

## Before the Building Practitioners Board

	BPB Complaint No. CB25869
Licensed Building Practitioner:	Gregory Strachan (the Respondent)
Licence Number:	BP 103155
Licence(s) Held:	Carpentry

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

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	28 September 2022
Final Decision Date;	25 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) and (d) of the Act.

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### Summary of the Board’s Final Decision

- [1] The Respondent has supervised building work in a negligent manner and in a manner that was contrary to a building consent. He is censured and ordered to pay costs of \$500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

### The Charges

- [2] On 12 May 2022, the Board received a Registrar’s Report in respect of a Complaint about the conduct of the Respondent.
- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [5] After the Notice of Proceeding was issued, the Respondent raised issues as regards his ability to engage in a hearing process. The Complainant, in turn, questioned the personal issues raised by the Respondent.
- [6] On 12 August 2022, the Board issued a Board minute advising that it would proceed by way of a Draft Decision but first invited the Respondent and Complainant to provide any further submission or evidence for the Board to consider.

- [7] The Board received further evidence and a submission dated 29 August 2022 from the Respondent. The Complainant did not provide anything further.
- [8] The Board’s jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures<sup>1</sup>. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation<sup>2</sup>. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [9] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.
- [10] The Board did, however, note that there might be further evidence in the possession of persons involved in the matter. To that end, it issued a Draft Decision. The Complainant and the Respondent were provided with an opportunity to comment on the Board’s draft findings and to present further evidence prior to the Board making a final decision. If the Board had directed or the Respondent had requested an in-person hearing, then one would have been scheduled.
- [11] The Board then issued a draft decision dated 28 September 2022 and gave the Respondent and the Complainant an opportunity to comment on the Board’s draft findings by 4 November 2022. The Respondent expressed a wish for the matter to come to a conclusion. The Complainant provided a submission dated 30 October 2022. He specifically recorded that in making the submission, he was not requesting the matter proceed to a hearing.

### **Disciplinary Offences Under Consideration**

- [12] On the basis of the Registrar’s Report, the Respondent’s conduct that the Board resolved to investigate was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act), IN THAT, he may have installed a hearth and framing for an inbuilt log burner contrary to the manufacturer’s specification and/or issued a Producer Statement in respect of the framing without checking that the building work aligned with the building consent and building code; and

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<sup>1</sup> Clause 27 of Schedule 3

<sup>2</sup> *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- (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) IN RESPECT OF the hearth and the framing for the inbuilt log burner.

### Function of Disciplinary Action

[13] 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*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.

[14] 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*,<sup>5</sup> 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.”*

[15] 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<sup>6</sup>:

*... 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.*

[16] 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.

[17] 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.

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<sup>3</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

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

## Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. 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.
- [19] In respect of a property at [OMITTED], Timaru, the Earthquake Commission engaged [OMITTED] to undertake repair work relating to earthquake damage. The Respondent was a contractor to [OMITTED].
- [20] One aspect of the work was the installation of a new insert wood fire replacing an existing freestanding log fire in an alcove. The Council approved a building consent application for this on 26 May 2011. The framing work for the firebox insert to the front of the existing three-sided brick alcove was completed between 20 April 2011 and 27 June 2011, and [OMITTED] was engaged by [OMITTED] to install the Firenzo Athena Woodfire insert complete with two-storey flue.
- [21] On 20 June 2011, the Council failed the inspection of the firebox on the basis that a *“producer statement for timber work around new fire inside wall”* was required. (Document 2.1.31, Page 47 of the Board’s file).
- [22] On 20 June 2011, the Respondent provided the Council with a letter stating – *“PRODUCER STATEMENT re BC 70868 Inbuilt Log Burner All framing timber in wall is 150mm away from the firebox on sides. Rondo metal batton on face of fire so no timber internal. 13mm gib on walls.”* (Document 2.1.36, Page 52 of the Board’s file)
- [23] On 23 June 2011, the Respondent emailed the Council stating – *“Producer Statement, Re; Job 4 Newton Street Timaru. Firenzo Inbuilt log burner. The filling in of the brick recess for the inbuilt log burner has been done to manufacturers specifications so it complys with the building code (sic).”* (Document 2.1.34, Page 50 of the Board’s file)
- [24] A Code Compliance Certificate was issued by the Council on 28 June 2011. (Document 2.1.29, Page 45 of the Board’s file).
- [25] In April 2018, the new owners of the house noticed a heat build-up in the walls. As a result, [OMITTED] inspected the firebox, and the Complainant states the Council then advised the homeowners not to use the fire.
- [26] The Complainant states that the Respondent inspected the installation in July 2019, and the presence of the wooden frame within the chimney space was mentioned and the Respondent allegedly said the Council had approved the installation of the firebox.
- [27] A Ministry of Business Innovation and Employment (MBIE) determination seeking the reversal of the Council’s Code Compliance Certificate was sought. The determination<sup>8</sup> stated that *“during remedial work on 15 July 2019, it was discovered*

