

## Before the Building Practitioners Board

	BPB Complaint No. 26456
Licensed Building Practitioner:	Bjorn Horrack (the Respondent)
Licence Number:	BP 124982
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding; Roof Membrane

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing and Decision Date:	12 November 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr G Anderson, LBP, Carpentry and Site AoP 2

#### Procedure:

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

#### Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), (d) and (da) (ii) of the Act.

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

The Respondent is fined \$2,000 and ordered to pay costs of \$2,100. 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

    Was the conduct serious enough ..... 7

    Has the Respondent been negligent or incompetent..... 7

**Contrary to a Building Consent** ..... 7

    Was there building work that differed from the building consent..... 8

    Was the conduct serious enough ..... 8

    Has the Respondent breached section 317(1)(d) of the Act ..... 8

**Failure to Provide a Record of Work** ..... 8

    Did the Respondent carry out or supervise restricted building work..... 9

    Was the restricted building work complete ..... 9

    Has the Respondent provided a record of work..... 9

    Was there a good reason for the Respondent to withhold his records of work ..... 9

    Did the Respondent fail to provide a record of work ..... 9

**Code of Ethics** ..... 10

    The Conduct..... 10

    Has the Respondent breached the Code ..... 11

**Board Decisions** ..... 11

**Penalty, Costs and Publication**..... 11

    Penalty ..... 11

    Costs..... 12

    Publication ..... 13

**Section 318 Order**..... 14

**Right of Appeal**..... 14

**Summary**

[1] The Respondent supervised the installation of a roof on a new residential dwelling. After completion, a commercial dispute arose, and the Complainant obtained a report that showed there were quality and compliance issues with the roof. The Board found, and the Respondent accepted, that he had not provided adequate supervision during and, in particular, that he had not carried out a final compliance check to ensure all of the building work had been completed in accordance with the

building consent and to an acceptable standard. On that basis, the Board found that the Respondent had supervised building work in a negligent manner and in a manner that was contrary to a building consent. The Board also found that the Respondent had failed to provide a record of work on completion of restricted building work.

- [2] The Respondent was fined \$2,000 and ordered to pay costs of \$2,100. A record of the disciplinary offending will be recorded on the public Register for a period of three years.
- [3] The Board also investigated whether the Respondent had breached the Code of Ethics. The Board's further investigation was based on a refusal to be accountable for quality and compliance issues raised. The Board decided that, on the basis of the evidence heard at the hearing, there had not been a breach because the Respondent was not aware of the quality or compliance issues when the refusal occurred.

### 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.<sup>1</sup>
- [5] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at **[Omitted]** 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;
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he 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 (section 317(1)(da)(ii) of the Act); and
  - (d) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act.
- [6] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board would be inquiring into the matters raised in the report of **[Omitted]** dated 15 January 2024 (Pages 40-45 of the Board's file).

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- [7] With respect to the allegation that the Respondent breached the Code of Ethics, the Complainant identified various principles which were allegedly breached. However, the specific provision of the Code (as set out under the Act) that will be further investigated at a hearing is:

**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.*

- [8] The Board gave notice that the conduct to be further investigated would be an alleged initial refusal by the Respondent to engage with the Complainant to remediate roofing issues.

**Evidence**

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [10] The Respondent's company was contracted to install a trapezoid profile roof on a new residential dwelling under a building consent. The building work to install the roof was carried out under the Respondent's supervision. He had experienced staff on site and a project manager who assisted him with the work on that and other sites.
- [11] The Respondent's evidence was that he visited the site on four occasions during the installation of the roof but that he did not carry out a final inspection of the work. He stated that the first attendance was to measure up. On subsequent visits, he measured materials for the lower roof and checked on work progress and the quality and compliance of the work. He stated his supervision processes included morning staff meetings to provide instructions for the day's work. The Respondent was assisted in his supervision by his project manager.
- [12] The work was carried out mostly completed in June 2023, and a final invoice was issued. Most of the contract price was paid by the Complainant, who raised concerns about the quality of the roof installation. In September 2023, a flashing around a chimney was replaced, and the Respondent considered that the building work was then complete.

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

- [13] Thereafter a commercial dispute between the Complainant and the Respondent's company followed. In November 2023, the Respondent's project manager attended a site meeting with the Complainant, at which a statement was made that the roof was compliant and the Complainant needed to pay the final invoice. Soon thereafter, the Respondent's company instructed debt collectors to recover the amount alleged to be owed. The debt collectors ceased their action on the basis of the dispute. The Respondent's company then commenced proceedings in the Disputes Tribunal.
- [14] Following the issue of the Disputes Tribunal proceedings, the Complainant sought a report from [Omitted]. The report outlined various quality and compliance concerns, and it formed the basis of the Board's investigations at the hearing.
- [15] Subsequent to the complaint being made, the Respondent attended to remedial work at his cost, which included the replacement of damaged sheets of roofing material and flashings. He also provided a record of work.

