

Before the Building Practitioners Board

	BPB Complaint No. CB26248
Licensed Building Practitioner:	Daniel Clarke (the Respondent)
Licence Number:	BP119375
Licence(s) Held:	Design AoP 1

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	8 December 2023
Decision Date:	19 January 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3

Appearances:

Ms Narayan and Mr Retter 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 disciplinary offences under sections 317(1)(b) and (g) of the Act.

The Respondent is censured for the breach of the Code of Ethics and fined \$3,500 for carrying out building work in a negligent manner. He is ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years and the decision will be published in Code Words (without naming the Respondent).

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Summary

- [1] The Respondent submitted a Building Consent application to the Council. It did not contain the necessary engineering details. A Special Advisor’s report also identified inconsistencies and missing information in the plans and specifications submitted with the application. The Council refused the consent application.

- [2] There were two issues before the Board. The first concerned an alleged breach of principles 13 and 14 of the Code of Ethics. The Board needed to consider whether the Respondent failed to advise his client of the potential consequences of not including the relevant engineering information with the Building Consent application and, if so, whether the seriousness threshold to warrant a disciplinary finding had been reached.

- [3] The second issue was whether the Respondent was negligent or incompetent in the carrying out of the design work for the failure to include the engineering information in the consent application and the inconsistencies and missing information further identified in the Special Advisor's report.
- [4] In the Board's view, the design, as submitted to the Council, did not meet Building Code requirements and was not capable of being constructed on the information provided. As such, the Board found that the Respondent had carried out the design work in a negligent manner.
- [5] As regards the alleged breach of the Code of Ethics, the Board decided that the Respondent had failed to adequately advise the Complainant (the homeowners) and this was a breach of principles 13 and 14 of the Code.
- [6] The Board decided to take an educative approach to the breach of the Code of Ethics and, as such, it censured the Respondent. In respect of the negligent design work, the Board ordered the Respondent to pay a fine of \$3,500. Costs for the hearing were set at \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years. There will be further publication of the decision in Codewords without naming the Respondent.

The Charges

- [7] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [8] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have:
 - (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
 - (b) breached principles 13 and 14 of the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act, IN THAT, he may have lodged a Building Consent application in December 2022 without advising his client of the potential consequences of not including the relevant engineering information with the application.
- [9] The Board gave notice that the matters to be further investigated under section 317(1)(b) of the Act would be those identified in the Special Advisor's report.

¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

Post Hearing evidence and submissions

- [10] Counsel for the Respondent provided written closing submissions after the hearing. They have been considered in reaching this decision.
- [11] Further the Respondent was given the opportunity to provide evidence of the repayment to the Complainants of the Council Building Consent lodgement fees. Counsel's closing submission recorded that evidence of payment was not able to be located.
- [12] The Complainants, however, provided a written outline of the payments received. They stated that a \$1,747.45 credit from the original \$2,870 they paid to the Council was reimbursed by the Council through the Respondent. The shortfall of \$1,122.55, which the Respondent said he had repaid to the Complainants out of his own pocket, was, on the Complainants' evidence, not paid to them.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

Background

- [14] The Respondent prepared the plans and specifications for alterations to an existing dwelling to form an extension to the lounge, construction of a pitched roof canopy, and a further two-storey extension with internal stairwell, ensuite bathroom and walk-in wardrobe. Further internal changes were also designed by the Respondent including reformation of the ceiling over the lounge and dining and kitchen to form a skillion roof and sloping ceiling.

Code of Ethics

Evidence

- [15] The plans and specifications for the Complainants' alterations were ready for submission to the Council for Building Consent in July 2022, but at that point, the Complainants made changes to the design, most significantly changing to a cathedral-style roof.
- [16] The Respondent continued to work on the plans, and in December 2022, the Complainants acknowledged that they put pressure on the Respondent to lodge the Building Consent application by Christmas.
- [17] The Complainants stated they asked the Respondent if a Christmas application was a reasonable timeframe and that the Respondent agreed. The Respondent did not

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

accept that he was asked and stated that he *"should have told [the Complainant] it was not feasible by Christmas"*.

