

Before the Building Practitioners Board

	BPB Complaint No. CB26340
Licensed Building Practitioner:	Minggui Chen (the Respondent)
Licence Number:	BP136001
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:	8 May 2024
Decision Date:	22 May 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member
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) and (d) of the Act.

The Respondent is 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.

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Summary

- [1] The Respondent was engaged by the Complainant to construct an extension to an existing dwelling, which included the demolition and remodelling of part of the existing dwelling. The homeowner alleged that there were multiple areas to be remedied and that, based on the Council inspections, the work was not completed in accordance with the Building Code and the consented drawings.
- [2] The Respondent’s main role on the project was as supervisor to his team of employees who carried out the work. The question for the Board was whether the building work supervised by the Respondent was negligent or incompetent. This required a determination of two issues – had the Respondent departed from an acceptable standard, and if so, was that departure serious enough to warrant a disciplinary finding.
- [3] The further issue before the Board was whether the work had been carried out in a manner contrary to the building consent. To determine this issue, the Board has only to find that building work departed from the building consent and does not have to

consider if that departure was deliberate or negligent. However, the seriousness of the conduct under investigation does have to be taken into account.

- [4] The Board investigated the issues and decided that the Respondent had been negligent in the supervision of the building work and that the building work was not in accordance with the building consent.
- [5] This finding was based on workmanship issues and the Respondent supervising work, which differed from the consented drawings and work which was carried out before necessary design and engineering input. In many instances, the Respondent called for inspections before the work was ready and repeatedly did not address issues raised in Council inspections.
- [6] The Respondent raised as mitigating factors the issue of delays in Council inspections at the time due to the impact of Covid-19 and the difficulties inherent in a renovation involving existing and new elements. He also admitted his supervision faults and apologised. On this basis, the Board moved from its starting point of a \$3,000 fine and decided that the Respondent would be fined \$2,500 and ordered to pay costs of \$3,500.

The Charges

- [7] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [8] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland have:
 - (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
 - (b) carried out or supervised building work that does not comply with the building consent contrary to section 317(1)(d) of the Act.
- [9] In further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board inquired into:
 - (a) the calling for Council inspections before the work was ready to be inspected;

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 multiple failed Council inspections and the repeated failure to resolve items in a timely manner;
- (c) the lack of appropriate construction sequencing and quality assurance of the building work;
- (d) items 2- 11,13,14 and 17 in the Council inspection dated 20 April 2023; and
- (e) the reasons for changing the consented landing sliding door, which resulted in a minor variation being sought and granted.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [11] The Respondent was engaged by the Complainant who was the homeowner, to construct an addition to an existing dwelling. This involved the demolition of a part of the existing house and the addition on the ground floor of a new kitchen, lounge and decking, and on the first floor the addition of a new bedroom and bathroom.
- [12] The Respondent told the Board that he supervised this project. He subcontracted the work to two companies who supplied their own labour. These workers were not Licensed Building Practitioners but had 3-5 years of carpentry experience and were known to the Respondent. The Respondent stated that there was anywhere between 2 to 6 workers on-site at any one time. One of the builders was doing a level 4 qualification. The Respondent was supervising 3 other projects at the same time.
- [13] The Respondent explained that he went to site every 1 to 2 days and would go through the work content for that day together with health and safety issues, communications with the clients and any questions. If there were issues on site when he was not present, the workers took photos and sent them via app for him to advise.
- [14] The Complainant, who lived on site, disputed this level of attendance by the Respondent. She said that from January/February until June/July, he did not come every 1-2 days, and for a period of 2 weeks, he was not on-site at all. She considered that the Respondent's workers did not know what to do when the Respondent was not on site. The Respondent admitted that for "*a very short period of time*" he was absent but he did not accept the Complainant's view.
- [15] The Respondent described his quality assurance process as using his knowledge of the Building Code and checking the work was in accordance with the building

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

consent. He said that he did this checking before each Council inspection, although sometimes the inspections occurred before he could do his check.

- [16] The Respondent stated in his opening that the failed inspections were outside his expectations. There were valid reasons for the failures but that he was sorry for them. He pointed to Covid, Cyclone Gabrielle, insufficient design drawings, lack of labour in the industry and Council inspection booking delays as contributing factors.
- [17] Mr [OMITTED], an employee of the Respondent's company, also attended the hearing as a witness. It was established that Mr [OMITTED] had a site coordination role only and did no building work.

Negligence or Incompetence

- [18] 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.
- [19] The Respondent's role in the build was as the supervisor. The question for the Board is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.
- [20] 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

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".

