

Before the Building Practitioners Board

	BPB Complaint No. CB26219
Licensed Building Practitioner:	Surendra Prasad (the Respondent)
Licence Number:	BP127832
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:	17 January 2024
Decision Date:	1 February 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Procedure:

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

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and (h) of the Act.

The Respondent **has** breached clauses 15, 19 and 20 of the Code of Ethics and has committed a disciplinary offence under section 317(1)(g) of the Act.

The Respondent is censured and fined \$2,500 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.

Contents

Summary	2
The Charges	3
Evidence	4
Negligence or Incompetence	5
Has the Respondent departed from an acceptable standard of conduct?	5
<i>Building Consent</i>	Error! Bookmark not defined.
<i>Building Work</i>	8
Was the conduct serious enough?.....	10
Has the Respondent been negligent or incompetent?.....	11
Code of Ethics	11
The Code within a disciplinary context.....	11
The Code provisions under investigation	12
Clauses 7 and 10 – Health and safety and complying with the Law	13
Clause 17 – Acting in the client’s best interests	14
Clauses 15, 19 and 20	14
Was the conduct serious enough?.....	15
Has the Respondent breached the Code of Ethics?.....	15
Misrepresentation or Outside of Competence	15
Has the Respondent carried out building work outside of his competence?.....	16
Board Decision	16
Penalty, Costs and Publication	16
Penalty	17
Costs.....	18
Publication	18
Section 318 Order	19
Submissions on Penalty, Costs and Publication	19
Right of Appeal	19

Summary

- [1] The Board was investigating whether the Respondent had carried out or supervised building work in a negligent or incompetent manner, had breached the Code of Ethics, and had carried out or supervised work outside of his competence.

- [2] The Board found that the Respondent had:
- (a) conducted himself in a negligent manner when he failed to obtain a Building Consent for a change of roofing from light-weight to heavy-weight and had negligently supervised building work that was not in accordance with clauses B2 and E2 of the Building Code;
 - (b) breached clauses 15, 19 and 20 of the Code of Ethics. The finding was made on the basis that the Respondent had not been accountable for his building work, had not behaved professionally and had not acted in good faith when disputes arose; and
 - (c) breached section 314B(b) of the Act when he carried out building work (design work) in relation to a carport that he was not competent to carry out.
- [3] The Board censured the Respondent for the Code of Ethics breach. The censure was ordered on the basis that the Code is new and the Board is taking an educative approach toward it. The Board fined the Respondent \$2,500 for the negligence and working outside of his competence findings and ordered that he pay costs of \$3,500. A record of the disciplinary findings will be recorded on the public Register for a period of three years, and a summary of the matter will be published. The Respondent will be named in that summary.

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] 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 THAT, he may have:
 - (i) carried out or supervised building work that required a Building Consent without first ensuring that one was in place in respect of the replacement of a light-weight roof with a heavy roof and/or the construction of a carport; and
 - (ii) failed to carry out or supervise the building work in a quality and compliant manner in respect of the issues raised in the reports of [OMITTED] of [OMITTED] and [OMITTED] of [OMITTED].

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.

- (b) breached the code of ethics prescribed under [section 314A](#) of the Act contrary to section 317(1)(g) of the Act, IN THAT, he may have breached one or more of the following provisions of the Code:
- 7 You must take responsibility for health and safety: in respect of the management and treatment of asbestos, the failure to use fencing, scaffolding and/or edge protection;
 - 10 You must comply with the law: in respect of the management and treatment of asbestos, the failure to use fencing, scaffolding and/or edge protection;
 - 15 You must be accountable: in respect of his interactions and dealings with the Complainant;
 - 17 You must act in your client's interests: in respect of the manner in which the building work was carried out;
 - 19 You must behave professionally: in respect of his interactions and dealings with the Complainant; and
 - 20 You must act in good faith during dispute resolution: in respect of his interactions and dealings with the Complainant.
- (c) breached section 314B of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out design work in relation to a carport that was not within his competence to carry out, noting that work completed may not have been in accordance with the Building Code.

Evidence

- [6] 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.
- [7] The Respondent was engaged to alter an existing dwelling and to construct a carport. Building Consents were not sought for either aspect of the work. The Respondent started but did not complete the work. The Respondent claimed it was not completed because of weather disruptions, issues with the supply of materials, an injury he suffered and an inability to find contractors who could do the work. The Complainant's position was that the Respondent made constant promises that were not kept and that he had no real intention of completing the work, which was originally estimated at six weeks of work but was still not completed after six months. The Complainants engaged others to complete the alteration to the house. The carport, which the complainants claimed was structurally unsound, was removed prior to it being completed.

