

Before the Building Practitioners Board

	BPB Complaint No. CB26065
Licensed Building Practitioner:	Richard Cournane (the Respondent)
Licence Number:	BP120745
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	22 November 2023
Decision Date:	9 January 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent is fined \$2,000 and 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.

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Summary

- [1] The Respondent was contracted to build two transportable units for two different customers. The Building Consent Authority made a complaint after the units had been located on their respective sites. The allegations were that building consents were required and that the building work did not comply with the Building Code. Notices to Fix had been issued for each unit.
- [2] The Board found that the exemptions in clauses 3A and 3B of Schedule 1 of the Act were not available and that building consents were required. The reasons were that the units were not detached (both were to be connected to other existing buildings), they were to contain sanitary fixtures, and one was closer than its own height to another residential building.
- [3] On the basis that the building work required building consents, the Board found that the Respondent had been negligent for carrying out or supervising the building work prior to consents being issued. The Board also found that the building work had been carried out in a negligent manner in that there were multiple instances of building work that did not comply with NZS 3604:2011, which is a means of compliance with the Building Code, or with clause E2 of the Code.
- [4] The Board fined the Respondent \$2,000. The fine was reduced from \$3,500 in recognition of mitigating factors that were present. The Board also ordered that the

Respondent pay the Board's scale amount of costs of \$3,500. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

The Charges

- [5] 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
- [6] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED] and [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act:
 - i. as set out in the respective Notices to Fix dated 6 July 2022 and 15 July 2022 (Documents 2.1.40 and 2.1.51, Pages 56-82 of the Board's file), and/or
 - ii. he may have failed to ensure a building consent was obtained when one was required; and
 - (b) carried out or supervised Restricted Building Work of a type that he is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT, he may have undertaken design work which he is not licensed to do under his carpentry licence.

Evidence

- [7] 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.
- [8] The complaint was made by a Building Control Officer (BCO) from Waimakariri District Council in its capacity as a Building Consent Authority (BCA). The complaints were about two unconsented building projects that the Respondent undertook. Both were related to minor dwellings being built as sleep-outs at properties that had an existing residential dwelling. Prior to making the complaint, the BCA had issued a Notices to Fix (NTF) for each property. The notices set out the issues that the Board gave notice it would investigate. In general, for both properties, the notices raised:
- (a) the need for a building consent for the work that had been undertaken; and
 - (b) the failure of the completed building work to meet Building Code requirements on the basis that it did not comply with NZS 3604:2011.

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.

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

- [9] The owners of the two properties appeared and gave evidence.
- [10] The owner of [OMITTED], gave evidence that she saw an advert for a transportable unit online and that she had inquired with the BCA about the need for a building consent. She was advised that it fit within an exemption as it was under 30m². The intention, however, was to connect the unit to an existing sleep-out and to install a kitchen with a sink, a shower and a toilet. She stated that provision was to be made for plumbing for those sanitary fixtures.
- [11] The owners of [OMITTED], gave evidence that they wanted a small sleep-out that was to be placed beside the existing dwelling. Initially, it was going to be a stand-alone unit, but this changed to it being connected to the main dwelling. The sleep-out was to be transportable on skids with a caravan plug electrical connection. They stated that they would get retrospective consent for plumbing when sanitary fixtures for a possible kitchen were installed.
- [12] Regarding the need for building consents, the Complainant gave evidence that building consents were triggered because, for both units, the size of the finished buildings would have exceeded 30m², sanitary fixtures were to be installed, and because of the connection to existing units, they were no longer transportable. [OMITTED] was also closer than its own height to another building, which meant it did not come within Building Act Schedule 1 exemptions.
- [13] The NTF issued made specific observations, which were supported by photographs.
- [14] For [OMITTED], the NTF noted the following:
1. *Finished floor level items:*

As per the recently constructed main dwelling the minimum finished floor level for a habitable building on this site is 540mm above undisturbed ground.

