Before the Building Practitioners Board

	BPB Complaint No. CB25842
Licensed Building Practitioner:	David Dawson (the Respondent)
Licence Number:	BP 118670
Licence(s) Held:	Design AoP 2

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	2 November 2022
Decision Date:	22 February 2023

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
Mrs J Clark, Barrister and Solicitor, Legal Member

Appearances:

Ms Sophie Lucas and Mr Jeremy Thomson 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)(i) of the Act.

Contents

Summary of the Board's Decision 2
The Charges 3
Function of Disciplinary Action 3
Inquiry Process 4
Evidence 4
Negligence 5
[OMITTED] Property 7
Sunroom roof addition – Level 3: 7
New roof over entrance door: 7
Re decks: 8
Floating floor over deck: 8
Metal Balustrade: 9
[OMITTED] Property 9
Subfloor Bracing: 9
Bathroom Changes: 9
Requests for Information (RFI): 9
Disrepute 11
Post Hearing evidence and submissions 13
Board's Conclusion and Reasoning 15
Negligence 16
Disrepute 20
Penalty, Costs and Publication 23
Penalty 23
Costs 24
Publication 24
Section 318 Order 25
Submissions on Penalty, Costs and Publication 26

Summary of the Board's Decision

[1] The Respondent has carried out building work in a negligent manner and has conducted himself in a manner that brings or is likely to bring the regime under this Act for licensed building practitioners into disrepute. The Respondent is fined $3,500 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.

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 at [OMITTED], Auckland and [OMITTED], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:

(a) 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 special advisor's report dated 9 March 2022 and in any addendum report provided; and/or

(b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act), in that his conduct in dealing with Council staff may have been unprofessional.

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].

[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]:

---

[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] [2016] HZHC 2276 at para 164

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

> *… 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 are 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.

Evidence

[10] 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.

[11] 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.

[12] In this case, the Board has extensively reviewed the documentation relating to the two building consent applications and the report of the Special Advisor.

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

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

David Dawson, the Respondent

Denise Whelan, for the Complainant, Auckland City Council

Alex Myers, Auckland City Council

Rob Woodger, Auckland City Council

[OMITTED], Auckland City Council

Graham Linwood, Special Advisor to the Board

[OMITTED], Expert witness for the Respondent

Negligence

[14] In her opening statement, the Complainant, the Manager Building Consents Capability, Auckland City Council, stated that the situation was *"unfortunate"* but that she was confident that making the complaint was the right thing to do.

[15] Counsel for the Respondent stated in their opening that there were three issues in relation to the alleged disciplinary offences under sections 317(1)(b) and (i) of the Act:

(a) Matters which should reasonably have been identified before the documents were submitted for building consent. Mr [OMITTED], the expert witness for the Respondent, was said to take a different view from Mr Linwood, the Special Advisor to the Board, on 8 of the 10 issues identified by Mr Linwood.

(b) Would the original application have satisfied the building code if built as planned? It was accepted that requests for information ("RFIs") are part of the standard process, and acknowledged that this did not run as smoothly as hoped. It was submitted that the nature and quality of the RFIs is the important part. The Respondent says there were difficulties in communication, the RFI questions were unclear, and this led to questions from the Respondent which were not always dealt with.

(c) Were the RFIs dealt with appropriately by the Respondent? Counsel stated that they were and that this issue overlapped with the alleged disciplinary offence under section 317(1)(i) of the Act. It was submitted that the allegations were not true or were exaggerated over time or not sufficiently serious to warrant a disciplinary response. Relying on a previous decision[7] of the Board, Counsel argued that the alleged behaviour did not meet the very high standard required to establish disrepute.

[7] Knight [2019] CB242274

[16] Mr Linwood was appointed as a special advisor to assist the Board. He was asked to consider five matters –

(a) Whether the design issues in the complaint should reasonably have been identified prior to the design being submitted for a building consent.

(b) Whether the original building consent application would not, on reasonable grounds, have satisfied the provisions of the building code if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

(c) Whether the responses to the requests for information were dealt with appropriately and adequately.

(d) Whether the Respondent's design was substandard.

(e) Whether the Respondent's drawings and/or specifications were incomplete and/or did not relate to the specific building application.