- [18] In order to complete the Building Consent documentation, the Respondent needed to obtain engineering input. The Respondent gave evidence that he did not have an engineer on board early in the design. He stated it was his usual practice to finalise the plans from a design perspective before getting engineer input to minimise the cost of going back to the engineer with design changes.
- [19] The Respondent first tried in October 2022 to obtain engineering input for the designs from an engineer he commonly used and discovered that he had retired. On 15 November 2022, he approached another engineer, Mr [OMITTED], who responded the same day with *"probably couldn't look at it till after xmas."* The Respondent provided further information to Mr [OMITTED], and he then said by email - *"I may be able to get onto it early December, but wouldn't like to guarantee it..."*.
- [20] Further, on 15 November 2022, the Respondent told the Complainants, *"The engineer has come back and said he could probably start it in early December."* This was not an accurate reflection of the email from Mr [OMITTED], but the Respondent said at the hearing that this advice was after a telephone call with Mr [OMITTED] in which he confirmed he could do the work by Christmas.
- [21] On 22 November 2022, the Complainants emailed - *"If you haven [sic] already, please lock that in with the Engineer, and please ask for a delivery date."*
- [22] Subsequently, Mr [OMITTED] advised on 23 November 2022 that he was in the area and could go to see the house and, in the meantime, he would get an engagement letter off to the Complainants (the homeowners).
- [23] The Complainants did not respond to Mr [OMITTED]'s engagement letter. Mr [OMITTED] advised the Respondent on 7 December 2022 that he had had no response to the engagement letter and that *"unfortunately as a result I didn't get to site last week, and am not now in a position to look at this work before Xmas."*
- [24] There is no further evidence of any communications by the Respondent to the Complainant after being told on 23 November 2022 that Mr [OMITTED] could not do the required work by Christmas and no evidence of any attempts by the Respondent to engage another engineer.
- [25] On 7 December 2022, the Respondent received a letter from [OMITTED] ([OMITTED]), who had been directly engaged by the Complainants. There was a series of emails over the next day or so with [OMITTED] asking, and the Respondent answering, questions.
- [26] The plans and specifications were submitted to the Council on 15 December 2022 without the necessary engineering details. The Respondent did not do any further work on the submission between 15 and 20 December 2023 because he said, he had 4 or 5 other projects he was working on.

- [27] The Council Officer, Ms Larmer, confirmed the Council shutdown period of 20 December 2022 to 10 January 2023 but said that work was sometimes done in that period. The evidence shows that the Council did a preliminary vetting of the application on 9 January 2023.
- [28] A calculation of the 20-working day Building Consent processing period results in a date of 7 February 2023. The Respondent said he had not worked out the date, but *“roughly mid-February”* was a *“rough guideline he was working to”*.
- [29] The Respondent said in his brief of evidence submitted prior to the hearing that *“I thought that this meant that once the Council started the application, presumably in January, I would have at least 20 working days to receive the engineering from [OMITTED] and amend the plans, through the Council’s online portal”*.
- [30] The Respondent gave evidence that he was on holiday through this period and was not contactable. [OMITTED] had sent an email with queries for the Respondent on 23 December 2022. The Respondent advised the Board that he did not see or respond to this email until 25 January 2023. On receipt of the required information, [OMITTED], on 26 January 2023, stated they would work on it the following week.
- [31] At the hearing, the Respondent confirmed that he did not ask [OMITTED] how long they would need to do the required details and just told [OMITTED] to do the work *“as soon as possible,”* but not to a certain date.
- [32] There were no follow-up communications after 26 January 2023 between the Respondent and [OMITTED], even though the Respondent knew or ought to have known the 20-working day period (within which he said he would provide the engineering detail) was approaching.
- [33] It was the Council Officer Mr Allam’s evidence that he telephoned the Respondent and explained there were significant documents missing, and it was his recollection that the Respondent consented to the application being refused.
- [34] The Respondent did not accept this version of events and said he was expecting requests for information (RFIs) from the Council and did not consent to the refusal.
- [35] The Complainants enquired with the Council about progress on 9 February 2023 and were verbally advised that day that the application was going to be refused.
- [36] The Council sent a letter to the Respondent on 10 February 2023, which stated the application had been refused *“because the plans and specifications accompanying the Building Consent application do not satisfy the Council on reasonable grounds that the completed building work would comply with the New Zealand Building Code.”* Of the four specific reasons given for the refusal, the relevant one was *“Engineers documentation such as PS1, memorandum and calculations supporting 200PFC Portal Frame have not been provided.”*
- [37] Ms Larmer of the Council explained that the Council does not expect to receive incomplete applications and that they would not normally allow or expect the iterative submission of documents for a project of this size and type. There was no

indication in the documents submitted that the application was incomplete, so the Council had to spend time reviewing the application to realise some of the necessary documentation was not included. She stated that this added time and cost to the process.

