Before the Building Practitioners Board

	BPB Complaint No. CB 25820
Licensed Building Practitioner:	Soon Yong Kim (the Respondent)
Licence Number:	BP 134942
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	26 April 2022
Decision Date:	25 May 2022

Board Members Present:

Mr C Preston, Chair
Mr M Orange, Deputy Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LBP, Carpentry and Site AOP 2

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), 317(1)(d) and 317(1)(da)(ii) of the Act.

Contents

Summary of the Board's Decision

[1] The Respondent carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He has also failed to provide a record of work on completion of restricted building work. He 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]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) in that, he undertook building work that may not have met the standard expected of a Licensed Building Practitioner as set out in the complaint file and outlined in the report of [OMITTED] on pages 75-76 of the Board's file, the report by [OMITTED] on pages 77-93 of the Board's file, the issues raised by [OMITTED] as noted on

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

page 8 clause 5.13 of the Registrar's report and those noted in failed Council inspections;

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act) in that he may have undertaken building work that did not meet the building consent as set out in paragraph (a) above; and/or

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

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]:

> *… 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

[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

Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

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

Inquiry Process

[8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Background to the Complaint

[10] The Respondent's company [OMITTED] had a labour only subcontract with the head contractor, [OMITTED], for the wall, mid floor and roof framing on a three-level townhouse development comprising of four units.

Evidence

[11] 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.

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

[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:

- Soon Yong Kim, the Respondent
- [OMITTED], the Complainant
- [OMITTED], [OMITTED]
- [OMITTED], [OMITTED]
- [OMITTED], [OMITTED]

[14] An Interpreter attended the hearing and assisted the Respondent.

[15] The Respondent stated that he had two employees on this site who had completed level 3 carpentry qualifications and had been working for him for a year and continue to work for him now. The Respondent had one other site operating at the same time with different staff, and he went between sites. His evidence was that no one worked on this site without him being present.

[16] The Board proceeded by way of taking the Respondent through the report of Mr [OMITTED] from [OMITTED], provided by the Complainant. (Document 2.5.12, Page 75 of the Board's file). Mr [OMITTED] had been summonsed to appear at the hearing, but he sought and was granted permission to have Mr [OMITTED] attend in substitution. Mr [OMITTED] has a BE(Hons), is a Senior Engineer at [OMITTED] has worked there for six years and was the author of the report under Mr [OMITTED]'s supervision.

[17] The Board pointed to items of work identified in the [OMITTED] report as failing the Engineers site inspection – for example, joist hangers missing for the beam connections (item 4 and 16), wind beam end connection not installed (item 6), lintel end fixings not completed (items 2, 8 and 14), studs supporting steel beams and lintels not tied or bolted together (item 3, 15, 1 and 20). The Respondent answered that there were material supply issues and a lack of scaffolding. He intended to go back and complete all of these matters before the Council inspected the related work.

[18] Ms [OMITTED], the Complainant and Mr [OMITTED], both of [OMITTED], the main contractor, stated that there were no material supply issues. Mr [OMITTED], who was the project manager, advised that when asked for further materials, the turn-around time to provide what was required was between 2 hours and the next day.

[19] The Respondent agreed that he would request materials from Mr [OMITTED] and that, depending on the situation, they would arrive later the same day or up to two days later.

[20] The Board put to the Respondent that it would have been easier and more logical in terms of correct work sequencing to complete these items before moving on to other work. The Board further queried the Respondent on why he did not ensure fixings on the lower level were in place for structural elements before he moved on to the upper levels that relied on that structure. The Respondent stated that there were no materials on-site, and he would have checked all of these items before Council inspection and dealt with them then. He did not consider it an issue that, in some circumstances, it would have been difficult to complete this work later and that it may have required removing and redoing existing work in order to install the required fixings.