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

- [8] The Respondent did not have any plans for the building work. Rather, he used his knowledge and experience to determine how the building work would be completed.
- [9] The actual work was carried out by contractors engaged by the Respondent. He did not do any physical work and stated, at the time, suffering from an injury that precluded him from doing any physical work. He did project manage the build and supply materials and generally instructed how the work was to be completed. He stated that he was checking the work as it progressed.
- [10] The Respondent was provided with an opportunity to submit further evidence after the completion of the hearing. He did not file anything further despite being given two extensions to do so.

Negligence or Incompetence

- [11] 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.

Has the Respondent departed from an acceptable standard of conduct?

- [12] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any Building Consent issued.¹⁰ The test is an objective one.¹¹

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”.

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

- [13] There were two issues that were being investigated. The first was whether a Building Consent was required for some of the work, and the second was the quality and compliance of the work that had been completed.

Building Consent

- [14] There were two aspects of the building work that the Board gave notice that it would investigate as regards Building Consents. One was the construction of a carport. The Board received evidence after the hearing from the Complainants that the carport was 28.5 m². Clause 18A of Schedule 1 of the Act provides an exemption for carports that exceed 20, but not 40 square metres, provided any design or construction work is carried out or supervised by a Licensed Building Practitioner.¹² On that basis, the exemption was available.
- [15] The second aspect was the alteration of the existing roof line of the dwelling, which stepped at the garage opening, to create a continuous roofing line. Prior to the alteration, the area above the garage opening was covered with a light-weight see-through roofing material. A new structure was built over that area, and heavy-weight roofing was installed (concrete tiles, which was the roofing material used on the rest of the roof). The following photograph shows the area. The dark tiles shown replaced the light-weight roofing material.



- [16] The Respondent submitted that the work on the roof line came within the Building Consent exemptions in Schedule 1 of the Act. He also stated that he had been given advice by his architect that a Building Consent was not required. The Respondent was provided with an opportunity to file evidence to substantiate that claim. No evidence was filed.

¹² The clause uses the phrase “design or construction work”. As such, there are alternatives. Either the design or the construction work must be carried out or supervised by a Licensed Building Practitioner, not both.

[17] Schedule 1 provides multiple exemptions. The only one that could apply is Clause 1, General repair, maintenance, and replacement. It provides:

1 General repair, maintenance, and replacement

- (1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*
- (2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*
 - (a) *a comparable component or assembly is used; and*
 - (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
 - (a) *complete or substantial replacement of a specified system; or*
 - (b) *complete or substantial replacement of any component or assembly contributing to the building’s structural behaviour or fire-safety properties; or*
 - (c) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
 - (d) *sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

[18] Clause 1 is generally referred to as “like for like” replacement in that a comparable component needs to be installed in the same position. The building work on the roof line was not like for like. A light-weight material was replaced with a heavy-weight one. A Building Consent was required. This finding accords with the Ministry of Business Innovation and Employment Schedule 1 Guidance Documentation, under clause 1 guidance, notes that a Building Consent would be required for:

Replacing old corrugated iron roofing with new concrete tiles. The new heavier tiles will impose an increased load on the existing structure which is likely to substantially affect the building’s structural behaviour.

[19] The question for the Board is whether, by failing to obtain a Building Consent prior to the building being located on the site, the Respondent has departed from an acceptable standard of conduct.

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

¹³ [2015] NZHC 3299 [18 December 2015]

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

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

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

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

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

[23] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a Licensed Building Practitioner, have a duty to ensure a Building Consent (or an amended Building Consent) is in place prior to building work being carried out. It follows that the Respondent, in failing to ensure a Building Consent was in place for the change of roofing from light to heavy-weight, has fallen below the standards of care expected of a Licensed Building Practitioner.

Building Work

[24] The building work issues under investigation were those noted in two reports filed by the Complainant. Both report writers appeared and gave evidence, as did the subcontractor who carried out the work and a roofer who carried out remedial work. The complainant also provided videos, which included a video of the carport structure showing excessive lateral movement when an external force was applied.

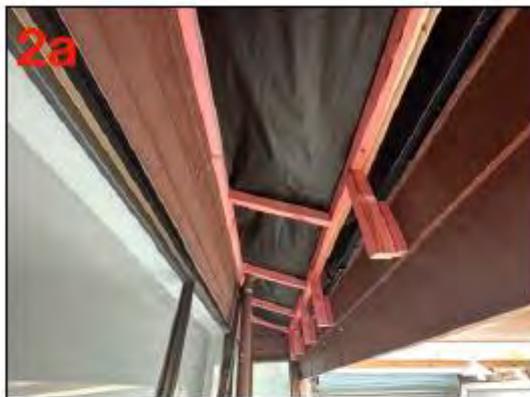
[25] As noted, the work was not carried out under a Building Consent. Under section 17 of the Act, all building work must comply with the Building Code, irrespective of whether consent is issued.