[17] Mr Linwood produced a report dated 9 March 2022 and a subsequent undated addendum. (Documents 5.1 and 5.2.1, Pages 430 – 445 of the Board's file). At the hearing, he confirmed his report and addendum.

[18] Mr Linwood had not received Mr [OMITTED]'s report in reply. The hearing was adjourned for a short period to give Mr Linwood the opportunity to consider it. The Board then canvassed whether there were any matters that the two experts agreed upon. A couple of matters were identified (numbers 20 and 24 referring to Mr [OMITTED]'s brief of evidence Document 8.4.2, Pages 498 and 499 of the Board's file), but this did not prove to be a productive avenue of inquiry.

[19] The Respondent set out for the Board his work history and experience and advised that, including the [OMITTED] property, he had been involved in 5 reclad projects of similar complexity.

[20] Mr [OMITTED] expressed two opening general opinions. Firstly, the Council should ask questions of a designer, but the Council should explain to the designer why the question is being asked; otherwise, the process builds resistance between the Council and the designer. Secondly, in the current environment, the design and specifications which are being required are too detailed in that certain details could and should be dealt with on-site. Mr [OMITTED] did not consider it desirable to have to provide many alternative design solutions in advance when matters could change on site.

[21] The Board then addressed a number of the design examples identified in Mr Linwood's report, which allegedly should have been identified prior to the design being submitted for building consent, and/or, if built as submitted in the original building consent application, would not have satisfied the code.

[OMITTED] Property

Sunroom roof addition – Level 3:

[22] In respect of the sunroom roof, Mr Linwood said in his report:

> *"The structure as designed did not meet NZS 3604 requirements and was subsequently specifically designed. The E2 requirements were not met in that the valley included a change of direction contrary to 8.1.6.2a and were technically gutters and not valleys "* (Doc 5.2.1, page 438)

[23] At the hearing, Mr Linwood explained that the layout and details for the sunroom roof were insufficient and that, as designed and submitted for consent, it was never going to work as the sunroom was a proposed addition over the existing balcony and the new roof to the sunroom was to connect into the existing roof and spouting lines. The Board questioned the Respondent on the inconsistencies between the original and revised roof drawings, the consented roof drawing, and the roof plan (Documents 2.2.7 and 4.4, Pages 188, 387 and 380 of the Board's file).

[24] Mr [OMITTED]'s brief of evidence recorded that the Respondent had told him a more detailed design would be done once the building was opened up and that Mr [OMITTED] had *"sympathy with that approach……the LBP approached the problem sensibly."* However, he went on to say that *"the original conception of the design was at fault…in my view the shape of the room should have been dictated by the roof construction, not the other way around."* (Document 8.4.2, Page 498 of the Board's file).

[25] The Respondent said it was *"always going to be a grey area"*. He agreed, however, that in his original design of the sunroom roof, water was not able to get out of the valley and around the corner but said that this *"could be addressed on site".* He accepted that on looking at it again now, he could have done better. In respect of the discrepancy between the roof drawing and roof plan, the Respondent said this was caused by CAD (computer aided design). The Respondent did state that this was not an excuse.

New roof over entrance door:

[26] Mr Linwood's report stated –

> *"the new roof over the entrance door is designed at 10 degree pitch when the minimum pitch allowable for concrete tiles is 15 degrees as per E2 8.2 Table 10."* (Document 5.2.1, Page 437 of the Board's file).

[27] Mr [OMITTED] described this as a *"minor glitch"* which could have been corrected on the drawings or, if it stayed at 10 degrees pitch, could have been corrected by using a different level of timber treatment product. He did, however, agree that for the concrete tile, it should have been 15 degrees.

[28] The Respondent stated that he had typed in "10 degrees" by accident and that there was plenty of space for 15 degrees to be accommodated.

[29] Ms Whelan for the Council said their expectation was that plans submitted for consent met the manufacturer's specifications and that any discrepancies were resolved before the plans were submitted.

Re decks:

[30] Mr Linwood's report stated (page 432 of the Board's file) that reference was made on the drawings that the existing timber decks are to remain in place and that they did not form part of the contract. Sheet 40 of the plans, however, stated that the existing timber decking was to be adjusted to suit the introduction of weatherboards. The two statements were contradictory:

> *The new cladding on a cavity will require that this deck be adjusted to allow for the cladding width and for the fixing at the base. Detail 9 Sheet A43 is contradicted by Detail 4 Sheet A40 while neither give any detail of the existing deck frame or how it will be altered (and still comply with NZS3604)"* (Document 5.2.1, Page 437 of the Board's file).