[38] In his brief of evidence, the Respondent said – *“I suggested to the [Complainants] to lodge the incomplete plans to the Council before the Close Down, presuming they would only receive the application in January 2023 by which time we would have the engineering work which we could submit in the meantime. I confirmed in an email that I could submit the plans without the engineering and would send the engineering to the Council when the details were ready. I also told them that it usually took 20 working days for the Council to process applications. I told them the day I submitted the designs that I did not yet have any engineering details. They said to proceed as the pool was a future project, but they were aware that there were “no details from the Engineers”.*

[39] The email relied on and referred to in the brief of evidence is dated 14 December 2023 and stated:

I’m planning to lodge the Building Consent application later today, do you want me to wait until we have all of the pool details?

Still no details from the Engineer.

Have you signed the attached Council authority, I don’t seem to have it in my files.

[40] On the same date, the Complainants replied:

I have reforwarded the original authority signed in July. We are keen to progress with the house plans – the pool is a future project so please go ahead with submitting without the pool engineering.

[41] The Complainants stated in evidence that they did not want to hold up the consenting process because of the pool and that they thought the engineering not being supplied to the Council was only in relation to the pool.

[42] The Respondent states in his brief of evidence that *“I verbally suggested to the [Complainants] to submit the incomplete plans to the Council “as is” and amend the plans once I received the engineering”.*

[43] The Complainants do not agree with this, and they had stated in their written complaint that:

... at no point, did [the Respondent], disclose the risks of submitting a consent without the engineering information and that would go against best practise advice. The Clients never received any communication from [the Respondent] advising against submitting the consent as he did not yet have all the information.

- [44] The Respondent said that he did not warn the Complainants of the extra cost to them because of the missing engineering details and the extra time the Council could consequently take to process the application.
- [45] The Respondent said that he had taken this approach in the past when he had an undertaking from the engineer as to the provision of the details within a time frame. He acknowledged that he did not have that undertaking in this instance.
- [46] Further, the Respondent stated his motivation as *“In any event, ...my thoughts were that at the very least, the [Complainants] would know that I was not simply delaying matters.”*
- [47] The Special Advisor, Mr Rennie, was asked if he considered it common practice to provide supplementary details later. It was his view that this was *“not acceptable”* and that adopting the Respondent’s approach adds processing time. Mr Rennie knew it as a practice 20 years ago as a way to meet deadlines, but not under the current legislative process. Further, in his report, he stated, *“Reliance on Council as a means of quality assurance is not appropriate, and an LBP ought to have a system in place to ensure that plans and specifications are correct and complete prior to being submitted to Council”*.

The Code within a disciplinary context

- [48] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁴ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes⁵ for some time, and the Board has taken guidance from decisions made in other regimes.
- [49] The Code of Ethics also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [50] The disciplinary provision in the Act simply states, “has breached the code of ethics”. The Board has taken guidance from other disciplinary regimes and, in particular, that the protection of the public is the central focus.⁶
- [51] Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,⁷ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

⁴ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁵ Lawyers, Engineers, Architects and Accountants, for example

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [128], McGrath J.

⁷ [1992] 1 NZLR 720 at 724

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[52] The Board also notes that the courts have applied a threshold test to disciplinary matters, and the Board has applied those tests. In *Collie v Nursing Council of New Zealand*,⁸ the test was stated as:

[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.

[53] Finally, when considering alleged breaches of the Code of Ethics, the Board needs to consider whether the conduct, if upheld as a breach of the Code, reaches the threshold for a disciplinary finding of disrepute, which is a more serious disciplinary finding.

The Code provisions under investigation

[54] The provisions the Board stated it would investigate were:

13. You must explain risks to your client

(1) *You must take all reasonable steps to –*

- (a) *Discuss with your client the design and construction risks of any project you are undertaking and any particular building method you are using in carrying out or supervising building work; and*
- (b) *Ensure that your client understands the options available to mitigate those risks before the work is commenced.*

(2) *If you become aware of a risk that has arisen or become apparent during the course of carrying out or supervising building work, you must, as soon as practicable, advise your client in writing.*

14. Your duty to inform and educate client

You must provide your client with sufficient information and advice to enable them to make an informed decision to enable you to continue with your building work.

