

Before the Building Practitioners Board

	BPB Complaint No. CB26196
Licensed Building Practitioner:	Shalen Prasad Lal (the Respondent)
Licence Number:	BP 135220
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	Auckland
Hearing Type:	In Person
Hearing Date:	28 November 2023
Decision Date:	11 December 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
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 disciplinary offences under sections 317(1)(b), (d) and (da)(ii) of the Act.

The Respondent is fined \$3,000 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 and there will be further action taken to publicly notify the Board's decision.

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Summary

- [1] The Respondent was engaged by the homeowner to do a renovation on an existing dwelling.
- [2] The Board needed to consider whether the Respondent had negligently or incompetently carried out and supervised the carrying out of the building work. The Board’s investigation was based on a Council inspection dated 29 November 2022, which identified 21 matters of concern. The Council had escalated the matter to a Senior Inspector, an unusual step, due to the failure to address ongoing issues inspection after inspection.

- [3] The Board found, based on failures to follow the consented drawings and the manufacturer's instructions and out-of-sequence construction causing fundamental mistakes, together with the inadequate level of the Respondent's supervision, that the matters reached the seriousness threshold and that a disciplinary offence had been committed.
- [4] The Board held that the Respondent had negligently carried out and supervised the building work. The Board also found that the Respondent had carried out and supervised building work which did not comply with the building consent, based on the same issues.
- [5] As regards the Record of Work, the Board decided that the Respondent's Restricted Building Work was complete at the latest when his contract was terminated in February 2023. As at the date of the hearing, he had not provided a Record of Work. The Respondent's explanation that he considered the work was incomplete was not a "good reason" for failing to provide a Record of Work. As such, the Board found that the Respondent had committed the offence of failing to provide a Record of Work on completion of the Restricted Building Work.
- [6] The Board decided that the Respondent would be fined \$3,000 and ordered to pay costs of \$3,500. The decision is to be published in Codewords with the Respondent being named in that publication.

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 3171(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to Restricted Building Work that he is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) of the Act with a Record of Work, on completion of the Restricted Building Work, in accordance with section 88(1) of the Act contrary to section

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.

317(1)(da)(ii) of the Act, noting that if the Respondent's work was removed or replaced, that a Record of Work may not have been required.

- [9] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, it would be inquiring into the issues noted in a building inspection dated 29 November 2022 and, in particular, those notated as "items to be sighted at next inspection" and numbered 1 to 21.

Evidence

- [10] 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.
- [11] The Respondent was engaged to renovate an existing dwelling. This included converting part of an existing building into an attached two-bedroom unit, adding bedrooms above an existing swimming pool and converting a basement into a rumpus, study, and kitchen. The Respondent both carried out and supervised this building work. His supervision was of two hammer hands of about 5 years experience each, a second-year and a third-year apprentice.
- [12] The Respondent clarified that some of the cavity battens were installed by a separate contractor engaged by the Complainant. The James Hardie Axon panels were also installed by a separate subcontractor - Mr [OMITTED] - under the Respondent's supervision. Mr [OMITTED] was summonsed to give evidence but did not attend or explain his non-attendance, although the Respondent advised that he was aware that Mr [OMITTED] was not going to attend the hearing.
- [13] The Respondent was carrying out building work and supervising two other sites at the same time as this project. He had different crews on the other two sites and said that he was full-time at this job up to the framing stage and then spent 3-4 hours at each job.
- [14] The Complainant homeowner disputed this level of attendance on site and said the Respondent was only full-time for the first month during demolition and then was on site about 2 days a week or was not turning up at all. The homeowner was living on site. The Respondent refuted this allocation of time spent and said that in respect of the 21 items the Board is focussing on in this hearing, he was in attendance on-site for all of them.
- [15] Mr [OMITTED] gave evidence that he assisted the Respondent with paperwork and liaising with the architect. He holds a Diploma in Civil Engineering. He described the project as challenging, with lots of surprises not shown on the drawings, causing a lot of variations. He was off-site and did not do any building work.

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

- [16] Mr [OMITTED] was the Licensed Building Practitioner designer for the project. He gave evidence that he was only involved in the building process once there were delays, and the homeowner was not happy. He liaised with the Respondent to assist to resolve issues identified in the Council inspections and provided further details and instructions to the Respondent. The Respondent confirmed this.
- [17] Two council inspectors attended. Mr [OMITTED] carried out the 29 November 2022 inspection, which formed the subject matter of this hearing. Mr [OMITTED] is a Senior Inspector who was brought in by the Council to try to resolve outstanding issues. Mr [OMITTED] said it was not usual for him to have to become involved. His view was that there was slow progress on issues being identified inspection after inspection.
- [18] The Respondent submitted in answer to these ongoing issues that the reasons for the issues were out of his control.
- [19] The Board then proceeded to address each of the 21 issues identified in the Council inspection of 29 November 2022 with the Council officers, the designer, and then the Respondent.

