

## Before the Building Practitioners Board

	BPB Complaint No. CB26238
Licensed Building Practitioner:	Mohammed Alfaz Khan (the Respondent)
Licence Number:	BP114710
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	6 December 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr G Anderson, LBP, Carpentry and Site AoP 2
	Mr P Thompson, LBP, Carpentry, 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 disciplinary offences under sections 317(1)(b), (d) and (da)(ii) 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 the supervising Licensed Building Practitioner (LBP) for a consented alteration. The main contractor, who was not licensed, was known to him. They had worked together in the past, and the Respondent adopted a high-trust, hands-off approach to his supervision. He did not review the building consent, issue instructions, or review the building work as it progressed. Compliance issues arose and were noted by the Building Consent Authority, including substantial changes from what was consented. The Respondent was informed of the building inspection failures. He did not take any action as a result of them.

- [2] The Board found that the Respondent had not supervised the Restricted Building Work in accordance with acceptable standards. His failings led to the non-compliance issues found during inspections. As such, the Board found that he had supervised building work in a negligent manner and that he had supervised building work that was contrary to a building consent.
- [3] The Respondent also failed to provide a record of work to the owner and the Territorial Authority on the completion of Restricted Building Work. He had provided it to the main contractor, who had not been passed on.
- [4] The Board fined the Respondent \$2,000. The fines were reduced to recognise mitigating factors. He was also ordered to pay costs of \$3,500. A record of the disciplinary finding 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.<sup>1</sup>
- [6] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> 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 in respect of the quality and compliance of the following building work noted in the following building inspection:
    - (i) Foundation dated 15 February 2019 (page 402 of the Board's file);
    - (ii) Standard Concrete Slab dated 28 February 2019 (page 453 of the Board's file);
    - (iii) Building Wrap dated 25 June 2019 (page 467 of the Board's file); and
    - (iv) Site Meeting dated 18 March 2020 (page 417 of the Board's file).
  - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act, in respect of the same matters noted above for section 317(1)(b) of the Act; and
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

- [7] The Board gave notice that the disciplinary grounds had been determined on the basis that the Respondent had accepted that he had supervised the building work. It noted that, in the event that the Respondent pleaded that he did not supervise the building work, then the Board would investigate whether the Respondent may have conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for LBPs into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have represented that he was the supervising LBP without an intention to provide actual or adequate supervision for the Restricted Building Work.
- [8] At the hearing, the Respondent accepted that he was the supervising LBP. On that basis, the Board did not need to consider whether there had been a breach of section 317(1)(i) of the Act.

#### **Evidence**

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. 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.
- [10] The complaint related to an alteration to an existing building to convert it into a sleepout between January 2019 and March 2020. The main contractor was [Omitted], a builder who was not licensed when the building work was carried out. Mr [Omitted] did not complete the build. Another contractor was appointed as a result of issues that arose with the building work. Mr [Omitted] became an LBP on 7 November 2020 when he was granted a Carpentry Licence.
- [11] The matter was initially investigated by the Ministry of Business Innovation and Employment (MBIE) as possible unlicensed building work contrary to section 85 of the Act. This was because, in the early stages of the build, the Council, acting as the Building Consent Authority, did not have any details as to who was the LBP supervising the Restricted Building Work. Mr [Omitted] had advised the owners that he was an LBP, and they had no knowledge of anyone other than Mr [Omitted] being involved in the build. During the MBIE investigation, the Respondent was identified by Mr [Omitted] as his supervising LBP. As a result, the investigation into Mr [Omitted] was stopped, and MBIE made a complaint about the Respondent's conduct.
- [12] The Respondent accepted that he was the supervising LBP. He also provided a record of work that stated he was the supervising LBP. He gave evidence that he had studied and worked with Mr [Omitted] since 2004, that they helped each other out

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

on jobs, and the Respondent acted as Mr [Omitted]'s supervising LBP when Mr [Omitted] was carrying out Restricted Building Work.