 - *The building is too close to the ground to allow adequate sub-floor ventilation which may cause dampness and mold growth.*
 - *The durability of the base of the exterior cladding, flooring and sub-floor framing has been compromised due to the close proximity to ground.*
 - *The building is likely to unevenly settle as it is only supported on the top soil.*
 - *The building must be supported on and connected to a suitable foundation design. This will include sub-floor bracing etc.*
 - *The timber treatment sizes, spacing and spans of the sub-floor support framing is unknown.*
 2. *Timber framing items (that do not meet NZS 3604:2001 requirements):*
 - *The 75 x 45mm exterior timber wall framing does not comply with NZS 3604. (75 x 45mm studs are only suitable for internal walls)*

- *The 75mm exterior wall cavities are also too thin for an effective wall insulation to be installed.*
- *The 140 x 45mm Rafters are undersize for the span.*
- *The Lintels fall outside the scope of NZS 3604 and consist of two 75 x 45mm on edge with plywood fastened to one face.*
- *Finger jointed 75 x 35 mm (non-structural) ceiling battens have been used as purlins.*
- *Suitable stud/plate and rafter end fixings do not appear to have been installed.*
- *Roof plane bracing has not been installed.*
- *A site specific wall bracing design is required.*

3. *Exterior cladding items:*

- *The direct fixed coloursteel tray type exterior wall cladding does not comply with the acceptable solutions of the NZ building code clause E2 Exterior Moisture and should have been installed on a drained and ventilated cavity.*
- *The Tekton non-absorbent building wrap is also not compatible for a non-absorbent cladding.*
- *There does not appear to be adequate roofing overhang into spouting.*
- *Low pitch eave flashings are required.*
- *The roofing underlay has not been supported on netting to prevent it from sagging between the purlins.*
- *Sill tape has not been installed around the openings and typically the windows are installed first so the cladding flashings can be installed.*
- *Head flashings and sill tray flashings are required for direct fixed claddings.*

Roofing underlay sagging & cause condensation to enter the ceiling cavity.

[15] For [OMITTED], the NTF noted:

1. *The new construction measures connects to an existing polystyrene panel sleep-out. The connecting walls are unsupported.*
 - *The existing sleep out is supported on and connected to concrete pads.*
2. *The new building is likely to unevenly settle as it is only supported on the top soil.*
 - *The new building must be supported on and connected to a suitable foundation design. This will include sub-floor bracing etc.*
3. *Timber framing items (that do not meet NZS 3604:2011 requirements):*

- *The 140 x 45mm rafters are undersize for the span.*
 - *The Lintels fall outside the scope of NZS 3604 and consist of two 75 x 45mm with plywood fastened to one face.*
 - *Finger jointed 75 x 35mm (non-structural) ceiling battens have been used as purlins and fixings are not screwed.*
 - *Suitable stud/plate and rafter end fixings do not appear to have been installed.*
 - *Top plate junctions have not been strapped.*
 - *Roof plane bracing has not been installed.*
 - *A site specific wall bracing design is required.*
 - *Kitchen and bathroom layout and plumbing schematics are required.*
4. *The Tekton non-absorbent building wrap is also not compatible for a non-absorbent cladding. There does not appear to be adequate roofing overhang into spouting.*
5. *The roofing underlay has not been supported on netting to prevent it from sagging between purlins.*

[16] The Respondent, in reply to the NTF, emailed the BCA stating:

Just touching base to confirm what action i will be taking to sort this out along with the [OMITTED] job. We have began decon tructing the [OMITTED] job. This should be completed in approximately 1 weeks time. I have already stopped the [OMITTED] job after our meeting onsite at [OMITTED] when i realized consent would be required. We will apply for a building consent for this one and bring all works up to code.

Any of my futur builds will be constructed to code if under 30m2.

Any jobs where clients require bathrooms or kitchen or over 30m2 will be referred to council for building consent.