[55] The two provisions of the Code of Ethics being considered are premised on “building work”. The Code adopts the same definition of the term as the Act, which is work that is *for, or in connection with, the construction, alteration, demolition, or removal*

⁸ [2001] NZAR 74

of a building ... and includes design work (relating to building work) that is design work of a kind declared ... to be restricted building work... ”⁹

- [56] The Respondent prepared plans and specifications for alterations and extensions to the existing building as described earlier in the decision.¹⁰ This design work was Restricted Building Work and meets the definitions required to come within the Code of ethics ambit.
- [57] Statutory interpretation principles require the meaning of legislation to be ascertained from its text and in the light of its purpose and its context.¹¹ In this instance, guidance on the purpose of the Code of Ethics can be ascertained from the Minister for Building and Construction at the introduction of the Code. She stated – *“However, this code sets out new standards for practitioners to give the industry, consumers, and homeowners clarity on what is expected from those who are licenced.”¹²*
- [58] Both principles 13 and 14 are expressed in mandatory terms, and the express obligations on a Licensed Building Practitioner are qualified only by the concepts of – “taking reasonable steps,” “as soon as practicable,” and providing “sufficient” information.
- [59] Generally, words in legislation will be given their natural or ordinary meanings and as such the above phrases should be given their usual dictionary meanings¹³.
- [60] The sections under consideration set up expectations for the consumer as to the type, speed and accuracy of information they should get from a Licensed Building Practitioner. The underlying theme and purpose are to keep consumers informed to enable them to make decisions based on that information.
- [61] Further, when considering ethical conduct, the Board needs to assess it objectively, and the subjective views of the practitioner or other parties involved are irrelevant.¹⁴

The conduct complained about

- [62] There are three aspects of the Respondent’s actions that the Board has to consider. They are whether the Respondent discussed with the Complainants the risks of not including the engineering details with the Building Consent application, the option of submitting with and without the engineering details, and whether they were given sufficient information to make an informed decision over the application going in without the engineering detail.

⁹ Section 7 of the Act and Clause 6 of the Building (Definition of restricted Building Work) Order 2011.

¹⁰ Para 14

¹¹ Section 10 Legislation Act 2019; Commerce Commission v Fonterra {2017} NZSC 36

¹² Parliamentary Hansard report 27 October 2021

¹³As soon as practicable means “as soon as both possible and practical under all the facts and circumstances of the individual case” (www.lawinsider.com/dictionary): Sufficient is defined as “Of a quantity, extent, or scope adequate to a certain purpose or object” (www.oed.com Oxford English Dictionary online). Reasonable is defined as “sensible; possessing or characterized by common sense; appealing to or in accordance with instinctive understanding or sound judgement” (www.oed.com Oxford English Dictionary online)

¹⁴ W v Auckland Standards Committee 3 of the New Zealand Law Society [2012] NZCA 401

- [63] Counsel for the Respondent submitted that the engineering details were excluded due to the pressure put on the Respondent by the Complainants to submit the application before Christmas. It was said, *“The engineer’s details were excluded not due to negligence or incompetence. [The Respondent] was aware that these would be required and advised the [Complainants] that the designs would need to be updated once the engineering details were made available. “*
- [64] The Board accepts that the application for the Building Consent may have been made before Christmas due to pressure on the Respondent from his clients. However, this does not excuse the lack of clear communication by the Respondent.
- [65] In particular, the email relied on by the Respondent as containing this advice is open to alternative interpretation, such that the agreement by the Complainants to submit the application without the engineering detail could be interpreted as relating only to the pool. Indeed, it was the Complainants’ evidence that this was their understanding. The Respondent’s evidence that what he verbally told the Complainants is in conflict with the Complainants’ evidence. On this point, the Board prefers the evidence of the Complainant.
- [66] Even if the fact of what the Respondent was doing was communicated in some fashion, it is clear to the Board that the Respondent did not advise the Complainants about the process being adopted, the alternatives available, the risks and costs associated, or the possible consequences of submitting the application without the engineering details. This is the crucial clarifying information principles 13 and 14 required of the Respondent to enable the Complainant to make an informed decision.
- [67] The Respondent’s whole approach was predicated on the assumption that the timing would work out in his favour, with the engineering details arriving before the end of the Council’s 20-day working day period for assessment. However, he did not communicate this to the Engineer or the Complainants or take any proactive steps to prevent this from occurring.
- [68] The Board considers that in failing to advise of the possible consequences of submitting the application without the engineering details, the Respondent did not take “reasonable steps” to advise the Complainants of the risks of this action and any alternative options available. Further, in failing to advise, the Respondent has not given the Complainants “sufficient” information to make an informed choice over submitting the application before Christmas.
- [69] Counsel for the Respondent submitted that the consequences for the Complainants were minimal as the Respondent compiled the missing documents within days of the Council rejection letter, and he remains willing to refund the shortfall in the reimbursement of the Council fees (\$1,122.50).
- [70] The Board notes that if it was his intention to refund the shortfall, it is something that could easily have been attended to before Counsel’s submission, and thus, the Respondent could have put himself in a better position.

