homeless. Mr Mortimer describes this as an insulated sleeping area, of 10 square metres, which was not permanent. It is unclear if this explanation is also intended to relate to the second building on the property.*
- (m) *The first building on the property has been there for some 15 months or more, as of the date of the Council's complaint to the Board. The second building has been there for some 3-6 months.*
- (n) *Mr Mortimer has not applied for a building consent, exemption, or certification of acceptance in relation to either of the buildings on the property, or in relation to any of the electrical, plumbing, or drainage works on the property.*

[11] The Respondent accepted that the summary of events was accurate.

[12] The Board was provided with documentation relating to the District Court proceedings. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court<sup>6</sup>. The Board considers, in this case, that estoppel applies as regards to the judgements made by the District Court. As such, given the acceptance of the facts by the Respondent and the estoppel, the Board need not make further inquiry with regard to the facts that led to the complaint.

[13] At the hearing the Respondent stated that he had to use the land for temporary accommodation when his working circumstances changed and his credit rating was such that he was not able to obtain rented accommodation. He stayed at home to care for children and his partner returned to work. As a result of his Partner's income they did not qualify for welfare assistance. He stated they did not have family or others they could turn to for help.

[14] The Respondent stated that he owned the land in question which was not encumbered with a mortgage. When asked why he did not use the capital value of the asset to obtain suitable accommodation he stated that if he sold the section he would never be in a position to own land again. He stated he did not have the funds nor the time to be able to go through a building consent process and that he had no other options. He did not make any enquiries with the Christchurch City Council

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<sup>6</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

about building consents or exemptions prior to the build. The Council witnesses produced an “application for a discretionary exemption from building consent” under Schedule 1(2) of the Building Act which the Respondent made in late 2015 in respect of the same land which was rejected.

- [15] The Respondent stated that the first construction on the site only took one week to build and cost \$750.00 to construct. He further stated that he would not have been able to get a consent for the work and that he considered it was structurally sound and met the structural requirements of the Building Code and he produced a letter from an engineer which stated the structure was structurally sound for the purposes of relocation. He accepted that it did not meet other Building Code requirements.
- [16] The Respondent accepted that he carried out the plumbing, drainage, gasfitting and electrical work. Electricity and water was supplied from a neighbouring property with the electricity supply being by way of a power cord from a plug outlet. It ran through a jagged hole in the tin cladding and multiple appliances including a stove were supplied from a multi box by way of electrical cable. The Respondent also installed a wood burner and electric heat transfer system of his own design and construction which was not consented and which was in close proximity to combustible materials. The flu was stated by Council witnesses to be too low. The Respondent eventually connected the property to a sewer connection without authority. He later made it appear as if he had complied with an order to disconnect.
- [17] The Respondent and his family were eventually assisted by the Respondent’s Mother who acted as their guarantor and they were then able to find alternative accommodation.
- [18] The Respondent’s partner and his neighbour both gave evidence that they considered the accommodation provided was safe.
- [19] The Respondent submitted in a closing that the Council should have assisted him under section 220 of the Act, that the work was not for a client and that it was not in a public area. He accepted that what he had done was wrong but submitted that he had no other options.

### **Board’s Conclusion and Reasoning**

- [20] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
  - (b) breached s 314B(b) of the Act (s 317(1)(h) of the Act);
  - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and should be disciplined.

[21] The reasons for the Board's decision follow.

Negligence and/or Incompetence

- [22] The consideration of whether the Respondent has been negligent and/or incompetent in this case relates to the failure to obtain building consents for the building work carried out.
- [23] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act. The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [24] In this instance the Respondent has variously submitted that his actions came within exemptions in Schedule 1 and or section 41(c) of the Act. Those arguments were rejected by the District Court and the findings of that Court can be accepted by the Board as sufficient evidence that the building work was carried out without a building consent.
- [25] The Board has found in previous decisions<sup>7</sup> that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068<sup>8</sup>.
- [26] More recently the High Court in *Tan v Auckland Council*<sup>9</sup> the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

*[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.*

*[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.*

- [27] The Board considers the Court 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 is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

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<sup>7</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>8</sup> Board Decision C2-01068 dated 31 August 2015

<sup>9</sup> [2015] NZHC 3299 [18 December 2015]

- [28] The Board also notes that the Respondent previously sought an exemption from a building consent in relation to the same land. As such it is clear that he knew what his obligations were.
- [29] The Respondent has accepted that he was in the wrong but that he had no other option. The later submission may go to mitigation.
- [30] The Board also notes that the conduct complained of was not a one off. There was a continuing pattern of not obtaining building consents for building work.
- [31] The Board also needs to consider whether the behaviour should result in a disciplinary outcome. In this respect the Board has considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>10</sup> as regards the threshold for disciplinary matters:

*[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.*

- [32] The conduct before the Board in this instance not mere inadvertence error, oversight or carelessness. There was a deliberate pattern of conduct and on the basis of the facts before the Board finds that the Respondent has been negligent in carrying out building work that required a building consent and that the conduct was sufficiently serious to make a disciplinary finding.

