

Before the Building Practitioners Board

	BPB Complaint No. CB25818
Licensed Building Practitioner:	Paul Mravicich (the Respondent)
Licence Number:	BP116727
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 Type:	In Person
Hearing and Draft Decision Date:	8 November 2022

Board Members Present:

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

Appearances: C J C McLean and W H Prior for the Respondent

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Findings:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent **has not** committed disciplinary offences under sections 317(1)(b) or (d) of the Act.

Contents

Summary of the Board’s Decision	2
The Board	2
The Hearing	2
The Charges	3
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Board’s Conclusion and Reasoning	8
Record of Work.....	8
Negligence and Contrary to a Building Consent	10
Penalty, Costs and Publication	11
Penalty	12
Costs.....	12
Publication	13
Section 318 Order	14
Submissions on Penalty, Costs and Publication	15
Right of Appeal	15

Summary of the Board’s Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$2,500.
- [2] The Respondent has not carried out building work in a negligent or incompetent manner or in a manner contrary to a building consent. The Board made its decision on the basis that the conduct was not serious enough to warrant a disciplinary outcome.

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 Hearing

- [4] The Board, on receiving a Registrar’s Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.

¹ Section 341 of the Act.

- [5] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

The Charges

- [6] 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], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner 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.
- [7] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board would be investigating the cladding, window, skylight and structural steel installation, including all fixings and external envelope flashings.

Function of Disciplinary Action

- [8] 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.
- [9] 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:

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

⁵ [2016] HZHC 2276 at para 164

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [10] 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 Complainant’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.

- [11] 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.
- [12] 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

- [13] 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.
- [14] 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

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. Under section 322 of the Act, the Board has

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

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

- [16] 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.
- [17] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:
- | | |
|----------------|-----------------------------------------------------|
| Paul Mravicich | Respondent |
| [Omitted] | Witness for the Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness, Licensed Building Practitioner ([Omitted]) |
| [Omitted] | Witness, Quantity Surveyor |
- [18] The Board also attempted to summon [Omitted], a building surveyor who had completed a report about the property. The Board received advice that he had moved overseas and that the contact details obtained for him were no longer valid. No new contact details could be obtained.
- [19] Counsel for the Respondent provided submissions and an affidavit from the Respondent. Counsel traversed the contractual interactions between the Respondent and the Complainant and the differences of view as to the nature of the contract under which the building work was undertaken (fixed price versus a charge-up with margins on materials). Whilst contractual matters are outside of the Board’s scope, the submissions were made to highlight that the contractual relationship and ongoing engagement were not straightforward and that the contractual parties held different views as to what the contractual terms were. The contractual parties also disagreed as to who was the overall project manager. The Respondent accepted he was responsible for the sub-trades that he contracted but not for those that the Complainant contracted (such as the roofer, electrician and painters).
- [20] The Respondent viewed the Complainant as the overall project manager. The Complainant did not accept that she was the project manager. She took the position that she had contracted the Respondent to provide those services. The differences, in part, came down to the differing views on the contractual arrangements and to the changes in scope as the build progressed. It was accepted, at the hearing, that the Complainant engaged the architects (a second architect was engaged when the first moved out of the region) and the engineer and that she was the primary contact for them during the build but that the Respondent also engaged with them.
- [21] Counsel also submitted that the scope of the works that the Respondent was to undertake was not clear and that it changed during the build. Generally, the build

was an alteration and addition to an existing dwelling. It involved a partial reclad, the installation of new external joinery units, the construction a new deck and veranda, the reconfiguration of some of the internal layout and internal renovation. Most, but not all, of the building work was carried out under a building consent and amendments to that consent were made during the build. Some, such as the installation of new external joinery units to the southeast and southwest elevations, was carried out under Clause 1 of Schedule 1 of the Act as general repair, maintenance and replacement. Amendments to the building consent were sought during the build, including accommodating a different roof design. Counsel submitted that poor design, design changes and Covid delays contributed to the overall complexity of the build and to uncertainty as regards the scope of the building work the Respondent was to undertake.

