

Before the Building Practitioners Board

	BPB Complaint No. CB26268
Licensed Building Practitioner:	Gary Howard Fowell (the Respondent)
Licence Number:	BP114343
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	Tauranga
Hearing Type:	In Person
Hearing Date:	18 January 2024
Decision Date:	7 February 2024

Board Members Present:

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

Procedure:

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

Disciplinary Finding:

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

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) or (d) of the Act.

The Respondent is fined \$1,000 and ordered to pay costs of \$1,000. 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 Board investigated three areas. They were, carrying out or supervising building work in a negligent or incompetent manner or in a manner that was contrary to a Building Consent and a failure to provide a Record of Work on completion of Restricted Building Work.

- [2] The only matter upheld was the failure to provide a Record of Work on completion of Restricted Building Work. The Respondent was fined \$1,000 and ordered to pay costs of \$1,000 for the offence, which will be recorded on the public Register for a period of three years.
- [3] The other matters under investigation were not upheld on the basis that they were either not proven or were not serious enough for a disciplinary finding to be made.

The Charges

- [4] 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
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(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 or she 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) 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.
- [6] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, it would be inquiring into the following:
- (a) the quality and compliance of the construction of a deck;
 - (b) whether a Building Consent amendment for a deck was obtained prior to the associated building work being carried out; and
 - (c) the quality and compliance of the construction of floors and, in particular, the levels of those floors.

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

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

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [8] The Respondent, through his company Gary Fowell Builder Limited,⁴ was engaged to build a new residential dwelling for the Complainant. The house was a complex build. The Respondent stated that he did have experience with the type of build undertaken.
- [9] There was some disagreement as to project management roles on site. What was clear to the Board was that the Complainant had a high degree of involvement in the build and that he instructed the design and engineering professionals involved in the build but that they interacted with both the Complainant and the Respondent during the build.
- [10] The Respondent's role during the build was as the supervising Licensed Building Practitioner. He did not carry out any of the work. He had other builds underway at the time and split his time between sites.
- [11] The Respondent had two qualified builders, an apprentice and a labourer on site carrying out the build. He stated that he had a daily pre-start meeting with his staff, during which he would plan the work to be carried out. He stated he also went to the site once a week and that he would check progress as well as the quality and compliance of the work during those visits.
- [12] The Respondent did not complete the build. In September 2021, a dispute resulted in the contract for services being terminated.

Negligence or Incompetence

- [13] There was no evidence of incompetence, which is the lack of skill or knowledge to carry out or supervise the building work. As such, the conduct was considered under the alternative of negligence.
- [14] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ 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*⁶ test of negligence.⁷ 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.⁸ A threshold test applies to both. Even if

⁴ The Respondent is one of two shareholders and directors of the company.

⁵ *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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ 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)

⁸ 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"

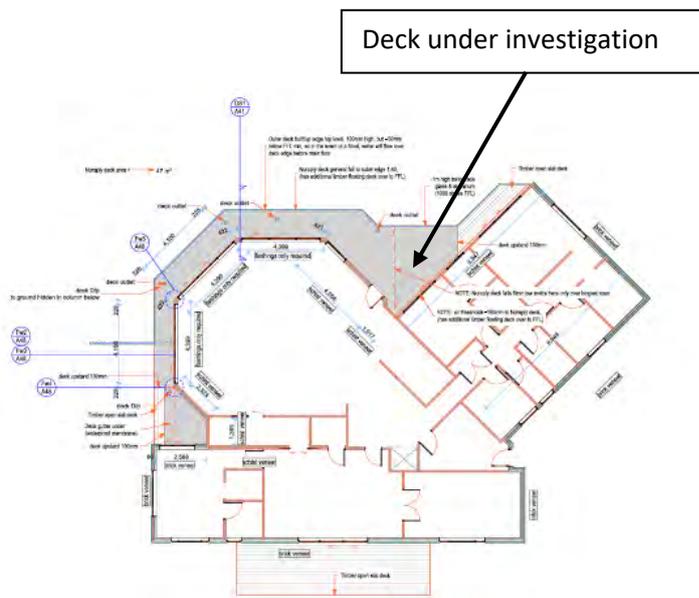
the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [15] 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 Code¹⁰ and any Building Consent issued.¹¹ The test is an objective one.¹²
- [16] There were three issues that the Board was investigating: the quality and compliance of the construction of a deck, whether a Building Consent amendment for a deck was obtained prior to the associated building work being carried out, and the quality and compliance of the construction of floors and, in particular, the levels of those floors.