Floating floor over deck:

[31] Mr Linwood's report stated –

> *"There is no detail around the floating floor over the deck …"*

[32] Mr [OMITTED] explained that the Council would not approve a new membrane over the existing plywood substrate until it was satisfied the existing plywood was in a good condition.

[33] Mr [OMITTED] and Mr Linwood agreed that the falls could not be adjusted without lifting the existing plywood substrate. Mr [OMITTED], however, considered it reasonable to keep the design at the original fall and then address the issue on-site when the plywood was lifted.

[34] Mr Woodger for the Council stated that *"it was the degree of evidence that was the issue."*

[35] The Board questioned the Respondent on the issue of the fall for the deck. The Respondent's detailed design relied on, and the Building Code required a minimum of, 100mm below an adjoining threshold to the enclosed deck. However, the existing threshold as noted on the Respondent's floor plans, was only 50mm below. In addressing the issue of how he would achieve the 100mm fall, the Respondent said, *"that could be addressed on site"*.

[36] The Board also asked the Respondent how deck falls, and construction of a new recessed edge gutter could have been achieved within the existing deck structure. When asked how the design as provided would have worked, he said, *"grey area is the substrate",* and it could have been *"solved by a notation on the drawings- that it would be decided on site."* The Respondent admitted not having any notation on the plan about the assumed joist direction and agreed that his plan did not show how the whole deck would work.

Metal Balustrade:

[37] The Council requested information on how the metal balustrade was to be reconnected back onto the dwelling, and this was an item identified by Mr Linwood as one which should have been addressed prior to the drawings being submitted for building consent. (Documents 4.2 and 5.2.1, Pages 358 and 437 of the Board's file). The Respondent agreed that no detail on this had been given in the original design and accepted that it was a valid question and *"quite possibly"* should have been dealt with in the original drawings submitted.

[38] Mr [OMITTED] stated that he could not see that *"the temporary removal and reinstatement of the metal balustrading causes a problem…This falls into the same "bucket" as several other points: they are matters of contract, not of compliance, and should be of no concern to the BCA until such time (if any) an amendment to the consent is necessary*."(Document 8.4.2, Page 500 of the Board's file).

<u>[OMITTED] Property</u>

Subfloor Bracing:

[39] Mr Linwood commented – *"…the sub floor bracing utilising a braced pile system was unworkable due to the lack of height for floor level to ground level"* and *"I consider that this should have been obvious to the designer and an alternative system should have been adopted from the start."*(Documents 5.1 and 5.2.1, Pages 432 and 437 of the Board's file).

[40] Mr [OMITTED]'s view was that the Respondent was entitled to rely on the engineering advice provided. The Respondent stated that he did not initially have engineering input into this aspect of the design but obtained engineering advice after receiving the Council's requests for information, in order to supply the answers needed.

Bathroom Changes:

[41] Mr Linwood commented on the poor detail in respect of the bathroom and questioned whether the specifications were taken from another job without customising. The Respondent said that he used a Master Specification and that a Plumbing and Drainage plan was not done because there was no change to the locations of fixtures within the bathroom. Mr Linwood, however, pointed out that the relocations were significant and that a plumbing and drainage plan was, in his view, necessary. He directed the Board to two drawings showing the original and new bathroom. The position of the toilet had changed in these drawings, and a new bath had been added. (Document 2.2.3, Pages 134 and 138 of the Board's file).

Requests for Information (RFI):

[42] In respect of the [OMITTED] property, the first RFI dated 29 April 2021, containing over 41 points, was responded to by the Respondent on 28 May 2021. A second RFI dated 31 May 2021 with approximately 28 unresolved points was replied to by the Respondent on 1 July 2021. A review of that response by the Council ascertained

that most of the unresolved points remained outstanding. Subsequently, on 6 July 2021, the Council refused the building consent application.

[43] In respect of the [OMITTED] property, the Council sent an RFI on 25 January 2021 with approximately 30 headings and 58 separate items raised, and the Respondent replied on 15 March 2021. A further 3 RFI letters were issued, and a third person was involved in providing answers before the building consent was issued.

