

Before the Building Practitioners Board

	BPB Complaint No 26423
Licensed Building Practitioner:	Craig O'Brien (the Respondent)
Licence Number:	BP 118522
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, and by audiovisual conference
Hearing Type:	In Person
Hearing Dates:	27 February 2025, 29 May 2025, and 5 August 2025
Decision Date:	28 October 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 (d) of the Act.

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

The Respondent is fined \$4,500 and ordered to pay costs of \$7,850. 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 carried out and supervised building work in a negligent manner, and in a manner that was contrary to a building consent. Building work that did not meet acceptable standards and was contrary to the building consent issued related to the installation of foundation poles, which were out of tolerance, as was the floor for the dwelling. The Respondent also failed to install critical subfloor fixings and spliced a subfloor bearer, both of which, along with the other failings, compromised the structure of the dwelling.
- [2] The Board did not uphold an allegation that the Respondent had failed to provide a record of work on completion of restricted building work on the basis that there was a dispute and the record work was provided to a legal advisor within a reasonable period of time. Nor did the Board uphold allegations of a breach of the Code of Ethics on the basis that the evidence before it was insufficient on which to make findings.
- [3] The Respondent was fined \$4,500 and ordered to pay costs of \$7,850. The costs were increased because of the Respondent's approach to the proceedings, which necessitated three hearings. A record of the disciplinary offending will be recorded on the Public Register for a period of three years, and the Registrar is directed to publish an article summarising the matter.

The Charges

- [4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have:
 - (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act
 - (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 or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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

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.

accordance with section 88(1) of the Act contrary to 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, it would be inquiring into:

- (a) the installation of foundation poles (including depth and alignment), subfloor framing and fixings as noted in the Engineer's report of April 2024 (Pages 796-807 of the Board's file) and as noted in the Council site meeting report dated 14 November 2023 (Page 976 of the Board's file);
- (b) floor levels as noted in Mr [OMITTED] email of 1 December 2023 (Page 425 of the Board's file) and as shown in the photographs at pages 431 to 446 of the Board's file; and
- (c) the installation of tanking in the bathroom.

[7] With respect to the allegation that the Respondent breached the Code of Ethics, the Board gave notice that the specific provisions of the Code that it would further investigate at a hearing were:

14. *Your duty to inform and educate client –“ You must provide your client with sufficient information and advice to enable them to make an informed decision to enable you to continue with your building work.”*

16. *You must advise clients of any delays as soon as they become apparent –“ You must, in relation to any building work you are carrying out or supervising, take all reasonable steps to-*

- (a) *Give your client regular reports on progress: and*
- (b) *Ensure that your time frame estimates to clients are realistic; and*
- (c) *Promptly notify your client when time frames for completing work change, particularly in the event of delays; and*
- (d) *Ensure that delays in completing building work are prevented wherever possible.*

18. *You must normally follow your client's instructions*

(1) *You must follow the instructions at all times unless those instructions would-*

- (a) *Involve a breach of the law; or*
- (b) *Be dangerous to implement; or*

- (c) *Be contrary to the terms of the relevant building contract or contracts; or*
 - (d) *Be contrary to the terms of the resource consent or building consent.*
- (2) *If you believe that subclause (1) (a), (b), (c), or (d) applies, you must take all reasonable steps to –*
- (a) *Discuss the issue with the client and endeavour to come to an arrangement so that subclause (1)(a),(b), (c) or (d) will no longer apply: but*
 - (b) *If you cannot reach such an arrangement because your client persists with their instructions, and if subclause (1) (a),(b) or (d) applies raise the problem with –*
 - (i) *The authority that issued the consent or permit; or*
 - (ii) *If no consent or permit was issued, a relevant authority with functions under the Building Act 2004, or the Resource management Act 1991.”*

[8] The Board notified the Respondent that the conduct to be further investigated with respect to the Code was the timeliness of the Respondent's actions and communications regarding arrangements with Vector and Watercare, and whether the Respondent was instructed to purchase materials early in order to avoid cost fluctuations.