[26] The reports noted issues with the way in which structural and external moisture management systems had been built, noting that many aspects did not meet Building Code requirements (B2 and E2 of the Building Code). Those issues, excluding incomplete work, included:

- (a) the use of roofing materials on a 1.5-degree pitch roof that was only suitable for a 6-degree and above pitch roof;
- (b) no fold-ups at the top of roofing iron;
- (c) no stop ends on translucent roofing;

- (d) missing flashings;
- (e) incorrectly folded flashings;
- (f) a flashing with the incorrect surface exposed to the elements;
- (g) no fall on a cap flashing;
- (h) insufficient cover between roofing material and gutters;
- (i) attaching fascia to extension blocks;
- (j) inadequate roofing structure for a heavy-weight roof;
- (k) failure to install window wrap and sill trays for external joinery;
- (l) no stop ends on external joinery;
- (m) failure to prime or seal cut timber;
- (n) framing and cladding in direct contact with ground surfaces (concrete);
- (o) inadequate structural framing for a carport.

[27] The following photographs, taken by one of the report writers, show some of the structural issues with the building work undertaken to support the heavy-weight roof. They are indicative of the compliance issues noted and show building work that is well short of compliance with clause B2 of the Building Code.



- [28] The Respondent put forward various reasons for why the building work was completed in the way that it was and submitted that the work either complied with the Building Code, was temporary or was incomplete. With respect to the non-compliant work, such as that shown above, he claimed that it would have been replaced. That claim was not accepted because it would not have been logical, efficient or practical to deconstruct and reconstruct the building work, especially as a heavy-weight roof had been installed above it.
- [29] The Board, which includes persons with extensive knowledge and experience in building, found that the building work listed above in paragraph [26] was completed in a substandard manner and that they would not have achieved compliance with clauses B2 or E2 of the Building Code. The finding was also made on the basis of the strong evidence received from three credible witnesses (the report writers and the remedial roofer).

Was the conduct serious enough?

- [30] The Respondent did not carry out the work. He planned, directed and supervised it. Because a Building Consent was not obtained, the building work was not Restricted Building Work, which must be supervised by a Licensed Building Practitioner. However, as noted, the Respondent took on a supervision role. He stated he was directing how the work was to be carried out and was checking it as it progressed. Despite those claims, significant quality and compliance issues arose.
- [31] Supervision is defined in section 7 of the Act.¹⁴ The Board has previously interpreted the definition in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of Licensed Building Practitioners. On that basis, the Board has found that the definition includes work carried out without a Building Consent.
- [32] The fundamental requirement in the section 7 definition i that the supervision of the building work is “*sufficient to ensure it is performed competently*” applies to all building work carried out under the supervision of a Licensed Building Practitioner.
- [33] The Board takes various factors into account when considering supervision, including the type and complexity of the building work to be supervised and the experience of the person being supervised. Ultimately, however, the Board needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance. In this matter, the level of non-compliance was high.

¹⁴ 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.

- [34] 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 1992¹⁵. 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.”

- [35] Looking at the Respondent’s conduct, whilst he stated that he was checking the work, the Board finds that he was not adequately fulfilling his duties as a supervisor, that his conduct has fallen well below the expected standard, and that a disciplinary finding should be made.

Has the Respondent been negligent or incompetent?

- [36] The Respondent has supervised building work in a negligent manner.

Code of Ethics

The Code within a disciplinary context

- [37] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.¹⁶ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes¹⁷ for some time, and the Board has taken guidance from decisions made in other regimes.
- [38] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [39] The disciplinary provision in the Act simply states, “has breached the code of ethics”. The Board has taken guidance from other disciplinary regimes and, in particular, that the protection of the public is the central focus.¹⁸

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁶ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

¹⁷ Lawyers, Engineers, Architects and Accountants, for example

¹⁸ *Z v Dental Complaints assessment Committee* [2009] 1 NZLR 1 at [128], McGrath J.

- [40] Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,¹⁹ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

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

- [41] The Board also notes that the courts have applied a threshold test to disciplinary matters, and the Board has applied those tests.