- [13] The Respondent's supervision of the building work under investigation involved the Respondent visiting the building site on four to five occasions when he viewed the building work from the exterior and at the following stages:
- slab cut off;
  - post concrete pour;
  - road site visit;
  - framing; and
  - before the wrap inspection was carried out.
- [14] The owners, who lived on the site when the building work was being carried out, stated that they had not seen the Respondent at the site.
- [15] The Respondent stated that he adopted a high-trust model that relied on Mr [Omitted]'s competence as an unlicensed carpenter and on the inspections to identify compliance issues.
- [16] The Respondent gave evidence that they spoke almost every day, and he did not consider it necessary to complete thorough checks of the work that was underway. He did not enter the building where the work was being carried out. He stated he had a copy of the building consent on his phone but did not review it and did not issue instructions on how the work was to be carried out. The Building Consent Authority witnesses present at the hearing also noted that a copy of the building consent was not on site. The Respondent did not attend Building Consent Authority inspections but received verbal updates from Mr [Omitted] and an email copy of them. At the time, the Respondent was engaged elsewhere on his own building projects. He did not charge for his time or services as the supervising LBP.
- [17] The Respondent made a general submission that, because the building work involved an alteration, what was found on site can vary from what was anticipated by the designer when the plans and building consent were developed. Notwithstanding this submission, the Respondent did not undertake any on-site investigations as the building work progressed and did not enter into any discussions with the designer. Discussions with the designer and any required changes to the building consent were managed by Mr [Omitted].
- [18] The Building Consent Authority witnesses described the building site as disorganised and stated that on-site issues were arising because of poor building methodology being adopted. They also stated it was not until the foundations had been completed that they were provided with the Respondent's details as the LBP who was supervising the Restricted Building Work.

[19] The building consent inspections noted the following compliance issues:

- 28 February 2019: *No nibwall for frames to be sat on as per consent, minor amends required. Refer sheet 10*  
*No detail for stairs as previously requested at strip inspection*  
*Slab is 70mm thick in places and starters sat on mesh over 100mm from damp proof layer*  
*Starters need replacing below mesh to ensure coverage*  
*Dpm is not continuous, albeit there is a layer in the strip as discussed with contractor.*  
*Mesh is sat on pipe*  
*There seems to be no sand blinding or hardfill to right hand side of stairs addition*  
*Do not pour until resolved.*  
*It is worth noting contractor became very hostile once being informed a reinspection would be required.*
- 25 June 2019: *Install roof/wall junction flashing*  
*Regrding monotech cladding inspection, saddle flashing required for upper level decking barrier that penetrates wall, see wrap photos.*  
*Remove h1.2 timber batten*  
*Ok to begin cladding, however please provide evidence of junction flashing and stop ends at next inspection, i.e saddles*  
*Provide copy of lbps licence details.*
- 15 December 2019: *look at strip sighted inadequacies with chairs, piped services need housing, pipec services need supporting in slab area.*  
*Discuss with engineer extra steel detail.*  
*No evidence of steel epoxied into existing slab.*
- 18 March 2020: *Plans have now been amended and new builder requested a meeting with inspector to confirm details and how to move forward.*  
  
*Outcome/Site instruction/remedial actions to be taken*  
*The conversion is now to be an entire fire cell separating from first floor. Amended plans highlight the details required.*  
*Builder needs to remove lining from walls (ensure structure is sound i.e as per nzs3604) and install the necessary holddowns as per consent and fire door etc.*  
*Remove timber battens from midfloor and install the Rhondo system.*  
*The steel beam that has been added by previous builder (not on plans) needs engineers input for loading and this has been*

*installed incorrectly with insufficient structural connections and pointloads.*

*Next inspection is to be a site meeting where inspector and builder can ensure compliance is met and inspections can move forward.*

- [20] The Building Consent Authority witnesses referred to the steel beam issue as an example of building work that was not as per the building consent and was not compliant. They stated an amendment to the consent was required and had not been obtained before the work was carried out. They noted that the point loads were inadequate and that its installation had caused a hump in the floor above it. The beam, which is shown in the following photograph, was noted as a safety issue because it was “not fully secured” as it was “not bolted to the existing structure”.



- [21] The Respondent generally described the issues, including the beam, as minor. The Building Consent Authority witnesses disagreed with that assessment.

### **Negligence or Incompetence**

- [22] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard

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<sup>4</sup> *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.

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*<sup>5</sup> test of negligence.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

[23] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

[24] The conduct in this matter that has to be assessed is the Respondent's supervision. He did not carry out any Restricted Building Work, but he did accept that he was the supervisor of it. Supervise is a defined term. Section 7 of the Act defined it as:

*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.*

[25] 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 1992.<sup>12</sup> The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

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<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> 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)

<sup>7</sup> 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”

<sup>8</sup> *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”.

<sup>9</sup> Section 17 of the Building Act 2004

<sup>10</sup> Section 40(1) of the Building Act 2004

<sup>11</sup> *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.