[44] Mr Linwood expressed his opinion that *"I have reviewed the RFI's and the responses to them and I don't consider that they were dealt with appropriately or adequately."* (Document 5.1, Page 432 of the Board's file).

[45] Mr [OMITTED]'s view was that the reasons for the Council's questions were not always apparent, and *"while it could be said that the [Respondent] should have simply provided what was asked for, rather than to try to understand the requests – and this may have resulted in a smoother process – Council should have communicated with the [Respondent] in a manner which he could comprehend.."*(Document 8.4.2, Page 503 of the Board's file).

[46] Mr [OMITTED] concluded that the answer to the question – were the responses to the RFIs dealt with appropriately and adequately – must be "no" because the [OMITTED] property consent application was refused. He, however, stated that *"the fault for that lies with both parties."*

[47] Mr [OMITTED]'s view was that –

> *"If the BCA requires more or better information, it is usual and common to issue RFIs. The existence of an RFI does not alter the underlying legal requirement, nor necessarily establish that the documentation was inadequate in respect of the item concerned. A large number of RFIs may indicate a mis-match in the expectations of each party…a design LBP is engaged for the purposes of gaining a building consent. This leads to a situation where documentation submitted for a building consent may well be inadequate (for the purposes of issuing a building consent0, but that does not establish that it is substandard."* (Document 8.4.2, Page 497 of the Board's file)

[48] Mr Linwood's opinion, answering the questions posed to him by the Board, was –

(a) Most, if not all, of the items listed in the RFIs should reasonably have been identified prior to the design being submitted for a building consent.

(b) If the two projects were properly built in accordance with the drawings and specifications in the original building consent application, they would not have met the requirements of the building code.

(c) The responses to the RFIs were not adequate and, at times, inappropriate.

(d) The drawings and specifications submitted were substandard. What was provided was poorly compiled and edited and, in many cases, contradictory (especially in relation to the [OMITTED] property)

(e) In respect of the [OMITTED] property, the documentation was not complete and only partially relates to the specific building consent application.

Disrepute

[49] On 29 April 2019, the Respondent made a formal complaint to the Council in respect of Ms [OMITTED], the Senior Building Control Surveyor with whom he was dealing for the [OMITTED] Property building consent application. He alleged that a serious allegation had been raised against his professional competence and standard of documentation.

[50] Ms [OMITTED] described the conversation with the Respondent, which led to the complaint as *"a heated discussion".* She had informed her Council team about the conversation straight after the call and before the complaint was received.

[51] Mr [OMITTED], team leader Project Assessment – Residential, had a telephone conversation with the Respondent about the complaint in which the Respondent allegedly said –*"she probably finished at Beijing university and started work for Auckland Council immediately after".*

[52] Mr Myers, team leader Specialist Reclads, was then tasked with dealing with the complaint. He sought Ms [OMITTED]'s input which was provided by email and a telephone conversation. Mr Myers, in an email to the Board, described the Respondent's response to the RFI as *"unprofessional and offensive"* and his manner on the telephone call to the person concerned as *"aggressive and defensive*". At the hearing, Ms [OMITTED] and Mr Myers both confirmed that the description in Mr Myer's email was Ms [OMITTED]'s words.

[53] On 5 July 2021, Mr Myers gave evidence that he had a telephone conversation with the Respondent. He alleged that the call was confrontational, and he described the Respondent as an *"unprofessional and arrogant man".* In response to questions from the Respondent's Counsel, Mr Myers, disclosed that he had handwritten notes of the conversation. Mr Myers alleges that in this call, the Respondent told him to *"just fuck off".* Mr Myers gave evidence that the notes were contemporaneous with the call and that it was a practice he had developed whilst serving in the police.

[54] A further aspect of behaviour the Council had raised is the Respondent's reply on 15 March 2021 to the RFI dated 25 January 2021 in respect of the [OMITTED] property. In response to item 29 – *"Sheet AO7, drainage note, please amend compliance document note. The current version should be AS/NZS3500.2.2018"* – the

Respondent has written – *"FMe?..Done"* (Document 2.1.2, Page 53 of the Board's file)

[55] There were allegations around behaviour at a meeting on 23 July 2021 with Council staff, the Respondent and the Respondent's client. Mr Woodger, Principal Specialist Building Surveyor, Auckland City Council, who was present at the meeting, gave evidence that there was no issue with the Respondent's behaviour at this meeting.

