Before the Building Practitioners Board

	BPB Complaint No. CB25808
Licensed Building Practitioner:	Jordache Edser (the Respondent)
Licence Number:	BP 129563
Licence(s) Held:	Roofing – Metal Tile, Profiled Metal Roof and/or Cladding

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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

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) or 317(1)(d) of the Act.

Contents

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 nor in a manner that was contrary to a building consent. 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[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

(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;

(b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

[4] In further investigating the Respondent's conduct under the grounds for discipline in section 317(1)(b) and (d) of the Act, the Board will be inquiring into the following:

(a) the issues disclosed in a Notice to Fix issued by the Kapiti Coast District Council dated 6 July 2021;

(b) installation of barge, ridge, hip, apron, eave and valley flashings;

(c) cutting of roof iron;

(d) installation of fixings;

(e) the quality and compliance of workmanship disclosed in photographs at pages 64 and 65 of the Board's files (documents 2.2.29 and 2.2.30) and in the photographs and notations on pages 77 to 90 of the Board's files (documents 2.5.7 to 2.5.20); and

(f) the Respondent's supervision of the building work.

Function of Disciplinary Action

[5] 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].

[6] 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:

[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

> *"… 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."*

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

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

[8] 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.

[9] 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

[10] 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.

[11] 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.

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

Evidence

[12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[13] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Jordache Edser	Respondent
[Omitted]	Complainant, Licensed Building Practitioner, Carpentry
Jeremy Lincoln	Building Consent Officer, Kapiti Coast District Council

[15] The Complainant in the matter was the main contractor for an extension and renovation of a residential dwelling. He carried out and supervised the carpentry work. He engaged the Respondent to re-roof the existing structure and install a new roof on the extension. The building work was carried out under a building consent.

[16] Due to the design of the proposed extensions to the dwelling involving the new roof structure being married into the existing structure was complex. The new roof design consisted of two valleys joining together and discharging into an internal gutter. It was a complex area involving different forms of rood structure coming together in one of the valleys and differing methods of roof construction, in that the old structure used rafters and sarking and the new with pre-nailed trusses and purlins. This resulted in a difference in heights of 25mm and 45mm between the former and the latter, resulting in issues with forming the valley. It was not clear if the truss set-up was completed in a way that accommodated for the difference.

[17] The Complainant maintained that the Respondent had completed the roofing work in a substandard and non-compliant manner. He provided photographs to support his allegations. The Respondent's position was that the roofing work complained about was temporary and that the underlying structure built by the Complainant was non-compliant, and that it needed to be remediated prior to him being able to redo the work. The Respondent had raised his concerns about the underlying structure with the Building Consent Authority (BCA). As a result, an inspection was carried out by the BCA and a Notice to Fix (NTF) was issued. The NTF noted:

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

> *All work that has not been carried out in accordance with the NZ Building Code namely B2 and E2, being the roof on the east side where the three roof sections meet to the valley layout, must be rectified, inspected and passed by a Council Building Inspector.*

[18] A BCA file note from the inspection that led to the NTF, noted:

> *On the 28/6/2021 At the request of the main building contractor myself & Luke visited* [Omitted] *to inspect an apparent roofing issue, On arrival we met with* [Omitted] *from* [Omitted]*, the main contractor, upon inspection of the roof & specifically a valley at the rear end of the building we established obvious code clause issues relating to B2 & E2, as are apparent in the photos taken. This included roofing fixed hard down in contact with the valley, fixings through the valley, insufficient roofing cover into the valley in places and insufficient valley width in others, valley tray cut short and ad hoc patches pot riveted in order to make cover.*
>
> *In subsequent discussions with Jordache Edser the roofing contractor, it was explained that this was intended as a temporary fix until roof framing errors could be corrected*

[19] The Respondent, in his written response to the complaint, noted:

> *During the roof installation we identified an issue in the way the valley board was set up between the existing house and the extension. This had been built by* [Omitted]*. We requested that* [Omitted] *rectify this, as the way it was built meant that the valley tray sat flat against the existing roof and creating a potential leak point.*
>
> *As you can see in the photos, we cannot achieve the adequate coverage for the long run over the valley tray, due to the angle of the valley and the way the valley purlin restricts where the valley tray can be placed. We raised this issue with* [Omitted]*, but he was not interested in fixing it on that day, and instead insisted that we install the valley tray over the framing as it was. Stefan wanted this done so we could then install the apron flashings, so that he could carry on with his cladding.*
>
> [Omitted] *advised us he would "sort it out" at a later date. This was not ideal for us, however we reluctantly agreed so that* [Omitted] *could finish the cladding, with the agreement that* [Omitted] *would fix the framing and we would then reinstall the valley tray correctly.*
>
> *On multiple occasions since then, when we have raised this with* [Omitted]*, he has refused to acknowledge the issue with the framing, and instead began threatening legal action and to report us to LBP registrar if we did not complete and sign off the roof (including the valley tray) as it is.*

[20] At the hearing, the Respondent gave evidence that, as a result of the way in which the underlying structure of the valley had been formed, the valley would not drain as there was less than 3 degrees of pitch, and a membrane valley would have been a better solution. He stated that he built the valley from the top down and that it became apparent as he worked toward the bottom of the valley that it would not drain. As such, he left it as temporary work with the intention of redoing it once the underlying structure was rectified and fall for drainage could be achieved. The Respondent's evidence was that the poor workmanship shown in photographs was the temporary work and that, as it was to be removed and redone, there was no point in doing more than was necessary to provide weather protection. At this point a dispute arose, and he was not able to return and complete the work, including work on other areas of the roof that had not been completed. The Respondent was trespassed from the site in or about July 2021.

