

Before the Building Practitioners Board

	BPB Complaint No. CB26013
Licensed Building Practitioner:	Tony Magele (the Respondent)
Licence Number:	BP126358
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	Wellington
Hearing Type:	In Person
Hearing Date:	26 January 2023 at 2 PM
Decision Date:	13 March 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs F Pearson-Green, LBP, Design AoP 2
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.

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Summary of the Board’s Decision

[1] The Respondent carried out or supervised building work in an incompetent manner and in a manner that was contrary to a building consent. He also failed to provide a record of work on completion of restricted building work. He is fined \$3,000 and ordered to pay costs of \$2,500. A record of the disciplinary offending will be recorded on the public register for a period of three years.

The Board

[2] 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.

¹ Section 341 of the Act.

Background to the Hearing

- [3] The Respondent did not appear at the hearing. Prior to it a Notice of Proceeding was issued on 12 September 2022 detailing the charges the Board would investigate at a hearing. A prehearing conference was scheduled for 25 November 2022. The Respondent was informed of the conference and emailed stating he would attend. He did not. The matter was set down for a hearing, and a Notice of Hearing was issued on 29 November 2022.
- [4] All the notices were sent to the Respondent in accordance with the provisions of the Act, and to the addresses the Respondent maintains on the Licensed Building Practitioner Register. The Respondent has not responded to the notices.
- [5] On the day of the hearing, the summoned witnesses appeared. The Respondent did not. The Board Officer contacted the Respondent by phone. He advised that he had been away travelling but was now back and that he had not had a chance to look at his emails. He informed the Board Officer that he had too much happening at present and would not be attending the hearing.
- [6] The Board directed that the Board Officer contact the Respondent to ascertain if he could attend by zoom or if he wanted to seek an adjournment. The Respondent did not answer his phone. He was sent a text with the same queries. He did not respond and did not answer a subsequent phone call.
- [7] No application for an adjournment was made. Nevertheless, the Board considered whether, in the interests of natural justice, one should be granted.
- [8] The Board noted the expense that had been incurred in convening the hearing and the Respondent's failure to engage in the process. Notwithstanding, the Board was concerned that if it continued the hearing, natural justice principles, and in particular the Respondent's right to appear, be heard and challenge the evidence, may be put at risk.
- [9] The Board decided that it would proceed with the hearing but that it would adopt a procedure that would still afford the Respondent his natural justice rights. The procedure adopted was as follows:
- (a) the Board would receive the evidence of the witnesses that were present and would then adjourn the hearing;
 - (b) a transcript of the evidence received would be produced and provided to the Respondent together with a further copy of the hearing file; and
 - (c) a direction would be issued that the Respondent is to advise, no later than 10 working days after the transcript is issued to him, whether he requires that the hearing resume to him to cross-examine any of the witnesses and/or to call or give evidence in his defence.
- [10] Directions in line with the above were issued. The Respondent was given until 17 February 2023 to respond. No response was received. The Board proceeded to make a decision.

The Charges

- [11] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Lower Hutt. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- [12] On the basis of the evidence provided to the Board, it has decided that it will further investigate the following grounds of discipline. They are that the Respondent may have:
- (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.
- [13] In further investigating the allegations under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the quality and compliance of Linea cladding installed.
- [14] At the commencement of the hearing, the Board noted that the Notice of Proceeding contained some typographical errors as regards the grounds of discipline but that the notice did give sufficient notice of the matters that the Board would be investigating. The Respondent may, as part of the process noted above, address any potential prejudice to him in submissions to the Board or at a resumed hearing.

Function of Disciplinary Action

- [15] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

[16] 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*,⁵ 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.”

[17] 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 persons⁶:

... 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.

[18] 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 breaches the Code of Ethics for Licensed Building Practitioners⁷ (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[19] 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

[20] 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.

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ 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 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

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

Evidence

- [22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁸. 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.
- [23] 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.
- [24] In addition to the documentary evidence before it, the Board heard evidence at the hearing from the Complainant, Mr [OMITTED].
- [25] The Respondent was engaged to carry out building work on a new residential build under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on or about 4 August 2021 and came to an end on or about 4 February 2022. The Respondent has not provided a record of work for the restricted building work that he undertook. The Complainant noted that requests for a record of work had been made, but there had been no response from the Respondent.
- [26] The complaint was made by the head contractor on the build. The Respondent was engaged to carry out carpentry work on the build, including the installation of framing and cladding. The Complainant raised issues with the quality and compliance of linear weatherboards installed, noting the following issues:
- *Some Linea board butt jointed (No T & G).*
 - *100mm (length) boards installed on some external corners.*
 - *Board on external corners are at different heights.*
 - *Some joins have not been staggered. IE, 3 rows of boards joining within 100mm of one another.*
 - *Vermon strip has been installed in-correctly.*
 - *First linea board is sitting 100mm below the slab. and not sitting on vermon strip*
 - *Inconstant gaps above the head flashings*

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

- *Board too short to be covered by corner soaker, the gap was siliconed and left.*
- *Board joins nailed on framing studs.*
- *Minimal cover to top board against soffit.*

[27] The Complainant raised issues with the weatherboard installation in September 2021 with the Respondent and gave him the “benefit of the doubt”. When reviewing the work in November 2021, he stated he was “horrified” with the work. The Complainant then called the Hutt City Council and Master Builders to review the work. He stated that both were “shocked”, and the Council issued a failed inspection notice. The inspection notice dated 9 December 2021 noted:

Called to site to inspect installation of Linea cladding. Linea installation instructions have not been followed and the following defects have been noted.

