Before the Building Practitioners Board

	BPB Complaint No. CB25684
Licensed Building Practitioner:	Lingyun Ni (the Respondent)
Licence Number:	BP 125538
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	24 February 2022
Decision Date:	28 February 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member
Ms K Reynolds, Construction Manager

Procedure:

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

Disciplinary Finding:

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

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

Contents

Summary of the Board's Decision

[1] The Respondent has failed to provide a record of work on completion of restricted building work. He is fined $1,500 and ordered to pay costs of $500. The disciplinary outcome will be recorded on the Register of Licensed Building Practitioners for a period of three years.

[2] The Board found that the Respondent has not carried out or supervised building work in a negligent or incompetent manner or in a manner that was contrary to a building consent on the basis that the conduct complained about was not serious enough to warrant a disciplinary outcome.

The Charges

[3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

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

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

[4] In further investigating the building work, the Board gave notice that it would be inquiring into the matters noted in a report obtained by the Complainant and provided to the Board from [Omitted], (MRICS, MNZIBS, MBOINZ) of [Omitted] and, in particular, the issues noted in sections 3.1 to 3.8 of the report on pages 50 to 55 of the Board's files (documents 2.1.33 to 2.1.38).

Function of Disciplinary Action

[5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[6] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board,*[4] Collins J. noted that:

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

[7] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

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

[8] Finally, the Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

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

Inquiry Process

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

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

Evidence

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

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

[14] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Respondent and from [Omitted], a Registered and Chartered Surveyor.

[15] The Respondent was engaged to carry out a new residential build by the Complainants. The building work progressed to completion, at which time a commercial dispute arose over variations carried out during the build. The Complainants engaged [Omitted] to provide a report to support a complaint to the Board. [Omitted] noted in his report that he carried out

[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200
[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

a non-evasive inspection of the property and a review of the Building Consent Authority and contractual documentation.

[16] [Omitted] identified the following issues. With the exception of the first and last items, [Omitted] expressed his opinion that the work had not been completed in accordance with the building consent issued:

(a) The number of Council inspections undertaken;

(b) Missing eaves;

(c) Collapsed retaining wall;

(d) Stormwater detention tank and finished floor level height difference;

(e) Timber louvres omitted;

(f) Timber window frame feature omitted;

(g) Internal staircase balustrade change; and

(h) Gap difference.

[17] The Respondent provided a written response to the complaint and to the above matters, and the Board questioned him about each of them. The Respondent outlined the commercial dispute to provide context and generally submitted that he had carried out the building work in a professional and proper manner. With respect to building consent changes, in his written response, he stated:

> *I always complied with building consent, and if there is variation I had to and always seek for advice from architect or engineer to get approval. Auckland council, structural engineer have passed all the inspections, which means they inspected and approved every step of our building. They would not approve if we did not comply with the building consent.*

Council Inspections

[18] [Omitted] noted the schedule of inspections in the Building Consent suggested 13 inspections were required and that:

> *Of the 21 inspections, 8 have failed with 4 have been subsequently passed following a recheck or multiple rechecks. There are however the vehicle crossing and more critically the residential final inspections that appear to have no final sign off. In addition there are internal administrative checks where Council recheck that all documentation has been received and the required inspection achieved.*

[19] The Respondent stated that the Auckland Council has a policy of failing any inspections if more than two items are noted as being non-compliant and that this extends to outstanding documentation. He put forward that the majority of the failed inspections were as a result of required documentation not being provided, but that the Council inspectors allowed the building work to continue as there were no on-site issues that were of concern. The Respondent was asked why he did not submit the requested documentation in a timely manner. He responded that he had been informed the documentation could be provided as

part of the final inspection and Code Compliance Certificate process and that he had not been asked to provide the documentation earlier than that.

