Before the Building Practitioners Board

	BPB Complaint No. CB25789
Licensed Building Practitioner:	Steven Bedford (the Respondent)
Licence Number:	BP 117096
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	14 December 2021
Decision Date:	21 January 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr B Monteith, LBP, Carpentry and Site AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

Appearances: Mr Cameron 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 a disciplinary offence under section 317(1)(b) of the Act.

Contents

Summary of the Board's Decision 2
The Charges 2
Function of Disciplinary Action 2
Inquiry Process 3
Background to the Complaint 4
Evidence 4
Legal Submissions 7
Board's Conclusion and Reasoning 7
Negligence 7
Section 318 Order 16
Submissions on Penalty, Costs and Publication 16
Right of Appeal 16

Summary of the Board's Decision

[1] The Respondent has carried out or supervised building work in a negligent manner. He is fined $2,500 and ordered to pay costs of $3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, but there will be no further action taken to publicly notify the Board's 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 Regulations[1] to hold a hearing in relation to building work in [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act), as detailed in the report of Mr Leon Goodwin of Prendos (Document 2.1.37, Page 48 of the Board's file).

Function of Disciplinary Action

[3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the 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].

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[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] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board,*[4] Collins J. noted that:

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

[5] 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 persons[5]:

> *… 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.*

[6] 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.

[7] 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

[8] 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.

[9] 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.

[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Background to the Complaint

[10] The Respondent was contracted to [Omitted] to undertake retrofit window work, including removal of existing windows and a French door and the installation of new joinery, at the Complainant's home. This work did not require a building consent as it was covered by the Schedule 1 (1) exemption under the Act.

[11] The Complainant alleged the Respondent's workmanship had weathertightness implications.

Evidence

[12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[13] 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.

[14] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:

Steven Bedford, Respondent

[Omitted], Complainant

Leon Goodwin, Senior Chartered and Registered Building Surveyor, Prendos New Zealand Limited

[Omitted], [Omitted]

[Omitted], [Omitted]

Haydon Miller, NZIBS Registered Building Surveyor

[15] It was common ground between the parties and the expert witnesses that the work undertaken by the Respondent had not, at the date of this hearing, exhibited any water ingress issues. However, the Complainant contended that the reliance on silicon for waterproofing was unsatisfactory and that it was only a matter of time before there would be weathertightness issues.

[16] On the expert evidence, there is a conflict as to whether the workmanship of the Respondent was acceptable or was likely to fail in the future.

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

[17] The Respondent gave evidence detailing the method and process he used to do the work:

(a) It was his understanding that the Complainant required a flush finish between the aluminium and timber facings;

(b) Consequently, he did a butt edge joint between the timber facing and the aluminium joinery;

(c) Silicone joints; and

(d) Head and sill flashings.

[18] In response to questioning from the Board, the Respondent explained that his system was weathertight because:

(a) He fitted window tape, air seals, perf rod, and foam;

(b) He fitted sill flashings with plastic stopends to the framing under the window;

(c) Head flashing and a second flashing above which carries water away from hitting the window;

(d) Secondary head flashing at the top extends 50mm over the end of the window, which covers the end grain of the timber; and

(e) The silicone he applied between the aluminium and timber facing would be durable and not fail over time.

[19] The Respondent confirmed that he did not consider installing a back flashing. He was adamant that the weatherboards went behind the windows, but that in any event the silicon joint to the window was adequate in that situation. He also confirmed, in answer to a question from the Board, that there was no rebated timber facing behind the aluminium joinery.

[20] The Complainant gave evidence there were two locations where the weatherboards did not go behind the flange – the kitchen door and the lounge window. The Respondent accepted this and said he thought it had been done but it was an oversight.

[21] Mr Miller, a NZIBS Registered Building Surveyor gave evidence which supported the Respondent's methodology. It was Mr Miller's view that the work was of a bespoke nature in which an existing cladding system is being modified to suit the selected joinery. He considered that as the building work did not require a building consent and the dwelling was over 50 years old the building code and E2 in particular were not relevant.

