Before the Building Practitioners Board

	BPB Complaint No. CB25917
Licensed Building Practitioner:	Christopher Reynolds (the Respondent)
Licence Number:	BP 121547
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:	28 September 2022
Decision Date:	14 November 2022

Board Members Present:

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

Procedure:

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

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), (d) and (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 a negligent 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. The Respondent is fined $2,000 and ordered to pay costs of $3,000. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

[2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [OMITTED], Waiheke Island. In respect of building work undertaken while the Respondent was licensed – that is, after 24 November 2020, the alleged disciplinary offences the Board resolved to investigate were that the Respondent may have, as set out in the report of Mr [OMITTED] and the Council inspection reports:

(a) carried out or supervised building work or building inspection work in a negligent or 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-

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

builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

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

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

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

[5] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

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

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

[7] Some of the building work on this project may have been undertaken when the Respondent's Licensed Building Practitioner license was suspended. The suspension was for a period from 21 April 2020 to 24 November 2020. In accordance with section 297 of the Act, the Board has no jurisdiction over the Respondent during that

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

[3] [1992] 1 NZLR 720 at p 724

[4] [2016] HZHC 2276 at para 164

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

suspension period. As such, the Board only inquired into building work and other conduct of the Respondent, which occurred after the date that his suspension ended.

[8] 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

[9] 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.

[10] 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

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

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

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

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

The Respondent

[OMITTED], the Complainant

[OMITTED], [OMITTED]

[OMITTED], Principal Engineer, [OMITTED]

[14] After the hearing, the Complainant provided further submissions and evidence to the Board Officer. This was made available to the Respondent on 19 October 2022, and he was given an opportunity to respond to it. He did not comment. The submission was taken into consideration by the Board in reaching this decision.

[15] The Respondent told the Board that he had 20 years of construction experience, and this type of project was not uncommon to him. He believed that it was *"not the nature of the work that was the problem here",*

[16] In October 2019, when he first engaged with the Complainant, the Respondent had no employees. On entering the contract for this project, he hired a labourer. A couple of weeks into the project more work was added, so the Respondent hired three more workmen – two builders (of 15-20 years and 30 years' experience, respectively). They were not Licensed Building Practitioners at that stage.

[17] The Respondent became the project manager, supervising the workmen. He was on site every day at some stage and organised the materials. The Respondent stated he left the "*responsibilities to guys on site"*. He advised that at the time he was involved in another project involving three apartments.

[18] The Respondent referenced his license suspension period and explained that this was due to paperwork issues and not for disciplinary reasons.

[19] Mr [OMITTED] of [OMITTED] was engaged by the Complainant. He told the Board that at the beginning of the project, he was on site once a week and was always available if the Respondent needed him. Mr [OMITTED] attended to 5-7 minor variations and did site observation. He commented that the *"job was not the easiest because it originated from non-consented building work originally*", and they were always *"finding things".*

[20] Mr [OMITTED] of [OMITTED] did some structural design work at the beginning of the project for Building Consent approval and became involved again when the soffit linings were removed and the incorrect CPC installations were uncovered.

[21] The Respondent explained the present situation as arising from a change in deck construction. The deck was designed by Mr [OMITTED] with an internal gutter and a trafficable membrane. The Respondent pointed out to the Complainant that this made the handrail at an uncomfortable height when standing in the internal gutter and suggested a floating deck instead. The Complainant declined.

[22] Later the Complainant changed his mind and wanted the floating deck. This resulted in changes to the construction– the handrail increased in height by about 200mm to accommodate the floating deck.

[23] An Auckland Council Inspection dated 16 February 2021 (Document 4.2, Page 294 of the Board's file) which resulted in a failed inspection, noted *"Also today sighted balcony membrane now installed and barrier which is not as per consent and floating deck now proposed. Minor variation and new balcony engineering details required as taller with greater leverage".*

[24] The Engineer was engaged to review the increased height of the existing balustrade design. An upgraded fixing capacity was required by the Engineer. The revised design required an upgrade of every washer from 50mm to 65mm retrospectively. To facilitate this, the soffit linings needed to be removed. When this was done, it was discovered that none of the CPCs were installed in accordance with the consented drawings.

[25] On this issue, the Respondent, in his written response to the Investigator said – *"With all of the framing and hardware that was going on the CPC's got missed. They should have went in prior to the nogging of the gutter but they didn't. This is my fault, nobody else's but the gutter got framed before the CPC's got installed. Then the guy that got tasked with installing the CPC's did a horrific job"* (Document 2.2.7, Page 217 of the Board's file).

[26] The Board notes that the Respondent said from his very first response to the Investigator – *"I do admit that there has been unacceptable work carried out by one of my team members that needs remediation and that I am liable for."* (Document 2.2.6, Page 216 of the Board's file)

[27] Some of the Council inspection reports were put to the Respondent:

- 3/12/20 – *"CPCs to be added as per consent detail…These need to be well photographed or sighted from underneath" (*Document 4.2, Page 276 of the Board's file) and
- 9/12/20 – request repeated (document 4.2, Page 283 of the Board's file)

and he accepted that he did not provide the requested photographs.

[28] After a visit to the site and inspecting the CPCs, Mr [OMITTED] summarised the issues in an email dated 25 March 2021 to the Complainant, which appears to have also been sent to the Respondent – *"Almost all the screws do not penetrate the timber or only touch the edge and this is of course unacceptable, as it simply doesn't provide the load transfer through the post to the deck framing as per the Lumberlok deck joist fixing detail. The CPC40s will have to be replaced and/or the timber blocking between the joists be cut to fit tightly between them. The extent of the chamfered ends was unnecessary in this instance."* (Document 2.1.21, Page 36 of the Board's file).