[21] Further workmanship issues from Mr [OMITTED]'s report that were put to the Respondent were-

(a) Missing beams (items 1 and 12). The Respondent maintained this work was incomplete and that he would have checked later and completed it. When asked why it was not completed at the time, he said he "*cannot remember right now".* The Respondent did accept that it made sense to install the beams before the ceiling battens and flooring above.

(b) Wind beam is not a continuous full length (item 5). The Respondent said the span was too long for a single piece of timber but that he did not ask the Engineer if it was acceptable to join two pieces. Mr [OMITTED] explained that 6.3 metres is the longest piece of timber available and that this span was shorter than that. He also highlighted the significance of having a jointed wind beam, in that if it is not a continuous beam, it can deflect under the lateral wind load and break at the join.

(c) Single joists were installed instead of double joists as required by the consented plans (item 13). The Respondent agreed that he *"missed this requirement".*

(d) Two lots of B24 joists were not bolted together (item 11). Mr [OMITTED] stated that the framing on the floor above was complete, and these bolts had not been installed. Mr [OMITTED] explained that by leaving the bolts until later, the beam could buckle and/or split in the intervening period. The Respondent replied that he was waiting on the bolts.

(e) Pre-nail wall frame installed back to front (item 21). The Respondent had no explanation for why the wall was put in the wrong way.

[22] Further aspects of the Respondent's workmanship were put to him based on a report by Mr [OMITTED] of [OMITTED] created for the Complainant. (Document 2.5.32, Page 95 of the Board's file). These included poor Z nail fixing, which the Respondent accepted was *"not ok",* and bolts used where the thread was too short. On this issue, the Respondent said, *"it will be ok"* when they are tightened, and they *"haven't been completed yet".*

[23] The Respondent used coach bolts instead of the engineers' bolts which were specified in the consented plans (Document 2.5.35, Page 98 of the Board's files). It

was put to the Respondent by the Board that such a change from the consented plans would require a minor variation. The Respondent thought that he could use either coach or engineers' bolts and had not prepared a minor variation.

[24] Turning to the requirement to provide a record of work. The Respondent's written response stated that his work on-site was from 22 April 2021 to 19 July 2021. Around 24 July 2021, the Respondent stated the Complainant texted him saying someone else was taking over his work. (Document 2.2, Page 49 of the Board's file). The Council file was obtained on 30 August 2021 and it did not contain a record of work from the Respondent. At the hearing, the Respondent confirmed that he still had not provided a record of work. The reason he gave was that as someone else had been working at the site, he "*cannot guarantee the work*".

Board's Conclusion and Reasoning

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

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

(b) carried out or supervised building work that does not comply with a building consent (s 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 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.

Negligence

[26] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[27] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction or, in other words, whether the conduct was serious enough.

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

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

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

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

[29] 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.*

[30] In terms of seriousness in *Collie v Nursing Council of New Zealand,*[12] the Court's noted, as regards the threshold for disciplinary matters, that:

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

[31] In *Pillai v Messiter (No 2)*[13] 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*

[10] *Martin v Director of Proceedings [*2010] NZAR 333 at p.33
[11] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[32] The Respondent executed the building work out of the correct and logical sequence, leaving items incomplete. This meant work was done on upper levels, which relied on the structural integrity of the lower work having been correctly completed when it had not been. That potentially put those working on the dwelling at risk. Furthermore, later fixing of this incomplete work would have involved the removal and redoing of existing work which was neither logical nor practical. In particular, in one area, the entire area was constructed with single joists, whereas double joists were required. The rework and extra work required would have been substantial. If materials were not available, then the work should have been delayed until they were. Also, the studs supporting steel beams and lintels not being tied or bolted together, missing joist hangers, missing beams, and cut wind beams were all examples of building work that had not been completed to a standard to be expected from a Licensed Building Practitioner.

[33] The Board accepts that the lack of scaffolding on the fourth side of the building caused a safety issue for the Respondent and contributed to some of the out-of-sequenced and incomplete work.

