

## Before the Building Practitioners Board

	BPB Complaint No. CB25753
Licensed Building Practitioner:	James Bold (the Respondent)
Licence Number:	BP 102336
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	Wellington
Hearing Type:	In Person
Hearing Date:	9 February 2022
Decision Date:	21 February 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2  
Mr R Shao, LBP, Carpentry and Site AOP 1  
Ms K Reynolds, Construction Manager

#### 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)(da)(ii) of the Act.

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

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Evidence</b> .....	4
<b>Board’s Conclusion and Reasoning</b> .....	7
Negligence and/or Incompetence .....	7
Record of Work.....	9
<b>Penalty, Costs and Publication</b> .....	10
Penalty .....	11
Costs.....	11
Publication .....	12
<b>Section 318 Order</b> .....	13
<b>Submissions on Penalty, Costs and Publication</b> .....	13
<b>Right of Appeal</b> .....	14

### Summary of the Board’s Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$1,000. The matter will be recorded in the Register of Licensed Building Practitioners for a period of three years.
- [2] The Respondent has not carried out building work in a negligent or incompetent manner. Whilst his work was substandard, it was not, on the basis of court decision on the disciplinary threshold for complaints to be upheld, sufficiently serious enough to warrant a disciplinary outcome.

### 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 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 contrary to section 317(1)(b) of the Act, IN THAT, a foundation at [Omitted] may not have been constructed to an

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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.

acceptable standard. In further investigating the matter, the Board will be considering whether the foundation was within acceptable tolerances; and

- (b) 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.

### Function of Disciplinary Action

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

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

- [6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>5</sup>:

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

- [7] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the

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

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

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

### **Inquiry Process**

- [9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. 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.
- [12] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [13] In addition to the documentary evidence before the Board heard evidence at the hearing from:

James Bold	Respondent
[Omitted]	Complainant
[Omitted]	Surveyor, [Omitted], summoned witness
[Omitted]	Survey Technician, [Omitted], summoned witness
[Omitted]	Survey Technician, [Omitted], summoned witness
[Omitted]	Licensed Building Practitioner, Carpentry, summoned witness for the Respondent

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[Omitted] Building Control Officer, [Omitted], summoned witness for the Respondent

[Omitted] Engineer, summoned witness for the Respondent

[Omitted] Licensed Building Practitioner, Carpentry, summoned witness for the Respondent

[14] The Respondent was engaged as the main contractor for the construction of a new residential dwelling for the Complainant. The Respondent, together with two apprentices and with the assistance of another Licensed Building Practitioner who had extensive experience with pod foundations (the Respondent stated he had constructed about ten pod foundations prior to this one), constructed the foundation. The Respondent's involvement in the build came to an end following the construction of the foundation as a result of a commercial dispute about the foundation in or about May 2020. The contract was terminated by the Complainant by email. The Respondent was trespassed from the site on 22 June 2020. The Respondent stated he respected the Complainant's decision to use another contractor. The Complainant pursued civil remedies in the Disputes Tribunal.

[15] [Omitted] was engaged to carry on with the build. He noted issues with the foundation stating in a letter to the Complainant dated 8 June 2021:

*In my professional opinion the foundation and floor is the most substandard I have worked on. It was obvious that the outside perimeter of the foundation was not straight or square, and this was confirmed when the frames were stood. As a result of this the frame size had to be increased from a 90mm wide frame to a 140mm wide frame in places to still achieve a legal load bearing capacity of the frame. The height of the finished floor is inconsistent from one side to the other which has caused numerous issues when erecting the frames and trusses/roof structure.*

[16] At the hearing it was established that the change to 140mm framing was limited to one external wall of the dwelling and that in other areas packers were used. Surveyors who were engaged by the Complainant took some spot levels of the foundations when they were on site. They noted some small changes in levels but did not note it as a concern. They did not do a full check of levels.

[17] The Respondent outlined his methodology for constructing the foundation. He stated that post pour checks did not show that the foundation was outside of acceptable tolerances. He did accept that there was some bowing and that some of the formwork bracing was at 800mm centres in some areas when they should have been at 600mm centres.