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

- [21] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:
- (a) the type and complexity of the building work to be supervised.
 - (b) the experience of the person being supervised.
 - (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities.
 - (d) the number of persons or projects being supervised; and
 - (e) the geographic spread of the work being supervised.
- [22] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [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 1992,⁹ and the Board is guided by those principles in assessing the adequacy of the Respondent's supervision.

Has the Respondent departed from an acceptable standard of conduct?

- [24] 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

Workmanship.

- [25] The Board proceeded by investigating key items in the Council inspections. These were noted in a preline building inspection dated 20 April 2023 as having been brought forward from earlier inspections.
- [26] In respect of the following matters, the Respondent acknowledged that he had reviewed the work before the Council inspection but had missed the issues identified by the Council inspector – the wall at the top of the stairs being 30 mm out of plumb, frames made on-site not complying with NZS3604 due to non-continuous studs, top floor lintel not checked into the studs by 15mm as required and all lintels and wall framing not connected together and tied to external walls.

⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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.

Work done without engineering and design input.

- [27] Some building work was noted as contrary to the building consent when inspected by the Council. The Respondent stated in evidence that for some of these matters, he had obtained engineering and/or design input, prior to doing the work. These included :
- (a) New piles. The addition of new piles which were not on the consented drawings are noted from the cladding inspection of 16 March 2023. The Respondent denied that he had added any piles. The Complainant, however, who lived on the property, confirmed that there were new piles and that no other builders had been engaged for any work other than the Respondent. The Respondent then advised that he had supervised new piles outside those on the consented plan but only after obtaining engineering input.
 - (b) New double stud added below a beam at the membrane roof area with no point load under the subfloor. The Respondent said there was no detail on the drawings, and he asked the engineer, who gave him two options – one of which was the double stud. Only after the inspection did the engineer realise in suggesting the double stud option, he had not taken into account the point load issue.
 - (c) The Council inspection also noted no joist hangers in the old entry door area. Again, the Respondent said the details were missing from the plans for the new/old house connection, and he got these details from the engineer prior to doing the work.
- [28] In respect of all of the above items, the Respondent was given the opportunity to submit after the hearing the design and engineering documents that evidenced, he had received professional input before undertaking work that was contrary to the consented building plans.
- [29] The information was submitted and was reviewed by the Board. It did not, however, establish to the Board's satisfaction that the Respondent had obtained professional input before undertaking the work. It was clear that the advice and instructions came after the work had been carried out.
- [30] Further, the Council inspection recorded the ceiling diaphragms were not constructed in accordance with the building consent as the roof access hatch was not within the middle third of the diaphragm, as required. The Respondent said there was no detail on the plans and that he did not get engineering input until after the work was done.

Repeated items and calling for inspections prematurely.

- [31] An inspection breakdown was provided in the Council file. This document evidenced, in summary form, the failed inspections, and the rebooking of another inspection before the earlier failed items were addressed. It demonstrates a 50% fail rate for the Council inspections (not including partial fails). The matters focussed on in this regard by the Board established a repeating pattern.

Framing inspections

- (a) On 25 January 2023, the site is recorded by the Council inspector as not ready for inspection. A further inspection on 9 February 2023 listed 6 items to resolve and 8 failed items. At the next framing inspection on 20 February 2023, the same issues are listed to still be resolved, and 3 of the failed items have not been remedied. The framing inspection was finally partially passed on 2 March 2023.

Cladding inspections

- (b) On 7 March 2023, there were 6 failed items and 8 issues to be addressed. On 13 March 2023, the cladding inspection still has 3 failed items, and 5 of the outstanding matters to be addressed. Again, on 16 March 2023, the inspection has 2 of the same failed items and more added. There are 3 of the same matters still be addressed and more are added. At the 20 March 2023 inspection, the same failed items as the previous inspection appear again, and there are 3 repeated items still to be addressed. The cladding inspection finally passed on 27 March 2023.
- [32] The Board notes that the pre-line inspections from 14 March 2023 to 28 April 2023 followed a similar pattern.
- [33] The Respondent explained that due to Covid and the difficulty in booking Council inspections, several were booked in advance, which may mean the work was not ready when the next inspection took place.
- [34] The Respondent stated in his written response to the investigator that he *“booked inspections at earlier stages than anticipated and worked overtime in the hope of completing required work before inspections”*.
- [35] Mr Allan Kellington is a Building Surveyor for Auckland City Council. He is a qualified carpenter with 14 years of experience and is currently studying for a level 6 building surveyor diploma. He confirmed that at that time, wait times for Council inspections were longer than usual. Mr Shao, an Auckland City Council building inspector, stated that at that time, an inspection had to be booked a long time ahead, and so work was not always where it should be for an inspection.
- [36] Mr Kellington also commented that the issues he saw at the pre-line and cladding inspections on 16 March 2023 were a mixture of non-compliant work and work that was not ready for inspection, together with some missing design details. He also

stated that the pattern of failed inspections, as set out in the Council summary, *“sometimes occurs but not on every job”*.

