Before the Building Practitioners Board

	BPB Complaint No. CB 25741
Licensed Building Practitioner:	Sam Sommerville (the Respondent)
Licence Number:	BP 102078
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:	22 February 2022
Decision Date:	3 March 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

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

Contents

Summary of the Board's Decision 2
The Charges 2
Function of Disciplinary Action 3
Inquiry Process 4
Evidence 5
Negligence and/or Incompetence 9
Contrary to a Building Consent 10
Outside of Competence 10
Record of Work 11
Penalty, Costs and Publication 13
Penalty 13
Costs 14
Publication 14
Section 318 Order 15
Submissions on Penalty, Costs and Publication 16
Right of Appeal 16

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 $1,000 and ordered to pay costs of $1,000. 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.

[3] The Board has also found that the Respondent has not carried out or supervised building work not within his or her competence on the basis that the conduct complained about was not serious enough to warrant a disciplinary outcome.

The Charges

[4] 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:

[1] 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 in a negligent or incompetent manner, in that he may have failed to follow the required or acceptable practices when making changes to the building consent in respect of the following work (s 317(1)(b) of the Act).

i. block retaining wall to a timber retaining wall,

ii. wooden window joinery to aluminium joinery,

iii. premixed 25Mpa concrete to slab bridging specific engineer design to bagged concrete, noting that the Council stated the change required engineer's approval prior to it being carried out,

iv. bathroom linings from ceramic tiles to acrylic wall lining,

v. tiled bathroom floor to vinyl

vi. change from 13mm aqualine to 10mm aqualine.

(b) carried out or supervised building work that does not comply with a building consent, in that, he may, in respect of the matters detailed in paragraph 4 (a)(i)-(vi) above, have carried out or supervised building work that did not comply with the building consent. (s 317(1)(d) of the Act).

(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).

(d) breached section 314B(b) of the Act, in that, he may have worked outside his competency when he designed a retaining wall for construction. (s 317(1)(h) of the Act).

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].

[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

[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 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.

[4] [2016] HZHC 2276 at para 164

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

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 the available evidence.

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

Sam Sommerville, Respondent

[Omitted], Director of [Omitted]

[Omitted], Complainants

[Omitted], Witness for Complainants

Matthew Greenhough, Building Inspector, Auckland City Council

[Omitted], Engineer

[Omitted], Designer

[15] The Complainants had a building consent dated 24 July 2017 for the conversion of a garage into a residential dwelling. The building consent was due to lapse, and, in order to prevent this, the Complainants asked the Respondent (who was a family friend) to commence foundation work. The Respondent was then asked to continue with the job on a charge–up basis. The Respondent stated - *"We agreed that we would fit in around him and would do any RBW work, up until the time that he could bring in his other builder."* (Document 2.2.3, Page 73 of the Board's file). As things eventuated, the other builder was not engaged, and the Respondent continued with the project.

[16] The Respondent advised the Board that he had consented building plans on-site, had no engagement with the designer [Omitted], but did have some phone contact with the Engineer [Omitted].

[17] The Respondent stated in his written response that he *"supervised the staff that were on site"* and that he *"went to site every day that my staff were on–site bar 4 or 5 days where it was clear that the work could progress without my input that day."* The Respondent's company employed *"a range of staff on–site from 2/3 year*

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

apprentices to qualified or 20 plus year builders". (Document 2.2.3 – 2.2.4, Pages 73 and 74 of the Board's file).

[18] In respect of the issues being investigated, the evidence was that:

Block retaining wall to timber retaining wall

(a) The client agreed to change the retaining wall on the basis that it was a cheaper and faster option, and the site was tight, making access for concrete trucks difficult. The Respondent spoke to someone at the Engineer's firm (whom he accepts may not have been familiar with the project) and was told that as the retaining wall was under 1 metre high, it came within the Schedule 1 exemptions, and the change did not need to be consented. The Board notes [Omitted]' evidence that there is no record of this conversation on his firm's files.

(b) The Respondent understood that a change to the consented plans required a process to be followed (which the Board acknowledged he had correctly followed in respect of a door variation).

(c) In this instance, he accepted *"it was a mistake"* and that the change did not fall within the Schedule 1 exemptions and did require a variation as it was part of the original consented works. [Omitted] agreed with this position. [Omitted] was also of the view that it was a minor variation.

(d) There was a conflict in the evidence as to when the retaining wall work was done. The Respondent said it was towards the end of the job. [Omitted], however, said it was built by January 2020 and was one of the first pieces to be completed on the project.