[21] The Respondent did accept that he had not installed eave flashings that were specified in the building consent. He stated that this was an oversight by him and by his roofing materials supplier and that he would have remediated the issue if he had been given the opportunity.

[22] The Complainant completed the roofing work following the termination of the Respondent's services. The Respondent expressed his opinion that the Complainant's roofing work was not compliant.

[23] The Respondent's work included restricted building work. In response to a query as to whether he had provided a record of work the Respondent stated:

> *No, as we have been unable to complete the installation to a satisfactory standard (eg watertight), due to* [Omitted]*'s refusal to remedy the inadequate framing. He has since cancelled our contract.*

Board's Conclusion and Reasoning

[24] 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).

[25] 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.

[26] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[27] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] 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.*

[28] 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*[8] test of negligence which has been adopted by the New Zealand Courts[9].

[29] 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,*[10] it was stated as *"an inability to do the job"*.

[30] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. 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.

[31] 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 as well as with regard to the sufficiency of the evidence before the Board.

[32] As noted above, the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority *is Z v Dental Complaints Assessment Committee,*[12] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the*

[7] Judge McElrea, DC Whangarei, CIV-2011-088-313
[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] [2009] 1 NZLR 1

> *standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[33] The Complainant's and the Respondent's evidence conflicted as regards the roofing work in the valley. Each gave evidence that the work of the other was at fault, and each made valid submissions. The corroborating evidence before the Board did not establish whether it was the underlying structure, the Respondent's roofing work, or both that was at fault. In such circumstances, it would not be appropriate for the Board to make a disciplinary finding.

[34] In *Collie v Nursing Council of New Zealand,*[13] 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.*

[35] In *Pillai v Messiter (No 2)*[14] the Court of Appeal 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.*

[36] The Respondent accepted that he had not installed eaves flashings. That failure did not reach the threshold noted above.

[37] The Board also noted that even if the Respondent's roofing work in and around the valley was not completed to an acceptable standard, he gave evidence that it was not complete and that he raised what he considered to be the underlying issues. It was not a case where he did nothing. He informed the BCA, albeit as part of a dispute, and he raised his concerns with the Complainant.

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[13] [2001] NZAR 74

[14] (1989) 16 NSWLR 197 (CA) at 200

[38] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not departed from what the Board considers to be an accepted standard of conduct.

Contrary to a Building Consent

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

[40] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.

[41] Unlike negligence contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established[15]. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[42] The failure to install eaves flashings was contrary to the building consent. However, given the finding made as regards negligence and/or incompetence, the Board has decided that a similar finding should be made as regards section 317(1)(d) of the Act. The breach is not serious enough to warrant disciplinary action.

Record of Work

[43] 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[16].

[44] 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.

[45] The Board discussed issues with regard to records of work in its decision C2-01170[17] 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.

[46] 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-

[15] *Blewman v Wilkinson* [1979] 2 NZLR 208
[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[47] 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*[18] "… 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.

[48] 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. On the Respondent's own evidence, the contract was terminated, and he was trespassed from the site. He was also aware that the Complainant had carried on with and completed the work. In effect, these factors 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 or about July 2021 when he was trespassed. As a record of work has not been provided, the disciplinary offence has been committed.

[49] 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.

[50] The Respondent put forward his concerns about an inability complete the work. as noted above, completion, from the perspective of the Respondent's record of work obligation, occurred when he could no longer carry out any further restricted building work. In this respect, if the Respondent's reasoning was accepted, the obligation to provide a record of work would never arise. That, in turn, would defeat the purpose of the legislation, which is to create a permanent record of all of the licensed Building Practitioners that carried out or supervised restricted building work under a building consent. As such, this does not constitute a good reason.

[51] 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.

[18] [2018] NZHC 1662 at para 50

[52] 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

[53] 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.

[54] 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

[55] 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*[19] 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.*

[56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[20] 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.

[57] 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.

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

[58] 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."

[59] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[21].

[60] In *Collie v Nursing Council of New Zealand,*[22] 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.*

[61] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[23] 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.*
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> *[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.*

[62] 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.

[63] 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

[21] *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.
[22] [2001] NZAR 74
[23] CIV-2011-485-000227 8 August 2011

Respondent is to pay the sum of $1,000 toward the costs of and incidental to the Board's inquiry.

Publication

[64] 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[24]. 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.*

[65] 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.

[66] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[25]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[26]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[27]. 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*[28].

[67] 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[29]. 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.

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

[24] Refer sections 298, 299 and 301 of the Act
[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[69] 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(l)(iii) of the Act.** **In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

[70] 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

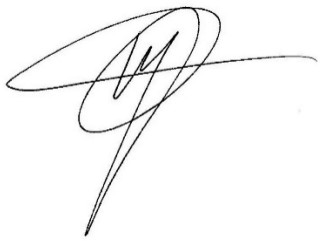
[71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on Friday 1 April 2022. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[72] 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

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

Signed and dated this 8th day of March 2022.



Mr M Orange
Presiding Member

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[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.