Before the Building Practitioners Board

	BPB Complaint No. CB25895
Licensed Building Practitioner:	Dillon Lewis (the Respondent)
Licence Number:	BP 126948
Licence(s) Held:	Design AoP 1

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	Hamilton
Hearing Type:	In Person
Hearing and Decision Date:	9 November 2022

Board Members Present:

Mr M Orange, 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 a disciplinary offence under section 317(1)(b) of the Act.

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

Contents

Summary of the Board's Decision

[1] The Respondent carried out building work (design work) in a negligent manner.

[2] The Respondent has not brought the regime for Licensed Building Practitioners into disrepute.

The Board

[3] The Board is a statutory body established under the Building Act.[1] Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

[4] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[2] to hold a

[1] Section 341 of the Act.
[2] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

hearing in relation to building work at [OMITTED], Te Awamutu. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

(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 contrary to section 317(1)(i) of the Act. In further investigating the Respondent's conduct with regard to disrepute, the Board will be inquiring into:

(i) the Respondent's conduct with regard to the timeframes within which design work was completed, including the responses to requests for information (RFI);

(ii) the Respondent's interaction with the Complainant as regards the building consent application and RFI; and

(iii) the taking of funds for design work that may not have been completed.

[5] With respect to the further investigation of the Respondent's conduct under section 317(1)(b) of the Act, the Board has further decided that it would, pursuant to section 322(1)(d) of the Act[3], appoint a Special Adviser to assist the Board in its inquiries and at the hearing.

Function of Disciplinary Action

[6] 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*[4] and in New Zealand in *Dentice v Valuers Registration Board*[5].

[7] 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,*[6] 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."*

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[3] 322 Board may hear evidence for disciplinary matters
(1) In relation to a disciplinary matter, the Board may—
(d) appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).

[4] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

[5] [1992] 1 NZLR 720 at p 724

[6] [2016] HZHC 2276 at para 164

[8] 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[7]:

> *… 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.*

[9] 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.

[10] 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

[11] 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.

[12] 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 Hearing

[13] The Respondent did not attend the hearing.

[14] The Board noted that the Respondent did not respond to the complaint when it was first sent to him. When the Investigator followed up with the Respondent, he stated that he had not received the initial notice of the complaint. It was resent. The Respondent did not respond. On 14 July 2022, the Board decided to proceed to a hearing. A Notice of Proceeding was issued on 29 July 2022.

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

[15] On 3 August 2022, the Respondent replied to the notice of proceeding, stating that this was the first notice he had about the complaint and asked how he could provide a response to the complaint allegations. He was phoned on the same day. He stated that he thought the complaint had "…gone away…" as the subject matter of the complaint had been resolved. He was offered a further opportunity to respond. On 11 August 2022, the Respondent emailed his written response.

[16] On 20 September 2022, a prehearing conference with the Respondent was held. The hearing date and procedure was discussed. The Respondent indicated that he would attend. A Notice of Hearing was issued on 17 October 2022 to the address that previous communications with the Respondent had been sent to.

[17] On the day of the hearing, the Respondent was contacted by the Board Officer to ascertain whether he would be attending in person or by zoom or whether he wanted to seek an adjournment. He advised he had said all that he wanted to say and that he just wanted it over and done with. He informed the Board Officer that he had sent an email about one month ago outlining his position. The email had not been received. He was asked to resend it. Again, it was not received.

[18] The Board decided that the required notices had been issued and that the Respondent had been provided with adequate opportunity to appear. The Board decided to proceed with the hearing.

Evidence

[19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[8]. 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.

[20] 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.

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

[OMITTED]	Complainant
John Rennie	Architect, Special Advisor to the Board

[22] The Complainant engaged the services of the Respondent to design three units on separate lots at [OMITTED], Te Awamutu, and to take the designs through to obtaining building consents for each. Lot 1 was to be a two-story dwelling, and lots 2 and 3 were to be single-story dwellings. A price was agreed in late April 2020, and a

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

time estimate of 3 to 4 months for the work was given. The work has not been completed in that building consents have not been obtained. The Complainant alleged 95% of the agreed price had been paid. The Special Advisor calculated that 69% of the agreed price had been paid, and the Complainant gave evidence that he had incurred additional fees with other design professionals because the Respondent had not completed work that he had been engaged to complete, such as additional town planning matters.

