

Before the Building Practitioners Board

	BPB Complaint No. CB25909
Licensed Building Practitioner:	Timothy Sharp (the Respondent)
Licence Number:	BP101017
Licence(s) Held:	Carpentry, Design AoP 2, Site AoP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	27 January 2023
Decision Date:	7 February 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

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

Disciplinary Finding:

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

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

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Summary of the Board’s Decision

- [1] The Respondent carried out building work (design work) in a negligent manner. He is censured and ordered to pay costs of \$3,500. The disciplinary finding will be recorded on the public Register for a period of three years.

The Board

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

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 Regulations² to hold a hearing in relation to building work (design work) at [OMITTED], Lower Hutt. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

¹ Section 341 of the Act.

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have misrepresented that the drawings for Lots 1 and 3 had been lodged with the Council for building consents when they had not, and he may have knowingly lodged drawings for building consents which he knew were substandard, not capable of being consented and contained documents relevant to another project.

[4] The Board has further gave notice that it would, pursuant to section 322(1)(d) of the Act³, appoint a Special Adviser to assist the Board in its inquiries and at the hearing.

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

[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*,⁶ Collins J. noted that:

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

[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 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 persons⁷:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It

³ 322 Board may hear evidence for disciplinary matters

(1) In relation to a disciplinary matter, the Board may—

(d) appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).

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

⁵ [1992] 1 NZLR 720 at p 724

⁶ [2016] HZHC 2276 at para 164

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

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 breaches the Code of Ethics for Licensed Building Practitioners⁸ (the Code), or it 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 committed⁹. 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.

⁸ a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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

Timothy Sharp	Respondent
[OMITTED]	Complainant
Ron Pynenburg	Special Advisor to the Board
[OMITTED]	Engineer
Hazel McColl	Building Control Officer
Natalie Hardy	Building Control Officer

[15] The Board also summoned [OMITTED]. He did not appear and did not respond to inquiries as to whether he would. The hearing proceeded. The Board will consider whether further action under section 326 of the Act¹⁰ is warranted.

[16] At the completion of the hearing, the Respondent was offered an opportunity to submit a timeline of events. On 2 February 2023, the Respondent emailed a further submission. It did not cover the timeline. Rather it reiterated matters that were raised and examined at the hearing and which are discussed in the following.

[17] The Respondent was engaged to carry out design work for multiple dwellings on lots [OMITTED], Lower Hutt. The developer, Mr [OMITTED], had been granted a Remissions Agreement by the Hutt City Council. The extent of the benefits to be conferred by the Remissions Agreement was not clear. The Board did, however, receive evidence that various charges that would ordinarily be levied by the Council would not be under the Agreement.

[18] The Remissions Agreement was time bound. Building consents had to be lodged and accepted by no later than 31 March 2021 in order to take advantage of it. The Respondent was aware of the time restriction, as were others involved in the design process.

[19] The designs for Lots 4 and 5 preceded those for 1, 2 and 3, which were those that the Board was inquiring into, and the building consent applications for Lots 4 and 5 were submitted prior to the Remissions Agreement deadline. The Respondent submitted building consent applications for Lots 1, 2 and 3 on 31 March 2021, the last date on which the building consents could be applied for under the Remissions Agreement. As part of the application, the Respondent provided a design memorandum under section 45(3) of the Act, stating that the designs comply with the building code.

[20] The Lots 1, 2 and 3 building consent applications were accepted by the Hutt City Council. On 14 May 2021, the Council issued Requests for Information (RFI).

¹⁰ Section 326 – Failure to comply with summons

Following their submission, the Respondent emailed the developer and the Complainant, stating:

Good news, the applications have been accepted at least, see attached invoices from the Council.

As discussed with you, the plans as they are are not exactly buildable, as they are showing the detail for lots 3. I'll talk to [OMITTED] again tomorrow, he said he is keeping on working the subfloor area of Lot 3, and the design and details for Lots 2 and 3.