Procedure

- [9] The matter was set down to be heard in the latter part of 2024. The Complainant and then the Respondent sought and were granted adjournments. Further adjournments were necessitated because key witnesses were not available. A hearing date of 27 February 2025 was set.
- [10] On 25 February 2025, the Respondent emailed the Board stating:
- I will be unable to attend this hearing as I have a court case scheduled on this day that I have to attend for personal reasons.*
- [11] The Respondent was asked to provide documentation to verify the court appearance. He provided copies of High Court insolvency proceedings against him and evidence that the matter was to be called at 10 am on the day of the Board's hearing. The High Court documents note that the Respondent does not have to attend the High Court hearing, but that the matter could proceed in his absence.
- [12] The Respondent did not explicitly request an adjournment, but his email implied that he was seeking one.
- [13] The Board considered whether an adjournment should be granted. The Board noted that considerable expense had been incurred in arranging the hearing, earlier adjournments had inconvenienced witnesses, the disciplinary allegations under

investigation were serious, and there was a need for the Board to deal with the matter without further delay. Because of those factors, an adjournment would not be granted, but a modified procedure would be used to ensure the Respondent's natural justice rights were not infringed. The hearing procedure adopted was:

- (a) the Board would receive the evidence of the summoned witness and would then adjourn the hearing;
- (b) a transcript of the evidence would be produced and provided to the Respondent together with a further copy of the hearing file; and
- (c) the Respondent would be given 10 working days from the date the transcript is issued to advise whether he requires the hearing to resume to allow him to cross-examine any of the witnesses and/or to call or give evidence in his defence.

- [14] The Respondent requested a resumption of the hearing. Notice was given that the hearing would resume on 29 May 2025. In the lead-up to the hearing, the Respondent indicated he would be calling various witnesses:

I refer to the Notice of Proceeding regarding the hearing scheduled for 27 February 2025 and its continuance.

In response to points [2] and [3]:

I confirm that I wish to cross-examine the following previously summoned witnesses at the continuance of the hearing:

- 1. *[OMITTED] (Complainant)*
- 2. *[OMITTED]*

In response to points [5] and [6]:

I intend to bring the following support persons and/or representatives to the hearing.

- 1. *Council representative*
- 2. *Water-care representative*
- 3. *Vector representative*
- 4. *Work Safe representative*
- 5. *Case review engineer independent*
- 6. *Case lawyer*

This list will be finalized and submitted no later than 5:00 pm, Wednesday, 21 May 2025, as requested.

- [15] On 28 May 2025, in response to a request to confirm witness details, the Respondent emailed stating:
- Myself and my support persons were working on a hearing date of Thursday 26th June, i have reached out to them to see if they can make 29th May work in their schedules and will advise on their reply.*
- [16] On 29 May 2025, the Complainant and Mr [OMITTED] were summoned and attended. The Respondent attended without his witnesses. He stated he had engaged with them and that they were prepared to attend and could provide positive evidence, but were not available for the scheduled hearing date. He accepted that he had provided them with the wrong date. The Respondent asked for an adjournment.
- [17] The Board noted that the first hearing took place without the Respondent. The second hearing was scheduled in consultation with the Respondent. He had agreed to the date. The purpose of the second hearing was to allow the Respondent to present further evidence, including from his witnesses, challenge the evidence of the summoned witnesses, and make submissions.
- [18] The Board decided that, because the first hearing proceeded in the Respondent's absence, and being mindful of the Respondent's natural justice rights, an adjournment would be granted. The Board made it clear to the Respondent that when the matter was set down for a further hearing, it would be his responsibility to ensure his witnesses were present and that further adjournments would be unlikely. The matter was set down for 5 August 2025, and the appropriate notices were issued.
- [19] The Respondent did not appear on 5 August 2025. He could not be contacted. The Board decided to proceed and make a decision on the evidence before it. In coming to that decision, the Board noted that the Notice of Hearing had been issued to the Respondent's email address for service that he maintains on the Register for Licensed Building Practitioners (LBPs), which was also the email address the Respondent had asked the Board to communicate with him on. The Board would also expect that if there has been a change of contact details whilst a matter is under consideration, the Respondent would have informed the Board of them. As such, the Board considered that the Respondent had been correctly served with notice and had been afforded his natural justice rights, as set out in section 283 of the Act, but had elected not to attend. The Board also noted that the purposes of the disciplinary provisions in the Act would be defeated if LBPs were able to avoid complaints by not appearing at hearings.