(e) The Respondent gave evidence that he did not obtain a design for the change to the retaining wall. He built it based on his knowledge and experience.

(f) Mr Greenhough, Council Building Inspector, said this retaining wall change would be assessed as a minor variation but that it was preferable to have that approved prior to the associated work being done.

Wooden window joinery to aluminium joinery

(g) This change eventuated as it was a cheaper option for the client and was done with the client's agreement. The Respondent did not instigate any change process for the consented plans. He did not speak to the designer.

(h) He installed the aluminium joinery based on the specifications for this type of joinery and his own experience. The Board asked the Respondent if he was aware of the impact this change had on the H1 insulation compliance calculations. The Respondent stated as the aluminium joinery was double glazed, which was better than single glazed timber windows. Therefore, it was an improvement in insulation, but he was not able to substantiate this.

(i) The Respondent noted that the Council did not comment on this change in its inspections and did not ask for a variation in respect of the joinery change.

(j) However, Mr Greenhough, the Council Building Inspector, gave evidence that from the Council's perspective, this would usually be a minor variation.

Premixed 25Mpa concrete to bagged concrete

(k) This change was discussed by the Respondent with the Council Inspector and noted on the Foundation Inspection record. (Document 8.2.1, Page 248 of the Board's file). The Respondent advised that the change was not made, and he provided a copy of the invoice showing the originally consented 20mm 25MPa premixed concrete was used. (Document 8.2.1, Page 243 of the Board's file).

Bathroom linings from ceramic tiles to acrylic wall lining

(l) This change was noted on the Postline inspection report dated 16 June 2020 as requiring a minor variation. (Document 2.5.19, Page 136 of the Board's file).

(m) The Respondent said that this was a client-initiated change. He would have booked a site meeting with the Inspector to do this minor variation before the final inspection but he had not returned to the project after the Postline inspection due to the relationship breakdown with the client.

(n) Mr Greenhough confirmed that in the Council's view, this would be a minor variation.

Tiled bathroom floor to vinyl

(o) A site meeting was called for by the client on 23 November 2020. The Respondent was not aware this meeting was taking place and did not attend. The inspection report from this meeting notes, *"tiling to shower, bathroom & kitchen floor now deleted – vinyl to be [sic] installed. Possible permiable [sic] changes. Refer back to designer for solutions to issues."* (Document 2.5.27, Page 144 of the Board's file).

(p) The Respondent gave evidence that he did not return to the site after the Postline inspection in June 2020.

Change from 13mm aqualine to 10mm aqualine

(q) The Respondent advised that this change was a consequence of changing from a tiled shower to an acrylic lining. The 13mm aqualine was no longer required.

(r) The Respondent said that this was a client-initiated change. He would have booked a site meeting with the Inspector to do this minor variation before

the final inspection but he had not returned to the project after the Postline inspection due to the relationship breakdown with the client.

(s) Mr Greenhough confirmed that in the Council's view this would be a minor variation.

[19] As regards the process for a change to the consented building plans, the Respondent said that he would normally do minor variations to the building consent before the work was done if it was obvious that it was needed. Otherwise, it would be picked up in discussion with the building inspector, and he would do the variation before the final inspection.

[20] On the record of work, the Respondent said that his general practice was to do it after the project passed the final inspection if he was the main licensed building practitioner. In this case, he left the site after the Postline inspection on 16 June 2020, while the client organised some landscaping and the pathway work to be done, and the drainlayer had to hook-up the drains. At that stage, he intended to return in order to have a site meeting for the minor variations needed and do the final inspection. He did not, however, return as the relationship broke down.

[21] Mr [Omitted] confirmed that at this point, the only work left to complete was the vinyl flooring, and there was no restricted building work still to be done.

[22] A record of work dated 12 August 2021 was provided to the Registrar on 15 February 2022. (Document 8.2.1, Page 242 of the Board's file). It had not been provided to the Council or to the owner.

[23] The Respondent confirmed his understanding of the requirement to provide a record of work to the owner and to the Council, but in this case, he did not believe the work was complete as the final inspection had not been done.

Board's Conclusion and Reasoning

[24] 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);

(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); or

(c) breached section 314B of the Act (s 317(1)(h) of the Act).

[25] 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.

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

Negligence and/or Incompetence

[27] 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.*

[28] 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].

[29] 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"*.

[30] 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.