### **Negligence or Incompetence**

- [16] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>5</sup> test of negligence.<sup>6</sup> To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>7</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

### Has the Respondent departed from an acceptable standard of conduct

- [17] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

<sup>6</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as "an inability to do the job"

<sup>8</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

- [18] As noted, the Board's investigations focused on the report provided by **[Omitted]** of **[Omitted]**. The report raised issues with scratches on roofing materials, some of which may have avoided the product warranty, insufficient cover on a ridge lab and dormer apron flashings, a flashing that was a different colour to the roofing material, excessive use of watershed flashings, failure to turn down all drip edges on low pitched roofs, and excessive capping on flashings and in particular the ridge cap flashing. **[Omitted]**, who was present at the hearing, confirmed his report and provided his opinion that the ridge cap flashing cover and the failure to turn down low-pitch roof iron would not have met E2 Building Code compliance requirements.
- [19] The Respondent accepted the findings and the report, except that he noted scratches on a lower roof may have been caused by other contractors standing on the roofing material, including those who were installing cladding in the immediate vicinity.
- [20] The report and the Respondent's acceptance of the findings in that report established that there were quality and compliance issues with the roof. The Board's finding is that those issues, with the exception of scratches on a low-pitched roof, arose because of the Respondent's failure to provide adequate supervision of the restricted building work he was responsible for. That being the case, the Board finds that the Respondent's supervision has fallen below an acceptable standard, and he has conducted himself in a negligent manner.
- [21] Supervise is defined in section 7 of the Act. The definition states:
- supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*
- [22] There are various factors the Board needs to consider when deciding whether an LBP's supervision has met an acceptable standard, but ultimately, the Board needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [23] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992<sup>12</sup>.

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

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

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

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

The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

*“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

- [24] In this matter, the Respondent attended site whilst the roofing work was being carried out but did not do a final check to ensure that the work had been completed to an acceptable standard, met building code and building consent requirements and was, in all aspects, complete. Because of those factors, the Board considered the Respondent had not provided an adequate level of supervision.

#### Was the conduct serious enough

- [25] The Board found that the conduct met the threshold for it to take disciplinary action. The Respondent knew he should have carried out a final quality and compliance check but did not do so. His failing led to a requirement for remedial work to be completed so that the roof met acceptable standards.

#### Has the Respondent been negligent or incompetent

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

#### **Contrary to a Building Consent**

- [27] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.<sup>13</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>14</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>15</sup> Inspections ensure independent verification that the building consent is being complied with.

- [28] 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

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<sup>13</sup> Section 49 of the Act

<sup>14</sup> Section 40 of the Act

<sup>15</sup> Section 222 of the Act

conduct.<sup>16</sup> 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.<sup>17</sup> If it does not, then a disciplinary finding cannot be made.

#### Was there building work that differed from the building consent

[29] The building consent required that the roof be installed in a manner that was compliant with clause E2 of the Building Code. [Omitted]'s report, which the Respondent accepted, identified building work that did not comply with E2/AS1 (ridge cap flashing cover and the failure to turn down low-pitch roof iron). The Board agreed with that opinion. It follows that there was work that was contrary to the building consent.

#### Was the conduct serious enough

[30] The conduct was serious. The departure from the building consent came about because of a failure to adequately supervise, and the Board doubts they would have occurred if the Respondent had carried out his supervisory obligations and completed a final compliance check.

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

[31] The Respondent has supervised building work that was contrary to the building consent.

[32] Board notes that the findings under sections 317(1)(b) and (d) of the Act relate, in part, to the same conduct. That will be taken into consideration when the Board determines the appropriate penalty.

#### **Failure to Provide a Record of Work**

[33] 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.<sup>18</sup>

[34] 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 work<sup>19</sup> unless there is a good reason for it not to be provided.<sup>20</sup>

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<sup>16</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>17</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

<sup>18</sup> Section 88(1) of the Act.

<sup>19</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>20</sup> Section 317(1)(da)(ii) of the Act



Did the Respondent carry out or supervise restricted building work

- [35] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included the installation of roofing and associated flashings, which is restricted building work because they form part of the external moisture management system of a residential dwelling.<sup>21</sup>

Was the restricted building work complete

- [36] The building work was completed in September 2023 when the Respondent installed what he considered to be the last required flashing. The Respondent considered his building work to be complete and pursued payment on that basis. September 2023 was when a record of work was due.

Has the Respondent provided a record of work

- [37] The Respondent did not provide a record of work until 27 February 2024, which was well after completion and only after a complaint had been made.

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

- [38] The Respondent outlined that his normal process for issuing records of work is to do so with the final invoice for when one was requested. He noted that, on this occasion, a request was not made until February 2024. It was also noted that the Respondent's common practice is to provide the record of work to the owner or the main contractor, depending on the contractual relationship.
- [39] Records of work have to be provided to both the owner and the territorial authority, not one or the other. Further, the requirement is for the LBP to provide a record of work on completion or soon thereafter. The owner or territorial authority does not have to demand one. An LBP is required to act of his own accord and not wait for others to remind them of their obligations. On that basis, the Board finds that a lack of a request for a record of work is not a good reason.
- [40] The Respondent should also note that whilst it may be common practice in some quarters of the building industry for records of work to be provided to main contractors, it is a practice that carries with it the risk that the record of work will not be passed on to the required recipients, the owner and the territorial authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If the main contractor does not pass a record of work on to the final recipients, it is the author of the record of work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation.