[71] The Board considers there was a time and cost consequence for the Complainants of the Respondent's actions, as more time and cost will be incurred for the Council review of the application a second time.

Was the conduct serious enough?

[72] The Board finds that the conduct was serious. It was not mere inadvertence, error, oversight, or carelessness. It was a deliberate departure from an acceptable standard of conduct.

[73] This is reinforced by the opinion of the Special Advisor that the approach taken by the Respondent was not an acceptable practice and the views of the Council that they expect a full Building Application when it is submitted.

[74] The purpose of the Code of Ethics is, in part, the provision of clear information for the consumer. The Respondent fell short of this. He did not take reasonable steps as soon as practicable to provide sufficient information to the Complainants. The Complainants were not put in a position to make an informed decision to submit the application without engineering detail.

Has the Respondent breached the Code of Ethics?

[75] Considering the above, the Board finds that the Respondent has breached the Code of Ethics provisions 13 and 14 for his failure to adequately advise the complainants of the options in December 2022 and the risks of submitting the application without engineering detail. As a consequence of this failure, the Complainants were not in a position to make an informed decision.

Negligence or Incompetence

Evidence

[76] The Board appointed Mr John Rennie as a Special Advisor under section 322(i)(d) of the Act to assist it with this investigation. The Board asked the Special Advisor to address the following issues:

- (a) whether the original Building Consent design documents were adequate with reference to completeness and relevance of information supplied and consistency in the drawings and specifications;
- (b) whether the design, if built as submitted in the original Building Consent application, would have satisfied the Building Code, and if not, examples of non-compliance;
- (c) reviewing of the design issues identified in the complaint by Architektonikos, could the design as submitted for Building Consent be constructed as detailed; and
- (d) Any further issues noted.

[77] The Special Advisor's conclusions were that *"Several key elements that are expected to be submitted with a normal Building Consent application were absent from the*

documents submitted, and the plans and specification contained several inconsistencies.”. Further “the plans and specifications as submitted to the Council...were inadequate, contained significant errors, and represented incomplete works.”

[78] Mr Rennie highlighted the missing specific engineering details – (portal frame, ridge beams, glulam beams and wrought iron stair handrail) and gave further examples such as -

- (a) the membrane roof had no detailing to demonstrate how it was to be constructed, and no membrane was nominated within the specification and no manufacturer’s details were provided;
- (b) the absence of basic detailing such as cladding clearances from ground level, and detailing to the tops of the weatherboard columns, and soffit/cladding detailing;
- (c) drawing inconsistencies, such as the roof plan showing different roof configurations over the lounge extension, and conflicting external weatherboard cornering details with both back flashing and tight mitred joints and metal corner soakers being shown;
- (d) the provision of a specification which has not been tailored for the project, for example, the inclusion of BRANZ appraisals which do not correlate with the drawings or main specification document.

[79] At the hearing, Mr Rennie highlighted the main areas of concern as to completeness of the drawings as the membrane roof, external wall cladding, flashing detail to the columns and the joinery detailing.

[80] In addressing the questions posed by the Board, Mr Rennie concluded:

- (a) the design, if built as submitted, would not comply with the Building Code – pointed to the membrane roof, external wall cladding, flashing details to the columns, and joinery detailing and concluded that these aspects would have failed to comply with B1, B2, E1, E2, E3, F2, F4 and H1 of the Building Code; and
- (b) based on the discrepancies, and insufficient detail supplied, it was not possible for the design to be built as detailed and the plans as submitted would not have been sufficient for a competent builder to follow on-site.

[81] Several of the issues identified in the Special Advisor’s report were canvassed by the Board with the Respondent at the hearing, and Counsel for the Respondent addressed the points in written closing submissions.