[22] Mr Miller stated that the Respondent's system *"does all the things you would expect to make it weather tight – it will work".* He acknowledged that the Respondent's work was different from the method proposed by Mr Goodwin and in his affidavit, Mr Miller stated – *"Experts commonly have different opinions when dealing with bespoke design solutions. His view is simply his view of a way to improve (in his opinion) what was installed, when in my view there is nothing materially deficient with the work undertaken."* (Document 8.3.2.1, Page 265 of the Board's file).

[23] When asked by the Board whether he would present the Respondent's detail to a Council for consent, Mr Miller replied yes. He further confirmed, when questioned by the Respondent's lawyer, Mr Cameron, that if he was the building consent officer, he would consider this work capable of being consented.

[24] Mr Goodwin, a senior chartered and registered building surveyor from Prendos did site inspections on 23 April 2012 and 17 June 2021 and created two reports. (Documents 2.1.37 and 2.5.5, Pages 48 and 148 of the Board's file).

[25] Mr Goodwin stated that the detail at the joinery facing flange did not appear to have sufficient lap provided between the facing board and the joinery facing flange. At the hearing he expressed the view that this was a critical fault and without some form of lap, water can get into the framing.

[26] Mr Miller was of the view that the Respondent's system worked without the need for a lap.

[27] Mr Goodwin's opinion was that the Respondent's system would not work because:

(a) It was not weather tight;

(b) There was a timber facing but no overlap;

(c) There was just an open gap between the weatherboard and the window frame;

(d) There was reliance on sealant alone and sealant breaks down over time; and

(e) As there was no back flashing or secondary method of protection, moisture would enter the framing over time.

[28] Mr Goodwin further stated in evidence that there are acceptable solutions and if you chose to deviate from these to use your own solutions then the installer must prove that his alternative solution works. In this case no testing has been done to show the Respondent's method is working. He further noted that the work is only 6 months old and that it is only working currently *"by luck".*

[29] There was conflicting evidence, and differing opinions on the issue of stop ends. Mr Goodwin expressed concern that proprietary sill tray stop ends were, from his observation, not fitted correctly. The Respondent believed there was one stop end that had worked loose. The Complainant said there were two locations – lounge window and kitchen door – and she referred to Mr Goodwin's site inspection Report Sheet (Document 2.5.5, Page 148 of the Board's file). Mr Goodwin agreed that the stop ends could move and it was an *"educated guess that if one had moved others would have also."*

[30] The Board queried the primary head flashing on the front elevation which had been installed in two sections. The Respondent explained that the section was over 3 metres long, and he could not obtain a single piece that long. Mr [Omitted] of [Omitted] confirmed this. Mr Goodwin stated in his report that *"the head flashing has been butt jointed and there is no visible evidence of a soaker flashing installed behind as typically required to provide a weathertight detail*." (Document 2.1.39, Page 50 of the Board's file). The Respondent stated

that this was not a common detail, but he had installed a soaker flashing, but it could not be seen as the front vertical edge had been removed.

[31] Mr Goodwin stated that jamb battens should have been installed to allow the sill tray flashing to extend to the outer edge of the window facings as per E2.

Legal Submissions

[32] The Respondent's lawyer made submissions on the Respondent's behalf. These can be summarised as –

(a) The Respondent stood by his work and believed it was fit for purpose and was watertight, and this was shown by there being no evidence of failure.

(b) A building consent was not required as it was exempt work under Schedule 1 of the Act. Section 42A of the Act requires the work to continue to comply with the building code to the extent that it did before the building work. On this basis and as the building is over 50 years old, E2 of the Building Code is relevant but not directly applicable.

(c) The workmanship could not be said to be negligent because there was no evidence that the work failed.

(d) The Respondent's willingness to return and redo the work in accordance with the Prendos recommendations demonstrated that he was not negligent.

Board's Conclusion and Reasoning

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

Negligence

[34] 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 Courts[8] .

[35] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. 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.