- [21] Prior to the hearing, the Respondent was provided with a copy of the Special Advisor's report. In an email response, the Respondent stated:

Thanks, I've had a quick look through, I don't disagree with anything the Author has said, but he does seemed to have missed my point that the Engineers had not completed their designs for any of the Building, and had assured me that they would before the RFI's were issued, so I could prepare the plans properly, Without the structural design by the engineer, there is no way possible I could complete my work.

And

I concede that I should not have lodged the applications knowing that they were not correct,

I had absolutely nothing to gain by lodging the applications when they were not ready, It was only done to help the same person that has lodged this complaint, and under the assumption that the engineer would be finished his design before the RFI's.

- [22] At the hearing, the Respondent accepted that the building consent applications were not capable of being consented and that they were misleading. He again accepted the Special Advisor's assessment of the applications that they were substandard and could not be granted building consents. In his report, the Special Advisor noted the applications were incomplete, did not reflect either the design intent or the construction requirements, the drawings did not relate to the building consent application and had conflicting layouts and designs. The Special Advisor also set out that, in his opinion, the Respondent did not deal with the RFIs appropriately or adequately. The Special Advisor provided a table that noted 40 issues, many of which had numerous sub-issues.

- [23] The Respondent gave evidence that he submitted aspects of the documentation from Lots 4 and 5 that had previously been accepted along with base documents from Lot 3 so as to create a building consent application package that would get through the initial vetting process at the Council. The Respondent also noted that he had previously worked for the South Wairarapa District Council and that he was familiar with consenting processes.

[24] Both at the hearing and in submissions prior to it, the Respondent gave evidence that the Complainant and the developer were aware of what was happening and that others, including the engineer, were complicit in it. He also stated that client-led changes on Lots 4 and 5 and delays in the provision of engineering detail caused delays in his own design work on Lots 1, 2 and 3.

Board's Conclusion and Reasoning

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

[26] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

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

Negligence – Design Work

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

[29] Under the definitions in the Building Act, design work forms part of the wider definition of building work and, as such, in respect of section 317(1)(b), it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

3 Design work declared to be building work

(1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*

(2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[30] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

[31] 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, in this case, a licensed building practitioner with a design license. This is

described as the *Bolam*¹¹ test of negligence which has been adopted by the New Zealand Courts¹².

- [32] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹³. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [33] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹⁴. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁵.
- [34] 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.*

- [35] The Board also notes the provisions of section 14D of the Act, which states:

14D Responsibilities of designer

¹¹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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

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

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[36] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account.

[37] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁶ 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.

[38] Looking at the design work, there was clear evidence in Mr Pynenburg's report that the design work had been carried out in a substandard manner and that what was submitted would not have been able to have been consented. The Respondent accepted this but put forward that the substandard design work had to be viewed in the context of the wider circumstances under which he was operating. The Board did not accept the Respondent's submission. It considered that those factors may go to mitigation when it considers penalty, but that they did not excuse the behaviour. The Respondent knowingly submitted a substandard building consent application so that his client could obtain the benefit of the Remissions Agreement. Further, the Respondent knew that what he had submitted could not and would not be consented and, when confronted with RFIs, did not proceed to deal with them appropriately, if at all.

[39] Whilst this was not a case where the Respondent was expecting the Building Consent Authority to identify and assist in fixing his mistakes, he should note that 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 legislation¹⁷:

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 pride in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a

¹⁶ [2001] NZAR 74

¹⁷ Hansard volume 669: Page 16053

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.

- [40] The Respondent, as the author of the Certificates of Work, gave the undertakings as to quality and compliance noted above.
- [41] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Disrepute

- [42] The disrepute disciplinary provision in the Act is similar to legislation in other occupations, including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹⁸ and discussed the legal principles that apply.
- [43] The Board, in C2-01111, considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above, there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example, in the High Court held in *Davidson v Auckland Standards Committee No 3*,¹⁹ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time. However, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example, dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

¹⁸ Board decision dated 2 July 2015.