[56] The Respondent responded to each of the behaviours the Council complained about.

[57] At the hearing and in an earlier written response, he denied swearing at Mr Myers in the telephone call – stating, *"As for the profanity he suggests I said to him and not just that, I "shouted". I think Mr Myers might have this wrong. I do not remember saying this and I can't imagine I would do so. It's not my character to speak in that way to another person in any aspect of life."* (Document 2.2.5, Page 170 of the Board's file.).

[58] In respect of the *"Fme?..Done"* comment in the RFI at item 29, the Respondent, in his written response, stated –

> *"I can only state I am guilty, yes I wrote this. Not that there is any excuse and I take full responsibility and apologise for any distress felt…I can only state, if allowed some defence in this matter that I did not aim this at anyone but myself. There was no intention to offend anyone, least of all Ms [OMITTED]. I often write to myself as I go through RFI's ad can use the odd profanity if frustrated on little things, this is absolutely aimed at me hence the "Me" and not the "you" being used. I always proof read my responses and go over them several times but obviously this got missed out. Again, I apologise and will endeavour to ensure it never happens again."* (Document 2.2.1, Page 123 of the Board's file.)

[59] At the hearing, the Respondent again stated that the comment was not aimed at anyone but said the *"FMe?"* meant *"Fault me".*

[60] In respect of the comment about Beijing University, the Respondent, in his written response, said –

> *"I stated to [OMITTED] that, quote "I know that she studied in Beijing and came straight to council", I had no intention of suggesting anything other than ascertaining her qualifications and I in no way meant it to come across as racist or disrespectful. If it has then I apologise for this. I had simply looked Ms [OMITTED]'s work profile up and this is what was mentioned, I did however get the city wrong as it was Shanghai."* (Document 2.2.1, Page 1245 of the Board's file).

[61] At the hearing, the Respondent said that there was no malice intended, the statement was no reflection on Ms [OMITTED]'s ability and it was not intended to be

disrespectful. He further stated that Ms [OMITTED]'s questions to him in the RFIs reflected her lack of experience, and that is the way in which to view his comment.

[62] In respect of the original telephone call between the Respondent and Ms [OMITTED] which led to the Respondent's complaint about her, the Respondent denied that it was as characterised by Mr Myers. He stated, *"…there was no aggression in my manner …nor was Ms [OMITTED] "very upset"".* (Document 2.2.1, Page 124 of the Board's file).

[63] In a closing statement, Ms Whelan stated that the Council expected pushback and robust discussions. She said Council was not *"precious but when it gets personal it crosses a line".*

Post Hearing evidence and submissions

[64] At the conclusion of the hearing, the matter was adjourned on the basis that various documents were to be made available by the Council. A copy of the specifications prepared by the Respondent for the [OMITTED] property were provided to Mr Linwood, and a copy of Mr Myers handwritten notes of his telephone call with the Respondent were provided to the Respondent's Counsel.

[65] On 11 November 2022, the Board received and considered Mr Linwood's and Mr [OMITTED]'s comments on the specification.

[66] After the hearing and the provision of the handwritten notes of the telephone conversation between the Respondent and Mr Myers, Counsel for the Respondent sought disclosure of the full notebook in which the notes were made directly from a Council representative. By Board minute (3) dated 16 November 2022, the Board issued directions that if the Respondent required that document, he was to make an application to the Board.

[67] The Council did state that it had no objection to the notebook being made available with the proviso that other matters in the notebook not related to the hearing may need to be protected for privacy reasons.

[68] No application for the notebook to be produced in its entirety was made by the Respondent.

[69] Subsequently, by memorandum dated 25 November 2022, the Respondent's Counsel submitted -

> *"…given the Council's failure to disclose the file note until this late stage in the proceeding, the Board should not accept it into evidence as doing so would be fundamentally inconsistent with basic standards of natural justice."*
> (Document 8.4.5.1, Page 816 of the Board's file)

[70] By Board minute (4) dated 1 December 2022, the Board issued its decision and directed that – *"the handwritten notes of the telephone conversation between the Council Officer and the Respondent be received into evidence and added to the Board file".*

[71] On 9 January 2023, the Board received closing submissions from the Respondent's Counsel. These have been considered by the Board in reaching this decision.