[82] In respect of two issues, the cladding and the joinery, the Respondent had included alternative choices in the application. For the cladding, he had allowed for both cedar and shadowclad and for joinery both timber and aluminium.

- [83] Mr Rennie said in evidence that, without a glazing election, it was not possible to do the H1 Building Code calculation. He stated it needed a clear selection, not options, so that the Council knows what it is consenting and the builder can build it.
- [84] The Council Officer, Ms Larmer, said that they would not expect in a Building Consent application for more than one option to be nominated for a critical element. Their expectation is that a selection is made.
- [85] The Complainants gave evidence that the election for aluminium joinery had been made earlier and that they had not been told of any decisions that needed to be made before the application was submitted. The Complainants pointed out that they were told, and the Respondent agreed in evidence, that the plans were ready for submission in July and were only not submitted then because the roof detail changed.
- [86] The Board infers from this evidence that, whilst the Respondent suggested time pressure from the Complainants was the root cause of the issues with the drawings, most of the work was complete in July 2022 and was not subject to such pressure.
- [87] The insulation material was not nominated, and it was put to the Respondent that this meant the H1 calculation had not be made. The Respondent pointed to R values for insulation shown on the drawings, but Mr Rennie said this was not an H1 calculation. The Council confirmed their expectation that the H1 calculation would be included.
- [88] The Special Advisor identified the proposed canopy extension to the north of the property and the need to ensure it has been setback so it is clear of an existing right of way. No set-out dimensions were included in the plans. The Respondent said he would need to get a survey done to obtain that setback dimension but had not done so prior to submitting the plans.
- [89] The issue of the downpipes only shown on the roof framing plan, and missing from the site plan and roof plan, was clarified by the Respondent, and the Special Advisor accepted that these were adequately shown.
- [90] The inconsistencies with the roof framing plan were queried with the Respondent, and it was pointed out by the Board that the ridges were not aligned. The Respondent said this was a difficult detail to draw and that a builder could make it work on-site. He agreed a minor variation would be needed. Mr Rennie said it was drawable and that it was not buildable as drawn. Mr Rennie also said there was an impact on the engineering detail required for this.
- [91] In respect of the issues addressed by the Special Advisor, legal counsel for the Respondent submitted:
- (a) The issues are not sufficiently grave as to warrant disciplinary action.
 - (b) Failures to carry through variations in the drawings was *“an oversight, rather than negligence or incompetence warranting sanction.”*

- (c) A number of the issues raised by the Special advisor were not relied on by the Council in refusing the application.
- (d) The pressure from the Complainants contributed to the failure to carry changes through the drawings and created the inconsistencies.
- (e) The Respondent had in the past operated on the basis of including alternatives in the consent application and then clarifying the choices in RFIs. Counsel stated that the Respondent *“now knows that the Council would prefer all the details present to begin with and [he]can ensure this is done going forwards.”*

Discussion

[92] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,¹⁵ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*¹⁶ test of negligence.¹⁷ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.¹⁸ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.¹⁹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [93] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code²⁰ and any Building Consent issued.²¹ The test is an objective one.²²
- [94] The inconsistencies and omissions in the Building Application to the Council were such that, as lodged, it did not meet the Building Code, and it could not have been constructed.

¹⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

¹⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁷ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁸ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as *“a demonstrated lack of the reasonably expected ability or skill level”*. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as *“an inability to do the job”*

¹⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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”*.

²⁰ Section 17 of the Building Act 2004

²¹ Section 40(1) of the Building Act 2004

²² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

- [95] The Building Consent Authority's role is to check that the design work has been carried out in accordance with the Building Code. It is not uncommon that a Building Consent Authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. In this respect, it is noted that the Building Consent Authority's job is to grant or refuse a Building Consent. It is not its role nor responsibility to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.
- [96] A designer should be aiming to get their design and specifications 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. In this respect, it is also to be noted that under section 45(3) of the Act, a Licensed Building Practitioner with a Design Licence must submit a Certificate of Work with a Building Consent that states that the design complies with the Building Code:
- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
 - (a) *provided by 1 or more Licensed Building Practitioners who carried out or supervised that design work; and*
 - (b) *that identifies that design work; and*
 - (c) *that states—*
 - (i) *that the design work complies with the Building Code; or*
 - (ii) *whether waivers or modifications of the Building Code are required and, if so, what those waivers or modifications are.*
- [97] 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 legislation²³:

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

²³ Hansard volume 669: Page 16053

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.