Negligence or Incompetence

- [20] 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 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.
- [21] In this instance, the Respondent both carried out and supervised the work. In addition to the standard of the workmanship, the Board has to consider the appropriate level of supervision required of the Respondent.

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.

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”.

[22] Supervise is defined in section 7⁹ of the Act. The definition states:

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

(a) is performed competently; and

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

[23] 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 1992¹⁰. 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.”

[24] 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, including:

(a) the type and complexity of the building work to be supervised.

(b) the experience of the person 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.

[25] 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.

⁹ 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.

¹⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Has the Respondent departed from an acceptable standard of conduct?

- [26] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹ as well as the requirement that all building work must comply with the Building Code¹¹ and any building consent issued.¹² The test is an objective one.¹³
- [27] Of the issues identified in the Council inspection of 29 November 2022, 12 were determined by the Board for the reasons detailed below as being matters which did not breach an acceptable standard. These 12 matters fell into four categories.
- [28] The first were issues the Council identified as requiring input from the designer for their resolution. The lack of progress on these was not the Respondent's responsibility. These issues were the glass barrier fixing to the balcony parapet, the barge flashing at the front lower roof to the existing block wall, the concrete barge at the existing masonry roof to Hardiflex cladding, and the PFC exposed at the garage opening (Items 2, 8, 9, and 10 of the Council inspection).
- [29] The second category were issues that, on the evidence presented, did not breach an acceptable standard. Those issues were-
- (a) the Council identified the need for evidence that cavity battens had been installed. At the hearing, the Respondent maintained these had been inspected at the time by Council (which Mr [OMITTED] of the Council denied), but in any event, the Respondent produced a photograph at the hearing which showed the cavity battens in place; and
 - (b) a number of issues related to the roof were caused by a change from a membrane to a metal roof and in this regard the Board was satisfied that the Respondent sought the appropriate design changes from Mr [OMITTED] before the work was done (items 7, 12,13,14 and 15 and 16 of the Council inspection).
- [30] The third category was incomplete work, which the Board accepts would have been attended to by the Respondent had he remained on site to complete the works. This was the incomplete seals at the chased-in flashing to the block wall (item 17 of the Council Inspection).
- [31] The fourth and final category was work the Board accepted was not carried out or supervised by the Respondent, which was the cladding junction horizontal flashing overlap at the corners above the Axon panels under the brick shelf angle that was undertaken by a separate contractor engaged by the homeowner (item 19 of the Council inspection).

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ *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.

- [32] There were, however, nine matters identified in the Council inspection which demonstrated an unacceptable standard of building work and/or supervision by the Respondent.
- [33] In this respect, the Respondent accepted that:
- (a) the timber bevel-back weatherboards with fixings through the laps were contrary to the manufacturer's specifications;
 - (b) weatherboards were installed out of sequence with the flashings, resulting in the cap flashing stopping short of the saddle/weatherboard junction;
 - (c) the fascia board at the lower roof by the front deck was too short, creating a gap between the fascia and the roofing iron;
 - (d) the Axon panels (which were installed by a subcontractor under his supervision) were not installed in accordance with the manufacturer's specifications; and
 - (e) the box corners and beam junction at the rear deck had been constructed out of sequence, resulting in the brick veneer being installed without building wrap in this location (items 1,3,11,18 and 21 of the Council inspection).
- [34] In respect of the fixings to the weatherboards, the Respondent stated that this work was done by a crew who had done this work correctly on other projects, so in this instance he did not check it. The Respondent's explanation for the short fascia board was that it was work still to be completed and was done out of sequence because the flashing was not ready. As regards the Axon panel installation, the Respondent had recognised the work was not acceptable and had asked the subcontractor to rectify it. The Respondent accepted there were weathertightness and vermin issues resulting from the brick veneer installation before the building wrap.
- [35] There were several instances identified by the Council of saddle flashings not being installed in accordance with the consented drawings and not complying with E2/AS1 of the Building Code. These included the saddle flashings to the front balcony deck post with the kick-out saddle uncompleted, the saddle flashing at the parapet to brick veneer cladding with the metal corner flange/flashings not being behind the brick veneer, and the saddle flashing for the Aircon services not being behind the brick veneer (items 4, 5 and 6 of the Council's inspection). In respect of these matters, the Respondent submitted that he had sought further detail from the designer Mr [OMITTED] as the detail required was not in the drawings. The Respondent accepted that he had installed the cladding before the flashings and that this was out of sequence but that Council and Mr [OMITTED] had allowed him to do it that way. These explanations were not accepted by Mr [OMITTED], who pointed to drawings, which, in his submission, contained the necessary details and denied that he had agreed to any out-of-sequence installation. In particular, Mr [OMITTED] said

in respect of the Aircon services that this unit was never meant to be positioned there, and there was no approved detail for such a large penetration.