#### 314B – Working Outside of Competence

- [33] As regards working outside of one's competence section 314B(b) of the Act provides:

*A licensed building practitioner must—*  
*(b) carry out or supervise building work only within his or her competence.*

- [34] The Respondent holds a Carpentry Licence which allows him to carry out restricted building work within the bounds of that licence. The Respondent, however, carried out plumbing, drainage and electrical work each of which falls within the definition of building work which is defined in section 7 of the Act as work “for, or in connection with, the construction, alteration, demolition, or removal of a building”.
- [35] Plumbing, drainage, gas fitting and electrical work fall within licensing regimes which require a person to hold a current practicing certificate in order to carry out the work. The Plumbers, Gasfitters, and Drainlayers Act 2006 regulates plumbing, drainage and gas fitting and the Electricity Act 1992 regulates electrical work. Both Acts contain very limited exemptions from the requirements to be licensed including an exemption for a home owner to carry out certain prescribed electrical work under

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<sup>10</sup> [2001] NZAR 74



the Electricity Act 1992. The home owner exemption requires inspection by a person licensed to carry out the work which did not occur. None of the other exemptions applied.

- [36] Both the Plumbers, Gasfitters, and Drainlayers Act 2006 and the Electricity Act 1992 make it an offence to carry out work when not licensed to do so. This recognises the health and wellbeing and the safety purposes of both pieces of legislation.
- [37] Given the above the Board finds that the Respondent has carried out building work outside of his competence.

### Disrepute

- [38] The final matter for consideration is disrepute.
- [39] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111<sup>11</sup> and discussed the legal principles that apply.
- [40] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*<sup>12</sup> a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [41] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>13</sup>, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [42] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>14</sup> and the courts have consistently applied an objective test when considering such conduct. In

<sup>11</sup> Board decision dated 2 July 2015.

<sup>12</sup> [2013] NZAR 1519

<sup>13</sup> 24 September 2014

<sup>14</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

*W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>15</sup> the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>16</sup>

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

- criminal convictions<sup>17</sup>;
- honest mistakes without deliberate wrongdoing<sup>18</sup>;
- provision of false undertakings<sup>19</sup>; and
- conduct resulting in an unethical financial gain<sup>20</sup>.

[44] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[45] In the present case the conduct which might be considered as bringing the regime into disrepute is the continued refusal to comply with Council and Court orders as regards to illegal building work. The Respondent displayed a belligerent manner and his conduct exposed members of his family to unacceptable risks. The buildings were not Building Code compliant, the sanitary conditions risked disease, the electrical work created a risk of electrocution and/or fire and the gas fitting work created a risk of fire as did the unconsented fire place.

[46] In respect of the above it is noted that the purpose of the Building Act as stated in section 3 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*

<sup>15</sup> [2012] NZCA 401

<sup>16</sup> [2012] NZAR 1071 page 1072

<sup>17</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>18</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>19</sup> *Slack, Re* [2012] NZLCDT 40

<sup>20</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- (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.*

[47] The Respondent's conduct impeded those purposes.

[48] It was also clear that the Respondent knew what he was doing and that he chose not to comply with the law. His reasons aside it is not conduct that the Board should condone.

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

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

[50] The Respondent's conduct is not a minor matter. The conduct complained of and found to have been committed was very serious and it warrants a finding of having brought the regime into disrepute.

### **Penalty, Costs and Publication**

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

[52] The Respondent made submissions at the hearing as regards penalty, costs and publication. This included his circumstances at the time and the reasons which he felt he had no option but to build without a consent and to ignore the Council and Court orders.

### **Penalty**

[53] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>21</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times,

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<sup>21</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.*

- [54] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>22</sup> the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they 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.
- [55] The Respondent has been found to have committed three offences all of which are very serious. Moreover there was a continuing pattern of conduct and a flagrant disregard for the requirements of the Building Act and a contempt for the Council and the Court's processes when they took action. These are aggravating factors. The Board also considers the dangerous and insanitary nature of the building work is an aggravating factor.
- [56] Given the above the Board's starting point is a cancellation of the Respondent's licence and an order that he not be able to apply to be licensed for a period of not less than two years. Looking at the mitigation presented and taking it into account the Board has decided that it will reduce the cancellation period to 12 months.
- [57] The Respondent should note that he will still be able to carry out restricted building under the supervision of a licensed person. He will also be able to carry out non restricted building work.

### Costs

- [58] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [59] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>23</sup>.
- [60] In *Collie v Nursing Council of New Zealand*<sup>24</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

<sup>22</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>23</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>24</sup> [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.*

- [61] Costs for a half day hearing without taking into account the costs of the investigation are in the order of \$2,000. Based on the above the Board's costs order will therefore be that the Respondent is pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of the actual costs. The reduced amount is ordered in recognition of the Respondent's constrained circumstances.

#### Publication

- [62] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>25</sup>. The Board is also able, under s 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.*

- [63] 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.
- [64] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>26</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>27</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>28</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>29</sup>.
- [65] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>30</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [66] The matters were serious as is the outcome. It is important that others learn from what has occurred and also that the public and profession are informed of the cancellation. As such there will be further publication which will consist of an article

<sup>25</sup> Refer sections 298, 299 and 301 of the Act

<sup>26</sup> Section 14 of the Act

<sup>27</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>28</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>29</sup> *ibid*

<sup>30</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

in Code Words and on the Board's website detailing the Respondent's conduct and the outcome.

### Section 318 Order

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

**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 s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 12 months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

[68] 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

[69] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **16 November 2017**. 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.

### Right of Appeal

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

Signed and dated this 25<sup>th</sup> day of October 2017



**Richard Merrifield**  
Presiding Member

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

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

**<sup>ii</sup> 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.*