[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)

[36] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act.[10] The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[11]

[37] 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.*

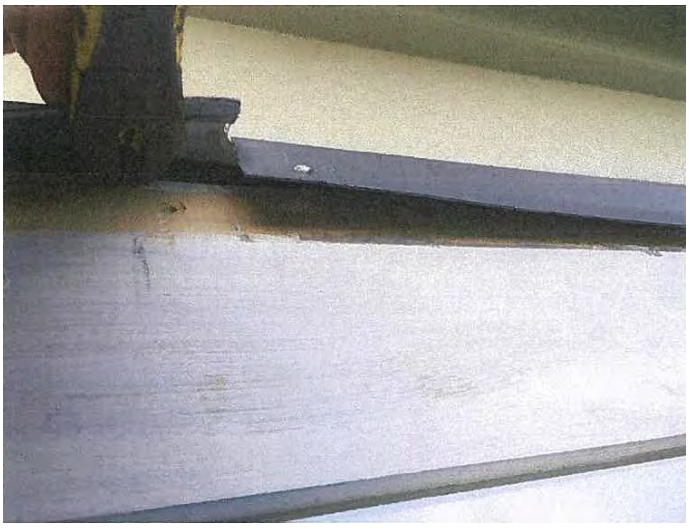
[38] Turning to seriousness in Collie v Nursing Council of New Zealand,[12] the Court's noted, as regards the threshold for disciplinary matters, that:

> *[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*.

[39] The Board determined that the failure of the weatherboards to go behind the flange, the reliance on silicon only to provide a weathertight join, and the absence of a secondary back up system such as a back flashing falling into a properly installed full width sill tray flashing were evidence of negligent building work. There was no evidence of a soaker behind the

[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] [2001] NZAR 74

butted head flashings over the 3 metre door span as explained in evidence by Mr Goodwin and seen in the photos below.



[40] The above photographs evidence the workmanship issues set out in paragraph [39] above and, in the Board's view, demonstrate the Respondent's failure to meet an acceptable standard.

[41] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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.

Legal Submissions

[42] The starting point is section 17 of the Act, which provides -

> *"All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work*."

[43] Section 42A (1)(a) of the Act provides that a building consent is not required for building work which is described in Part 1 of Schedule 1 provided that -

> *(a) the building work complies with the building code to the extent required by this Act:*
>
> *(b) after the building work is completed, the building, —*
>
> *(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or*
>
> *(ii) if it did not comply with the building code immediately before began, continues to comply at least to the same extent as it did then comply:*

[44] Based on these statutory provisions, all new building work (whether it requires a building consent or not) must meet the current building code. The existing building work must continue to comply with the building code to at least the same extent as it already did.

[45] This point was discussed by Justice Muir in *Wheeldon v Body Corporate 342525 and Stent*[13] in the context of section 112 of the Act, which is the equivalent provision to section 42A, save that it relates to a situation where a building consent is required.

> *[160] …. Section 112 does not detract from the s 17 Building Act requirement that all building work must comply with the Building Code (or the ss 67-70 provisions relating to waivers or modifications which are not, on the evidence, engaged in this case). Building Law in New Zealand summarises the position as follows:[14].*
>
> *In other words:*
>
> - *Any new work must comply completely with the Building Code subject to any waiver or modification granted by the territorial authority (for example, if a shower compartment made of ordinary glass is being replaced, then the replacement must be made of safety glass as required to comply with the Building Code); and*
> - *After the alteration, the whole building must comply with the Building Code to the extent specified by s 112.*
>
> *[161] The "extent specified" is that the building will "continue to comply at least to the same extent as it did then comply"[15] but that is a reference to the building as a whole. It is not a*

[13] [2015] NZHC 884
[14] Building Law in New Zealand (online looseleaf ed, Thomson Reuters) at [BL112.02].
[15] Building Act 2004, s 112(1)(b)(ii).

mandate for a repair or replacement of the particular element which has failed in accordance with some historical and now superseded Code requirement.

[162] Department of Building and Housing's: Determination 2011/09346[16] is on point and discussed in Building Law in New Zealand.[17] The determination related to a relocated house and associated alterations. It confirmed that s 112 applied to the compliance of the building as a whole (after alteration) and not to the building work itself. Therefore new stairs replacing rotten stairs in a relocated house had to comply fully with the Building Code. They were not an existing building element simply because they were located in the same place and built to the same dimensions and configurations as the original stairs.

