

Before the Building Practitioners Board

| | |
|---------------------------------|--|
| | BPB Complaint No. CB25773 |
| Licensed Building Practitioner: | Danny Tafeamaalii (the Respondent) |
| Licence Number: | BP 106265 |
| Licence(s) Held: | Roofing – Profiled Metal Roof and/or Wall Cladding |

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 and Decision Date: | 5 April 2022 |

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms K Reynolds, Construction Manager

Appearances:

Ms L Castle and Ms R Thomson for the Respondent

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.

Contents

Summary of the Board’s Decision..... 2

The Charges 2

Function of Disciplinary Action 3

Inquiry Process 4

Evidence..... 5

Board’s Conclusion and Reasoning..... 7

 Negligence..... 7

 Supervision..... 8

 Building Consent 9

 Seriousness 11

Penalty, Costs and Publication..... 11

 Penalty 11

 Costs..... 12

 Publication 13

Section 318 Order..... 13

Right of Appeal..... 14

Summary of the Board’s Decision

[1] The Respondent negligently supervised building work and was negligent in failing to ensure a building consent was in place prior to building work being carried out. he is censured and ordered to pay costs of \$2,000. The disciplinary finding will be recorded on the public register for a period of three years.

The Charges

[2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at 3 Tui Road, Raumati Beach, Paraparaumu. The alleged disciplinary offence the Board resolved to investigate was whether the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[3] The Board gave notice that the matters it would further investigate at a hearing were those detailed in a report provided by Comprehensive Property Reports Independent Roofing Inspection dated 3 June 2021, and, in particular, the issues noted as Summary Defect Overview:

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

- (a) Excessive use of silicone products. Silicone is designed to seal gaps up to 4-5mm at most. We identified 60mm gaps filled with silicone in some areas;
- (b) Excessive use of touch up paint across multiple areas of the roofing system;
- (c) Multiple areas of the roofing system have not been touched up and are now rusting. 1st stage surface rust in multiple areas;
- (d) 2nd stage imbedded rust in multiple areas (it appears to be hot metal sparks from a grinder or similar friction type tool);
- (e) Lifting sheet edges. (This will cause moisture damage);
- (f) Buckling, warping, incorrect fixing, incomplete fixings, beyond substandard sheet metal work, dangerous unfinished sections, incorrect run-off pitch, pooling water in multiple areas, completely open sections to the ceiling cavity & timber framework, multiple areas are unfinished and allow clear unrestricted access for wind/rainwater/all weather directly into the ceiling cavity of the property, etc. (These have caused moisture damage);
- (g) Extremely substandard flashing connections in multiple areas. It would be more accurate to state "in every flashing section". (This will cause moisture damage);
- (h) An excessive amount of poor fixings/holes through the roof coverings. (This will cause moisture damage);
- (i) Pooling water on a pitch change flashing. This "flashing" is more of a gutter now that diverts water into the ceiling cavity area. (This will cause moisture damage);
- (j) Pooling water on two separate barge flashings. These "flashings" are not only effectively gutters now, but the "turned up" flashing edge is only 4mm high and not even fully covered by the "turned down" edge of the connecting flashing. This now diverts water into the structure of the building (These have caused moisture damage);
- (k) No Stop-ends beneath multiple flashings. Not all sections were inspected. 5 areas were chosen at random, 4 showed no stop-ends. (This will cause moisture damage); and
- (l) No Turn-downs or Drip edging in multiple areas. (This will cause moisture damage)
No gutter flashings. (This will cause moisture damage).

[4] Additionally, the Board gave notice that it would also investigate whether a building consent should have been obtained for the building work, having noted that there was a reference to a change to the pitch of the roof.

Function of Disciplinary Action

[5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the

United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

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

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

- [7] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation 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 persons⁵:

... 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 are 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.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [13] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [14] The Board summoned the Complainant and Mr Travis Mackay of Comprehensive Property Reports Limited to the hearing. However, in the days leading up to the hearing, the Respondent filed, by way of his legal counsel, an affidavit in which he accepted a breach of section 317(1)(b) of the Act. On that basis, the witnesses were excused from attending. Notwithstanding, the Complainant attended the hearing.
- [15] The Comprehensive Property Reports New Zealand report detailed the issues listed in the Notice of Proceeding. The report included photographs of the issues noted.
- [16] The Respondent provided a written response to the complaint. In it, he outlined the history of the work and noted:

We don't disagree that there have been many issues with the job at Tui Road, however we have made every attempt to remedy the problems, at our own cost, taking advice from governing bodies and the insurance company.

