

Before the Building Practitioners Board

	BPB Complaint No. CB26280
Licensed Building Practitioner:	Kevin George Adlam (the Respondent)
Licence Number:	BP117667
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:	5 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 a disciplinary offence under section 317(1)(b) of the Act.

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

The Respondent is fined \$1,500 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>Floor levels</i>	6
<i>Construction of wall framing to the ground floor level and a stairwell</i>	7
<i>External wall junctions between a concrete block and weatherboard cladding</i>	8
<i>Issues noted in an engineer’s site inspection</i>	8
<i>Window and cladding installation</i>	9
<i>Failure to ensure a minor variation was in place</i>	10
Was the conduct serious enough?.....	11
Has the Respondent been negligent or incompetent?	11
Contrary to a Building Consent	11
Was there building work that differed from the Building Consent?	12
Was the conduct serious enough?.....	12
Has the Respondent breached section 317(1)(d) of the Act?.....	12
Failure to Provide a Record of Work	12
Did the Respondent carry out or supervise Restricted Building Work?	12
Was the Restricted Building Work complete?	12
Has the Respondent provided a Record of Work?	13
Did the Respondent fail to provide a Record of Work?.....	13
Penalty, Costs and Publication	13
Penalty	13
Costs.....	14
Publication	15
Section 318 Order	15
Submissions on Penalty, Costs and Publication	16
Right of Appeal	16

Summary

[1] The Respondent carried out building work in a negligent manner with respect to some areas of the concrete floors not being level and walls, particularly in a stairwell, not being plumb. The Respondent was fined \$1,500 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.

- [2] Other areas investigated with respect to negligence were not upheld on the basis that they were not serious enough or were not upheld as being building work that had been carried out or supervised below an acceptable standard.
- [3] The Board also investigated whether the Respondent had carried out building work contrary to a Building Consent and whether he had failed to provide a Record of Work on completion of Restricted Building Work. The Board found that whilst there was work that was contrary to a Building Consent, the matter under investigation (a failure to ensure a minor variation was in place) was not serious enough. With regard to the Record of Work, the Board found that a Record of Work was provided soon after completion as per the requirements of section 88(1) of the Act.

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, the Board would be inquiring into the quality and compliance of the following building work, being work that may have reached the threshold for further investigation:
 - (a) floor levels as set out in the complaint;

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) the construction of wall framing to the ground floor level and a stairwell, as set out in the complaint;
- (c) an external wall junctions between a concrete block and weatherboard cladding;
- (d) issues noted in an engineer's site inspection (page 91 of the Board's file);
- (e) window and cladding installation; and
- (f) failure to ensure a minor variation was in place for a product substitution in relation to garage wall linings.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [8] The Respondent, through his company Whangapoua Builders Limited,⁴ was engaged to construct a new residential dwelling for the Complainants. The Respondent carried out the set out of the foundations with the assistance of his staff and was involved in the construction of the foundations. Thereafter, he supervised the building work that was being carried out by his staff, who were a combination of a qualified builder, an experienced person who had worked for the Respondent for four years, and a relatively new apprentice. The Respondent stated that he was checking the work as it progressed and was happy with the work. The Complainant questioned the Respondent's supervision, claiming that unskilled staff were unsupervised.
- [9] The Respondent did accept that there was a period when he was overseas for two weeks when his son was in charge. He stated that he provided remote supervision by phone during that period.
- [10] The Respondent's involvement in the build came to an end on 15 February 2023 when lawyers acting for the Complainants wrote to the Respondent's lawyer stating:
- Your client is required to cease all work on our clients build until further notice.*
- [11] No further work was carried out by the Respondent after that date. The termination of the Respondent's services came about as a result of issues that arose during the build, and the complaint came about as a result of them. A commercial dispute followed, and issues that were not within the Board's jurisdiction were raised. The Respondent submitted that the complaint had only come about as a result of financial issues.

