

Before the Building Practitioners Board

	BPB Complaint No. CB25823
Licensed Building Practitioner:	Jarrod Trotter (the Respondent)
Licence Number:	BP 128832
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 Type:	On the Papers
Hearing and Decision Date:	6 September 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mr D Fabish, LBP, Carpentry and Site AOP 2
Ms K Reynolds, Construction Manager

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), 317(1)(d) and 317(1)(da)(ii) of the Act.

Contents

Summary of the Board’s Decision	2
The Board	2
The Charges	3
Adjournments	3
Procedure	3
Disciplinary Offences Under Consideration	4
Function of Disciplinary Action	4
Evidence	5
Board’s Conclusion and Reasoning	7
Negligence.....	8
Contrary to a Building Consent.....	11
Record of Work.....	12
Penalty, Costs and Publication	13
Penalty	13
Costs.....	14
Publication	15
Section 318 Order	16
Right of Appeal	16

Summary of the Board’s Decision

[1] The Respondent carried out building work in a negligent manner and in a manner that was contrary to a building consent. He failed to provide a record of work on completion of restricted building work. He is fined \$3,500 and ordered to pay costs of \$500. The costs order has been reduced on the basis that the matter was dealt with on the papers. A record of the disciplinary offending will be published on the Public Register for a period of three years.

The Board

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

¹ Section 341 of the Act.

The Charges

- [3] On 4 November 2021, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.
- [4] 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.
- [5] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing. A Notice of Proceeding was issued, and a Notice of Hearing was subsequently issued setting the matter down for a hearing.

Adjournments

- [6] The matter was initially set down to be heard on 2 March 2022 in Queenstown. The Respondent was granted an adjournment on health grounds. The Respondent then instructed Legal Counsel. A new hearing date of 23 August 2022 was set. Following notice of the new date being given, Counsel wrote the Board stating:

Following our most recent contact with him, and in light of the determination by the Board to proceed with a hearing of this matter on 23 August 2022, we would like to propose that the matter be considered on the papers. Our client has commissioned an independent peer review by [OMITTED] of the report that was provided by the complainant, which is currently in the process of being finalised, which we could provide to the Board, with written submissions, and potentially an affidavit from our client.

- [7] The request was granted. Counsel was asked to provide the peer review and submissions prior to the Board making its decision.
- [8] On 6 September 2022, the Board met, reviewed the evidence and made an on the papers decision.²

Procedure

- [9] 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 procedures³. 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 legislation⁴. As such, it may depart from its normal procedures if it considers doing so

² See *Robinson v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at paragraph [24] where the practitioner asked for the matter to be dealt with on the papers.

³ Clause 27 of Schedule 3

⁴ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

Disciplinary Offences Under Consideration

- [10] 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 contrary to section 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 contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [11] The Board gave notice that, in further investigating the allegations under sections 317(1)(b) and (d) of the Act, the Board would be inquiring into the quality and compliance matters raised in the report prepared by Mr [OMITTED] of [OMITTED].

Function of Disciplinary Action

- [12] 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*⁵ and in New Zealand in *Dentice v Valuers Registration Board*⁶.
- [13] 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*,⁷ Collins J. noted that:

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

⁵ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁶ [1992] 1 NZLR 720 at p 724

⁷ [2016] HZHC 2276 at para 164

[14] 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 persons⁸:

... 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.

[15] 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.

[16] 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.

Evidence

[17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁹. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[18] The Respondent was contracted to carry out the wall and roof cladding of a new residential build. The contracted work was not completed. The Complainant commissioned a report from Mr [OMITTED] of [OMITTED], a qualified builder with 25 years of experience. Mr [OMITTED] noted the following issues in his report, which were supported with photographs of the issues:

- Wrong size screws and only penetrating into framing by 15mm
- No upturns on sill flashings as per plan
- No Upturns on any sheets under soffits or windows.
- On wing walls used .55mm metal, plans say .75mm
- Diverter at front door incorrect and is leaking
- Skylight flashed poorly causing damage to the skylight
- Sheets out of plumb
- Head flashings not straight also cuts in sheets above windows poor workmanship
- Sheets installed with scratches