[29] Mr [OMITTED]'s report dated 1 July 2021 noted – *"Every single washer is checked into the baluster posts. This reduces the baluster strength and means that the baluster posts do not meet the strength requirements to carry the design loads outlined in AS/NZS1170 – "The Loadings Code". Many washers are not 65mm x 65mm specified. There were very few areas where the bolt threads project beyond the end of the nut. Typically, we would be looking at least 1 clear thread to project beyond a nut to be acceptable."* (Document 2.1.45, Page 60 of the Board's file).

[30] Further workmanship issues which were raised with the Respondent were evidenced by photographs.

[31] This photograph showed the bolts in the baluster posts being too short. The Respondent said this was caused by a miscalculation of the lip of the membrane over the deck which resulted in the need to pack behind the post, making the bolt too short. Mr [OMITTED] said the post had been compromised and was no longer fit for purpose.

[32] This photograph showed the blocking cut short and not properly done. The Respondent agreed they had been cut too short and there was *"excessive"* shear from the back.

[33] The Respondent said he had tried his best to resolve the situation amicably and he agreed to go back to fix the issue and that *"…I will pay my way, whatever the CPC issue causes to fix I'll pay that"* (Document 2.2.9, Page 219 of the Board's file).

[34] The Respondent said that he had learnt from this experience and that now he worked with just one labourer and was present on site supervising him.

[35] In respect of the alleged failure to provide a record of work, the Respondent disputed that the work was complete. He suggested that it was only in the last couple of months that he knew the Complainant had employed another builder and that therefore he was not going back to the project. He did, however, also acknowledge that it had not been provided because the parties were in a dispute and that it was not given because the Complainant owed him money.

[36] Communications between the Respondent and the Complainant reference another builder *"taking over [the Respondent's] unfinished work"* on 27 July 2021 (Document 2.1.150, Page 165 of the Board's file), but the parties continued discussing the Respondent returning to do remedial work through to November 2021 (Document 2.1.142, Page 157 of the Board's file). The Respondent stated via text on 2 December 2021 that he was not dealing with him, the Complainant, anymore and would not be back. (Document 8.1.2, Page 493 of the Board's file).

[37] The Territorial Authority file was obtained on 27 April 2022, and it did not contain a record of work from the Respondent.

[38] The Complainant requested the record of work from the Respondent by email dated 8 January 2022. (Document 8.1.2, Page 494 of the Board's file) and confirmed that, as of the hearing date, he still did not have it.

Board's Conclusion and Reasoning

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

(a) carried out or supervised building work or building inspection work in a negligent or 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.

Negligence

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

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

[42] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act.[10] The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

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

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

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

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

standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[11]

[43] 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.

[44] In terms of seriousness, in *Collie v Nursing Council of New Zealand,*[12] the court 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.*

[45] 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.*

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[11] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

[46] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[14]. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

> *"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."*

[47] The Respondent acknowledged at the hearing and earlier in his written response to the complaint that his supervision of the restricted building work was inadequate. As a result of the lack of supervision, the work was not completed in accordance with the building code and the building consent. In particular, the Board notes that by checking in the washers and not installing the CPCs, the structural strength of the balustrade, which was designed to comply with F4 'Safety from Falling' of the NZ Building Code, was compromised.

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

<u>Contrary to a Building Consent</u>

[49] 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*

[14] *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

> *continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[50] 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.

[51] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established[15].

[52] Given the above factors, and the workmanship issues discussed above, the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected, and, as such, they will be treated as a single offence when the Board considers penalty.

Record of Work

[53] 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[16].

[54] 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.

[55] The Board discussed issues with regard to records of work in its decision C2-01170[17] 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.

[56] 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.

[57] 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

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

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Ministry of Business Innovation and Employment v Bell[18] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[58] As to when completion will have occurred is a question of fact in each case.

[59] 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. Completion occurred at the latest in December 2021 when the Respondent said he was not dealing with the Complainant anymore. A record of work had not been provided as at the date of the hearing. 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.

[60] 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.

[61] In this instance, there was an ongoing payment 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.

[62] 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.

[63] Accordingly, the Board finds that no "good reason" for the failure to provide a record of work has been established.

Penalty, Costs and Publication

[64] 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.

[65] 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.

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[18] [2018] NZHC 1662 at para 50

Penalty

[66] 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*[19] 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.*

[67] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[20] 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.

[68] Based on the above, the Board considers that the matter was at the lower level of seriousness and that a fine was appropriate. It adopted a starting point of $2,700. This is an amount that is consistent with other penalties imposed by the Board for similar offending. The Board considered that there were mitigating factors, including that the Respondent has made changes to his work practice and his early acceptance of wrongdoing. Taking those mitigating factors into account, the Board has set the fine at $2,000.

Costs

[69] 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."

[70] 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[21].

[71] In *Collie v Nursing Council of New Zealand,*[22] where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[21] *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.
[22] [2001] NZAR 74

> *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.*

[72] Based on the above, the Board adopted a starting point for a costs order of $3,500, which is the Board's scale costs for a half-day hearing. The Board considered that the Respondent's early acceptance of responsibility was to be commended and was a mitigating factor. Accordingly, the Board's costs order is that the Respondent is to pay, toward the costs of and incidental to the Board's inquiry, the sum of $3,000.

Publication

[73] 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.*

[74] 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.

[75] 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].

[76] 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.

[77] Based on the above, the Board **Will Not** order further publication.

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[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

Section 318 Order

[78] 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 $2,000.**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $3,000 (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.

[79] 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

[80] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **9 December 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[81] 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

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

Signed and dated this 17th day of November 2022

Ms F Pearson-Green
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.