Deck and deck amendment

- [17] The deck complained about is shown in the following plan. The issue being investigated was whether deck falls were correct. What was built was not what was consented.



- [18] The change came about as a result of required falls not being able to be obtained using the construction methodology that had been consented. A report obtained by

⁹ *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”.

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

the Complainant from a Registered Building Surveyor¹³ indicated that the change came about because: “*Beam height installed in error consequently, deck was constructed incorrectly.*” Evidence was also heard that the owner wanted one downpipe from the edge of the deck removed. The designer and the owner (the Complainant) were consulted prior to the change to the method of construction being made, and the designer corresponded with the owner about the change.

- [19] On 22 October 2021, the designer filed what was described as a “minor onsite variation”. In it, he stated:

Changes as described as below;

2, Due to construction onsite, we have revised the deck section on A41, Note [OMITTED] has already inspected this deck and requested further asbuilt details. New deck balustrades have been installed & PS3 attached.

- [20] The minor variation came after the associated building work had been completed.
- [21] Once a Building Consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the Building Consent. The extent of the change to the Building Consent dictates the appropriate method to be used. In this instance, the Building Consent Authority accepted a minor variation.
- [22] Section 45A provides a more flexible approach to changes to a Building Consent for minor variations. Notably, it states:

45A Minor variations to Building Consents

- (1) *An application for a minor variation to a Building Consent—*
- (a) *is not required to be made in the prescribed form; but*
 - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A Building Consent Authority that grants a minor variation—*
- (a) *must record the minor variation in writing; but*
 - (b) *is not required to issue an amended Building Consent.*

- [23] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a Building Consent, there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the Building Consent still applies. Most importantly, the Building

¹³ The surveyor’s report was submitted after the Board had made its regulation 10 decision and had set the charges.

Consent Authority retains a discretion to refuse a minor variation.¹⁴ To aid the process of applying for a minor variation, most Building Consent authorities have a minor variation application form.

- [24] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect, it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought.¹⁵
- [25] In this instance, whilst a minor variation had not been applied for prior to the work being completed, the owner and the designer had been consulted, and the risk that the work would not be compliant or approved was reduced. Nonetheless, a Licensed Building Practitioner should know and apply the correct process, and because the Respondent did not, his conduct has fallen below an acceptable standard. The pre-construction consultation is, however, a factor that will be taken into consideration as regards the seriousness of the conduct.
- [26] Turning to the complaints about the completed deck, the Complainant alleged that, following construction, water pools on the deck. His view was that the joists under the deck were too high. The Respondent stated that the deck levels were established with a laser and that they were correct. He disputed the allegation. The following photograph of ponding was provided by the Complainant.



- [27] The Building Consent file recorded that, on 27 April 2021, after the deck had been constructed and a membrane laid, the deck failed an inspection with the notes stating: “**E2: External Moisture:** Gradient and cross falls non compliant”. A subsequent inspection recorded as 7 July 2021 noted: “**DECK & DP FLOOD TEST AND UPPER LEVEL ROOF INTERNAL DP NORTH ELEVATION FLOOD TEST**”.
- [28] The Board did not receive any evidence that established, to the required evidentiary standard, the actual cause of the alleged ponding. The extent and seriousness of the