[31] 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.*

[32] 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*

[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

includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[33] 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.

[34] The Board accepted that most of the changes had been requested by the owner for cost reasons and that had the Respondent remained on-site he would have completed the correct minor variation processes. The shortcomings in process did not cause any disruption in the construction process. The Board notes that the alleged premixed concrete to bagged concrete change did not occur.

[35] As regards the retaining wall change, the Board accepts the Respondent made a genuine mistake and thought that he was correctly following engineering advice. 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. He ought, however, as a licensed building practitioner to have known better and to have appreciated that the Schedule 1 exemption does not apply when the works are part of the originally consented building work.

Contrary to a Building Consent

[36] 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.

[37] The Board also notes that the Respondent left the site prematurely due to a breakdown in the relationship with the client, and if he had remained on-site, he would have sought the appropriate variations to the consented plans.

[38] 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.

Outside of Competence

[39] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)). It is the second that is of relevance in this case.

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

[40] As regards working outside of one's competence, section 314B(b) of the Act provides:

> *A licensed building practitioner must—*
>
> *(b) carry out or supervise building work only within his or her competence.*

[41] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single-level dwellings unsuccessfully undertakes a complex multi-level build. Likewise, if a licensed building practitioner undertakes work outside of their licence class,[15] then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is noncompliant or is in some way deficient.

[42] 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

[43] The Respondent genuinely, but mistakenly, believed he had engineering acceptance for the change in retaining wall. There was no evidence that the retaining wall was inadequately built or that the Respondent did not have the requisite skill and knowledge to build the timber retaining wall in place of the block retaining wall. As such, the overall conduct did not reach the disciplinary threshold.

<u>Record of Work</u>

[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[16].

[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[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

[15] Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.
[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

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

[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 June 2020. The Respondent left the site, but at that stage, all parties intended him to return after some landscaping work had been done. This did not happen as there was a breakdown in the relationship with the client. On the evidence of [Omitted], there was no restricted building work left to be completed at this stage.

[50] The Respondent wrote a record of work on 12 August 2021, after he received notice of this complaint against him in April 2021. The fact that he wrote it indicates that, at that point in time, he felt his restricted building work was complete. It is arguable, however, that completion occurred as early as June 2020 as there was, at that stage, no further restricted building work to be done. In any event, he did not provide the record of work to the owner or the Territorial Authority. It was given to the Investigator on 15 February 2022. 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.

[51] 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.

[52] In this instance, the Respondent said his general practice was to wait until final inspection to complete the record of work.

[18] [2018] NZHC 1662 at para 50

[53] In past cases, the Board has held that where it becomes apparent that a licensed building practitioner will not be continuing, then their work will be considered to have been completed, and they will be required to provide a record of work soon thereafter. As such, the point in time had arrived when the Respondent knew or ought to have known that his restricted building work was complete and that a record of work was due.

[54] To require otherwise would defeat the purpose of the record of work provisions in the Act, which are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out. If a record of work is not provided because the intended work is not complete, then there would be no such record.

[55] 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

[56] 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.

[57] 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.

<u>Penalty</u>

[58] 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.*

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

[59] 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.

[60] 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 some mitigating factors present, being a non-deliberate withholding of the record of work, a misunderstanding as to his obligations and the fact that the final inspection was not held up through the Respondent's actions. As such, the Board has decided to reduce the fine to $1,000.

Costs

[61] 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."

[62] 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].

[63] 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:

> *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.*

[64] The Board's scale costs for a half-day hearing are $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 $1,000.

Publication

[65] 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:

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[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

[23] Refer sections 298, 299 and 301 of the Act

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.

[66] 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.

[67] 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].

[68] 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.

[69] Based on the above, the Board w**ill not** order further publication.

Section 318 Order

[70] 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 $1,000.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $1,000 (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.**

[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

[71] 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

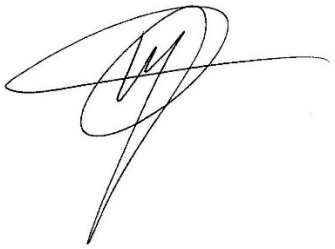
[72] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Monday 11 April 2022.** The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no 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.

[73] 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

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

Signed and dated this 21st day of March 2022.



Mr M Orange
Presiding Member

[i] ***Section 318 of the Act***
(1) In any case to which section 317 applies, the Board may
(a) do both of the following things:

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

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

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

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

(d) order that the person be censured:

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

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

(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.