[17] After the complaint had been made, the Respondent made a written response to it. He outlined the actions taken since the NTF were issued. He also stated that he had informed the clients at the beginning of the jobs that if they were going to be putting bathroom/kitchen facilities in the under 30m² builds, they were supposed to obtain building consent. In a later response, he also stated that he was not aware that the unit at [OMITTED] would be connected to an existing sleep-out.

[18] At the hearing, the Respondent gave evidence that he developed the designs for the units in conjunction with a non-licensed builder that he used to carry out the building work and that he supplied the materials. With regard to materials, he noted there were supply issues at the time and that, as a result and because of time pressures, he used

what he could get. He stated that he was aware of NZS 3604 and E2/AS1 but that he did not have copies of them.

- [19] The Respondent also submitted that he had learnt from the matters, no longer takes on any jobs that involve plumbing, and had engaged a licensed designer to develop compliant designs that also took into account the issues noted by the BCA.
- [20] The Respondent was invited to file written submissions after the hearing. He was granted extensions to file. A submission was received on 19 December 2023. With regard to the compliance issues raised in the complaint, he stated:

The newly constructed sleep-out measure connects to an existing polystyrene panel sleep-out.

THE NEWLY CONSTRUCTED SLEEP-OUT WAS UNDER 30M2. THE HOMEOWNER REQUESTED IT BE BUILT CLOSE TO THE EXISTING SLEEP-OUT. THIS EVOLVED INTO A COVERED WALK THROUGH. THE INITIAL CONTRACT WAS ALWAYS TO BUILD 1 UNDER 30M2 UNIT. THE CHANGES WERE DECIDED BETWEEN THE HOMEOWNER AND ONSITE BUILDER

- Unsupported connecting walls between the newly constructed sleepout and the existing sleepout. WE NEVER HAD A CHANCE TO COMPLETE THIS*
- The build is likely to unevenly settle as it is only supported on the top soil. SPECULATION BY COUNCIL. THE BASE WAS WELL SUPPORTED*
- The requirement of a support and connection to a suitable foundation design, including sub-floor bracing. IT WAS BUILT AS A TRANSPORTABLE WITH THE POSSIBILITY OF PILING AT A LATER DATE.*
- Timber framing concerns.1.1. FRAMING WAS AS PER NZ3604*
- The requirement of a site-specific wall bracing design. WE NEVER GOT A CHANCE TO DO THE BRACING*
- The Tekton non-absorbent building wrap is not compatible for a non-absorbent cladding. THE BUILDER ONSITE ARGUES THE WRAP IS SUITABLE*
- There does not appear to be adequate roofing overhang into spouting. THE ROOF OVERHANG WAS SUFFICIENT*
- The roofing underlay has not been supported on netting to prevent sagging between the purlin. IT WAS SELF SUPPORTING ROOFING UNDERLAY.*

Negligence or Incompetence

- [21] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the

⁴ *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.

same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ 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.⁷ 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.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [22] 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 Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹
- [23] There are two matters for the Board to consider. The first is whether the Respondent's conduct has departed from an acceptable standard as regards the failure to ensure building consents were in place for building work that may have required a consent. The second is with regard to the quality and compliance of the building work.

Building Consent

- [24] The intention was to build two separate sleep-outs for two clients that were less than 30m². On that basis, they could have come within the scope of exemptions from a building consent available in Schedule 1 of the Act, specifically clauses 3A or 3B.
- [25] Clause 3A applies to detached buildings that are built using lightweight building products for the walls and roof and in accordance with Acceptable Solution B1/AS1 for timber or steel buildings (B1/AS1 references NZS 3604:2011 as a means of compliance).
- [26] Clause 3B applies to buildings that are designed or constructed by a Licensed Building Practitioner. Because of that requirement, the B1/AS1 provision in clause 3A does not apply to 3B. The building does have to meet Building Code requirements.¹²
- [27] Neither of the Clause 3A nor the 3B exemptions can be used if a building contains sanitary facilities or facilities for the storage of potable water. Nor can they be used when a building is closer than the measure of its own height to any residential building or to any legal boundary.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ 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)

⁷ 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"

⁸ *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".