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>8</sup> 2021/017

*that timber framing was situated approximately 100mm from the top of the firebox and scorch marks were visible.”*

- [28] In the context of the determination, the Council submitted that “*when deciding whether to issue the Code Compliance Certificate it relied on the producer statement*” supplied by the Respondent.
- [29] The determination found that the decision to issue the code compliance certificate was incorrect. The end result of further investigations and the MBIE determination was that a new firebox was installed in August 2021.
- [30] The Respondent stated that his involvement in this job was to scope the work, price it and organise subcontractors and the execution of the work by builders from [OMITTED].
- [31] The Respondent stated:

*“I gave the builders the instructions to do the framing in respect of the fireplace in question. My instructions included a sketch, drawn by me, which evidenced the builders needed to build the sides with timber and that there needed to be a metal rondo baton above the fireplace and that the new frame area needed to be lined....*

*I believe this sketch was extremely clear as to what parts of the frame were to be timber and which parts were required to be rondo crossrails (metal). I also explained the sketch to the builders when giving them instructions.*

*Once the frame area was lined, the fire would be installed by [OMITTED] into the existing area which had brick walls that were tiled on the face on 3 sides of the structure...*

*I believed that the builders of [OMITTED] who I had given instructions to had complied with my sketch in respect of the framing around the fire, specifically to put rondo batons above the fire box and install the surrounding area to the fire to specifications as required.*

*I confirm that I did not carry out any of the building work myself in respect of the framing around the fire. I was acting in a supervisory role in respect of the Property and the required works.*

*I recall that I asked the builders to confirm that the job was completed as per the sketch and was told by each of them that it was. For this reason I passed on that the job had been completed as per the manufacturer’s specifications. My sketch was provided to Council showing the frame around the fire....*

*I did not oversee the builders actually building the surround and frame for the fire. If I had been present, I would have identified it was not being done as per my instruction...*

*I acknowledge that I was supervising this job, however my physical presence was limited due to other sites I needed to attend in the course of my work for [OMITTED].....I was not able to supervise every aspect of the job. I acknowledge that I did not see the framing around the fire before it was covered and not visible.*

*It is extremely unfortunate that the framing was not completed to the design and sketch I had provided, however I trusted the builders to do what they were instructed to do for this job. I relied on the builder's confirmation that they had built the framing as per my sketch and that the framing met the requirements." (Document 2.5.3, Page 140 of the Board's file)*

#### **Further Evidence and Submissions Received**

- [32] Following the Board issuing a Draft Decision, it received a submission from the Complainant. No substantive submission was made by the Respondent.
- [33] The Complainant's submission included, that:
- (a) the Respondent's employer/main contractor should be included in the scope of the investigation;
  - (b) the Respondent's extensive experience as a supervisor was an aggravating factor;
  - (c) it was unreasonable to name the Plumbing Company but not the builders involved;
  - (d) the recent licencing of Building Practitioners in 2011 is not a mitigating factor, as builders were always required to meet the Building Code, the Council Building Consent and the Manufacturer's Instructions;
  - (e) the absence of remorse, acknowledgement of wrongdoing and contrition by the Respondent were aggravating factors;
  - (f) the possible catastrophic consequences arising from the Respondent's negligence was an aggravating factor; and
  - (g) the determination of \$500 as a cost is inadequate.
- [34] The Board took the further evidence and submissions into account when making this Final Decision.

### Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)

and **should** be disciplined

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

#### Negligence

[37] 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*<sup>9</sup> test of negligence which has been adopted by the New Zealand Courts<sup>10</sup>.