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

⁴ The Respondent is the sole shareholder and director of Whangapoua Builders Limited.

[12] The Complainant raised various issues with the Board and made reference to a report obtained from [OMITTED] produced by [OMITTED]. That report was provided to the Board prior to the hearing. The Board was also provided with engineering observations from Mr [OMITTED], which included notes about some of the issues complained about. Both Mr [OMITTED] and Mr [OMITTED] gave evidence at the hearing.

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 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

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”

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.

Floor levels

- [16] The design utilised the foundation of an existing garage (that was removed as part of the build) in the foundation of the new dwelling that was constructed, as shown below.



- [17] The Board heard evidence that there were issues with the levels of the existing garage floor as well as with the new floors that were poured, with the general issue being hollows rising up to where doors were installed. The Respondent was aware of issues with the garage floor, stating that there was about a 20mm variance from the midpoint to the outer point, but did not take any action regarding grinding, the use of floor levelling compound, or any other means to address the issue. He did not pour the new floors but did set out the foundations and stated that a laser-level was used. He stated a Licensed Building Practitioner poured the floors.
- [18] The Complainant took measurements of floor-level issues and provided the following photographs to demonstrate them. He stated they were mostly in a bathroom and in the adjacent laundry.



- [19] Mr [OMITTED] of [OMITTED] also took measurements as part of this report. He relied on a smart-level as he did not have a long-level with him when he did his site assessment. Mr [OMITTED] made similar observations to the Complainant's but conceded that more accurate or reliable measurements would have been obtained with a long-level. His report stated:

Floor surfaces uneven with humps and hollows. On closer inspection, large inconsistencies with the floor levels were determined. These variances have affected finishings around plumbing fittings, flooring, and doors.

- [20] Floor levels are critical. They set the platform on which other building work takes place. Any issues with floor levels can, unless they are addressed, transfer into other building elements. The Respondent knew there were issues with the existing garage floor. He did not address those issues. The Board is also satisfied that there were issues with floor levels in the bathroom and adjacent laundry area. Those issues have impacted other building elements and fixtures in those areas.
- [21] Whilst the floor level issues are limited in terms of the overall size of the build and taking into account an inherited problem with an existing foundation, the Board finds that the Respondent has fallen below an acceptable standard as regards floor levels. In making this decision, the Board has decided that a critical element is the fact that the Respondent knew of the existing foundation issue and ought to have known of other issues and addressed them before the building work continued.

Construction of wall framing to the ground floor level and a stairwell

- [22] The main issue raised was in relation to a stairwell. The Respondent accepted that it been completed incorrectly and that it had to be remediated. The Complainant contended that after remediation, the wall was still not plumb. The Complainant stated that there were some 6 to 7 other walls that were not plumb with particular issues in the kitchen.

- [23] Mr [OMITTED]' report noted:

Multiple locations reviewed indicated numerous walls are not plumb, areas of concern were raised at time of construction including ground floor walls and the stairwell walls which were packed in an attempt to correct. Joinery cabinetry installed plumb has revealed unsightly gaps down adjacent walls surfaces.

- [24] Again, Mr [OMITTED] completed his assessment using a smart-level. His assessment included a note that the stairwell was not plumb.
- [25] The Board finds that some walls were not plumb and that the Respondent's supervision has fallen below an acceptable standard. The most serious was the stairwell, which had to be relined and was still not correct.
- [26] With respect to supervision, the term is defined in section 7¹³ of the Act. The definition states:

¹³ 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.

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.

[27] The Board considers various factors when looking at supervision, but ultimately, the Board considers whether the work has been completed in a quality and compliant manner. As the stairwell wall was built incorrectly, had to be remediated and was still not built to an acceptable standard, the Board finds that the Respondent's supervision was inadequate.