[72] In summary, Counsel submitted –

(a) Of the six points identified in Mr Linwood's report as ones which should reasonably have been identified before the consent application was submitted only three *"can fairly be characterised as issues which ought to have been addressed before the application was made(the sunroom roof, deck and design of the window set with circular heads)".*

(b) It is not uncommon that an original building consent application may not satisfy all of the Building Code provisions if it was to be built at that stage. *"This is not evidence of negligence or substandard design work per se or evidence of a breach which requires a disciplinary response."*

(c) The RFI process suffered from difficulties in communication on both sides. The RFI questions were not always clear, and it was appropriate for the Respondent to question those. The nature and quantity of the RFIs must be considered, and a designer will not be negligent simply because there have been RFIs.

(d) The submission addressed and noted Mr [OMITTED]'s views on the six identified issues in respect of the [OMITTED] property and the four on the [OMITTED] property.

(e) Communication surrounding the RFI process was *"direct at times".* The reasons for the questions were not always apparent to the Respondent, and *"where there is uncertainty, it is inevitable that a Licensed Building Practitioner might ask questions or express frustration".* This is not unacceptable behaviour and not *"an inability to do the job."*

(f) The Respondent acknowledged it would have been better for the *"FMe?..Done"* notation to have been removed before the response was sent. However, it is reasonable to query requests in RFIs, and Mr [OMITTED]'s view was that there was often tension between the approach of architectural designers and Council building officers. *"Given the differences in approach, Council building officers sometimes insist on a level of design detail which architectural designers find frustrating and unnecessary."*

(g) The explanation given for the comment was that it was a note to himself expressing frustration that he had included the wrong version of the relevant standard and that *"Done"* was added later once he

amended the design as requested and that, at that point, he omitted to remove *“Fme?”* before sending the response.

(h) The Respondent *“strongly refutes any suggestion that he was aggressive”* in the telephone call with Ms [OMITTED] or that the call ended early. The contemporaneous emails from Ms [OMITTED] do not support the claim that the call was aggressive or needed to be ended early.

(i) The comment about *“Beijing University”* was intended as a reference to Ms [OMITTED]’s lack of experience*. “The implication is that [the Respondent’s] comment was racist. At the hearing [the Respondent] explained that he had no intention of insulting Ms [OMITTED] and explained that he did not intend for it to be construed as a comment on her race.”*

(j) It was submitted that this comment fell considerably short of the high threshold for disrepute.

(k) The Respondent strongly denies that he acted in the manner alleged in his telephone call with Mr Myers. *“He was naturally frustrated at the Council’s decision to refuse the building consent…He never said, ‘just fuck off’.* It was submitted that the handwritten notes of the conversation were clearly made after rather than during the call, were not contemporaneous and gave *“rise to the question of whether the note was prepared to support the Council complaint”.* The submission that the notes were not contemporaneous was based on the use of the past tense in the notes themselves – “explained”, “spoke” and “advised”.

(l) Mr Myers was said to be an unreliable witness, to have a personal dislike of the Respondent and to have exaggerated the telephone call between Ms [OMITTED] and the Respondent.

(m) In respect of the meeting on 23 July 2021, there was no evidence to support the suggestion that the Respondent’s behaviour at the meeting was unprofessional in any way.

Board’s Conclusion and Reasoning

[73] The Board has decided that the Respondent **has**:

(a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and

(a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and **should be** disciplined.

Negligence

[74] The Board's considerations as regards negligence and/or incompetence are in respect of the Respondent's design work.

[75] Under the definitions in the Building Act, design work forms part of the wider definition of building work, and, as such, in respect of section 317(1)(b), it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

> ***3 Design work declared to be building work***
>
> *(1) Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
>
> *(2) Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[76] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

[77] 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.*

[78] 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 Courts[10] .

[79] 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"*.

---

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

[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]

[80] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[12] . 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 or, in other words, whether the conduct was serious enough.

[81] 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[13]. 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.[14]

[82] 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.*

[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

[83] The Board also notes the provisions of section 14D of the Act, which states:

> ***14D Responsibilities of designer***
>
> *(1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
>
> *(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[84] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design[15].