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

[39] 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.<sup>12</sup> 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 practitioner<sup>13</sup>

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<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[40] 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.*

[41] In terms of seriousness in *Collie v Nursing Council of New Zealand*,<sup>14</sup> 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.*

[42] In *Pillai v Messiter (No 2)*<sup>15</sup> 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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<sup>14</sup> [2001] NZAR 74

<sup>15</sup> (1989) 16 NSWLR 197 (CA) at 200

- [43] In Board Decision C2-01143,<sup>16</sup> the Board found that the definition of supervise in section 7<sup>17</sup> of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board’s position, therefore, is that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in section 7 that the supervision of the building work is *“sufficient to ensure it is performed competently”* applies to all building work carried out under the supervision of a licensed building practitioner.
- [44] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner’s obligations noting that the level of supervision required will depend on a number of circumstances, including:
- (a) the type and complexity of the building work to be supervised;
  - (b) the experience of the person being supervised;
  - (c) the supervisor’s experience in working with the person being supervised and their confidence in their abilities;
  - (d) the number of persons or projects being supervised; and
  - (e) the geographic spread of the work being supervised.
- [45] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [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<sup>18</sup>. 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*

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<sup>16</sup> Board Decision dated 14 April 2016

<sup>17</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

*(b) complies with the building consent under which it is carried out.*

<sup>18</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

*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] When this work was undertaken in 2011, the provisions relating to “Restricted Building Work” had not been enacted and, therefore, there was no statutory requirement for this work to be supervised by a Licensed Building Practitioner. However, the Respondent took on that responsibility and acknowledged that he was supervising the work. This responsibility manifested itself in the Respondent providing producer statements to the Council, upon which the Council relied in issuing the Code Compliance Certificate.
- [48] The Respondent stated that he did not oversee the work in question and that, when providing the Producer Statement, he relied on the builder’s confirmation that the work was carried in accordance with his instructions.
- [49] The Board finds that the Respondent took on the responsibility of supervising this work and stated that it had been done in accordance with his instruction, manufacturer’s specifications, the building consent and the building code without checking the work itself. The fundamental requirement that the supervision of the building work is “*sufficient to ensure it is performed competently*” was not met by the Respondent.
- [50] Addressing the Complainant’s submission on the Draft Decision, the Board did not have the evidence before it to warrant an investigation into the Respondent’s employer/main contractor. Nor was the information on the identity of the builders who carried out the onsite works available after the length of time that had passed from the installation.
- [51] 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.

#### Contrary to a Building Consent

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

[53] 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.

[54] 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<sup>19</sup>.

[55] Given the above factors, 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.

#### **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<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[57] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions from the Complainant and notes the mitigating and aggravating factors raised by him in respect of penalty. The Board has made a final decision as regards penalty, costs, and publication.

#### **Penalty**

[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*<sup>20</sup> 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.*

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<sup>19</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>20</sup> 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*,<sup>21</sup> the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [60] The Board considered that there are several mitigating factors:
- (a) the level of supervision required in any particular circumstance depends in part on the experience of the person being supervised, and the supervisor's experience in working with the person being supervised and their confidence in their abilities. The experience and expertise of the builders carrying out the work, in this case, is not in evidence, but there may have been some legitimacy in the Respondent relying on their statements as to the work being compliant. Nevertheless, checks should have been made before providing a producer statement;
  - (b) arguably there was also an obligation on the plumbing company which installed the firebox to have noticed the incorrect framing and to have brought it to the attention of the appropriate people; and
  - (c) in 2011 when this work was undertaken, it was optional to hold a licence and Restricted Building Work was not introduced until March 2012.
- [61] In this case, the offending conduct was in 2011, when the Licensed Building Practitioners' scheme was in its inception, and its members were still getting used to the new requirements. Given this, the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval.

### Costs

- [62] 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."
- [63] 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<sup>22</sup>.
- [64] In *Collie v Nursing Council of New Zealand*,<sup>23</sup> 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.*

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<sup>21</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>22</sup> *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.

<sup>23</sup> [2001] NZAR 74

[65] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

#### Publication

[66] 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<sup>24</sup>. 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.*

[67] 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.

[68] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>25</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>26</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>27</sup>. 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*<sup>28</sup>.

[69] 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<sup>29</sup>. 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.

[70] Based on the above, the Board **will not** order further publication.

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<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

<sup>26</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>27</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>28</sup> *ibid*

<sup>29</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### Section 318 Order

[71] 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 \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

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

### Right of Appeal

[73] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 1<sup>st</sup> day of December 2022



**Ms F Pearson-Green**  
Presiding Member

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#### <sup>i</sup> 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:

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- (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.*