Building Work Contrary to the Building Consent

[20] [Omitted] noted that the building was designed and consented to have eaves above the first floor to the southeast wall of bedroom one, a timber louvre feature and timber window frame surrounds as an architectural feature but that those items were not constructed or not constructed in accordance with the building consent. [Omitted]'s report did note that a minor variation had been submitted for the louvre feature.

[21] [Omitted] also noted that the stormwater detention tank was not at the required level as a result of changes to the construction of a retaining wall and that the building was designed and consented to have a glazed balustrade with a specifically designed engineered support at the base with a proprietary vice clamp feature that concealed the fixings. However, the as-built glazed balustrade had been constructed with an exposed spaced disc fixing method.

[22] The Respondent noted that there were multiple changes made by the owner during the build so as to reduce costs. The Respondent accommodated those changes, and his written response in paragraph [17] above was reiterated. He also noted that the Council passed the inspections relating to the building work, had not required minor variations or consent amendments during the build, but that as-built plans would have been required and submitted as part of the Code Compliance Certificate process. In this respect, he noted that the architect for the project had drawn an as-built plan dated 23 July 2020, which showed the change to the louvres. The as-built was created after the build had been completed on or about 1 July 2020 and a final inspection was carried out on 22 July 2020.

[23] With respect to the change to the eaves, the Respondent stated that the change came about as a result of the detailer for the truss manufacturer assessing that an eave would not be practicable because of the height of lintels and positioning of downpipes and that the truss detailer consulted with the designer before the change was made. The Respondent was not consulted about the change, and a minor variation was not sought by him or the designer.

[24] The Respondent gave evidence that, in respect of levels, he engaged a surveyor and followed surveyor's instructions and that the retaining wall had be changed as a result of design and on-site issues, which are noted below.

[25] The Respondent stated that the balustrade was not installed by him and that he put the owners in touch with the contractor that did install it.

Retaining Wall

[26] The section on which the house was built had an existing boundary retaining wall. The consented design kept the existing retaining wall, and an additional retaining wall of similar form in front of it was to be installed inside it. [Omitted]'s report alleged that the Respondent undermined the existing retaining wall when the site was excavated and that this resulted in the wall collapsing and a new solution having to be built.

[27] The Respondent's evidence was that the existing retaining wall was inside the boundary, not on it as was drawn in the consented plans, the owner wanted a concrete path behind the house and that the design would not have worked as there was not enough room to build a

retaining wall with the batter that was required in the space available and that this was confirmed by the surveyor. As such, a different solution was always going to be required.

[28] In terms of the wall collapsing, the Respondent stated that the poles of the existing retaining wall were not installed at an adequate depth and that this became apparent when the excavations were underway. The Respondent contacted the engineer when it became apparent that the designed solution would not work, and the existing retaining wall was at risk, to obtain a solution. He stated that he mounded clay against the wall to try and stabilise it whilst a solution was developed, but that it collapsed about a week later.

Gap Difference

[29] [Omitted] noted in one area, wall linings and abutting joinery linings, that the horizontal and vertical alignment is not of an acceptable standard, and the joinery linings are formed in two pieces resulting in cracking at the butt joint. The Respondent's evidence was that the issue arose as a result of cost-cutting directives from the owners.

Record of Work

[30] The owners complained that they had not been provided with a record of work. The Board obtained a copy of the Territorial Authority file on 4 November 2021. It contained some records of work, but not the Respondent's record of work. The Respondent maintained that he had provided it to the Territorial Authority (Council) and the owner on or about 7 July 2021 when a Code Compliance Certificate was applied for. He stated that he tried to give the Council a hard copy but that they required that he submit it using the Council's online system. When asked for evidence that he had submitted the record of work using an online system, the Respondent stated that he would be able to provide evidence of it.

[31] The Respondent provided an email chain following the conclusion of the hearing. It included a number of attachments, one of which was the Respondent's record of work dated 1 February 2020. The email chain showed that the Respondent emailed the record of work to the owner's lawyer on 10 February 2021. He did not provide any evidence that he had submitted the record of work to the Council.