And

We have replied and responded reasonably over the issues each time and visited the site when requested to address any issues raised – noting this has been an added cost to our business estimated at approx. \$4825.00 in addition to the \$15k for replacing and re-pitching.

The remainder of the roof on the property has not had any other issues, it has been around the penetrations for which we originally advised would be better to be removed given the low pitch of the roof.

As it stands, we have worked with the Dolans and our insurance company to remedy the internal damage caused by any leaks due the works we have carried out. We have replaced and re-pitched the roof as per the recommendations from the Roofing Association. Please also note there has been no other issues reported since the final works done in April 2021.

- [17] Prior to the hearing, Counsel for the Respondent filed an opening statement. It noted:
2. *There were a number of issues arising from the work. That is not in dispute. The respondent has tried to rectify the issues through both insurance and by the company wearing some of the costs.*

And

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

4. *It is accepted that the work was not adequately supervised. It is also accepted that in the circumstances, this was negligence under s317(1)(b) of the Building Act. The appropriate outcome in this situation is a fine. An order for usual costs will also be appropriate.*
5. *The respondent wishes to apologise to Mr Brian Dolan, the property owner, and regrets the situation which has led to this complaint.*

[18] The Respondent's affidavit outlined his work history and it provided details of an injury that occurred prior to the building work being undertaken and which was impacting the Respondent when he was supervising the building work. The Board accepted that the injury and ensuing medical symptoms did have an impact on the Respondent and that it was a mitigating factor.

[19] The affidavit also outlined the background to the building work and the remedial work that was undertaken. The Respondent noted that the work was carried out under his supervision. At the time, as a result of the Respondent's injury, he was not in a position to carry out the work. The Respondent stated:

35. *I agree with the comments made by Mr Gerbes about the lack of compliance with E2/AS1. This came about in the following way: our initial quote included a reference to E2/AS1. This standard requires the roof to be pitched at over 3 degrees. This would also require a building consent. But because the homeowner did not want to get a building consent then we tried to pitch as much of the roof as possible at just below 3 degrees, or as close as we could get it.*

[20] The Respondent also provided comments on the report that was provided by Mr Mackay and outlined his current work practices. He concluded the affidavit by stating:

39. *I recognise that on this job, I did not supervise staff as well I could and should have. We now have a completely different set of staff working for the company. One has completed Year 2 Metal Roofing and Wall Cladding, and the other two have completed Year 1.*
40. *We are supporting these staff to obtain their qualifications through Skills BCITO and are enjoying their youth and enthusiasm. This is not an excuse, but the calibre of the work undertaken at Tui Road in 2019 and 2021 was not what would be tolerated from the current crew.*
41. *It is our policy not to undertake any work under a building consent unless I am at the site. If I am not, or not able to be due to Fire Service commitment, we will call in another practitioner from another company to contract for us, refer the work to them in the first instance or juggle the workload until I can make it and undertake the work myself.*

[21] At the hearing, the Board put the allegations in the Notice of Proceeding to the Respondent and asked whether there were any items in it that he did not accept. The Respondent accepted all of the matters in paragraph [3] above except [3](i), which he stated was work that was carried out by another contractor.

- [22] The Respondent also accepted that he had not supervised the building work in an acceptable manner and stated that he had placed too much faith and trust in the workers that were carrying out the roofing work.
- [23] The Respondent also accepted that he should have ensured that a building consent was in place for the remedial building work relating to a change of roof pitch prior to it being undertaken. He noted that he had recommended that a building consent be obtained and stated that he should have instead of it being obtained.