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



*“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.”*

- [26] Based on the above, when looking at supervision, the Board considers various factors, including:
- (a) the type and complexity of the building work to be supervised;
  - (b) the experience of the person(s) being supervised;
  - (c) the supervisor’s experience in working with the person being supervised and their confidence in their abilities;
  - (d) the number of persons or projects being supervised; and
  - (e) the geographic spread of the work being supervised.
- [27] Ultimately, the Board needs to consider whether the work met Building Code requirements and, if not, the level of non-compliance.
- [28] In terms of non-compliance, there was a high degree of non-compliance. They were not, as the Respondent submitted, minor issues, and whilst some may have arisen as a result of the underlying structure being different to what the building consent anticipated, an acceptable process to change the building methodology was not adopted, and the Respondent did not engage in the decision process to make those changes.
- [29] The Board’s finding is that the non-compliance noted by the Building Consent Authority was, in the main, a result of the Respondent’s failure to supervise. Put another way, the Board would expect that, with competent supervision from an LBP, the issues would not or should not have arisen. In this respect, the Board would have expected the Respondent to have reviewed the building consent, issued instructions on how the work was to progress, reviewed the work as it progressed, and, at a minimum, before Building Consent Authority inspections were called for, intervened once non-compliance issues were noted by the Building Consent Authority and engaged with the appropriate parties<sup>13</sup> when changes to the consent, such as the installation of the steel beam, were being considered and before the associated work was undertaken.

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<sup>13</sup> Such as the designer, engineer and Building Consent Authority.

- [30] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct.

Was the conduct serious enough?

- [31] Looking at the Respondent's supervision, he adopted a high-trust model and took a hands-off approach. He did not issue instructions or review the building work as it progressed. He did not attend Building Consent Authority inspections. Nor did he take any action to ensure that compliance issues raised in those inspections were attended to. Rather, he left it to the Building Consent Authority to identify compliance issues and to work with Mr [Omitted] to resolve them.
- [32] The Board's view is that the Respondent failed in his responsibilities to the point of abdicating them. He did not provide the level of supervision that was required for the job or expected of a competent LBP. In this respect, it was particularly poor for the Respondent to rely on the Building Consent Authority rather than supervise properly. The Building Consent Authority's role is to check that the building work has been carried out in accordance with the building consent. The supervising LBP should be checking that the work is in a compliant state before Building Consent Authority inspections are called for. That did not happen.
- [33] Given those factors, the departures from an acceptable standard of conduct were serious. They warranted a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [34] The Respondent has been negligent. He knew what was required as a supervisor but chose a method of supervision that did not meet those requirements.

**Contrary to a Building Consent**

- [35] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.<sup>14</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>15</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>16</sup> Inspections ensure independent verification that the building consent is being complied with.
- [36] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.<sup>17</sup> The Board does, however, consider that the seriousness of the conduct

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<sup>14</sup> Section 49 of the Act

<sup>15</sup> Section 40 of the Act

<sup>16</sup> Section 222 of the Act

<sup>17</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>18</sup> If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[37] The Building Consent Authority inspections showed that substantial amounts of the work did not comply with the building consent.

Was the conduct serious enough?

[38] The Respondent, as the supervising LBP, had a duty to ensure that the work was carried out in accordance with the consent. The departures came about as a result of him not supervising the work and, as noted above, the departures were serious. Further, the Respondent did not engage when those changes occurred or take any action as a result. Because of those factors, the Board found that the conduct was serious enough.

Has the Respondent breached section 317(1)(d) of the Act?

[39] The Respondent supervised building work that did not comply with the building consent.

[40] The Board does note the commonality between the findings under section 317(1)(b) and 317(1)(d) of the Act. It will take that into account when considering the appropriate penalty to impose.

**Failure to Provide a record of work**

[41] An LBP must provide a record of work for any Restricted Building Work that they have carried out or supervised to the owner and the Territorial Authority on completion of their Restricted Building Work.<sup>19</sup>

[42] There is a statutory requirement under section 88(1) of the Building Act 2004 for an LBP to provide a record of work to the owner and the Territorial Authority on completion of Restricted Building Work<sup>20</sup> unless there is a good reason for it not to be provided.<sup>21</sup>

Did the Respondent carry out or supervise Restricted Building Work?

[43] The Respondent accepted that he was supervising the Restricted Building Work. It follows that he had an obligation to provide a record of work for it on completion.