[23] On 30 July 2021, the Respondent did submit documentation to the Building Consent Authority (BCA) for building consents. Two Requests for Information (RFI) were issued by the BCA in August 2021. The Respondent has not provided any responses to the RFI. The applications were placed on hold by the BCA.

[24] The Complainant gave evidence that the Respondent, when pursued about the outstanding design work, gave various excuses as to why the work had not been completed and made promises that completion was imminent. The Complainant did note that, in or about June of 2022, the Respondent did place documents in a Drop Box for the Complainant to review. The Complainant gave evidence that the lending he had secured for the project had lapsed during the intervening period.

[25] The Board, as part of its investigations, sought the opinion of a design expert (the Special Advisor) on the quality and completeness of the building consent application for Lot 3, a single-storey dwelling with 3 bedrooms, 2 bathrooms, and an integral double garage. The building is a lightweight timber-framed structure with brick veneer, long-run roofing and a ribraft concrete foundation and floor slab.

[26] The RFI for Lot 3 noted and included:

- No plans or engineering design were provided for the retaining wall
- Discrepancies between the submitted engineering designs and the foundation plan prepared by the respondent
- Bracing calculations were not provided
- H1 energy efficiency calculations not provided
- Stormwater connections and detention tanks not provided
- Discrepancies on whether gas or electricity was to be provided
- Confirmation of waste water connection
- Roofing material discrepancies
- Safety glazing requirements
- Ventilation requirement
- Confirmation of water supply
- a change in the position of the dwelling on the site between the approved Resource Consent site plan, and the plan submitted for Building Consent

[27] The Special Advisor reviewed the consent documentation and expressed his opinion that:

(a) had the building been constructed in accordance with the plans and specification produced by the Respondent, it would not have satisfied the provisions of the New Zealand Building Code. The Special Advisor made particular reference to the foundation design. He noted an engineered design was produced, which included a rib-raft foundation with additional reinforcing to accommodate the soil expansivity. The architectural plans produced by the Respondent, however, contradicted the specific engineering in that it only had a standard firth rib raft detailing; and

(b) design issues that formed the basis for the complaint amounted to basic design co-ordination errors or incomplete documentation, and the design work, as submitted to the BCA for building consent, did not demonstrate compliance with the building code, was largely incomplete, did not relate to the specific building application for Lot 3, and was substandard.

[28] The only response to the complaint was an email dated 11 August 2022. In it, the Respondent stated:

(a) I want to start by saying that I believe all of the drawings and documentation I have provide has been accurate and in compliance with the NZ building code. Along with that the past few years dealing with covid, a busy & tough building industry my mental health hasn't being in the best shape. The communication between Deepak & my self has been difficult;

(b) I accept there has been delays in this project that are on my part but right from the outset the project was out side of the scope in which the contract was written. The original concept plans had numbers fudged which meant all three had to be adjusted to fit within the planning rules, along with that the lots and setback cut heights & retaining was redone by myself & used for the resource consent as the original designer had not properly taken these into account. Other delays including engineers, traffic engineer, development engineering & multiple changes have caused delays. Work I have done in good faith without charge to try and keep the client happy.

(c) The working drawings are complete and have been for some time. I have answered all the RFI points possible and provided the documents to the client awaiting him advise what to do next. I believe the only thing preventing the consent is the SS & SW design is yet to be provided with a complete design showing invert levels gradients ect. This is something I have asked Deepak for several times via phone text and email.

[29] The Respondent also addressed issues between him and the Complainant as regards the completion of the design services. He stated, "I thought everything between us

was fine" and he referred to offers to settle the matter. He reiterated that he believed "all of the design work I have done within these projects are to standard".

Board's Conclusion and Reasoning

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

[31] The Board has decided that the Respondent **has not** 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).

Negligence – Design Work

[32] The Board's considerations as regards negligence are in respect of the Respondent's design work.

[33] 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.*

[34] 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.

[35] Turning to negligence, it 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, in this case, a licensed building practitioner with a design license. This is described as the *Bolam*[9] test of negligence which has been adopted by the New Zealand Courts[10].

[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)

[36] The New Zealand Courts have stated that an assessment of negligence 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.

[37] 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[12]. 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[13].

