

## Before the Building Practitioners Board

	BPB Complaint No. 26492
Licensed Building Practitioner:	Chris Howchow (the Respondent)
Licence Number:	BP 141453
Licence(s) Held:	Carpentry

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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 Type:	On the Papers
Hearing and Decision Date:	6 May 2025
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  
Ms E Harvey McDouall, Registered Architect

#### Procedure:

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

#### Disciplinary Finding:

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

The Respondent's licence is suspended until the earlier of his successful completion of specified training or a period of 12 months, and he is ordered to pay costs of \$2,350. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary of the Board's Decision

- [1] The Respondent was contracted to carry out building work that included the construction of a 47 m<sup>2</sup> alteration to an existing dwelling. The building work required a building consent, but one was not obtained. The Respondent's building work was substandard, and he did not deal with asbestos appropriately.
- [2] The Board found that the Respondent had carried out building work in a negligent manner and had carried out design work that he was not competent to carry out. The Board suspended the Respondent's licence until the earlier of his completion of a Level 4 New Zealand Certificate in Building Regulatory Environment or 12 months.

He was ordered to pay costs of \$2,350. A record of the disciplinary offending will be recorded on the Public Register for a period of three years. The Board also ordered the Registrar to publish an article summarising the Board's findings.

### The Charges

- [3] 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>
- [4] 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. In further investigating the Respondent's conduct, the Board will be inquiring into:
    - (i) a failure to appropriately assess, remove and dispose of asbestos; and
    - (ii) timber construction that does not comply with clause B1 of the New Zealand Building Code, as identified by the Special Advisor;
  - (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act in that he may have, in that the Respondent may have carried out design work in relation to a lean-to structure that he was not competent to carry out and specifically design solutions that did not comply with NZS: 3604 or any other acceptable solution; and
  - (c) breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act, in that he may have breached clause 10 of the Code (you must comply with the law) with respect to:
    - (i) section 45 of the Act, which requires that all building work be carried out under a building consent unless an exemption applies;
    - (ii) section 362D of the Act and regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014 (the Consumer Regulations) with respect to the failure to provide the prescribed disclosure information and checklist; and
    - (iii) section 362F of the Act and regulation 6 of the Consumer Regulations in respect of the failure to provide a written building contract.

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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.

## Procedure

- [5] A Notice of Proceeding was issued, and the matter was set down to be heard in person. The Respondent would not engage in the hearing process. He provided reasons why he could not engage or attend a hearing. He was asked to provide corroborating evidence. What was provided was limited and did not substantiate his claims.
- [6] The Board considered there was sufficient evidence to determine the matter on the papers. A Revised Notice of Proceeding was issued stating an intention to determine the complaint on the papers along with timetable orders to enable the Respondent to file further evidence and submissions, including a response to a Special Advisor's report. The Respondent did not file any further evidence or submissions.
- [7] The Respondent was also advised that he could seek an in-person hearing. No applications were received.
- [8] In deciding that the matter would be determined on the papers, the Board took into account the purposes of the disciplinary provisions in the Act and noted that they would be defeated if Licensed Building Practitioners (LBPs) were able to avoid complaints by not engaging in investigations or appearing at hearings.

## 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 was contracted to carry out alterations to a residential dwelling, following flood damage that occurred in early 2023. The building work was not carried out under a building consent. The Respondent did not complete the contracted work, and the Complainant raised multiple issues with his work and conduct, not all of which were investigated by the Board.<sup>4</sup>
- [11] To assist in its investigations, the Board appointed a Special Advisor under section 322(1)(d) of the Act.<sup>7</sup> Mr [OMITTED], a Member of the Royal Institute of Chartered Surveyors and of the New Zealand Institute of Building Surveyors, was appointed. He was asked to advise on various matters.
- [12] Mr [OMITTED] was provided with a copy of the complaint file, and he interviewed the Respondent, who stated he would provide further information, but did not.
- [13] Mr [OMITTED] provided his report, and the Respondent was provided with an opportunity to respond to it. He did not take up that opportunity.

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

<sup>4</sup> The Board, as part of its first Notice of Proceeding, detailed the reasons why regulation 9 of the Complaints Regulations applied.