Did the Respondent fail to provide a record of work

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

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<sup>21</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

## Code of Ethics

- [42] The Code of Ethics for LBPs was introduced by Order in Council<sup>22</sup> 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 regimes<sup>23</sup> for some time, and the Board has taken guidance from decisions made in other regimes.
- [43] The Code 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.
- [44] The disciplinary provision in the Act simply states, “has breached the code of ethics”. 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*,<sup>24</sup> 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.*
- [45] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests.<sup>25</sup>

## The Conduct

- [46] The conduct under investigation was an alleged initial refusal by the Respondent to engage with the Complainant to remediate the roofing issues. The Board’s further investigation arose out of the meeting between the Respondent’s project manager and the Complainant in November 2023 when the project manager asserted the roof was compliant and that the Complainant should pay the balance of the contract price.
- [47] The evidence received at the hearing, however, established to the Board’s satisfaction that when the meeting occurred the Respondent and his company were not aware of the quality compliance items raised on [Omitted]’s report. As previously noted in this decision, the Respondent would or should have been aware of those issues if he had carried out a final check of the work. That failing has been

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<sup>22</sup> Building (Code of Ethics for Licensed Building Practitioners) Order 2021

<sup>23</sup> Lawyers, Engineers, Architects and Accountants, for example

<sup>24</sup> [1992] 1 NZLR 720 at 724

<sup>25</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

dealt with, from a disciplinary perspective, by the Board's findings under sections 317(1)(b) and (d) of the Act.

- [48] Because the Respondent was not aware of issues in [Omitted]'s report in November 2023, the Board has decided that conduct does not come within clause 15 of the Code, or if it does, it is not serious enough to warrant disciplinary action. The Respondent should note, however, that if he had been aware of compliance issues when demanding final payment, then the conduct may have come within clause 15.

#### Has the Respondent breached the Code

- [49] The Respondent has not breached the Code of Ethics.

#### **Board Decisions**

- [50] The Respondent has breached sections:

- (a) 317(1)(b) of the Act;
- (b) 317(1)(d) of the Act; and
- (c) 317(1)(da)(ii) of the Act.

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

#### **Penalty, Costs and Publication**

- [52] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [53] The Respondent made submissions at the hearing regarding penalty, costs, and publication.

#### Penalty

- [54] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>26</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>27</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>28</sup>
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;<sup>29</sup>

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<sup>26</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

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

<sup>28</sup> Section 3 Building Act

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

- (c) setting and enforcing a high standard of conduct for the industry;<sup>30</sup>
- (d) penalising wrongdoing;<sup>31</sup> and
- (e) rehabilitation (where appropriate).<sup>32</sup>

- [55] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>33</sup> and applying the least restrictive penalty available for the particular offending.<sup>34</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>35</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>36</sup>
- [56] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.<sup>37</sup>
- [57] In this matter, the Board adopted a starting point of a fine of \$3,000, an amount that is consistent with fines imposed by the Board for similar levels of disciplinary offending.
- [58] There are mitigating factors. The Respondent has attended to reveal work at his cost. He has also accepted that his failure to supervise led to the issues and has changed his business practices to ensure it will not occur again. He has also now provided a record of work. The Respondent also raised issues with his ability to return to the site. However, those issues were after the fact and were not the reason why the quality compliance issues arose in the first place. As such, that particular factor has not been taken into account.
- [59] Taking the accepted mitigation into account, the Board decided the fine would be reduced by \$1,000, making the final fine \$2,000.

### Costs

- [60] 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.<sup>38</sup>

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

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

<sup>32</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

<sup>34</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

<sup>37</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>38</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [61] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>39</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>40</sup>.
- [62] 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 simple. Adjustments are then made.
- [63] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,100 toward the costs of and incidental to the Board's inquiry.

#### Publication

- [64] 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,<sup>41</sup> and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [65] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>42</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>43</sup>
- [66] Based on the above, a summary of the decision will be published. The Respondent will not be named in that publication. The publication is to focus on the requirement, particularly with roofing work, for compliance checks to be carried out by the responsible LBP before completion.
- [67] Whilst the Respondent will not be named he should note that the Board has not made any form of suppression order.

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

<sup>40</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>41</sup> Refer sections 298, 299 and 301 of the Act

<sup>42</sup> Section 14 of the Act

<sup>43</sup> *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 pay a fine of \$2,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,100 (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.

## Right of Appeal

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

Signed and dated this 6<sup>th</sup> day of December 2024.



**M Orange**  
Presiding Member

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### <sup>i</sup> Section 3 of the Act

*This Act has the following purposes:*

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

- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

**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.*

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- (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.*

<sup>iv</sup> **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.*