[34] The explanation that the unavailability of materials caused some of these issues may have been correct in a few instances. However, given the Complainant's and Mr [OMITTED]'s explanation of the material ordering process, with which the Respondent fundamentally agreed, the Board does not accept that this is a valid reason for the continued non-completion of those items or for the continuation of structurally reliant work on upper levels. Moreover, given the progress of the build, it was apparent that many of the missing connections had been missing for extended periods of time and beyond what could be viewed as issues related to materials shortages.

[35] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

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

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[37] 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.

[38] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[39] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.

[40] 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[14].

[41] Given the above factors, and the workmanship issues discussed above (particularly the use of single joists instead of double joists, coach bolts instead of engineers' bolts, missing beams and the cutting of the wind beam), the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally

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

connected and, as such, they will be treated as a single offence when the Board considers penalty.

Record of Work

[42] 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[15].

[43] 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.

[44] The Board discussed issues with regard to records of work in its decision C2-01170[16] 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.

[45] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[46] 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*[17] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[47] As to when completion will have occurred is a question of fact in each case. 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 case. The Respondent, on his own evidence, left the site on 19 July 2021 and was informed on 24 July 2021 by the Complainant that he would not be continuing with the work.

[48] In past cases, the Board has held that where it becomes apparent that a licensed building practitioner will not be continuing, then their work will be considered to have been completed, and they will be required to provide a record of work soon thereafter. As such, the point in time had arrived when the Respondent knew or ought to have known that his restricted building work was complete and that a record of work was due.

[15] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[16] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[17] [2018] NZHC 1662 at para 50

[49] To require otherwise would defeat the purpose of the record of work provisions in the Act, which are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out. If a record of work is not provided because the intended work is not complete, then there would be no such record.

[50] In this case, completion of the Respondent's work occurred when he left the site in July 2021. To date, the Respondent has not provided a record of work. Accordingly, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

[51] 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.

[52] In this instance, the Respondent was concerned to give a record of work when others had been working on site after he left. He mistakenly thought that giving a record of work would be guaranteeing the work on-site, which he thought could include guaranteeing work done by others. Providing a record of work is not "signing off". It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work.

[53] The Respondent, by his evidence, has not understood what a record of work is for. It is not a statement as to the quality or compliance of the restricted building work. It is not any form of sign off or undertaking. It is not to be confused with a producer statement. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself, create any liability that would not otherwise exist, as section 88(4) provides:

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

[54] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed, or supervised. As such, if the Respondent had concerns about future liability for work that he had not carried out or supervised, he could have used the record of work to capture those concerns.

[55] In this instance, the Board finds that the reasons provided by the Respondent do not establish a "good reason".

Penalty, Costs and Publication

[56] 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.

[57] 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

[58] 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*[18] 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.*

[59] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[19] 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.

[60] The negligence offence was at the mid-range of seriousness, and the record of work matter is at the lower end of the disciplinary scale. The Board considered that a fine was appropriate. It adopted a starting point of $3,500. It did not consider there were any mitigating or aggravating factors present. As such, the fine is set at $3,500. This is an amount that is consistent with other penalties imposed by the Board for similar offending.

Costs

[61] 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."

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

[62] 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[20].

[63] In *Collie v Nursing Council of New Zealand,*[21] 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.*

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

> *[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
> *[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

[65] 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.

[66] Based on the above, the Board's costs order is that the Respondent is to pay the sum of $3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type and is significantly less than 50% of actual costs.

Publication

[67] 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[22]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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[20] *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.
[21] [2001] NZAR 74
[22] Refer sections 298, 299 and 301 of the Act

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.

[68] 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.

[69] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[23]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[24]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[25]. 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*[26].

[70] 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[27]. 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.

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

Section 318 Order

[72] 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.** **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.**

[73] 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.

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

Submissions on Penalty, Costs and Publication

[74] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs, and publication up until close of business on ***15 June 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.

[75] 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

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

Signed and dated this 25th day of May 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.