

Before the Building Practitioners Board

	BPB Complaint No. CB25865
Licensed Building Practitioner:	Marcus Allen (the Respondent)
Licence Number:	BP 127968
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	Christchurch
Hearing Type:	In Person
Hearing Date:	7 September 2022
Decision Date:	12 September 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mrs F Pearson-Green, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

M Gall for the Respondent

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 disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

The Respondent **has not** committed a disciplinary offence under 317(1)(da)(ii) of the Act.

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Summary of the Board’s Decision

[1] The Respondent carried out building work in a negligent and incompetent manner. He also carried it out in a manner that was contrary to a building consent. He is fined \$4,000 and ordered to pay costs of \$1,750. A record of the disciplinary offending will be maintained on the Public Register for Licensed Building Practitioners for a period of three years.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

¹ Section 341 of the Act.

The Charges

- [3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Christchurch. 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 contrary to section 317(1)(b) of the Act, IN THAT, he may have failed:
 - (i) to check the dimensions on the consented plans before commencing building work; and
 - (ii) to respond to the Council's on-site requests for a Building Location Certificate within an acceptable timeframe; and
 - (iii) to call for and have inspections completed in a timely manner as the work progressed;
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, he may have failed to obtain a Building Location Certificate and to check the site dimensions, both as required by the building consent documentation; and/or
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

Consolidation

- [4] The Board may, under the Complaints Regulations, consolidate two or more matters into one hearing but only if the matters are, in the opinion of the Board, about substantially the same subject matter and the complainant and the Licensed Building Practitioners in respect of each matter agree to the consolidation.
- [5] The Board sought agreement for consolidation of this matter with Inquiry number CB25927. The consent of all those involved was forthcoming. The two matters were consolidated.

Function of Disciplinary Action

- [6] 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

² 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁵ Collins J. noted that:

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

- [8] 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 persons⁶:

... 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.

- [9] 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.
- [10] 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.

Inquiry Process

- [11] 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

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

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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.

- [12] 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

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

- [14] 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.

- [15] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Marcus Allen	Respondent
[OMITTED]	Respondent in matter CB25927
[OMITTED]	Summoned witness, employee of [OMITTED]

- [16] Counsel for the Respondent filed submissions outlining the Respondent's position.

- [17] The building and design work related to an alteration and addition to a residential dwelling under a building consent. The alteration aspect involved an extension to create an entry and bathroom addition that would extend from the dwelling toward a boundary with a neighbouring property. As the project was residential and consented, it included restricted building work, and the design for the building consent had to be carried out by a Licensed Building Practitioner with the appropriate class of Design Licence.

- [18] The Respondent introduced the project to Mr [OMITTED], the designer. The Respondent had been engaged by the father of the owner, Mr [OMITTED]. The Respondent and Mr [OMITTED] had carried out a prior job for Mr [OMITTED].

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[19] Prior to commencing the design work, Mr [OMITTED] was provided with a copy of plans that had been prepared by another architectural studio ([OMITTED]) for previous consented works for earthquake repairs on the interior of the property. It contained a Site Plan with boundary offset dimensions. It was used for the development of the design. The Site Plan follows. Mr [OMITTED]’s design included a notation for the “contractor to verify all dimensions prior to commencing work”. Provision was also made for a Building Location Certificate. Mr [OMITTED] stated, in a brief of evidence he provided, that a Location Certificate was discussed with Mr [OMITTED] during the design process due to the proximity of the bathroom to the boundary. The building consent that was issued included the requirement for a Building Location Certificate.



[OMITTED] Site Plan

- [20] The right-hand boundary measuring 2290 mm was the boundary where the building work for the bathroom was to be carried out. The Site Plan included the following notation:

Set out

The location of site features shown on the site plan is approximate only. The contractor is to verify and note the location of all features within their scope on site and advise of any discrepancies.

- [21] A similar notation was contained on the site plan notes “Contractors must verify all dimensions on site prior to commencing an work ...”.
- [22] The design that was developed used all of the 2290 mm available between the existing building and the fence. Mr [OMITTED] submitted that it was reasonable in the circumstances to rely on the [OMITTED] dimensions on the basis that there was a requirement for a Building Location Certificate that would have to be provided by a Registered Surveyor and that dimensions were to be verified on site. Mr [OMITTED], in his brief of evidence, stated:

[13] I believe that the approach taken in this situation was reasonable and the discrepancy in the dimensions would have been found at an early stage of the process and easily rectified if the correct process had been followed, as:

- (a) There were recent plans with dimensions stamped as approved by the Council for the property;*
- (b) The scale of the project was small and allowed for a minor adjustment to the plans to correct (as was ultimately done);*
- (c) There were clear requirements to confirm the provided dimensions were correct throughout the architectural drawings and specifications; and*
- (d) There was a condition of consent requiring a BLC before the concrete pad was poured.*

- [23] Mr [OMITTED] was asked whether consideration was given to obtaining a survey prior to the design being developed and submitted for a building consent. Mr [OMITTED] accepted that it would have been advantageous and that he has now changed his process to obtain one sooner.
- [24] The Respondent proceeded with the build in February 2020. He stated that he reviewed the building consent prior to construction commencing. He was not aware of the requirement for a Building Location Certificate. He stated he had not seen the requirement for it in the building consent and that he did not know what a Building Location Certificate was.

- [25] The Building Consent Construction Documentation and Advice Notes, listed the following requirements:

Test report and/or “as built”

Building location certificate: Provide a B-081 certificate from a registered professional surveyor or a licensed cadastral surveyor for building location relative to boundaries, and building heights relative to recession planes on South and West boundaries.

- [26] The Respondent proceeded with the build without a survey being carried out by a Registered Surveyor or a Building Location Certificate being obtained. The Respondent gave evidence that he uses surveyors on a case-by-case basis. He did not see that there was a need for a survey on this project. The Respondent set out the addition using the existing building as the reference point and the measurements provided in the consented design.
- [27] The requirement for a Building Location Certificate was brought to the Respondent’s attention during the build by the Council. Once a survey was carried out, some two months after the issue was identified, it was ascertained that the bathroom, as designed, would encroach on the boundary. The exterior wall of the bathroom had to be reduced by 310mm. A redesign was required. Mr [OMITTED] stated that the redesign that was developed was the same as the design that would have been developed had the issue with the boundary been known when the design was first developed. The redesign involved pulling the wall framing back and moving the bathroom over, reducing the size of the shower and changing the veneer cladding to a sheet cladding system.
- [28] The Respondent gave evidence that once the requirement was brought to his attention, he made inquiries with the designer and the Council as to what was needed to be done. He stated neither responded with any guidance.
- [29] The Respondent accepted that he had not obtained a Building Location Certificate prior to commencing the build but submitted that it was not his responsibility to obtain one and that the proximity to the boundary was an issue the designer should have identified and dealt with. He noted that the Council allowed construction to continue until May 2021. A Notice to Fix was issued by the Council on 26 July 2021. The reason was “Dwelling not located as per consent”.
- [30] The Respondent was asked why he continued with the build after the boundary issue had been brought to his attention. He stated that it was a small build that was going up quickly, there was pressure to get it finished and that he did not see that it was his position to challenge the work of the designer.
- [31] The Respondent was also questioned about a missed inspection. The building consent included a schedule of inspections. It included foundations inspection. The Respondent did get an engineer to complete a foundations observation. The engineer’s observation stipulated, “Work shall not proceed without the relevant

Council inspections completed". A foundation inspection was not carried out. The Respondent stated that he did not make the link that there was still a need for a Council inspection.

- [32] A half-height masonry inspection was also missed. The Respondent stated that this was a mix-up with timings. The inspection was booked for the morning, but the inspector did not turn up on time. The blocklayer continued and covered in the work without it being inspected.
- [33] With regard to the provision of a record of work, the Respondent gave evidence that he provided one in 2022 when he ascertained that he would not be returning to carry out any further restricted building work. After the hearing, he provided a copy of the record of work that he stated he had submitted. It was dated 28 April 2022. The Respondent stated that his last actual day on site was when he attended a Council inspection on 27 May 2021.

Board's Conclusion and Reasoning

- [34] The Board has decided that the Respondent **has**:
- (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)
- and **should** be disciplined.
- [35] The Board has also decided that the Respondent has not failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).
- [36] The reasons for the Board's decisions follow.

Negligence and Incompetence

- [37] The Board's incompetence finding relates to the failure to obtain inspections in a timely manner, and the incompetence finding to the failure to obtain a Building Location Certificate.
- [38] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

- [39] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [40] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,¹¹ it was stated as “*an inability to do the job*”.
- [41] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [42] 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 Act¹³. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁴.
- [43] 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*

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

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

- (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.*

[44] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[45] The issues before the Board related to a failure to obtain a Building Location Certificate and to call for inspections as the build progressed.