The Code provisions under investigation

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

7 You must take responsibility for health and safety

While carrying out or supervising building work you must—

- (a) take reasonable care of your own health and safety; and*
- (b) take reasonable care to avoid doing things that might adversely affect the health and safety of others; and*
- (c) take all reasonable steps to—*
 - (i) identify risks to health and safety; and*
 - (ii) eliminate or manage those risks in an appropriate manner.*

10 You must comply with the law

- (1) When you carry out or supervise building work, you must ensure that the building work complies with the following:*
 - (a) the Building Act 2004;*
 - (b) the building code set out in Schedule 1 of the Building Regulations 1992;*
 - (c) the Building (Residential Consumer Rights and Remedies) Regulations 2014;*
 - (d) any relevant requirements in other legislation or bylaws.*
- (2) You must also ensure that building work that is carried out by you or supervised by you, is carried out or supervised in accordance with—*

¹⁹ [1992] 1 NZLR 720 at 724

- (a) *the Resource Management Act 1991:*
- (b) *the Hazardous Substances and New Organisms Act 1996:*
- (c) *the Construction Contracts Act 2002:*
- (d) *the Fair Trading Act 1986:*
- (e) *the Consumer Guarantees Act 1993:*
- (f) *the Health and Safety at Work Act 2015:*
- (g) *any relevant legislation made under those Acts.*

15 You must be accountable

If building work carried out by you, or someone under your supervision, is or could be defective you must—

- (a) *take all reasonable steps to communicate with your client about the problem in a way that—*
 - (i) *is honest; and*
 - (ii) *is responsive; and*
- (b) *act with integrity in relation to the resolution of the problem.*

17 You must act in your client's interests

You must take all reasonable steps to ensure that building work you carry out or supervise is carried out or supervised to an acceptable standard.

19 You must behave professionally

In carrying out or supervising building work, you must act professionally and treat your clients and colleagues with respect.

20 You must act in good faith during dispute resolution

If there is a dispute involving you and your client about building work (including, without limitation, the price, quality, or timing of the building work or your or the client's actions), you must—

- (a) *attempt to resolve the dispute with your client; and*
- (b) *ensure that you make yourself available to discuss the dispute with the client so that all parties (including you) have the opportunity to express their views and be heard; and*
- (c) *ensure that at all times you act in a professional and respectful manner towards your client.*

Clauses 7 and 10 – Health and safety and complying with the Law

[43] Clause 7 relates to health and safety. The specific matters being investigated were the management and treatment of asbestos, the failure to use fencing, scaffolding and/or edge protection.

- [44] The Board received evidence that the soffit that was removed did not contain asbestos. On that basis, the clause has not been breached.
- [45] There was no evidence that fencing had been erected or any other means of isolating the work from the public had been used. Mobile scaffolding was used, but not edge protection. No safety harnesses were used when working at heights. The roof was on a single-storey building, and it was not a high pitch roof.
- [46] The safety processes and systems on site did not accord with industry practice, particularly with respect to working at heights. The extent of the departures, however, whilst concerning, were not serious enough to warrant a Code of Ethics breach finding. The Respondent is, however, cautioned. The building industry has an unacceptably high level of workplace injuries. Lax health and safety practices only add to the risk of such injuries. The Respondent should be implementing site-specific safety plans that align with industry best practices and ensure people's safety.

Clause 17 – Acting in the client's best interests

- [47] The specific allegation under investigation was "the manner in which the building work was carried out". Having decided that the Respondent carried out building work in a negligent manner, it has decided that it is not necessary to further investigate the Respondent's conduct under clause 17 of the Code. In short, the conduct has been dealt with.

Clauses 15, 19 and 20

- [48] Clause 15 comes within the "take responsibility for your actions" principle in the Code. Clauses 19 and 20 relate to the "behave professionally" principle. In terms of the conduct under investigation, the Board gave notice that it was the Respondent's interactions and dealings with the Complainants. As there are similarities in what is being investigated and in the respective Code provisions, the Board will consider the clauses as a group.
- [49] The Complainants provided a summary of their interactions with the Respondent. It showed that, over an extended period, the Respondent either did not respond or made various wide-ranging promises that the work would be completed, which were not fulfilled. When the Respondent did engage, there was a pattern of him not acknowledging the issues raised or not seeing them as serious.
- [50] Having reviewed the interactions and the excuses put forward by the Respondent, the Board formed the view that the Respondent was not being accountable or professional and that he was not acting in good faith. Further, the reasons he put forward for not completing were, in the main, not genuine. Rather, it was evident that financial issues were at the heart of the failure to continue and complete the work and that cost was one reason why the work was carried out in the manner it was. In this respect, the Board heard evidence that the Respondent was seeking further funds, over and above the quoted amount, in order to complete the project.