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<sup>18</sup> *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".

<sup>19</sup> Section 88(1) of the Act.

<sup>20</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>21</sup> Section 317(1)(da)(ii) of the Act

Was the Restricted Building Work complete?

[44] The Restricted Building Work came to an end as a result of Mr [Omitted]'s engagement on the build being terminated in March 2020. Another contractor was engaged. As a result, the Respondent would not have been to carry out or supervise any further Restricted Building Work. As such, completion occurred in March 2020. That was when a record of work was due.

Has the Respondent provided a record of work?

[45] The Respondent completed a record of work dated 19 December 2019. He gave it to Mr [Omitted]. Mr [Omitted] retained it and did not pass it on to the owner or the Territorial Authority. As such, the Respondent did not provide a record of work as per the obligations in section 88(1) of the Act.

Was there a good reason for the Respondent to withhold his record of work?

[46] The Respondent stated that he was not aware of the requirement to provide a record of work to the owner and the Territorial Authority. He thought he had fulfilled his duty by providing it to the main contractor.

[47] Whilst it may be common practice in some quarters of the building industry for records of work to be provided to main contractors, it is a practice that carries with it the risk that the record of work will not be passed on to the required recipients, the owner and the territorial authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If the main contractor does not pass a record of work on to the final recipients, it is the author of the record of work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation. It is also to be noted whilst, at times, a Respondent may not immediately know who the owner is, there are ways and means of ascertaining such details<sup>22</sup> and that there should be no impediments to a record of work being provided to a Territorial Authority.

Did the Respondent fail to provide a record of work?

[48] The Respondent has failed to provide a record of work on completion of restricted building work.

**Board's Decisions**

[49] The Respondent has breached sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act, and should be disciplined.

**Penalty, Costs and Publication**

[50] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty,

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<sup>22</sup> Ownership details of land are available on public registers.

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

[51] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

[52] The Board has the discretion to impose a range of penalties.<sup>iii</sup> 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.<sup>23</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>24</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>25</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>26</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>27</sup>
- (d) penalising wrongdoing;<sup>28</sup> and
- (e) rehabilitation (where appropriate).<sup>29</sup>

[53] 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 cases<sup>30</sup> and applying the least restrictive penalty available for the particular offending.<sup>31</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>32</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>33</sup>

[54] 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.<sup>34</sup>

[55] In this matter, the Board adopted a starting point of a fine of \$3,000, which the Board felt was appropriate given the nature of the relationship between Mr

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<sup>23</sup> *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]

<sup>24</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>25</sup> Section 3 Building Act

<sup>26</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>27</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>28</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>29</sup> *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

<sup>30</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>31</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>32</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

<sup>34</sup> 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.

[Omitted] and the Respondent and the fact that the Respondent failed to take his supervision responsibilities seriously.

- [56] The Respondent stated that he had learnt from the matter. He assured the Board that the type of conduct investigated would not happen again. Mr [Omitted] is now licensed, and he no longer requires the Respondent's supervision. The Board took that into consideration, along with the provision of a record of work to the wrong person and the fact that he was not paid for his services, and it reduced the fine to \$2,000.

### Costs

- [57] 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 LBPs should not be left to carry the financial burden of an investigation and hearing.<sup>35</sup>
- [58] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>36</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>37</sup>.
- [59] 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.
- [60] 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. That is the Board's scale costs for a half-day hearing. It is considerably less than 50% of actual costs.

### Publication

- [61] 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 LBPs' scheme as is required by the Act,<sup>38</sup> 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.
- [62] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>39</sup> 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

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<sup>35</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>36</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>37</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>38</sup> Refer sections 298, 299 and 301 of the Act

<sup>39</sup> Section 14 of the Act

stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>40</sup>

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

### **Section 318 Order**

[64] 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(I)(iii) of the Act.

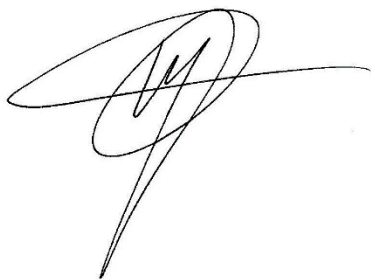
In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

[65] 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**

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

Signed and dated this 26<sup>th</sup> day of January 2024.



**Mr M Orange**  
Presiding Member

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<sup>40</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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**<sup>i</sup> 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.*

**<sup>ii</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (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.”*



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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:*
  - (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.*