[14] Mr [OMITTED] findings, in respect of each question put to him by the Board, were:

- (a) whether the work carried out or supervised by the Respondent required a building consent:

*I consider that a building consent was required for the construction and that the works are Restricted Building Works.*

*A detailed and meaningful design and specification was not produced. In my opinion the lack of design and building consent is a primary issue. Due to the lack of a building consent which would include an appropriate design, specification and inspection procedure, a correct and complete process has not been followed, which in my opinion has resulted in a mis-alignment of expectations for the work being undertaken. I consider that in addition, had approved building consent and design documents been provided (which should have accompanied the quote and building contract), there would have been much more certainty for both parties around the details of the building contract being undertaken.*

- (b) if possible, quantify the area in square metres of non-friable asbestos removed from the property by the Respondent;

*I am not able to positively confirm the area of non-friable asbestos (fibre cement board) removed from the property by the Respondent although based on the evidence available I consider the measurement to be 'approximately 10m<sup>2</sup>'.*

*Even if it is deemed that the area of asbestos removed is less than 10m<sup>2</sup> and deemed appropriate for a non-licenced person to remove, the ACOP1 stipulates that the person must be 'competent' to remove the asbestos.*

*I have confirmed the presence of asbestos debris both inside the kitchen area and outside around the new extension that in my opinion confirms that the asbestos has not been removed in a competent manner.*

- (c) if possible, comment on whether friable asbestos material was contained in the removed wall linings and floor covering carried out or supervised by the Respondent:

*I confirm that friable asbestos material is still present within the floor area of the dining/kitchen room.*

*As part of the building work the chimney and fireplace from the dining/kitchen room was removed.*

*Beneath the hearth is a loose, white fibrous material that is considered friable. At the time of my inspection, it remained unprotected and un-sealed.*

*I have confirmed that it contains asbestos by laboratory analysis.*

- (d) If possible, comment whether the existing exposed areas of asbestos at the property have been sealed and currently encapsulate asbestos fibres:

*No. Existing areas of exposed asbestos have not been sealed and contain asbestos.*

*During our telephone conversation the Respondent confirmed that there had not been any attempt to seal the asbestos and claimed not to have been aware of it.*

*The Complainant has obtained a quote from a specialist asbestos removalist, the exact scope is to be clarified, but represents a significant cost of around \$20,470.*

- (e) the quality and compliance with the New Zealand Building Code of the building work carried out or supervised by the Respondent:

*The building works are incomplete and some of the timber construction is outside of the requirements of NZS3604:2011. In the absence of a Structural Engineers input, I consider this to be a potential breach of NZBC Code Clause B1 – Structure.*

*Some levels were taken during our inspection, all of which were considered to be acceptable, when considering its incomplete state.*

*Prior to continuing site works, the council would have to be consulted in order to agree a pathway forward considering the fact that some of the works are not visible (pile footings). The council may choose to issue a 'Notice to Fix' if they deem appropriate. A design is required to be completed and any remedial works such as additional piles, additional or adjusted floor joists/spacings or bearer spans etc are required to be considered. The condition and treatment of the timber following its exposure must also be ascertained. It may be the case that council can't be satisfied that the requirements of the NZBC can be met with the existing structure and significant or total rebuild may be required. This is considered to be significant in terms of time and cost.*

*Had a suitable design and Building Consent been provided, the appropriate building inspection process would have been followed and many of the aforementioned concerns would not be*

*present or would likely have been resolved during the correct inspection and design process.*

*I have also identified some issues and concerns with the installation of the land drainage system that require some remedial and completion works.*

[15] Mr [OMITTED] conclusions were:

*The lack of a Building Consent is considered to be a breach of the requirements of Section 40 of the Building Act 2004.*

*Although incomplete, I have some concerns that some of the structure that has commenced is outside of the scope of NZS3604:2011 and without a Structural Engineers input, may be a potential breach of NZBC Code Clause B1 – Structure.*

*I also consider there to be a breach of Section 27 of the Health and Safety at Work (Asbestos Regulations) 2016.*

### **Negligence or Incompetence**

[16] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>5</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>6</sup> test of negligence.<sup>7</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>8</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>9</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>1</sup> as well as the requirement that all building work must

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<sup>5</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>6</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>7</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>8</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>9</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>10</sup> and any building consent issued.<sup>11</sup> The test is an objective one.<sup>12</sup>

- [18] Mr [OMITTED] report established that asbestos was present and was not dealt with appropriately. His report also clearly established that building work did not comply with the Building Code. Specifically, his report established that work on piles, bearers, stringers and floor joists was not compliant, whilst other areas were incomplete.