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

14D Responsibilities of designer

(1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the Building Code.*

(2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the Building Code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[99] The Respondent's failures relate not only to the lack of engineering detail but also the numerous inconsistencies and missing information in the plans and specifications.

[100] The Respondent did not find out from [OMITTED] if it was a reasonable assumption that the engineering detail could be provided in the 20-working day period. He did not convey the situation to [OMITTED], with whom he had no prior working relationship and was effectively proceeding on a "wing and a prayer".

[101] The Council expects and should expect a complete submission when an application for Building Consent is made. Specifying alternative choices is not acceptable and does not enable the Council to assess the application's compliance with the Building Code.

[102] There were reasons for submitting the application in this state – namely the pressure from the client with Christmas approaching. However, as a professional, the Respondent should have said the documentation was not ready for submission.

[103] The drawings, as submitted, did not achieve compliance with the Building Code and were unbuildable. This is not acceptable conduct for a Licensed Building Practitioner.

Was the conduct serious enough?

[104] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.

[105] The conduct that the Board has focused on in its findings is the incomplete state of the drawings submitted to the Council for Building Consent. This was a deliberate step taken to appease the Complainants and done on the unsupported belief that the engineering detail would come through in time. The Respondent's motivation

was at least in part to be seen to be moving things forward and not himself being the cause of any delay. In other words, he was content to put the ball in the Council's court.

- [106] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [107] The Board finds the Respondent's conduct departed from an acceptable standard and that he has been negligent but not incompetent. Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Penalty, Costs and Publication

- [108] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [109] The Board heard evidence during the hearing relevant to penalty, costs and publication and in addition legal Counsel for the Respondent has made some written submissions.
- [110] 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.
- [111] Counsel in closing submissions, submitted that *"the level of omission and the results of those omissions cannot justify suspension or cancellation of [the Respondent's] license. His actions were simply not grave enough to impact his entire career. He has shown a willingness to learn and to admit where he is wrong and he cannot therefore be a risk to the public."*

Penalty

- [112] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.²⁴ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁵
- (a) protection of the public and consideration of the purposes of the Act;²⁶

²⁴ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

²⁵ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁶ Section 3 Building Act

- (b) deterring other Licensed Building Practitioners from similar offending;²⁷
- (c) setting and enforcing a high standard of conduct for the industry;²⁸
- (d) penalising wrongdoing;²⁹ and
- (e) rehabilitation (where appropriate).³⁰

[113] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases³¹ and applying the least restrictive penalty available for the particular offending.³² In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³³ that is consistent with other penalties imposed by the Board for comparable offending.³⁴

[114] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.³⁵

[115] In this matter, the Board decided in respect of the breach of the Code of Ethics that the offending is at the lower end of the scale. The Code of Ethics is new to the industry, and the Board is taking an educative approach. Given this, the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval.

[116] In respect of the finding of negligent building work, the Board set a starting point of a fine of \$3,500. This is in line with other decisions dealing with the lower end of negligent conduct. There are no mitigating factors. It would have been a mitigating factor if the Respondent had, as he stated he had at the hearing he had, repaid the Complainants in full for the wasted Council lodgement fees. However, as advised by the Respondent's Counsel, there is no evidence to support this payment having been made, and the Complainant's evidence is that it was not made.

[117] Accordingly, the Board decided that there is no reason to depart from the starting point, and the Respondent is to pay a fine of \$3,500.

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁵ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

Costs

- [118] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁶
- [119] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁷. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁸.
- [120] 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 moderate, and it was a half-day hearing. Adjustments are then made.
- [121] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a hearing of this type, and it is less than 50% of actual costs.

Publication

- [122] 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,³⁹ and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [123] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁰ Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.⁴¹
- [124] Based on the above, the Board will order further publication by way of an article to be published on its website and in appropriate publications. The Respondent will not be named in the article.

³⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁷ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁸ *Coaray 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.

³⁹ Refer sections 298, 299 and 301 of the Act

⁴⁰ Section 14 of the Act

⁴¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[125] 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.

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 \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website. The decision is to be published (without the Respondent being named).

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

Submissions on Penalty, Costs and Publication

[127] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **27 February 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

[128] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Signed and dated this 5th day of February 2024



Mr M. Orange
Presiding Member

ⁱ Section 3 of the Act

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.*

ⁱⁱ 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.”*

ⁱⁱⁱ Section 318 Disciplinary Penalties

- (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 1 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.*

^{iv} **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.*