- [36] Mr [OMITTED]'s evidence was that he was not consulted by the Respondent before work was done and that in respect of all of his design amendments, he was asked to do them after the work was completed. The exception to this, which he acknowledged, was the change from a membrane to a metal roof.
- [37] Mr [OMITTED] reiterated that the reason for the matters being noted on the inspection were that they did not comply with the consented drawings.
- [38] The Council inspection highlighted the lack of weathertightness detail of the wrap, cavity batten, and flashing construction of the rear elevation by the deck stairs and under the slatted deck. Mr [OMITTED] explained that this was noted because the absence of detail on the drawings meant it had been built in a non-compliant manner. The Respondent acknowledged that the deck had been constructed before the flashings were ready, and the work had, therefore, been done out of sequence. Mr [OMITTED] said a minor variation was provided for the changes made on-site (item 20 of the Council's inspection).
- [39] The Board considers that the acknowledged workmanship issues (paragraph 33 above), the failure to follow the consented drawings and manufacturer's installation instructions for the weatherboard and Axon panels, the saddle flashing issues together the areas of out of sequence construction - the brick veneer cladding before the flashings and the deck installation before that are was complete - are matters which depart from an acceptable standard of conduct.
- [40] In addition to the inadequate workmanship, the Respondent is responsible for the supervision of the non-Licensed Building Practitioners in his crew who were doing Restricted Building Work. This supervision was demonstrated to be inadequate by virtue of the evidence of poor workmanship. In particular, the Board notes that the Respondent had no qualified builders on site, was covering 3 building sites as the only Licensed Building Practitioner and his level of attendance on-site at this project was put in question by the conflict in the evidence between the Respondent and the Complainant. On balance, the Board considers the evidence of the Complainant who lived on site as reliable and queried how the Respondent's 3-4 hours each day in attendance at each site worked in practice.

Was the conduct serious enough?

- [41] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.
- [42] Based on the number of significant issues identified by the Council and accepted by the Board, and the consistent out-of-sequence construction which caused fundamental mistakes, 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?

- [43] The Board finds the Respondent's carrying out and supervision of the work departed from an acceptable standard and that he has been negligent. The Board makes this finding by focusing on the failure to follow consented drawings and manufacturer's instructions and out-of-sequence construction. In addition, the level of supervision failed to ensure the work was performed correctly and was in accordance with the Building Code, particularly in relation to the Axon panels and weatherboard installation.
- [44] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent

- [45] 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.¹⁴ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁵ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁶ Inspections ensure independent verification that the building consent is being complied with.
- [46] 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.¹⁷ The Board does, however, consider that the seriousness of the conduct 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.¹⁸ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [47] The weatherboard and Axon panel installation and the saddle flashings in numerous locations were not in accordance with the consented drawings.

Was the conduct serious enough?

- [48] As with the Board's finding under negligence, the departures from the building consent were serious enough to make a finding under section 317(1)(d) of the Act.

¹⁴ Section 49 of the Act

¹⁵ Section 40 of the Act

¹⁶ Section 222 of the Act

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *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".

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

- [49] The Respondent has committed the disciplinary offence under section 317(1)(d) of the Act. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected, and, as such, they will be treated as a single offence when the Board considers penalty.

Failure to Provide a Record of Work

- [50] A Licensed Building Practitioner 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.¹⁹
- [51] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a Record of Work to the owner and the territorial authority on completion of Restricted Building Work²⁰ unless there is a good reason for it not to be provided.²¹

Did the Respondent carry out or supervise Restricted Building Work?

- [52] The Respondent gave evidence that he both carried out and supervised Restricted Building Work.

Was the Restricted Building Work complete?

- [53] The Respondent commenced work on the project on 28 January 2021. From 15 December 2022, no further work was undertaken by the Respondent because the parties were in dispute over a variation claim. The Respondent stated that a Record of Work could not be provided because the work was incomplete.
- [54] The Complainant advised that the contract with the Respondent was terminated on 15 February 2023, and the Respondent confirmed this. On that basis, completion occurred at the latest on 15 February 2023 when the Respondent's engagement in the building work came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further Restricted Building Work.