Board's Conclusion and Reasoning

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

Negligence

- [25] The Board's findings relate to both the manner in which the building work was supervised and the failure to ensure a building consent was in place prior to the roof being repatched.
- [26] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [27] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁹. 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.
- [28] 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 Act¹⁰. 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 practitioner¹¹.
- [29] 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—*

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

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

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

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

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[30] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

Supervision

[31] The Board accepted that the Respondent's role in the building work was as the supervisor. Supervise is defined in section 7¹⁴ of the Act. The definition states:

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.*

[32] 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 1992¹⁵. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

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

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ 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.*

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [33] In determining if a Licensed Building Practitioner’s supervision has met the required standards, various factors are taken into consideration but ultimately, the Board needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [34] The Respondent accepted the quality and compliance allegations as outlined in the Notice of Proceeding except for one item which the Board accepted was completed by another contractor. He also accepted that he failed to adequately supervise the work. On the basis of the acceptance and admission, the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has departed from what the Board considers to be an accepted standard of conduct.

Building Consent

- [35] In addition to considering the tests for negligence outlined above, when considering whether the Respondent was negligent as regards a failure to ensure a building consent was in place for the building work, the Board also needs to consider the statutory building consent framework.
- [36] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [37] All building work must also be carried out in accordance with a building consent. Section 40 of the Act 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.*
- [38] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:
- 49 *Grant of building consent***
- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*
- [39] 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

- [40] In *Tan v Auckland Council*¹⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [41] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can, potentially, put persons and property at risk of harm.

- [42] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [43] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

- [44] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception. The remedial building work to re-pitch the roof, in this instance, did not come within an exemption. In particular, it did not come within clause 1, which covers general repair, maintenance and replacement, as the building work was not a replacement in the same position given that the pitch of the roof was increased.

- [45] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

- [46] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent or incompetent.

- [47] Again, on the basis of the Respondent’s acceptance and admission, the Board finds that the Respondent knew a building consent was required and that he was negligent when he

¹⁶ [2015] NZHC 3299 [18 December 2015]

allowed the building work to take place under his supervision without a building consent having been obtained.

Seriousness

[48] As noted, the Board also needs to consider how serious the conduct was prior to making a disciplinary finding. In *Collie v Nursing Council of New Zealand*¹⁷, 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.

[49] The failings were significant and serious. They resulted from a failure to supervise. The failure was not deliberate, but it was also not error, oversight, or carelessness. There were significant mitigating factors, but those factors go to what the Board should do as a result and not to whether the Respondent should be held accountable. Accordingly, the Board finds that the conduct was sufficiently serious and that there will be a disciplinary outcome.

Penalty, Costs and Publication

[50] 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.

[51] Submissions on penalty, costs and publication were received at the hearing.

Penalty

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

[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.

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

¹⁷ [2001] NZAR 74

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

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

- [54] The Board adopted a starting point of a moderate level fine. It noted that the Respondent had previously been disciplined by the Board. Whilst the previous decision was for similar conduct, the Board did not consider it to be an aggravating factor as it was at around the same time and because of the mitigating factors that were present. In this respect, the Board noted and accepted the Respondent's medical history and the impact an injury had on him at the time as a mitigating factor. It also took into account the fact that the Respondent had accepted responsibility and had taken steps to ensure similar instances did not occur in the future.
- [55] Based on the above, the Board decided that a censure was the appropriate penalty. A censure is an expression of the Board's disapproval of the Respondent's conduct.

Costs

- [56] 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."
- [57] 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 case²⁰.
- [58] In *Collie v Nursing Council of New Zealand*,²¹ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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

- [59] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²² the High Court noted:

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

[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.*

- [60] 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. Adjustments based on the High Court decisions above are then made.

²⁰ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²¹ [2001] NZAR 74

²² CIV-2011-485-000227 8 August 2011

[61] The Board's normal starting point for costs in a hearing of this type is \$3,500. However, based on the above and taking into account the Respondent's acceptance of responsibility and the fact that the Board did not have to call witnesses, the Board decided to reduce the costs to \$2,000 as a contribution toward the costs of and incidental to the Board's inquiry.

Publication

[62] 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 Act²³. 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.

[63] 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.

[64] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. 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.

[65] 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 interest²⁸. 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.

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

Section 318 Order

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

- Penalty:** Pursuant to section 318(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 \$2,000 (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(I)(iii) of the Act.

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

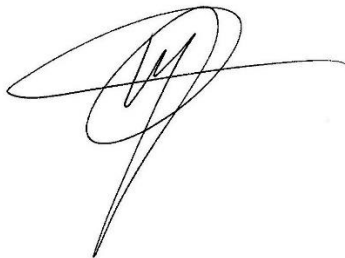
In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

- [68] 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

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

Signed and dated this 21st day of April 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.