[163] In my view this conclusion follows logically from s 17 of the Building Act, which provides:

> *17 All building work must comply with Building Code All building work must comply with the Building Code to the extent required by this Act, whether or not a building consent is required in respect of that building work.*

[164] Significantly, the section consigns to the point of irrelevance much of the argument in the case about whether a building consent is necessary for the membrane work to the decks. Exactly the same principles apply whether or not a building consent is required.

[46] Accordingly in this case, the new joinery installed by the Respondent, in the same way as the rotten stairs example discussed by Justice Muir, must comply with the Building Code. To meet the Building Code, it is necessary to either use an acceptable solution (which the Respondent did not do) or a verification method[18]. Based on the evidence given by Mr Goodwin, the solution adopted by the Respondent was not an acceptable solution, and a verification method had not been used.

[47] Accordingly, the Board does not accept the submission made by Mr Millar and by the Respondent's lawyer that the building code and in particular E2 were not "relevant" and /or were relevant but "not directly applicable".

[48] In assessing negligent building work for the purposes of section 317 of the Act, the Board must assess the acceptable standard of work in accordance with the cases outlined above. Whether the Respondent's chosen method of work responds to the requirements of E2 is one measure the Board is entitled to consider in that assessment.

[49] The Respondent and Mr Miller suggested that because the building work has not failed, - that is, there is no evidence of a water ingress issue - it was not possible for the Respondent's work to be negligent. This position is not accepted by the Board.

[50] In *Beattie v Far North District Council*[19]Judge McElrea held that the word "negligent' in section 317(1)(b) of the Act is not to be construed by applying the concept of negligence

[16] Department of Building and Housing Determination 2011/092 (21 October 2011).
[17] Building Law in New Zealand, above n 45, at [BL112.02].
[18] Section 19 of the Act stipulates the means by which compliance with the Building Code can be established.
[19] DC Whangarei CIV-2011-088-313, 11 May 2012 at para 41

from the law of torts. Accordingly, the judge said the absence of damage can be relevant to penalty but is not determinative of liability in respect of a disciplinary offence.

[51] In reliance on this authority, the Board does not consider that the lack of evidence of a failure in the building work or of water ingress, is determinative of the question of the Respondent's alleged negligent workmanship.

[52] There was a conflict between the expert evidence on the issue of whether the building work will fail. On this point, the Board prefers the evidence of Mr Goodwin who stated that no testing has been done to show the Respondent's method is working, the work is only 6 months old and that it is only working currently *"by luck"*.

[53] The Respondent gave evidence of his willingness to adopt the recommended work methodology set out by Mr Goodwin (Document 2.1.40, Page 51 of the Board's files) in order to satisfy the Complainant. It was submitted that this demonstrated that the Respondent was not negligent. The Board does not accept this submission.

[54] The Respondent's workmanship is to be judged at the time it was originally done. Subsequent actions may be relevant to penalty but do not affect the assessment of negligence. The Board considers that licensed building practitioners should be aiming to get building work right the first time and not waiting for a complaint and then relying on others to identify compliance failings and to assist them to get it right.

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 Act[i], 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.

<u>Penalty</u>

[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*[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.*

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

[58] 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.

[59] The matter was at the mid-range of seriousness. The Board considered that a fine was appropriate. It adopted a starting point of $2,500. It did not consider that there were any mitigating factors that would warrant a reduction. As such, the fine is set at $2,500.

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 case[22].

[62] 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.*

[63] 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.*

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

[64] 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 moderate in complexity. Adjustments based on the High Court decisions above are then made.

[65] 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. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

[66] 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[25]. 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.*

[67] 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.

[68] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[26]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[27]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[28]. 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].

[69] 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[30]. 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.

[70] 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

[71] 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 $2,500.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $3,500 (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(l)(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.

[72] 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

[73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Friday 25 February 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.

[74] 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

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

Signed and dated this 4th day of February 2022.

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.