Has the Respondent provided a Record of Work?

- [55] The Respondent acknowledged at the hearing that a Record of Work had not to date been provided.

Was there a good reason for the Respondent to withhold his Record of Work?

- [56] The reason put forward by the Respondent that the work was incomplete is not acceptable, as once it was clear that the Respondent was not returning to the

¹⁹ Section 88(1) of the Act.

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²¹ Section 317(1)(da)(ii) of the Act

project, and at the latest this was when the contract was terminated, the Record of Work was then due.

[57] At the hearing the Respondent also suggested that he would normally provide the Record of Work at “compliance time”. This, again, is not an acceptable reason for its non-provision as the obligation arises on completion of the Respondent’s Restricted Building Work and not at some time in the future when the Code Compliance Certificate is being applied for. What is more, in this situation where the Respondent is no longer involved in the project, he may not know when the project is at Code Compliance Certificate stage, and it leaves the homeowner having to find the Respondent to seek the Record of Work.

[58] It is noted that the requirement is on the licensed building practitioner to provide a Record of Work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Did the Respondent fail to provide a Record of Work?

[59] The Respondent’s Restricted Building Work was complete in February 2023, and as of the date of the hearing (28 November 2023), he had not provided a Record of Work to the owner or the Territorial Authority. As such, he has failed to meet his statutory obligation to provide a Record of Work.

Board’s Decisions

[60] The Respondent has failed to provide a Record of Work on completion of Restricted Building Work.

Penalty, Costs and Publication

[61] 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.

[62] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[63] 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.²² It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²³

- (a) protection of the public and consideration of the purposes of the Act;²⁴
- (b) deterring other Licensed Building Practitioners from similar offending;²⁵
- (c) setting and enforcing a high standard of conduct for the industry;²⁶
- (d) penalising wrongdoing;²⁷ and
- (e) rehabilitation (where appropriate).²⁸

- [64] 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 cases²⁹ and applying the least restrictive penalty available for the particular offending.³⁰ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³¹ that is consistent with other penalties imposed by the Board for comparable offending.³²
- [65] 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.³³
- [66] The Board has upheld three disciplinary offences against the Respondent. It is noted, however, that for the purposes of penalty, the offences under sections 317(1)(b) and (d) are treated as a single offence.
- [67] The Respondent was offered, at the end of the hearing, the opportunity to provide the Record of Work to the Council and homeowner within a specified time frame. If he did so, the Respondent was advised that this would be taken into consideration in setting a penalty if any disciplinary offences were upheld against him. The Respondent did provide a Record of Work. This was taken into account in determining the penalty by way of a reduction in the fine.
- [68] In this matter, the Board adopted a starting point of a fine of \$4,000 because there were repeated and ongoing failures warranting escalation within the Council system.

²² *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]

²³ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁴ Section 3 Building Act

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

²⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

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

²⁸ *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

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

³³ 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.

The Board has then taken into account the mitigating factor that the designer contributed to the difficulties the Respondent faced through the lack of detail provided in the drawings. A \$500 reduction is appropriate. It has also taken into account the late provision of the Record of Work and a further \$500 reduction has been applied.

[69] Based on the above, the Board has decided that the Respondent is to pay a fine of \$3,000 and that this penalty meets the principle of setting and enforcing a high standard of conduct for the industry.

[70] The Board notes the Complainant's submission that the Respondent's licence should be cancelled as a result of the Board's disciplinary findings. The Board did not consider cancellation as an appropriate penalty as the offending was not at the level of other matters where cancellation was ordered³⁴. In addition, the Board noted that this was a first offence by the Respondent and the building issues raised were restricted to areas which were impacted by design issues.

Costs

[71] 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.³⁵

[72] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁷.

[73] 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.

[74] 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 normal tariff for a half-day in person hearing.

Publication

[75] 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,³⁸ and he will be named in

³⁴ CB26195, CB26138, CB26139 and CB 25992

³⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

³⁷ *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.

³⁸ Refer sections 298, 299 and 301 of the Act

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.

- [76] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁹ 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.⁴⁰
- [77] Based on the above, the Board **will** order further publication in Codewords, and the Respondent is to be named in the publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,000.

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 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 in Codewords with the Respondent being named.

- [79] 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

- [80] 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 **23 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.

³⁹ Section 14 of the Act

⁴⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

[81] 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



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:
- (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.