Consented sliding door.

- [37] The consented plans specified a staircase design which included a sliding cavity door part-way down the stairs on the landing. This was a specific requirement of the Complainant. She discovered that the staircase had been constructed without accommodating the sliding door and raised it with the Respondent, who responded (according to the Complainant) – *“I forgot”*.
- [38] The Respondent now says the staircase was not capable of being built to accommodate a sliding door so he changed it to a swinging door at the top of the stairs. This was contrary to what the Complainant wanted. The Respondent acknowledged at the hearing that he did not consult the designer for other options. He said he consulted with the Complainant, but she maintains that this was after the fact.
- [39] Given the approach to quality assurance the Respondent had earlier explained, the Board asked why he missed the issues repeatedly picked up in the Council inspections. He stated that he *“should reflect on this”* and admitted *“my management was not very careful”*. At that point, he had only 2 years experience running his company, and he has now increased his checking. The Respondent further stated that he relied on the builders doing the work correctly because he knew them and knew their work *“was going to be ok”*.
- [40] The workmanship issues that resulted in failed Council inspections, the high failure rate of the inspections and the outstanding items continuing to appear in inspection after inspection are indicative of a lack of supervision by the Respondent.
- [41] Further, the Respondent should not have allowed changes to the building work on the consented plans without, where necessary, getting prior design and/or engineer input.
- [42] On that basis, the Board finds that the Respondent negligently supervised the building work.

Was the conduct serious enough?

- [43] The supervisory conduct, which the Board has focussed on, are the workmanship issues in the Council inspections and the high failure rate for the inspections. The Respondent accepted at the hearing that the failure rate was *“too much”*. In addition, the Board considers there was repeated booking of Council inspections before the work was ready for inspection and a pattern of not addressing serious issues from one inspection to the next.
- [44] Given these issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent’s conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [45] Based on the above findings, the Respondent has supervised building work in a negligent manner.
- [46] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent

- [47] 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.¹³ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁴ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁵ Inspections ensure independent verification that the building consent is being complied with.
- [48] 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.¹⁶ 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.¹⁷ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [49] 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. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [50] In respect of the double stud, roof hatch position, cavity sliding door change, and joist hangars, the Respondent supervised building work, which was contrary to the

¹³ Section 49 of the Act

¹⁴ Section 40 of the Act

¹⁵ Section 222 of the Act

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁷ *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".

building consent. He did not, prior to carrying out the work, follow the correct Council process, obtain necessary professional guidance, or inform his client.

Was the conduct serious enough?

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

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

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

Board's Decisions

[53] The Respondent has

- (a) supervised building work in a negligent manner
- (b) supervised building work that is contrary to the building consent

Penalty, Costs and Publication

[54] 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.

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

Penalty

[56] 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.¹⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁹

- (a) protection of the public and consideration of the purposes of the Act;²⁰

¹⁸ *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]

¹⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁰ Section 3 Building Act

- (b) deterring other Licensed Building Practitioners from similar offending;²¹
- (c) setting and enforcing a high standard of conduct for the industry;²²
- (d) penalising wrongdoing,²³ and
- (e) rehabilitation (where appropriate).²⁴

[57] 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 cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸

[58] 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.²⁹

[59] In this matter, the Board adopted a starting point of a fine of \$3,000 because this is comparable to penalties ordered for similar levels of offending.

[60] The Board has taken into account, as mitigating factors, that the Respondent was experiencing long lead times for Council inspections and was attempting to address this by booking ahead and that he admitted his supervision faults and apologised. There are no aggravating factors.

[61] Taking the noted factor into account, the Board decided that the Respondent is to pay a fine of \$2,500.

Costs

[62] 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.³⁰

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁴ *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

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

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

²⁹ 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.

³⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [63] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³².
- [64] 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.
- [65] 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 for a moderately complex matter.

Publication

- [66] 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,³³ 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.
- [67] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁴ 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.³⁵
- [68] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

³¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³² *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.

³³ Refer sections 298, 299 and 301 of the Act

³⁴ Section 14 of the Act

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[69] 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 \$2,500.
- 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 published on the Board's website.**

[70] 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

[71] 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 July 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

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

Signed and dated this 1st day of July 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*

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- (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.*