- [22] The work that was carried out by the Respondent under the building consent did include restricted building work for which a record of work was required on completion. A record of work was provided on 18 April 2022. The building work came to an end in or about 5 February 2021, which the Respondent, in his affidavit, stated was his last day. In May 2021, the Respondent removed his scaffolding on the basis that he would not be returning to carry out any further work. The complaint, which included an allegation that a record of work had not been provide on completion, was made on 12 July 2021. The Respondent accepted that there had been a delay in the provision of his record of work.
- [23] It was established, early in the hearing, that the roofing work, including roofing flashings, fascia and guttering, was completed by a subcontractor who was engaged by the Complainant. Those aspects of the Board's investigation that related to the roof and flashings were not further investigated on the basis that they were carried out by licensed persons who were responsible for the quality and compliance of their own work.
- [24] The Respondent, in his affidavit, identified that another Licensed Building Practitioner was also involved in the carpentry work ([Omitted], first licenced [Omitted], suspended between [Omitted] and [Omitted]). The Respondent was questioned on who carried out and supervised what. The Respondent stated that they worked together as a team but that the Respondent was responsible of the supervision of non-licensed persons that were on site (one qualified builder and one experienced hammer hand). The Respondent gave evidence that [Omitted] had not provided a record of work for the restricted building work that he had carried out during the period when he was licensed and that he was unaware of the requirement in section 88 of the Act for each Licensed Building Practitioner to provide a record of work.
- [25] The Board reviewed various photographs in relation to the cladding, window, skylight and structural steel installation and asked questions of the witnesses present.

- [26] A particular area of concern was a vertical cladding junction with exterior joinery window jamb that had a visible gap (page 1308 of the file) and which did not have cladding running underneath the joinery as detailed in the building consent (page 1494). The Respondent noted that the work was not complete, that a thin strip of material could be inserted into the gap and that a scribe with silicone would be installed over it. When asked why the cladding had not been installed without the gap in the first instance, he stated that it was a set-out issue in respect of where the cladding was started from.
- [27] The Board also inquired about:
- (a) the distance between the unsealed ground level and the finished level of cladding (page 1310). Photographs showed a lack of ground clearance. The Respondent stated that the cladding and cavity closers were installed as per the building consent 50mm below the bearer, that the work was not complete and that it was not clear what was going to be done with the ground below the cladding, implying that the ground levels could be changed to remediate the issue;
 - (b) the installation of new windows in the existing cladding. The pictures provided (pages 1319 and 1322) showed gaps that could have led to water ingress. The Board heard evidence that there was a future intention to replace the existing cladding but a difference in view between the Complainant and the Respondent as regards when it might have been replaced, with the Respondent taking the position that it was more imminent than the Complainant. The re-cladding of the existing house in vertical boarding formed part of the approved building consent. The Respondent viewed the installation of the windows as temporary and the replacement of the cladding as outside of his scope of work. The Complainant's position was that she was not aware that installing the new windows in the existing cladding could lead to issues that the joinery would have to be removed to reclad the area. When the Respondent was asked why steps were not taken to ensure the windows would be weathertight by closing off gaps, he stated that the work was not complete and that there were time pressures to get on with other work;
 - (c) the use of galvanised fixings when stainless were specified. [Omitted] gave evidence that there were 10-12 bolts that were closer than 600mm to the ground that were not stainless steel. The Respondent stated that if they were not, then it would have been a mistake. He further stated that he was concerned about corrosive reactions between stainless and galvanised fittings in some areas and was seeking a solution from the engineer and that the work was not complete;
 - (d) the installation of skylights which the Complainant had noted were not fixed in place. The plans specified three large horizontal Velux skylights. A different

option was pursued (Adlux), which the Respondent stated was similar, but could be sized to the specific dimensions required. Two large vertical Adlux maxlight were installed. A change of the building consent was not obtained to accommodate the different product. The Respondent stated he had not picked up on the need for a change but that he had researched the suitability of the replacement skylights. The Respondent framed the area for skylight installation but considered that actual installation was the responsibility of the roofers who had to install the flashings. He stated his engagement on the project came to an end some 2-3 days after this; and

- (e) structural steel. Changes to the type of steel used in the veranda over the deck occurred. The Respondent stated that it was to aid with installation and that the engineer was consulted prior to the change being made. A Council inspection note of 14 December 2020 noted the need for a minor variation.

Board's Conclusion and Reasoning

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

[29] The Board has further decided that the Respondent **has not**:

- (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; or
- (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.