[85] In terms of seriousness in *Collie v Nursing Council of New Zealand*[16], 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.*

[86] In *Pillai v Messiter (No 2)*[17] the Court stated:

> *… 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*.

[87] The Board considers the original drawings submitted on the [OMITTED] and [OMITTED] properties for building consent were inadequate. Mr Linwood and Mr [OMITTED] agreed that at least 3 of the 6 matters on the [OMITTED] Property (being the sunroom roof, the deck and the design of the windows set in the circular heads) should reasonably have been identified before submission for building consent.

[88] In respect of the [OMITTED] property, Mr Linwood and Mr [OMITTED] agreed that the inadequate roof, wall, floor and framing sizes should have been identified before the building consent application was submitted.

---

[15] Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

[16] [2001] NZAR 74

[17] (1989) 16 NSWLR 197 (CA) at 200 adopted in various New Zealand decisions.

[89] In addition, the Board is persuaded by Mr Linwood's opinion that the original drawings (for both properties), if properly built in accordance with the drawings and specifications, would not have met the building code and the documentation (particularly for [OMITTED] property) was not up to standard due to being poorly compiled and edited and contradictory.

[90] The Respondent displayed an attitude of expecting to be able to address the missing details on-site with a builder. This is not an acceptable expectation, and there were no directions on the plans to that effect. A builder is entitled to rely on the drawings to work and to be capable of being built in accordance with the building code. The Respondent stated many times that his details were compliant with the code. However, many of his designs were not achievable or reflected the existing house as noted on his submitted documents.

[91] The Respondent's answers to the Council's RFIs are a contributing factor in the Board's findings.

[92] The Board considers that licensed building practitioners should be aiming to get design work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. In this respect, the introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[18]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*
>
> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[93] Given the above, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had departed from

[18] Hansard volume 669: Page 16053

what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Disrepute

[94] The disrepute disciplinary provision in the Act is similar to legislation in other occupations, including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111[19] and discussed the legal principles that apply.

[95] The Board, in C2-01111, considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above, there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example, in the High Court held in *Davidson v Auckland Standards Committee No 3,*[20] a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time. However, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example, dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[96] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute *of Chartered Accountants*[21], convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[97] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[22], and the courts have consistently applied an objective test when considering such conduct. In W v Auckland Standards Committee 3 of the New Zealand Law Society[23] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*[24]

[19] Board decision dated 2 July 2015.
[20] [2013] NZAR 1519
[21] 24 September 2014
[22] Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus,* search settings UK English, accessed 12/05/15`
[23] [2012] NZCA 401
[24] [2012] NZAR 1071 page 1072

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

- criminal convictions[25]
- honest mistakes without deliberate wrongdoing[26]
- provision of false undertakings; and[27]
- conduct resulting in an unethical financial gain.[28]

[99] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code under the Building Act came into force in October 2022, although only conduct which occurs after that date qualifies for consideration under the Code of Ethics. What is clear from the cases though, is that unethical or unprofessional conduct can amount to disreputable conduct.

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

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

[101] The Board takes note of previous relevant decisions of the Board in findings both upholding and not upholding grounds for discipline under section 317(1)(i).

[102] Language described as "intemperate" was found not to have degenerated to the point where a finding of disrepute should be made.[29] Behaviour, however, which included threatening language, which was highly personal in nature, was upheld as constituting disrepute.[30] Similarly, payment demands which threatened physical violence and included lewd sexual references were also held to be disreputable conduct. [31]

[103] The most relevant and closely aligned previous decision of the Board in respect of disreputable conduct concerned the Respondent talking to a Council officer in relation to a building consent.[32] His comments were that she did not know what she was talking about and that she was *"wasting his fucking time".* In that matter, the

---

[25] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[26] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[27] *Slack, Re* [2012] NZLCDT 40
[28] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[29] Knight [2019] BPB 24274
[30] Davies [[2018] BPB 1883
[31] Spence [2018] BPB 1906
[32] Morgan [2021] BPB 25824

Respondent apologised and stated it was said out of frustration with no malice intended. The Council officer concerned felt that the comments were directed at her and her competence but did not feel they were threats to her person.

[104] The Board debated at length whether the conduct of the Respondent in this case reached the high threshold of 317 (1)(i) of the Act and in the end, the Board decided that it did meet the threshold. It was a close call.