[18] The Board was provided with a surveyor's report that set out variances to grid lines established by the surveyors. The survey noted variances from grid lines as follows and noted that the measurement equipment used had a plus or minus tolerance of 3mm:

GRID REF (X)	DISTANCE OFF LINE (m)	GRID REF (Y)	DISTANCE OFFLINE (m)
A1	0.003	1A	-0.002
A2	0.002	2A	0.000
A7	0.003	7A	0.010
B1	-0.002	1B	-0.003
B2	0.003	2B	0.000
B6	-0.001	6B	0.006
B7	-0.001	7B	0.008
C1	0.006	1C	0.006
C2	-0.001	2C	0.005
C6	0.001	6C	0.019
C7	0.005	7C	0.023
D1	0.009	1D	0.006
D4	0.003	4D	0.004
D5	0.001	5D	0.015
D7	0.007	7D	0.017
E3	0.015	3E	-0.003
E4	0.014	4E	0.001
F3	-0.014	3F	0.005
F4	-0.012	4F	0.011
G1	0.005	1G	-0.014
G4	0.008	4G	-0.010
G5	0.011	5G	0.007
G7	0.003	7G	0.006
H1	0.003	1H	-0.014
H2	-0.007	2H	-0.012
H6	0.010	6H	-0.005
H7	-0.003	7H	-0.001
I1	0.001	1I	-0.015
I2	-0.006	2I	-0.014
I6	-0.006	6I	-0.008
I7	0.000	7I	-0.008
J1	-0.001	1J	-0.022
J7	-0.001	7J	-0.003
A3	0.005		
A4	0.001		
A5	-0.002		
A6	-0.005		
B3	0.009		
D2	0.017		
D3	0.009		
D6	0.011		
G2	0.004		
G3	0.003		
G6	-0.002		
J2	0.010		
J3	0.016		
J4	0.011		
J5	0.006		
J6	0.001		
5E	-0.006		
5F	-0.007		

[19] At the hearing, the Board heard evidence about issues that were not raised as part of the complaint and, as such, were not included in the allegations the Board was investigating at the hearing. Those issues included a failure to provide a recess for a floor safe that was shown on the consented plans, the incorporation of underfloor heating in the concrete floor (this occurred just prior to the pour occurring) and

cutting of the concrete floor after the Respondent's engagement had ended. The Respondent believed this may have compromised floor mesh, foundation reinforcing and DPC membrane below. It was noted that no building consent process had been followed for the incorporation of underfloor heating which required the concrete floor slab thickness to be increased by a minimum of 20mm to accommodate the pipework, as well as raising the consented finished floor level.

- [20] The Respondent has not provided a record of work for the foundations. He stated, in response to the complaint, that he was not willing to provide a record of work for work that was structurally damaged as a result of cuts made to accommodate the floor safe. The Respondent had been trespassed from the site in June 2020, and a new contractor took over. The Respondent was aware that another contractor had continued with the build.

### **Board's Conclusion and Reasoning**

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

### Negligence and/or Incompetence

- [24] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>7</sup> 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.*

- [25] 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*<sup>8</sup> test of negligence which has been adopted by the New Zealand Courts<sup>9</sup>.

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<sup>7</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>8</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>9</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [26] 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*,<sup>10</sup> it was stated as “an inability to do the job”.
- [27] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>11</sup>. 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.
- [28] It is with respect to the seriousness of the matters before the Board that it decided that the Respondent had not been negligent or incompetent.
- [29] In *Collie v Nursing Council of New Zealand*,<sup>12</sup> 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.*
- [30] When considering seriousness, the Board must also take into consideration decisions that have been made in the courts as regards the Licensed Building Practitioner disciplinary regime. In *Heslop*<sup>13</sup>, Judge Macaskill held that a dimension error in the foundations of 90mm “was a simple mistake”, “the quality of the build was not affected” and “this was not behaviour that fell seriously short of what would be considered to be acceptable by competent, ethical and responsible building practitioners”. Judge Macaskill also decided that the tolerances in NZS3109<sup>14</sup> apply to foundations which he noted are less restrictive than those in NZS3604.
- [31] Given the findings in *Heslop* and the noted variances, the Board has decided that allegations of negligence or incompetence did not meet the seriousness threshold outlined above. The Respondent is, however, cautioned to take care with future work.
- [32] The Board does note that had the issue of changes to the foundation to accommodate underfloor heating been before it, then it may have made a finding of negligence or a failure to comply with a building consent (section 317(1)(d) of the