¹⁴ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of Building Consents

¹⁵ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

- [31] A report obtained from a Registered Building Surveyor noted a: “*variation of 19m,m over 4m when reference back to data height at top of stairs*”.
- [32] Various theories were advanced regarding the issue, including incorrect finished floor level set-out and portal beams being 20mm too high. The Complainant submitted:

During the erection of the first portals under the lounge area, I saw the top of the portals were 20mm too high. I mentioned this to several of your staff, the solution being to save cutting the steel post between bedroom 4 and the garage, to cut and reduce the level of the concrete under the post. I knew the height of the beams would have an impact on the first floor above, (a) with the 20mm difference between the concrete floor level and the ply floor level and (b) an impact on the 10mm gap between the steel and the ply flooring (refer to plan A29). As a result of this your staff spent an extraordinary amount of time (to the detriment of the integrity of the ply) rebating at least 10mm to clear the steel. (The obvious observation was, a calculation was never made to ascertain the difference between the first floor concrete datum and the top of the steel portal utilizing a laser.) In one instance I asked them to remove a sheet after fixing, as it had not been rebated sufficiently.

- [33] The Respondent noted that the floors were constructed to the set out provided by a surveyor who checked the levels prior to the floor being poured, that he checked the steel work levels, which were packed on a 20mm dry pack base, a rebate was provided for the installation of the diaphragm, and that the concrete was placed by a subcontractor who used a laser to establish the finished floor level. He noted that the issue may have arisen from slumping during the concrete pour or shrinkage and that there was a 15mm pre-camber on the steel beam.
- [34] The construction of the floor was reviewed by a structural engineer who produced a Construction Review Producer Statement (PS4) dated 5 May 2023. A Site Visit Report dated 9 December 2020 noted:

Elements of Construction Observed

- 1. Structural steel beams & connections*
- 2. Base plate connections*
- 3. Floor diaphragm & struct fixings*
- 4. Portal frames and connections*

Comments/Events:

All elements observed are as per Building Consent documents.

- [35] The structural portal steep frames were supplied and installed by a fabricator who provided a construction Producer Statement (PS3) dated 23 March 2021. The Respondent also provided a PS3 for the foundations and one for piles.

[36] The Board finds that there were issues with the floor levels as noted by the Building Surveyor but finds that, as there were multiple building professionals involved, including a surveyor, an engineer, a steel fabricator and a concrete placer, it was reasonable for the Respondent to rely on the assurances they provided and that it would be unfair to single the Respondent out as bearing responsibility for the issue.

Was the conduct serious enough?

[37] The only finding that the Respondent's conduct fell below an acceptable standard is in relation to the failure to ensure a minor variation was in place before a deck was constructed in a manner that differed from the Building Consent. As noted, the owner and the designer were aware of the intended change, and the designer obtained a minor variation after the work had been completed. In those circumstances, the Board finds that the conduct was not serious enough. The Respondent is, however, cautioned that he should, in future, ensure the correct process is followed and that the Building Consent Authority approves of the change before it is carried out.

Has the Respondent been negligent or incompetent?

[38] The Respondent has not been negligent or incompetent.

Contrary to a Building Consent

[39] 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.¹⁷ Once issued, there is a requirement that the building work be carried out in accordance with the Building Consent.¹⁸ Building Consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁹ Inspections ensure independent verification that the Building Consent is being complied with.

[40] 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.²⁰ 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.²¹ If it does not, then a disciplinary finding cannot be made.

¹⁷ Section 49 of the Act

¹⁸ Section 40 of the Act

¹⁹ Section 222 of the Act

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

²¹ *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".

Was there building work that differed from the Building Consent?

- [41] On a strict interpretation, the change to the method of construction of the deck prior to a minor variation being granted meant that building work had, at the time of construction, been carried out in a manner that was contrary to the Building Consent.

Was the conduct serious enough?