⁸ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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

- Mitres on windows poorly installed.
- Multiple sheet dented from forced installation
- Apron flashings do not line up causing a big gap
- Jamb and head flashings are not flush or closed off, could leak.
- Jamb flashings have no compressed foam as per plans
- Head flashings have no hard fold as per plans, also head flashings have no kick
- out against the windows as per plan.
- Multiple scratches visible from more than 3m away
- No gap between the sill flashing and window as per plan.
- Roof is currently leaking at a barge to roof junction.

[19] The Complainant put forward that he believed the Respondent had left unskilled labour on site to carry out complex tray cladding.

[20] The following are sample photographs of workmanship issues noted:



[21] The Complainant also alleged that the Respondent had not provided a record of work for the restricted building work that he had completed prior to his removal.

[22] Following the Respondent being removed from the job, the Complainant had the wall cladding replaced. The work was carried out by another contractor.

[23] The Respondent provided a response to the complaint. In it, he stated that he considered he had acted reasonably and within the manufacturer's requirements and the applicable standards. With respect to the issues raised in the [OMITTED] report, the Respondent submitted that issues were not valid, or responsibility did not lie with him, or that, at the direction of the Complainant, the work was stopped, and portions of the work were left unfinished. The Respondent questioned the independence of the report.

[24] The Respondent commissioned a peer review report. It was completed by [OMITTED] of [OMITTED], a Chartered and Registered Building Surveyor. It was a desktop review. No site visits were completed. The report provided the following summary

On review of the evidence available we would not agree that the wall cladding has been fixed with the incorrect fixings as it would appear to have been installed in accordance with the manufacturer's technical details. We are also unable to confirm if issues raised in respect of the apron flashings, rooflight flashing and diverter and any out of plumbness to wall claddings are in fact defects without further evidence, information or invasive investigation. We would however agree that a number of the metal cladding sheets have suffered from mechanical damage in the form of denting or scratching, and require replacement. Some mitred window junctions have also been poorly formed and no upturns would appear to have been provided to sill flashings and cladding sheets, as would be required by the consented drawings and manufacturer's technical details or good practice guidelines. The report does not provide any evidence that the issues raised have caused any failure of the dwelling to comply with the Building Code Clause, E2 External Moisture.

[25] Counsel for the Respondent also provided submissions in which it was stated that the Respondent considered that the use of 40mm screws with a 15mm penetration, was safe and functionally appropriate.

[26] More generally, it was submitted

[36] Overall, the Respondent has at all times throughout the provision of the Works acted reasonably and within what he considered to be the requirements of the manufacturer and the applicable standards from the consented plans.

[37] As set out above and in the Peer Review, further clarification establishes that with each of the issues cited in the complaint that they are either not valid, the responsibility does not lie with the Respondent, or at the direction of the Complainant, the Respondent stopped work on the job and therefore portions of the work were left unfinished for which the Respondent cannot be held liable.

[38] Therefore, it is submitted that there is no basis for the complaint, and the Respondent respectfully requests that the Board find accordingly.

Board's Conclusion and Reasoning

[27] 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);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or

supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)

and **should** be disciplined

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

Negligence

[29] 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*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

[30] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹². 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.

[31] 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 Act¹³. 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 practitioner¹⁴.

[32] 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*

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[33] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building consent¹⁶. 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.

[34] Turning to seriousness 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.

[35] Looking at the building work, the Board received two opinions on the quality and compliance of the building work. The [OMITTED] report writer attended the site and carried out a review of the Respondent's work. The [OMITTED] report was a review of the [OMITTED] report and findings. The Board considered the [OMITTED] report to be the more compelling evidence.

[36] The main issue with the degree of embedment of the screws. The [OMITTED] opinion was based on the screw appearing to be between 42 and 45 mm in length. Mr [OMITTED] stated they were 40 mm screws. Mr [OMITTED] provided a photo of the screws. He did measure them. The Board prefers his first-hand evidence. On that basis, the screws would not have provided sufficient embedment. Further, the Board does not accept the submission that the degree of embedment was functionally appropriate. It was not.