Was the conduct serious enough

- [19] The departures from acceptable standards were serious. The failure to deal with asbestos in an appropriate manner has put the occupants of the dwelling at risk. The Respondent should have taken a cautious and preventive approach to the work. He did not, and quite simply, he should have done more. The building work on the floor substructure was not in accordance with NZS 3604, an Acceptable Solution. The work was not complex, and a competent LBP should have gotten it right the first time.

Has the Respondent been negligent or incompetent

- [20] The Respondent has carried out building work in a negligent manner.

**Working Outside of his Competence**

- [21] Section 314B(b) of the Act provides:

*A licensed building practitioner must—*

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

- [22] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b), a Licensed Building Practitioner must only work within their individual competence. The Respondent holds a Carpentry Licence. That deems him to be competent to carry out carpentry work.

The Conduct

- [23] The evidence shows that the Respondent also carried out design work. That finding is based on the fact that aspects of the Respondent's building work involved the use of Alternative Solutions.
- [24] An Alternative Solution is a design-led Building Code compliance solution that differs partially or completely from those provided for in an Acceptable Solution, such as NZS 3604, an Acceptable Solution for Timber Framed Buildings, or a Verification Method, like E2/VM1 for external moisture management, both of which are accepted means of compliance with the Building Code. Alternative Solutions are

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<sup>10</sup> Section 17 of the Building Act 2004

<sup>11</sup> Section 40(1) of the Building Act 2004

<sup>12</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.



normally used where either an Acceptable Solution or a Verification Method cannot be used, or a non-generic approach to the building work is necessary.

- [25] Alternative Solutions are normally developed by a person with the necessary knowledge and skills to ensure that Building Code compliance will be achieved. Persons who are recognised as having those skills are Architects, Design LBPs, and Engineers. The Respondent does not have those qualifications, and there is no evidence that he has acquired or retains any of the skills or knowledge that those persons hold.

Has the Respondent carried out Building Work outside of his Competence

- [26] Looking at the Alternative Solutions that he came up with and used, Mr [OMITTED] noted that various aspects did not meet Building Code compliance. It follows that he has carried out design work that he was not competent to carry out.

**Code of Ethics**

- [27] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.<sup>13</sup> It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes<sup>14</sup> for some time, and the Board has taken guidance from decisions made in other regimes.
- [28] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [29] 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>15</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.*

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<sup>13</sup> Building (Code of Ethics for Licensed Building Practitioners) Order 2021

<sup>14</sup> Lawyers, Engineers, Architects and Accountants, for example

<sup>15</sup> [1992] 1 NZLR 720 at 724

- [30] The Board also notes that the courts have applied a threshold test to disciplinary matters. It is the same as those for negligence. The Board has, in considering the matter, applied those tests.

### The Conduct

- [31] The Board was investigating three areas of conduct under clause 10 of the Code of Ethics: whether a building consent should have been obtained for the building work, whether there was a failure to provide the prescribed disclosure information and checklist, and whether there had been a failure to provide a written building contract.

### *Building Consent*

- [32] The issue under consideration is whether the Respondent has breached the Building Act by undertaking building work without a building consent. If he did, then that breach could, in turn, be considered a breach of clause 10 of the Code of Ethics.

- [33] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.<sup>16</sup> The burden is on the person carrying out the work to establish that an exemption applies. The building consent process is important as it ensures that the proposed building work is assessed by a Territorial Authority (Council) for compliance with the Building Code prior to it being undertaken<sup>17</sup> and that the consented work is then assessed against the consent issued through scheduled inspections.<sup>18</sup> In *Tan v Auckland Council*,<sup>19</sup> the High Court noted that if a person fails to obtain a building consent, that deprives a Council of its ability to check any proposed building work. The Court also held:

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

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

- [34] The Respondent falls into the category of a person who was in the best position to ensure unconsented work did not occur. As such, he had a duty to assess whether a building consent was required prior to the building work being undertaken.