External wall junctions between a concrete block and weatherboard cladding

[28] The Complainant raised a concern with a junction between a block wall and Linea panel cladding. He noted that a scribe that was specified had not been installed and that there had been some water ingress in the area. The Respondent stated that a chased-in flashing had been installed under the junction with a silicone bead between it and the cladding. Construction photographs supported the claim that a flashing had been installed. The Respondent noted the cause of water ingress had not been established. The Complainant gave evidence that the leaks had stopped after silicone had been applied to the joint and the blocks had been painted.

[29] The Board is satisfied that the junction was built in a compliant manner. No finding is made as regards the Respondent's conduct.

Issues noted in an engineer's site inspection

[30] A Site Inspection Record Sheet issued by Mr [OMITTED] on 7 December 2022 raised eight items. They were:

1. *Engineered piles have not been installed to bearers correctly.*
2. *Spacing of the bolts is incorrect, too close to the top of the bearer/ Not installed as detailed on design plans*
3. *Bolts are too short in the area of engineered piles and not tightened*
4. *Missing 100x75 angle brace in the engineered pile area*
5. *Broken post support for second story deck has not been fixed as per details sent to Kevin via email. Missing bracket from new pile to bearer. Bearer cut too short, not making it to the external boundary joist. Missing multigrips on new bearer to bearers*
6. *Second story deck has some substantial beam installed, no bracket from beam to boundary joist bolted to house. CPC40s installed on one area but insufficient fixing.*
7. *Bracket also missing from external corner connecting the two boundary joists together*

8. *Some fabricated brackets maybe required for structural fixing of second story deck*

- [31] In general, the evidence heard established that there were only limited instances of items 1 to 4, item 5 arose as a result of damage that occurred to a post during the build and items 6 to 8 were incomplete except that, in relation to item 6, one bracket was the wrong way around. Overall, Mr [OMITTED] described the matters observed as not too serious. The Respondent's position was that the issues would have been addressed if he had continued with the build.
- [32] The Board is satisfied that the work was either incomplete or that the issues did not reach the threshold for further consideration.

Window and cladding installation

- [33] The complainant raised issues with Linea joints. He questioned whether it had been installed as per the manufacturer's specifications with silicone sealant applied under the joints. He also raised a gap between cladding, as shown in the following photograph:



- [34] The Respondent stated silicone was applied under joints and that any external silicone would be installed by the painters. With respect to the gap shown above, he stated that the bricklayer would have attended to the issue.
- [35] Issues with window joinery were also raised. Mr [OMITTED], in his report (which relied on readings from his smart-level) noted:

The joinery installation has been undertaken with little emphasis on levels. Multiple doors and windows were checked and found not to be level.

- [36] The Respondent stated that a level was used to set up the support bars and that there were no issues with the exterior joinery noted when the cladding was being installed.
- [37] The Board finds that there is insufficient evidence on which to make a finding as regards the Linea and the windows and that the gap between cladding is incomplete work.

Failure to ensure a minor variation was in place

- [38] The minor variation related to a change from BL 1 plasterboard (brace line) to plywood in the garage. The lining formed part of the bracing elements in the garage. A building inspection dated 21 October 2022 noted the requirement for a minor variation. The Respondent stated he always recommended ply in a garage and stated that the minor variation would have been dealt with after the work was completed. He did not consult with the designer prior to making the change and submitted, in his initial response to the complaint, that the Complainant had to obtain the minor variation.
- [39] 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 indicated a minor variation would suffice.
- [40] 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.*

- [41] 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 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.
- [42] 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

¹⁴ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

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

- [43] The Respondent, on his own admission, completed building work on a structural element (bracing) that differed from the Building Consent without ensuring a minor variation had been approved. As such, the Board finds that this conduct has fallen below an acceptable standard.

Was the conduct serious enough?

- [44] There are three areas where the Board has found that the Respondent's conduct fell below an acceptable standard. They are in relation to floor levels, walls being out of plumb and a failure to ensure a minor variation was in place. The last item could be considered, from a disciplinary perspective, to be minor in nature, but the other two were not. They were deliberate departures from an acceptable standard of conduct, and it is appropriate that he be disciplined.