Board's Conclusion and Reasoning

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

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

(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).

[33] 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.

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

Negligence and/or Incompetence

[35] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] Judge McElrea noted:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

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

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

[38] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction or, in other words, whether the conduct was serious enough.

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

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

[40] In *Pillai v Messiter (No 2)*[13] the Court of Appeal stated:

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

[41] The matters before the Board were, on the basis of the evidence heard at the hearing, not sufficiently serious enough to warrant the Board taking disciplinary action against the Respondent. The Board accepted that changes had been requested by the owner or were, in the case of the retaining wall, required due to on-site conditions and that other

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[7] Judge McElrea, DC Whangarei, CIV-2011-088-313
[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

professionals (the designer and/or the engineer) were involved in those changes. As such, whilst the Respondent could and should have followed better processes for building consent changes, the overall conduct did not reach the disciplinary threshold.

Contrary to a Building Consent

[42] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. Whilst a charge of building contrary to a building consent can be a form of strict liability offence[14] , the Board, in this instance, has taken the nature of the matters before it into account and has decided that the contraventions were not serious enough.

[43] The Respondent is, however, cautioned to take care when dealing with building consent changes. It is recommended that he ensure a written record is kept of his interactions with design and engineering professionals as regards changes and that Building Consent Authority paperwork and approvals are processed prior to the changes being undertaken on site.

Record of Work

[44] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[15].

[45] 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.

[46] The Board discussed issues with regard to records of work in its decision C2-01170[16] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[47] 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.

[48] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*[17] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[14] *Blewman v Wilkinson* [1979] 2 NZLR 208
[15] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[16] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[17] [2018] NZHC 1662 at para 50

[49] As to when completion will have occurred is a question of fact in each case. In most situations' issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. That did not occur in the present matter. The build progressed through to December 2018. It then came to an end as a result of a commercial dispute. The building work has been completed by other contractors. The Respondent wrote a record of work dated 1 February 2020, which indicates that his restricted building work was complete on or about that date. He did not provide it to the owner until 10 February 2021, one year after he wrote it. There is no evidence to corroborate the Respondent's claim that he provided the record of work to the Council as part of the Code Compliance Certificate process. Moreover, even if he had, the Certificate of Compliance was not applied until 7 July 2021, which was well after completion.

[50] 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.

[51] In this instance, there was an ongoing dispute. 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.

[52] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Penalty, Costs and Publication

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

[54] The Respondent made submissions at the hearing as regards penalty, costs and publication. He noted that he had learnt from the matter and had changed his business practices and outlined the impact the dispute had had on him and his business.

Penalty

[55] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[18] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[18] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[19] the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[57] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of $1,500, an amount which it considers will deter others from such behaviour. There are no mitigating or aggravating factors present. As such, the Board see no reason to depart from the starting point. The Fine is set at $1,500.

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 that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[20].

[60] In *Collie v Nursing Council of New Zealand,*[21] where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

[61] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[22] 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.*

[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[20] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.
[21] [2001] NZAR 74
[22] 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.*

[62] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate. Adjustments based on the High Court decisions above are then made.

[63] The Board's scale costs for a half-day hearing is $3,500. The only charge upheld, however, was the failure to provide a record of work. Given this, the Board has decided to reduce the costs to $500.

Publication

[64] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act[23]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public Register:

> *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[65] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[66] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[24]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[25]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[26]. 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*[27].

[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[28]. 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)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $1,500.**

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

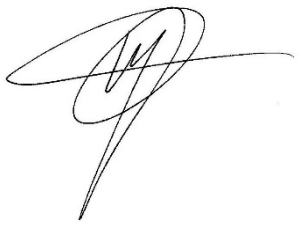
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance 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.

[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.

Right of Appeal

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

Signed and dated this 17th day of March 2022



Mr M Orange
Presiding Member

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[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.