*As noted, there are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those who seek to rely on an exception to show that the building work comes with that exception.*

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<sup>16</sup> Refer sections 40, 41 and 42A of the Act.

<sup>17</sup> Section 49 of the Act.

<sup>18</sup> Section 222 of the Act.

<sup>19</sup> [2015] NZHC 3299 [18 December 2015]

[35] Mr [OMITTED], the Special Advisor, who reviewed the building work that had been carried out, provided his opinion that a building consent was required. He also considered that the lack of building consent was a cause of the issues complained about. Regarding the specific reasons why a building consent was necessary, Mr [OMITTED] noted:

*I consider that the building work undertaken triggered the need for a building consent for a number of reasons:*

- *Size of the new structure is 47 m2 and does not fall within any of the exemption categories. As it is a new addition, with plumbing fixtures, the works would be required to meet most of the New Zealand Building Code clauses.*
- *In addition to the new structure, the works also involved alterations to the structure of the retained 'main' building, specifically between the dining/kitchen area and the new addition. A wall that had a number of previous openings, was to be removed in order to open the room up to the new extensions. Presumably supporting lintels and structure were going to be installed. The linings of the dining/kitchen area have also been removed, which may contribute to the bracing of the dwelling. This affects Code Clause B1- Structure.*
- *In addition to the new structure, the external envelope of the main dwelling is affected by the building work. The new extension is connected to the dwelling and will result in a junction between the new and old, which, in addition to the extension, is required to be compliant to meet the provisions of Code Clause E2 - External Moisture. I have not observed any plans or detailing to demonstrate how this was to be achieved. In any case, these works affect the external envelope of the building which is also a trigger for requiring a building consent.*
- *Part of the contracted works involved the installation and alteration to site stormwater and foul water drainage. The intention and extent are not fully known due to the lack of any plans or specifications. These plumbing and drainage works also contribute to trigger the requirement for a building consent.*

[36] The Respondent advised the Special Advisor that he considered the building work was "like for like replacement". Like for like is a reference to work that falls within clause 1 of Schedule 1 of the Act, which allows for general repair, maintenance, and replacement. Clause 1 clearly did not apply to the 47 m2 building addition. Also, there are limitations to clause 1. In particular, it does not apply to the complete or substantial replacement of a building product or an assembly contributing to the building's structural behaviour. Also, to qualify as exempt building work under clause<sup>o</sup>1, the building work has to use a comparable building product or assembly,

and any replacement has to be in the same position. Those requirements were clearly not met.

[37] The Board is satisfied that a building consent was required for at least some of the building work.

[38] The Respondent, by proceeding with the building work without a building consent, has breached section 40 of the Act, which states that all building work must also be carried out in accordance with a building consent:

**40      *Buildings not to be constructed, altered, demolished, or removed without consent***

(1)      *A person must not carry out any building work except in accordance with a building consent.*

(2)      *A person commits an offence if the person fails to comply with this section.*

(3)      *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

[39] Because the Respondent proceeded to carry out the building work without a building consent, there has been a breach of section 40 of the Act. It follows that the Respondent has breached a provision of the Building Act and has, in turn, breached clause 10 of the Code of Ethics.

*Prescribed Disclosure Information and Checklist*

[40] Prior to the building work commencing, the evidence indicated that the Respondent had not complied with the provisions of section 362D of the Act or regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

[41] Section 362D requires a building contractor, which the Respondent was, to provide “prescribed disclosure information” and a “prescribed checklist” for building work that exceeds the prescribed minimum price. The prescribed minimum price is \$30,000. The building work exceeded that amount by a long margin.

[42] Regulation 5 of the regulations sets out what the “prescribed disclosure information” and a “prescribed checklist” are.

[43] Overall, the statutory provisions are designed so that a consumer can make an informed choice before entering into a building contract.