[38] 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.*

[39] 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.*

[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[13] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *(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.*

[40] Turning to seriousness in *Collie v Nursing Council of New Zealand,*[14] 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.*

[41] Looking at the design work, there was clear evidence in the Special Advisor's report that the design work had been carried out in a substandard manner and that aspects of the designs may not have met Building Code requirements. There was a general lack of care and attention paid to the documentation, and no action was taken when issues with the building consent application were brought to the Respondent's attention. The Respondent's failings were fundamental and verged on incompetence, which is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. It must also be noted that, when applying for a building consent, a Licensed Building Practitioner who holds a design licence must, under section 45(3) of the Act, submit a certificate of work that states that the design complies with the building code. There was evidence that it did not.

[42] Further, the response provided by the Respondent showed a lack of perception or understanding of the situation or of his failings.

[43] It appeared as if the Respondent did not have any quality assurance processes in place and was either indifferent to the errors or relying on others to identify and fix them. 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[15]:

> *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.*

[14] [2001] NZAR 74

[15] Hansard volume 669: Page 16053

> *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.*

[44] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has 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.

Disrepute

[45] 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[16] and discussed the legal principles that apply.

[46] 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",[17] 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*[18] *,* 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*.[19]

[47] 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[20];

[16] Board decision dated 2 July 2015.
[17] 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
[18] [2012] NZCA 401
[19] [2012] NZAR 1071 page 1072
[20] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

- honest mistakes without deliberate wrongdoing[21];
- provision of false undertakings[22]; and
- conduct resulting in an unethical financial gain[23].

[48] 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 and cases that have been considered under them make it clear that unethical or unprofessional conduct can amount to disreputable conduct.

[49] On 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022[24]. The conduct in this matter predated the Code. As such, it cannot be considered in light of it.

[50] The matters under investigation related to the Respondent's conduct with regard to the timeframes within which design work was completed, the responses to requests RFIs and the Respondent's interaction with the Complainant as regards the building consent application and RFIs. The Board has made findings as regards negligence. The matters under investigation with regard to disrepute are similar to those that were under investigation with respect to negligence. When considering that together with the threshold for disciplinary complaints of disrepute, which is high, the Board has decided that the Respondent has not brought the regime into disrepute.

[51] The Respondent should note, however, that on 25 October 2022, a Code of Ethics for Licensed Building Practitioners came into force. In particular, he should note the Code includes requirements that a Licenced Building Practitioner "takes responsibility for his or her actions" and to "behave responsibly" and that the conduct of the type complained about may, in the future, come within it.

Penalty, Costs and Publication

[52] 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.

[53] 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.

[21] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[22] *Slack, Re* [2012] NZLCDT 40
[23] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[24] Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

Penalty

[54] 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*[25] 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.*

[55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[26] 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.

[56] The conduct was serious and, as noted, the failings were fundamental, and the Respondent has not been able to recognise that his design work did not reach an acceptable standard. The Board considered the cancellation or suspension of the Respondent's licence as a starting point. However, as the Respondent has not previously been before the Board and the issues related more to care and attention rather than design skill, the Board decided that it would impose a fine. A starting point of $3,000 was adopted.

[57] The Respondent's approach to the matters under inquiry is an aggravating factor. In *Daniels v Complaints Committee*[27] the High Court held that it was permissible to take into account as an adverse factor when determining the penalty that the practitioner has responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the Respondent has not cooperated and has avoided dealing with the matter. The Board has, on this basis, increased the fine to $3,500.

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

[25] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[26] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[27] [2011] 3 NZLR 850.

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[28].

[60] In *Collie v Nursing Council of New Zealand,*[29] 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*,[30] 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.*

[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 moderately complex and included a Special Advisor being instructed. Adjustments based on the High Court decisions above are then made.

[63] The Board's normal starting point for a half-day in-person hearing with a Special Advisor is $4,500. The Special Advisor report was not overly complex. On that basis, and based on the above, the Board's costs order is that the Respondent is to pay $3,500 the sum the Board ordinarily orders for costs for a half-day hearing without a Special Advisor.

<u>Publication</u>

[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[31]. The Board is also able,

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[28] *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.
[29] [2001] NZAR 74
[30] CIV-2011-485-000227 8 August 2011
[31] 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.*

[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[32]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[33]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[34]. 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*[35].

[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[36]. 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.

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 $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.**

[32] Section 14 of the Act
[33] Refer sections 200 and 202 of the Criminal Procedure Act
[34] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[35] ibid
[36] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[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 **30 December 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 December 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.