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *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.

¹² Section 17 of the Act requires that all building work complies with the Building Code.

[28] Turning to what was in the process of being built, whilst there may have been an initial intention to supply detached buildings, that changed during the build and supply process, and it became evident that neither of the buildings would be detached. In this respect, [OMITTED] was to be connected to the existing dwelling, and [OMITTED] was in the process of being connected to another sleep-out. [OMITTED] was also closer than its own height to another building. Further, there was also evidence that the Respondent was aware that there were going to be sanitary fixtures in both of the units under construction. Given those factors, the exemptions in Schedule 1 of the Act could not be used, and building consents should have been obtained before the building work was undertaken.

[29] The question for the Board then is whether, by failing to ensure building consents were in place, the Respondent has departed from an acceptable standard of conduct.

[30] In *Tan v Auckland Council*,¹³ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[31] Justice Brewer in *Tan* also noted:

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

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

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

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

[34] Looking at the specific matter, the exclusion wording as regards the requirement that the exempt buildings must be detached and not contain sanitary fixtures in clauses 3A and 3B of Schedule 1 of the Act is clear, and the Respondent should have considered those provisions prior to any building work on the respective sites being undertaken. As

¹³ [2015] NZHC 3299 [18 December 2015]

such, the Board finds that the Respondent's conduct has fallen below what is expected of a Licensed Building Practitioner.

Building Work

[35] The two NTFs listed significant departures from NZS 3604:2011, which is a means of compliance with the Building Code. The requirement to build in accordance with the Building Code is set out in section 17 of the Act.

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

[36] As stated, the requirement applies even if a building consent is not required. This is further provided for as regards Schedule 1 in section 42A of the Act, which provisions for the Schedule 1 exemptions and which, in subsection (2) states:

(2) *Subsection (1) is subject to the following conditions:*

(a) *the building work complies with the building code to the extent required by this Act:*

[37] Given those provisions, even if building consents were not required (which they were), the building work had to meet Building Code requirements, which it clearly did not. The departures from it were significant, and they put the ongoing safety and performance of the building at risk.

[38] Before considering whether the Respondent's conduct as regards the building work has fallen below an acceptable standard, the Board needs to consider the extent of his involvement in the actual building work.

[39] The Respondent had the overall control and oversight of the building work, assisted with its design, and supplied the materials. He stated that a person who he thought was licensed carried out the building work.

[40] The Board considers that the extent and degree of the Respondent's engagement in the role outside of actually carrying out building work was sufficient to make a finding that he had been negligent as regards the building work matters noted in the two NTFs.

[41] The Board makes the same finding as regards the work carried out by the unlicensed builder on the basis that he was supervising that person's work. In this respect, in Board Decision C2-01143,¹⁴ the Board found that the definition of supervise in section 7¹⁵ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of Licensed Building

¹⁴ Board Decision dated 14 April 2016

¹⁵ Section 7:

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

(a) *is performed competently; and*

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

Practitioners and, as such, it includes work carried out without a building consent. The Board's position, therefore, is that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a Licensed Building Practitioner and that where the work is carried out under a building consent, an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in section 7 that the supervision of the building work is "*sufficient to ensure it is performed competently*" applies to all building work carried out under the supervision of a Licensed Building Practitioner.

[42] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a Licensed Building Practitioner's obligations, noting that the level of supervision required will depend on a number of circumstances but that, ultimately, the Board also needs to consider whether the work met the requirements of the Building Code and, if not, the level of non-compliance.

[43] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁶. The definition of supervision in that Act is consistent with the definition in the Building Act, and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

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

[44] Applying those criteria, the Board finds that the Respondent's supervision of the building work fell below an acceptable standard and that he has been negligent.

Was the conduct serious enough?