[44] It was not clear, on the evidence before the Board, that the Respondent had complied with his legal obligations under section 362D of the Act and regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

### *Contract*

- [45] The Respondent also failed to provide a building contract prior to undertaking the building work. Section 362F of the Act mandates a contract if the price for residential building work exceeds the prescribed minimum price. It also states that the residential building contract must be in writing, dated, and comply with the regulations.<sup>20</sup> Regulation 6 of the Consumer Regulations sets out the prescribed content for residential building contracts.
- [46] There was some evidence that the Respondent may have provided a written contract.

### Consideration

- [47] Because the Board is dealing with this matter by way of an on-the-papers decision and there is limited evidence before it regarding Code of Ethics matters, it has decided that it will not uphold a breach of the Code of Ethics. The Respondent is, however, cautioned as regards future contractual arrangements and is reminded of his legal obligation to provide disclosure information, checklists, and a written contract with a value of the building work exceeds \$30,000.

### **Board's Decision**

- [48] The Respondent **has** committed disciplinary offences under section 317(1)(b) and (h) of the Act.
- [49] The Respondent **has not** committed a disciplinary offence under section 317(1)(g) of the Act.

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

- [50] 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.
- [51] The matter was decided on the papers. Included was information relevant to penalty, costs, and publication. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

- [52] 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

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<sup>20</sup> Building (Residential Consumer Rights and Remedies) Regulations 2014

aggravating factors present.<sup>21</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>22</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>23</sup>
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;<sup>24</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>25</sup>
- (d) penalising wrongdoing;<sup>26</sup> and
- (e) rehabilitation (where appropriate).<sup>27</sup>

[53] 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>28</sup> and applying the least restrictive penalty available for the particular offending.<sup>29</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>30</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>31</sup>

[54] 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>32</sup>

[55] The conduct was at the higher end of the scale in terms of seriousness, and multiple disciplinary findings have been made. The Board considered that a commensurate penalty was required. The Board considered the cancellation of the Respondent's licence as a starting point but decided to reduce that to a suspension, the term of which will be 12 months.

[56] The Board recognises the impact a suspension will have on the Respondent. To mitigate that impact, the Board has decided that the suspension will be lifted if the Respondent successfully completes the Level 4 New Zealand Certificate in Building Regulatory Environment. The qualification, if it is undertaken, is to be completed at

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<sup>21</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>22</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>23</sup> Section 3 Building Act

<sup>24</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>25</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>26</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>27</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>28</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>29</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>30</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>31</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>32</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.

the Respondent's cost. If the Respondent does not complete the qualification, the suspension will remain in place until the expiry of the 12-month period.

- [57] The Respondent should note that whilst his license is suspended, he will be able to carry out restricted building work under the supervision of an LBP who holds a current license and that he will be able to carry out building work that is not restricted building work.

### Costs

- [58] 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>33</sup>
- [59] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>34</sup>. The starting point can then be adjusted up or down, depending on the particular circumstances of each case<sup>35</sup>.
- [60] 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 complex. Adjustments are then made.
- [61] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,350 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a complex matter that has been dealt with by way of a Decision. It is less than 50% of actual costs.

### Publication

- [62] 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>36</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.
- [63] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>37</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

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<sup>33</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>34</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>35</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>36</sup> Refer sections 298, 299 and 301 of the Act

<sup>37</sup> Section 14 of the Act

stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>38</sup>

- [64] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication. The publication, which is to be in Code Words, the Wrap Up or other suitable publication, will note the suspension and focus on the lessons LBPs can learn from the matter.

### Section 318 Order

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

- Penalty:** Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended until the earlier of the Respondent successfully completes the Level 4 New Zealand Certificate in Building Regulatory Environment to the satisfaction of the Registrar or the expiry of a period of 12 months and the Registrar is directed to record the suspension in the register of Licensed Building Practitioners.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,350 (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.
- The Registrar is directed to publish an article in Code Words or the Wrap Up summarising the decision and the lessons to be learned from it.
- 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.

- [66] 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

- [67] 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 **Monday 30 June 2025**. 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.

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<sup>38</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055



## Right of Appeal

[68] 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 June 2025.



**Mr 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.*

### <sup>ii</sup> **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:*

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- (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—

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- (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.*