[51] On the basis of the evidence heard and received, and noting that the Board considered the Respondent to be an inconsistent and unreliable witness, it has decided that the Respondent has breached clauses 15, 19 and 20 of the Code of Ethics.

Was the conduct serious enough?

[52] The conduct was serious. It was not mere inadvertence, error, oversight or carelessness. It was a deliberate departure from an acceptable standard of conduct, and it was sustained over a period of time. It is appropriate that the Board make a finding that the Respondent has breached the Code of Ethics.

Has the Respondent breached the Code of Ethics?

[53] The Board finds that the Respondent has breached clauses 15, 19 and 20 of the Code of Ethics. He was not accountable, did not behave professionally and did not act in good faith.

Misrepresentation or Outside of Competence

[54] The conduct the Board was investigating was whether the Respondent may have carried out design work in relation to a carport that was not within his competence to carry out (noting that work completed may not have been in accordance with the Building Code). Such conduct can fall within the provisions of section 314B(b) of the Act, which relates to carrying out or supervising building work outside of a Licensed person's competence. The section provides:

A Licensed Building Practitioner must—

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

[55] In the context of the Act and the disciplinary charge under section 317(1)(h) and 314B(b) of the Act, a Licensed Building Practitioner must only work within their individual competence. Within his context, if a Licensed Building Practitioner undertakes work outside of their licence class,²⁰ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is non-compliant.

[56] The carport that was partially constructed and then removed was designed by the Respondent. It was not built under a Building Consent. It came within a Building Consent exemption in Schedule 1 of the Act, specifically, clause 18A of Schedule 1, which provides an exemption for carports that exceed 20, but not 40 square metres. The exemption only applies if the design or construction work is carried out or supervised by a Licensed Building Practitioner,²¹ which the Respondent is. The

²⁰ Note that to carry out restricted building work outside of a Licensed Building Practitioner's licence class is a disciplinary offence under s 317(1)(c) of the Act.

²¹ The clause uses the phrase "design or construction work". As such, there are alternatives. Either the design or the construction work must be carried out or supervised by a Licensed Building Practitioner, not both.

Licensed Building Practitioner restriction is designed to ensure that the work is carried out in a competent and compliant manner. That did not occur in this instance. The work was not compliant with clause B2 of the Building Code. The following photograph shows the carport prior to its deconstruction.



- [57] The Respondent, when asked how he had developed the design, stated that he had based it on his knowledge and experience and that he used materials that were available at the time. He also claimed that he had referenced NZS 3604, an acceptable solution for compliance with clause B2 of the Building Code. It was clear, however, that the structure was not compliant.

Has the Respondent carried out building work outside of his competence?

- [58] The Respondent developed the carport design, which was substandard and non-compliant. In doing so, the Respondent has carried out building work (design work) that he was not competent to carry out and has breached section 317(1)(h) of the Act.

Board Decision

- [59] The Respondent has committed disciplinary offences under sections 317(1)(b), (g) and (h) of the Act.

Penalty, Costs and Publication

- [60] 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.

- [61] 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

- [62] 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
- [63] 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
- [64] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above before considering any aggravating and/or mitigating factors present.³³
- [65] The Board has not previously disciplined the Respondent. As it is his first offence, and because the Code of Ethics is new and the Board is taking an educative approach to it, the Board adopted a starting point of a censure, which is a public expression of disapproval, for the Code of Ethics breach and a fine of \$2,500 for the other offences. The level of the fine is based on the level of negligence and the finding of

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.

working outside of the Respondent's competence, and it is consistent with other fines imposed by the Board. There are no mitigating factors. As such, the fine is set at \$2,500.

Costs

- [66] 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.³⁴
- [67] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁵. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁶.
- [68] 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.
- [69] 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.

Publication

- [70] 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,³⁷ 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.
- [71] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁸ 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.³⁹
- [72] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication.

³⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁵ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁶ *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.

³⁷ Refer sections 298, 299 and 301 of the Act

³⁸ Section 14 of the Act

³⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Act, the Respondent is censured for the breaches of the Code of Ethics; and

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,500 in respect of the findings under sections 317(1)(b) and (h) of the Act.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be publicly available on the Board's website.

Further, the Board will publicly notify the Board's action. The Respondent will be named in the publication.

[74] 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

[75] 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 **19 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

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

Signed and dated this 27th day of February 2024



M Orange
Presiding Member

i Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and Building Consent authorities who have responsibilities for ensuring that building work complies with the building code.*

ii Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

iii Section 318 Disciplinary Penalties

- (1) *In any case to which [section 317](#) applies, the Board may—*

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