- [42] The Board has found that the conduct was not serious enough to make a finding of negligence. The same applies to building contrary to a Building Consent. The conduct is not serious enough to warrant a disciplinary finding.

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

- [43] The Respondent has not breached section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [44] 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.²²

- [45] 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 Work²³ unless there is a good reason for it not to be provided.²⁴

Did the Respondent carry out or supervise Restricted Building Work?

- [46] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a Building Consent. His work included building work on the primary structure and external moisture management systems of a residential dwelling, both of which are Restricted Building Work.²⁵

Was the Restricted Building Work complete?

- [47] The Respondent's Restricted Building Work came to an end in September 2021 when the contract was terminated as, after that date, he would not be able to carry out or supervise any further Restricted Building Work.

Has the Respondent provided a Record of Work?

- [48] The Respondent filled out a Record of Work dated 30 September 2021. He stated that he filled it out in December 2021 and that he held it for future provision. He had not provided it to the owner (the Complainant) or the Territorial Authority when the complaint was made on 20 April 2023. The Record of Work was given to the Board's

²² Section 88(1) of the Act.

²³ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁴ Section 317(1)(da)(ii) of the Act

²⁵ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Investigator on 28 July 2023 as part of the investigation. A copy was provided to the Territorial Authority in September 2023.

- [49] As completion occurred in September 2021 and a Record of Work was not provided until July 2023, and then only in response to a complaint, the Board finds that the Respondent did not provide a Record of Work on completion of Restricted Building Work.

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

- [50] In his initial response to the complaint, the Respondent stated that he was waiting for the final invoice to be paid. The provision of a Record of Work is a statutory requirement, not a negotiable term of a contract. Its provision cannot be differed for contractual reasons or because of contractual disputes. As such, payment issues are not a good reason.
- [51] The Respondent also made reference, at the hearing, to there having been no requests for a Record of Work. The Respondent should note that the requirement is on the Licensed Building Practitioner to provide a Record of Work, not on the owner or Territorial Authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Did the Respondent fail to provide a Record of Work?

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

Board's Decisions

- [53] The Respondent has breached section 317(1)(da)(ii) of the Act.
- [54] The Respondent has not breached sections 317(1)(b) or (d) of the Act.

Penalty, Costs and Publication

- [55] 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.
- [56] The Board heard evidence relevant to penalty, costs, and publication during the hearing 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

- [57] 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.²⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁷

- (a) protection of the public and consideration of the purposes of the Act;²⁸
- (b) deterring other Licensed Building Practitioners from similar offending;²⁹
- (c) setting and enforcing a high standard of conduct for the industry;³⁰
- (d) penalising wrongdoing;³¹ and
- (e) rehabilitation (where appropriate).³²

[58] 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 cases³³ and applying the least restrictive penalty available for the particular offending.³⁴ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁵ that is consistent with other penalties imposed by the Board for comparable offending.³⁶

[59] 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.³⁷

[60] Record of Work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a Record of Work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. The Respondent has, as part of the investigation, provided a Record of Work. Whilst it is late, the Board has taken its provision into account as a mitigating factor. The fine is reduced by \$500 to \$1,000.

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

²⁶ *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]

²⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁸ Section 3 Building Act

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

³⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³² *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

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

³⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁷ 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.

that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁸

- [62] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴⁰.
- [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 and a half-day hearing was held. Adjustments are then made.
- [64] The Board's scale costs for a matter of this nature is \$3,500. However, the only finding was one of a failure to provide a Record of Work. On that basis, the Board has reduced the fine to \$1,000.

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,⁴¹ 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 1990.⁴² 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.⁴³
- [67] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

³⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴⁰ *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.

⁴¹ Refer sections 298, 299 and 301 of the Act

⁴² Section 14 of the Act

⁴³ *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 \$1,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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, the Respondent will be named in this decision, which will be published 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.

Submissions on Penalty, Costs and Publication

[70] 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 **26 March 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 5th day of March 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:*

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- (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.*