¹⁹ [2013] NZAR 1519

[44] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants²⁰, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[45] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”,²¹ and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*²², the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*²³

[46] As to what conduct will or will not be considered to bring the regime into disrepute, it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect, it is noted disrepute was upheld in circumstances involving:

- criminal convictions²⁴;
- honest mistakes without deliberate wrongdoing²⁵;
- provision of false undertakings²⁶; and
- conduct resulting in an unethical financial gain²⁷.

[47] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics, and cases that have been considered under them make it clear that unethical or unprofessional conduct can amount to disreputable conduct.

[48] On 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022²⁸. The conduct in this matter predated the Code. As such, it cannot be considered in light of it.

²⁰ 24 September 2014

²¹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

²² [2012] NZCA 401

²³ [2012] NZAR 1071 page 1072

²⁴ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁵ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁶ *Slack, Re* [2012] NZLCDT 40

²⁷ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

²⁸ Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

[49] In this matter, the Respondent, in essence, provided a false Certificate of Work and submitted building consent applications which he knew were not able to be consented with the intention of stopping the clock on a Remissions Agreement. That Remissions Agreement provided financial benefits to his client at the cost of the Council. In short, the Respondent misled the Council to obtain a pecuniary benefit for his client.

[50] As with negligence, the Courts have stated that the threshold for disciplinary complaints of disrepute is high, and the Board notes that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[51] The Board decided that whilst the Respondent's conduct was intentional, it did not reach the threshold for disrepute. The Board doubted that the Respondent had turned his mind to the implications of what he was doing. Rather he was acting to protect his client's interests. Those interests would have been better served by attending to a compliant design and building consent application in a more timely manner. The Respondent is on notice, however, that such conduct is not acceptable and that any future occurrences may be dealt with differently or may come within the provisions of the Code of Ethics.

Penalty, Costs and Publication

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

[53] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[54] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²⁹ 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

²⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,³⁰ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [56] The negligence was at the higher end, and the conduct was deliberate and calculated. A significant penalty is warranted. The Board adopted a starting point of a substantial fine. At the same time, there are mitigating factors. The Respondent was acting with the knowledge of those whom he was acting for, and others that contributed to the design package were, to a lesser degree, complicit in the conduct. The Respondent has also incurred a financial loss, as have others involved in the matter. Finally, and significantly, the Respondent accepted the Special Advisor's findings, and the Board considered he had learnt from the matter.
- [57] Balancing the various factors, the Board decided that it would censure the Respondent. A censure is a public expression of disapproval. The Respondent's conduct was calculated and deceptive, and his consent applications were woefully inadequate. Any future contraventions of this nature will not be dealt with so lightly.

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 case³¹.
- [60] In *Collie v Nursing Council of New Zealand*,³² 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*,³³ the High Court noted:

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

³¹ *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.

³² [2001] NZAR 74

³³ CIV-2011-485-000227 8 August 2011

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [62] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex, and a Special Advisor was instructed. Adjustments based on the High Court decisions above are then made.
- [63] The Board's scale amount for a hearing of this type with a Special Advisor is \$4,500. However, the Board has decided to reduce the costs order to \$3,500 on the basis that he did not contest the Special Advisor's report. As such, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

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 Act³⁴. 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 1990³⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal

³⁴ Refer sections 298, 299 and 301 of the Act

³⁵ Section 14 of the Act

³⁶ Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive³⁷. 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*³⁸.

- [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 interest³⁹. 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 order further publication. The Respondent will not be named in that publication. The publication will be in the Ministry of Business Innovation and Employment CodeWords circular, and it is to focus on the lessons to be learnt by other practitioners from this matter.

Section 318 Order

- [69] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

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

- [70] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

- [71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 March 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.

³⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁸ *ibid*

³⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[72] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 7th day of March 2023



M Orange
Presiding Member

ⁱ Section 318 of the Act

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

ⁱⁱ Section 330 Right of appeal

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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