[46] In terms of the Building Location Certificate, there was a clear requirement in the building consent for a Building Location Certificate to be obtained. Further, the building consent outlined what was required to meet the requirement, including engaging the appropriate professional. The Respondent stated that he reviewed the building consent before he started. If he had, he should have identified the need for a Building Location Certificate. He did not. Further, the Respondent stated that he did not know what a Building Location Certificate was or how he was to go about obtaining one. It is because of this lack of knowledge that the Board decided that the failure was one that amounted to incompetence.

[47] The Board would also note that, in a build where distances to boundary came down to millimetres, and there were no locatable survey pegs, that a reasonable and prudent Licensed Building Practitioner would obtain the services of a surveyor when setting out the build. The Respondent did not. A finding of incompetence has already been made. The Respondent should note that even if a Building Location Certificate had not been required, it would have considered the failure to utilise a surveyor to be negligent conduct.

[48] Turning to the failure to obtain inspections, the building consent clearly set out the inspections that were required. The Board's finding, however, only relates to the missed foundations inspection. With respect to the half-high masonry inspection, the blocklayer should have delayed the work to allow for the inspection and bears responsibility for it. The same cannot be said of the foundation inspection. Not only did the building consent stipulate that one was required but the engineer also noted it had to be completed in his site observation note. The Board would expect a Licensed Building to understand and apply the need for all of the specified inspections to be carried out.

¹⁵ [2001] NZAR 74

- [49] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, has decided that the Respondent demonstrated a lack of knowledge and 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.

Contrary to a Building Consent

- [50] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 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.*

- [51] 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.
- [52] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁶. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.
- [53] The Respondent failed to obtain a Building Location Certificate as required by the building consent. In doing so he failed to comply with it. The Board does, however, note that there is an element of duplication between the findings under sections 317(1)(b) and (d) of the Act. As such, it will when considering penalty, treat them as a single offence.

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

Record of Work

- [54] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁷.
- [55] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [56] The Board discussed issues with regard to records of work in its decision C2-01170¹⁸ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [57] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [58] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [59] As to when completion will have occurred is a question of fact in each case.
- [60] In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. The Respondent’s last attendance at the site was at an inspection on 27 May 2021. He did not return to the site. A dispute arose. The Respondent stated that he provided a record of work when that dispute was resolved, and he knew he was not going to return to carry out any further work. He then provided a record of work.
- [61] When there is a genuine dispute and the possibility that further restricted building work may be carried out, completion may not have occurred. The Board accepts that this may have been the case in this matter and on that basis, the Board finds that the disciplinary offence has not been committed.

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁹ [2018] NZHC 1662 at para 50

Penalty, Costs and Publication

[62] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[63] 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

[64] 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*²⁰ 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.

[65] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²¹ 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.

[66] The Respondent has committed two disciplinary offences. As previously noted, the Board will treat them as one offence when considering penalty. The failure to obtain a Building Location Certificate was serious, and the Board has found that the Respondent had been incompetent. The failure could have led to more serious consequences than occurred. Similarly, the failure to obtain an inspection of the foundations could have had more serious downstream consequences.

[67] Ordinarily, the Board would consider cancellation, suspension or a training order when it makes a finding of suspension. It has decided, however, that it was an isolated and very limited finding of incompetence, and as there were no quality or compliance issues relating to the actual building work, it has decided that a fine will suffice as a penalty. The fine needs to reflect the seriousness of the offending.

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

[68] The Board adopted a starting point of a fine of \$4,500. It took into consideration as a mitigating factor that, had a Building Location Certificate been obtained prior to the design being developed, the issue as regards location and redesign would not have occurred. On that basis, the Board has reduced the fine to \$4,000.

Costs

[69] 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.”

[70] 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 case²².

[71] In *Collie v Nursing Council of New Zealand*,²³ 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.

[72] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁴ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

[73] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.

²² *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.

²³ [2001] NZAR 74

²⁴ CIV-2011-485-000227 8 August 2011

[74] The matter proceeded as a consolidated hearing. As a result, the hearing costs were less. There was also an element of duplication in the investigation. The Board's scale amount for an investigation and hearing of this nature is \$3,500. It has decided, however, to impose a costs order of one-half of that amount to each of the Respondents. Accordingly, the Board's costs order is that the Respondent is to pay the sum of \$1,750 toward the costs of and incidental to the Board's inquiry.

Publication

[75] 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 Act²⁵. 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.

[76] 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.

[77] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.

[78] 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 interest³⁰. 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.

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

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

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

Section 318 Order

[80] 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 pay a fine of \$4,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,750 (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.

[81] 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

[82] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **8 November 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[83] 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

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

Signed and dated this 17th day of October 2022



Mr M Orange
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.*