Has the Respondent been negligent or incompetent?

- [45] The Respondent has been negligent.

Contrary to a Building Consent

- [46] 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.¹⁶ Once issued, there is a requirement that the building work be carried out in accordance with the Building Consent.¹⁷ Building Consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁸ Inspections ensure independent verification that the Building Consent is being complied with.
- [47] 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.¹⁹ 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.²⁰ If it does not, then a disciplinary finding cannot be made.

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

¹⁶ Section 49 of the Act

¹⁷ Section 40 of the Act

¹⁸ Section 222 of the Act

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²⁰ *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,

Was there building work that differed from the Building Consent?

- [48] The change from brace line plasterboard to plywood was a departure from the Building Consent as no approval process had been undertaken as regards the change.

Was the conduct serious enough?

- [49] 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?

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

Failure to Provide a Record of Work

- [51] 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.²¹
- [52] 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 Work²² unless there is a good reason for it not to be provided.²³

Did the Respondent carry out or supervise Restricted Building Work?

- [53] 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.²⁴

Was the Restricted Building Work complete?

- [54] The Respondent was advised, in February 2023, that he was to cease work “until further notice” was given. The Respondent considered there may have been a negotiated outcome and that he may have returned. On 6 May 2023, a request was made for a Record of Work. At the time, it should have been apparent to the Respondent that he would not be returning to carry out any further Restricted Building Work.

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”.

²¹ Section 88(1) of the Act.

²² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²³ Section 317(1)(da)(ii) of the Act

²⁴ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Has the Respondent provided a Record of Work?

[55] In response to the 6 May 2023 request, a Record of Work dated 10 May 2023 was provided on 11 May 2023. The complaint to the Board was made on 10 May 2023.

Did the Respondent fail to provide a Record of Work?

[56] The Board finds that the Respondent did provide a Record of Work on completion of Restricted Building Work. The finding is made on the basis that up until early May 2023, the Respondent considered he may have been able to return and that when it became apparent that it would not, he provided a Record of Work.

Board's Decisions

[57] The Respondent has breached section 317(1)(b) of the Act.

[58] The Respondent has not breached sections 317(1)(d) or (da)(ii) of the Act.

Penalty, Costs and Publication

[59] 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.

[60] 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

[61] 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.²⁵ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁶

- (a) protection of the public and consideration of the purposes of the Act;²⁷
- (b) deterring other Licensed Building Practitioners from similar offending;²⁸
- (c) setting and enforcing a high standard of conduct for the industry;²⁹
- (d) penalising wrongdoing;³⁰ and

²⁵ *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]

²⁶ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁷ Section 3 Building Act

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

²⁹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

(e) rehabilitation (where appropriate).³¹

[62] 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 cases³² and applying the least restrictive penalty available for the particular offending.³³ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁴ that is consistent with other penalties imposed by the Board for comparable offending.³⁵

[63] 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.³⁶

[64] The only finding is one of negligence, the level of which was at the lower end of the scale. As such, the Board has decided that the appropriate penalty is a fine the starting point of which is \$1,500. There are no mitigating factors that the Board considers should be taken into account, nor aggravating factors.

Costs

[65] 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.³⁷

[66] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁸. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁹.

[67] 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, with a half-day hearing. Adjustments are then made.

[68] 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 Board's scale amount, and it is less than 50% of actual costs.

³¹ *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

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

³³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³⁶ 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.

³⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁸ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁹ *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.

Publication

- [69] 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,⁴⁰ 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.
- [70] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴¹ 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.⁴²
- [71] Based on the above, a summary of the decision will be published. The Respondent will not be named in that publication.
- [72] The Respondent should also note that the Board has not made any form of suppression order.

Section 318 Order

- [73] 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 \$1,500.
- 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, 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 not 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.

⁴⁰ Refer sections 298, 299 and 301 of the Act

⁴¹ Section 14 of the Act

⁴² Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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 **22 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 29th 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.