[105] In reaching that conclusion, the Board considers the separate instances of behaviour complained about to be cumulative. The fact of profanities alone being used would not have reached the threshold for disciplinary action in this case. However, the comment about the Council Officer's education was personal in nature and easily capable of a racist interpretation. Such a comment was directed at the Council Officer personally after looking up her work profile online. There is no other way to interpret that comment than as demeaning and undermining.

[106] The personal nature of the comment made is what took this behaviour beyond that discussed in earlier Board decisions where the disrepute threshold was not reached.

[107] The Board takes note of Ms [OMITTED]'s evidence that the description of the Respondent as *"unprofessional and offensive"* and *"aggressive and defensive"* recorded in Mr Myers' email of 21 July 2021 were her words and considers these descriptions to be indicative of the impact on her of the Respondent's conduct.

[108] The Board does not often receive complaints where the Territorial Authority is the Complainant and even less which raise disrepute as a ground of complaint. That, in the Board's view, goes to the seriousness of the matter.

[109] The Board notes that the explanations of the *"FMe?..Done"* comment in answer to an RFI were inconsistent. The Respondent changed from describing it as a profanity in his written response to, in the hearing, maintaining the F stood for Fault me.

[110] The Board declines to consider Mr Myers an unreliable witness as submitted by the Respondent's Counsel. There is no evidence to challenge Mr Myers' statement that the handwritten notes of his telephone conversation with the Respondent were contemporaneous.

[111] Finally, the Board records that in reaching its conclusion, it did not take into account any allegations in respect of the meeting on 23 July 2021. It accepts the evidence of Mr Woodger that there was nothing unacceptable about the Respondent's behaviour at that meeting.

[112] The matters before the Board are serious, and the impact on the Council Officers involved was significant. On the basis of the above, the Board finds that the Respondent's conduct has brought the regime into disrepute.

Penalty, Costs and Publication

[113] 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.

[114] 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>

[115] 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*[33] 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.*

[116] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[34] 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.

[117] The Respondent has committed two disciplinary offences. The findings in respect of negligence relate to two properties. The Board has, in determining the appropriate starting point for the offending, considered the conduct in aggregate. Both the negligence and the disreputable conduct were at the lower end of the scale of conduct. Countering this, and as noted above, multiple disciplinary offences have been conducted. Taking those factors into consideration, the Board decided that a starting point of $3,500 was appropriate. The amount is consistent with penalties imposed by the Board in other matters.

[118] The Board did not consider that there were any mitigating or aggravating factors. As such, no adjustment from the starting point has been made. There may, however, be

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

[34] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

mitigating factors that the Board is not aware of. To that end, the Respondent will be afforded an opportunity to make further submissions.

<u>Costs</u>

[119] 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."

[120] 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[35].

[121] In *Collie v Nursing Council of New Zealand,*[36] 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.*

[122] 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. Adjustments based on the High Court decisions above are then made. The current matter was moderate in complexity and involved a full-day hearing. A Special Advisor was instructed.

[123] 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. The Board's scale costs for a full-day hearing of a matter of this nature with a Special Advisor is $9,000. The Board's scale costs are set at an amount that is significantly less than 50% of actual costs.

[124] The Board took into account that the Special Advisor was instructed to assist the Board and that the Respondent also instructed an expert. The exchange of evidence between them assisted the Board. As such, the Board decided to discount the Special Advisor component of the costs. It also decided to set costs on the basis of a half-day hearing as opposed to a full-day hearing. The costs are, therefore, set at $3,500.

<u>Publication</u>

[125] 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[37]. The Board is also able,

---

[35] *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.

[36] [2001] NZAR 74

[37] Refer sections 298, 299 and 301 of the Act

under section 318(5) of the Act, to order publication over and above the public register:

> *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[126] 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.

[127] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[38]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[39]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[40]. 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*[41].

[128] 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[42]. 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.

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

Section 318 Order

[130] 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 $3,500.**
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.**

[38] Section 14 of the Act
[39] Refer sections 200 and 202 of the Criminal Procedure Act
[40] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[41] ibid
[42] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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.

[131] 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

[132] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 April 2023**. 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.

[133] 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

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

Signed and dated this 13th day of March 2023

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.