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

Record of Work

[31] 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 work⁸.

[32] 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.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [33] The Board discussed issues with regard to records of work in its decision C2-01170⁹ 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.
- [34] 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.
- [35] 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*,¹⁰ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [36] 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 this matter. The Respondent stated his last day on site was 5 February 2021. A record of work was not provided until 18 April 2022 and only after a complaint had been made.
- [37] The Respondent acknowledged the delay and submitted he was not sure how to submit a record of work for work that was not complete. At the same time, there was no evidence that he took any steps to try and determine what he should have done. In this respect, the Respondent should bear in mind that a record of work can capture not only what has been done but also what has not been done by the Licensed Building Practitioner. By providing adequate detail within the record of work, they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [38] On the basis of the above, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [39] 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.

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁰ [2018] NZHC 1662 at para 50

- [40] The Board noted that there was an ongoing payment dispute. Whilst it has not been put forward as a reason for non-provision, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed Building Practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [41] 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.
- [42] Finally, the Respondent should note, in future, that if other Licensed Building Practitioners are also carrying out or supervising restricted building work, then they have to provide their own record of work for that which they carried out or supervised.

Negligence and Contrary to a Building Consent

- [43] The Board, when dealing with disciplinary matters regarding section 317(1)(b) and (d) of the Act, is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*,¹¹ Justice Gendall stated, as regards the threshold for disciplinary matters:
- [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.*
- [44] In the present matter, there was some evidence of building work that had not been carried out to an acceptable standard or in accordance with the building consent issued. Notwithstanding, the Board decided that the transgressions were not serious enough to warrant it making disciplinary findings.
- [45] The Respondent is cautioned however that he needs to take care in future as regards the sequencing of work and in terms of changes to a building consent. With regard to sequencing, the Board found it difficult to understand why work was progressed on elements such as cladding when there were gaps in it that would have been harder to remediate than to complete the right way the first time. In this respect, during the first reading of changes to the Act around licensing,¹² it was noted by the responsible Minister:

¹¹ [2001] NZAR 74

¹² Hansard volume 669: Page 16053

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [46] 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 legislation¹³:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [47] Turning to changes to the building consent, whilst section 45A of the Act allows for minor variations, a Building Consent Authority retains the discretion to refuse them¹⁴. Given this and the fact that a minor variation has to be applied for, indicates that the building work that relates to it must follow rather than proceed the application. Accordingly, in future, the Respondent should ensure that the correct processes are followed when departures from the consent are being considered.

Penalty, Costs and Publication

- [48] 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.
- [49] The matter was dealt with at a hearing. The Board received evidence relevant to penalty, costs and publication, and the Board has decided to make indicative orders

¹³ Hansard volume 669: Page 16053

¹⁴ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[50] 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*¹⁵ 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.

[51] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁶ 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 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.

[52] The only matter that has been upheld by the Board is the failure to provide a record of work. Such matters are at the lower end of the disciplinary scale. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. The Respondent has referred to his uncertainty and to financial losses. In the context of record of work offending, they are not mitigating factors. As such, there are no aggravating or mitigating factors present and the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

[53] 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.”

[54] 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 case¹⁷.

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁷ *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.

- [55] In *Collie v Nursing Council of New Zealand*,¹⁸ 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.

- [56] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁹ 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.*

- [57] 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. Adjustments based on the High Court decisions above are then made.

- [58] The matter was dealt with at a hearing. The Board's scale costs for a half-day hearing is \$3,500. That is the Board's starting point. The Board has noted, however, and has taken into account that the allegations under section 317(1)(b) and (d) of the Act were not upheld. On that basis, the Board has decided to reduce the costs to \$2,500.

Publication

- [59] 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 Act²⁰. 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.

¹⁸ [2001] NZAR 74

¹⁹ CIV-2011-485-000227 8 August 2011

²⁰ Refer sections 298, 299 and 301 of the Act

- [60] 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.
- [61] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.
- [62] 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 interest²⁵. 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.
- [63] Based on the above, the Board will not order further publication.

Section 318 Order

- [64] 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 \$1,500.

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.

- [65] 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.

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [66] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **17 January 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.
- [67] 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

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

Signed and dated this 21st day of December 2022.



Mr M Orange
Presiding Member

ⁱ Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*

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- (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.*