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<sup>10</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>12</sup> [2001] NZAR 74

<sup>13</sup> [2018] NZDC 21096

<sup>14</sup> Refer clause 5.3 of NZS3109:1997 and tables 5.1 and 5.2.



Act) as an acceptable building consent change process was not followed prior to the related work being carried out.

### Record of Work

- [33] 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 work<sup>15</sup>.
- [34] 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.
- [35] The Board discussed issues with regard to records of work in its decision C2-01170<sup>16</sup> 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.
- [36] 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.
- [37] 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*<sup>17</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”. As to when completion will have occurred is a question of fact in each case.
- [38] 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. That did not occur in the present matter. Rather, the Respondent’s building work came to a premature end. The contract was terminated, civil proceedings ensued, and another contractor carried on with the build. In effect, this meant that completion as regards the Respondent’s restricted building work had occurred as he would not be carrying out any further restricted building work. The Board finds that completion occurred in mid-2020. As a record of work has not been provided, the disciplinary offence has been committed.

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<sup>15</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>16</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>17</sup> [2018] NZHC 1662 at para 50

- [39] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [40] The Respondent put forward his concerns about changes that were made to the foundation after he had completed his restricted building work. In this respect, the Respondent should note that providing a record of work does not equate to signing off on the work. A record of work is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:

*(4) A record of work given under subsection (1) does not, of itself,—  
create any liability in relation to any matter to which the record of work  
relates; or give rise to any civil liability to the owner that would not otherwise  
exist if the licensed building practitioner were not required to provide the  
record of work.*

- [41] The Respondent’s concerns do not, therefore, constitute a good reason.
- [42] The Board notes that there was a civil dispute. Whilst not put forward as a good reason, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [43] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

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

- [44] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<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.
- [45] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an

opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

[46] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>18</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[47] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>19</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 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.

[48] Record of work matters are at the lower end of the disciplinary scale. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

### Costs

[49] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

[50] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>20</sup>.

[51] In *Collie v Nursing Council of New Zealand*,<sup>21</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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<sup>18</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>19</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>20</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>21</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.*

- [52] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>22</sup> 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.*

- [53] 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.
- [54] The Board's normally scale of costs for a hearing of this type is \$3,500. The Board notes that the only charge that was upheld was in relation to the failure to provide a record of work. Had the Board dealt with that matter alone at a hearing, costs would have been in the order of \$1,000. Given this, the Board has decided that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

#### Publication

- [55] 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>23</sup>. 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.*

- [56] 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

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<sup>22</sup> CIV-2011-485-000227 8 August 2011

<sup>23</sup> Refer sections 298, 299 and 301 of the Act

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

- [57] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</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>26</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>27</sup>.
- [58] 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>28</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.
- [59] Based on the above, the Board will not order further publication.

### Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

- [61] 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

- [62] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Monday 28 February 2022**. The submissions should focus on mitigating matters as they relate to

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<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

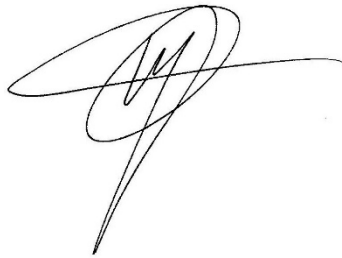
the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

- [63] 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

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

Signed and dated this 2<sup>nd</sup> day of March 2022.



**Mr M Orange**  
Presiding

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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.*

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- (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.*