[45] The extent of the departures from acceptable standards on both properties were such that NTFs had to be issued. Further, the remedy undertaken was the deconstruction and or removal of the units from the building sites.

[46] The Respondent partly designed and supervised the building of two units, and in doing so, he failed to demonstrate knowledge and understanding of basic Building Code and NZS 3604:2011 requirements. The extent of the failings was such that the Board considered whether a finding of incompetence rather than negligence was warranted. However, it noted and took into account the Respondent's submission regarding

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

material shortages and the substitutions that were made because of them. Those shortages do not excuse the conduct, but having taken that into consideration. The Board decided that what occurred were deliberate departures and that they were serious enough to warrant disciplinary action.

Has the Respondent been negligent or incompetent?

[47] The Respondent has carried out and supervised building work in a negligent manner.

Not Licensed

[48] Building work that is carried out under a building consent and involves Restricted Building Work must be carried out by a Licensed Building Practitioner. Section 84 of the Act states:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[49] The requirement also applies to design work in relation to a building consent, which is defined as Restricted Building Work by clause 6 of the Building (Definition of Restricted Building Work) Order 2011.

[50] However, as no building consents had been sought or obtained, the design work in relation to the two units was not Restricted Building Work. It follows that the charge under section 317(1)(c) of the Act cannot be considered by the Board as it only relates to Restricted Building Work.

[51] What the Board could have considered, had it given notice of the allegation, was a charge under section 317(1)(h) of the Act. Under that section, the Board can investigate Licensed Building Practitioners who carry out or supervise building work outside of a licensed person's competence contrary to section 314B(b) of the Act, which provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

[52] In the context of the disciplinary charge a Licensed Building Practitioner who undertakes work outside of their licence class,¹⁷ such as when they carry out design work when holding a Carpentry Licence, can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the design work is noncompliant or is in some way deficient.

[53] As noted, however, the Board did not lay a charge under section 317(1)(h) of the Act. As such, it cannot be considered. The Respondent is, however, cautioned for the future.

Penalty, Costs and Publication

[54] 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

¹⁷ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

Respondent should be ordered to pay any costs and whether the decision should be published.

- [55] The Board heard evidence relevant to penalty, costs, and publication during the hearing. It also received post-hearing mitigation and penalty submissions, which have been taken into consideration. As such, it has decided to issue the appropriate orders.

Penalty

- [56] 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.¹⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁹
- (a) protection of the public and consideration of the purposes of the Act;²⁰
 - (b) deterring other Licensed Building Practitioners from similar offending;²¹
 - (c) setting and enforcing a high standard of conduct for the industry;²²
 - (d) penalising wrongdoing;²³ and
 - (e) rehabilitation (where appropriate).²⁴
- [57] 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 cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸
- [58] 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.²⁹
- [59] The Board considered a training order but noted that the Respondent had stated that he had learned from the matter, was using a designer to develop plans, and had changed the way he conducts his business. As training was not appropriate, it adopted a starting

¹⁸ *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]

¹⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁰ Section 3 Building Act

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁴ *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

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁹ 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.

point of a fine of \$3,500. The starting point is consistent with other penalties imposed by the Board for similar offences.

- [60] There are mitigating factors. Principally, the Respondent's change of business practices and the actions he took after the complaint was made warrant a reduction in the fine. It is reduced to \$2,000.

Costs

- [61] 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.³⁰
- [62] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³².
- [63] 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. Adjustments are then made.
- [64] 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. The amount is the Board's scale amount of costs for a hearing of this type, and is significantly less than 50% of actual costs.

Publication

- [65] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,³³ 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.
- [66] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁴ 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.³⁵
- [67] Based on the above, the Board will not order further publication.

³⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³² *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.

³³ Refer sections 298, 299 and 301 of the Act

³⁴ Section 14 of the Act

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[68] 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 \$2,000.

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 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, which will be publicly available on the Board's website.

[69] 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

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

Signed and dated this 1st day of February 2024



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.*