[37] The Board also noted that the [OMITTED] report did not contest all of the findings made in the [OMITTED] report. It did question the evidence that the dwelling would fail to comply with Clause E2 External Moisture of the Building Code. The Board did

¹⁵ Section 17 of the Building Act 2004

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

not agree. It found that there was, on the balance of probabilities, a risk that the Respondent's work would not have met clause E2 of the Building Code.

- [38] Further, the Board considered that the quality of the cladding work was substandard. It was not completed in a tradesperson-like manner. It was a high-quality cladding with hidden fixings. It was not unreasonable to expect a high-quality finish.
- [39] The Respondent did raise that work was not complete. It was substantially complete and the Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing,¹⁸ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [40] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁹:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

¹⁸ Hansard volume 669: Page 16053

¹⁹ Hansard volume 669: Page 16053

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

Contrary to a Building Consent

[42] 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.*

[43] 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.

[44] 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 established²⁰. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[45] Aspects of the Respondent's work, and in particular the manner of fixing the cladding, was not in accordance with the building consent. Other items noted in the [OMITTED] report had risked noncompliance with Clause E2 of the Building Code. On this basis, the Board finds that the Respondent has committed a disciplinary offence under section 317(1)(d) of the Act.

[46] The Board does note that there is a degree of duplication between the findings under sections 317(1)(b) and (d) of the Act. As such, it will, when considering penalty, treat them as a single offence.

²⁰ *Blewman v Wilkinson* [1979] 2 NZLR 208

Record of Work

- [47] 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 work²¹.
- [48] 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.
- [49] The Board discussed issues with regard to records of work in its decision C2-01170²² and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [50] 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.
- [51] 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*²³ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [52] As to when completion will have occurred is a question of fact in each case.
- [53] In most situations, issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Completion occurred in August 2021 when the Respondent’s involvement in the build came to an end. A record of work has not been provided.
- [54] The Board notes that the Respondent carried out or supervised wall and roofing cladding. The wall cladding that the Respondent carried out or supervised has been replaced. As such, a record of work is not required for it. The roofing cladding remains. As a record of work has not been provided for it, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

²³ [2018] NZHC 1662 at para 50

- [55] 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.
- [56] In this instance, there was an ongoing dispute. Whilst this was not put forward as a reason, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [57] 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

- [58] 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.
- [59] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [60] 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*²⁴ 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.

- [61] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁵ the Court noted that whilst the statutory principles of sentencing set

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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.

- [62] The Board considered that the Respondent's conduct was in the mid-range of negligence. The Respondent has also failed to provide a record of work. On the basis of those factors, the Board adopted a starting point of a fine of \$3,500. This is an amount that is consistent with the fines that the Board has imposed for similar offending. The Respondent has not accepted any responsibility for his actions. Notwithstanding, the Board has not considered this to be an aggravating factor. It is not aware of any mitigating factors. As such, the fine is set at \$3,500.

Costs

- [63] 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."
- [64] 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 case²⁶.
- [65] In *Collie v Nursing Council of New Zealand*,²⁷ 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.*
- [66] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁸ 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.*

²⁶ *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.

²⁷ [2001] NZAR 74

²⁸ CIV-2011-485-000227 8 August 2011

[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.

- [67] 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.
- [68] 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

- [69] 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 Act²⁹. 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.

- [70] 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.
- [71] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³¹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³². 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*³³.

²⁹ Refer sections 298, 299 and 301 of the Act

³⁰ Section 14 of the Act

³¹ Refer sections 200 and 202 of the Criminal Procedure Act

³² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³³ *ibid*

[72] 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 interest³⁴. 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.

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

Section 318 Order

[74] 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 \$3,500.

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(I)(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.

[75] 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

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

Signed and dated this 27th day of September 2022



Mr M Orange
Presiding Member

³⁴ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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.*