Some weatherboard joints are not staggered,

Joints are made closer than 100mm to studs,

External corners do not have enough cover.

Bottom board does not sit correctly on vermin closer.

[28] The Building Control Officer issued the following site instructions:

Boxed corners to be fitted to external corners to solve cover issue.

Some weatherboard to be removed and reinstalled as per James Hardie Linea specifications.

[29] The failed inspection notice was accompanied by annotated photographs which depicted the issues noted in the failed inspection.

[30] At the hearing, the Complainant confirmed the issues complained about and stated:

I think the photos pretty much summed up a good majority of it. We did try at one point to work on an area with six boards, but once we discovered that all the windows weren't set to a set height, and all the head facings were going to be up and down, we virtually went for a reclad with another builder.

[31] As noted, the Respondent did not engage in the investigation or hearing process and did not respond to the allegations.

Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in an incompetent manner (s 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 (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 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.

[33] The Board has made its decision on the basis of the uncontested evidence that was put before it. Further, in this respect, whilst the Board did not hear from the Respondent, it was satisfied that the complaint had been brought to his attention as had the matters that the Board would be investigating and that he had been given sufficient opportunity to respond and to participate in the proceedings. In making a decision, the Board took into account that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not engaging in the process.

[34] The specific reasons for each of the Board's decisions follow.

Negligence and/or Incompetence

[35] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁹ 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.

[36] 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*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

[37] 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*,¹² it was stated as "*an inability to do the job*".

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

- [38] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. 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.
- [39] 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 Act¹⁴. 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 practitioner¹⁵.
- [40] 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.*

- [41] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶ and be carried out in accordance with a building consent¹⁷. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁵ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁶ Section 17 of the Building Act 2004

¹⁷ Section 40(1) of the Building Act 2004

[42] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁸ 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.

[43] There was clear evidence that the building work on the exterior cladding had been carried out in a non-compliant manner. Moreover, the building work was not completed to the standard expected of a licensed Building Practitioner. Issues with the cladding were brought to the Respondent's attention early on in the build and were not rectified. There appeared to be a degree of indifference from the Respondent to the quality and compliance of building work on the cladding.

[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.

Contrary to a Building Consent

[45] 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.*

[46] 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.

[47] 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.

¹⁸ [2001] NZAR 74

No fault or negligence has to be established¹⁹. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[48] Again, there was clear evidence that the building work on the exterior cladding had not been carried out in accordance with the building consent. In particular, the manufacturer's installation instructions, which form part of the building consent, had not been complied with. Accordingly, the Board finds that the disciplinary offence has been committed.

[49] The Board does note the commonality between the findings under section 317(1)(b) and 317(1)(d) of the Act, and it will, when considering penalty, treat the two findings as a single offence.

Record of Work

[50] 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 work²⁰.

[51] 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.

[52] The Board discussed issues with regard to records of work in its decision C2-01170²¹ 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.

[53] 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.

[54] 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*²² "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²¹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

²² [2018] NZHC 1662 at para 50

- [55] 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.
- [56] In the matter, completion occurred in February 2022. A record of work has not been provided. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [57] 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.
- [58] 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. No good reasons have been advanced.

Penalty, Costs and Publication

- [59] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [60] 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

- [61] 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*²³ 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.

²³ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁴ 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.
- [63] The offending was in the mid-range of negligence and seriousness. The Board adopted a starting point of a combined fine of \$3,000 for all three offences, an amount that is consistent with other penalties imposed by the Board for similar offending. There are no known mitigating or aggravating factors other than the Respondent failing to engage in the process, which has not been taken into account. The fine is set at \$3,000.

Costs

- [64] 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.”
- [65] 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 case²⁵.
- [66] In *Collie v Nursing Council of New Zealand*,²⁶ 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.

- [67] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁷ 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.

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

²⁵ *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.

²⁶ [2001] NZAR 74

²⁷ CIV-2011-485-000227 8 August 2011

[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.

- [68] 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. Adjustments based on the High Court decisions above are then made.
- [69] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board's inquiry. Ordinarily, the Board's scale costs for a half-day hearing is \$3,500. However, as the Board held two hearings on the same day in respect of the Respondent, there were some economies in the costs incurred, and the costs order has been reduced accordingly.

Publication

- [70] 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 Act²⁸. 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.

- [71] 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.
- [72] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².
- [73] 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 interest³³. It is,

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

[75] 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 \$3,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (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(I)(iii) of the Act.

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

[76] 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

[77] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 April 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[78] 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

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

Signed and dated this 20th day of March 2023



M Orange
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*