Evidence

- [20] The Board must be satisfied on the balance of probabilities that the alleged disciplinary offences 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.
- [21] The Respondent contracted, through his company, Building Labour Solutions, which has been in liquidation since 14 March 2025, to construct a new residential dwelling. The residence was based on a timber pole specific engineer designed (SED) foundation. The Respondent did not complete all of the contracted work. His and his company's engagement came to an end in late October 2023. A commercial dispute then arose. A complaint was made to the Board on 23 November 2023.

Building Work Issues

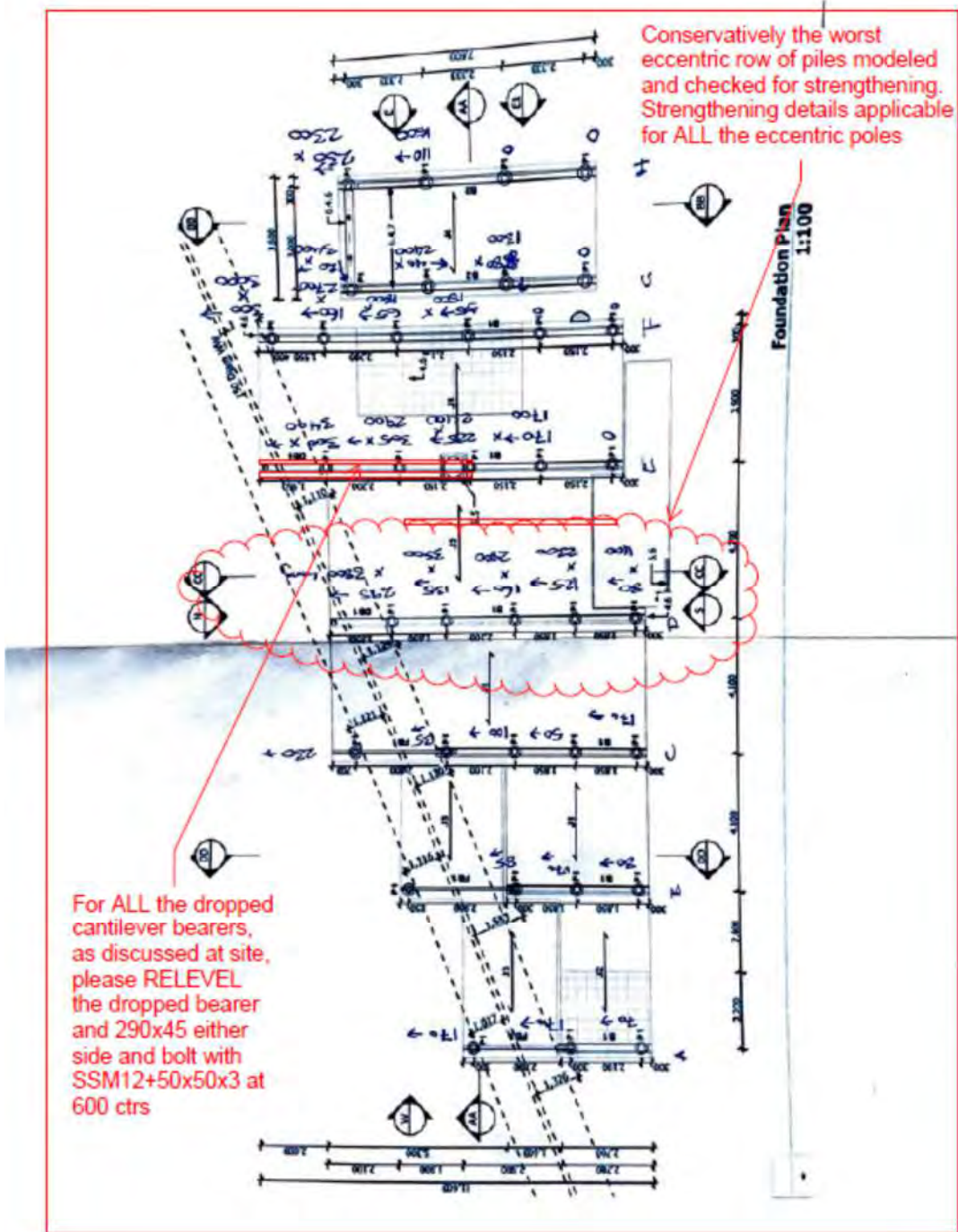
- [22] Regarding the issues the Board was investigating, the documentation that was before the Board, which was voluminous, included the Building Consent Authority (BCA) inspections. A Site Meeting dated 14 November 2023 noted:

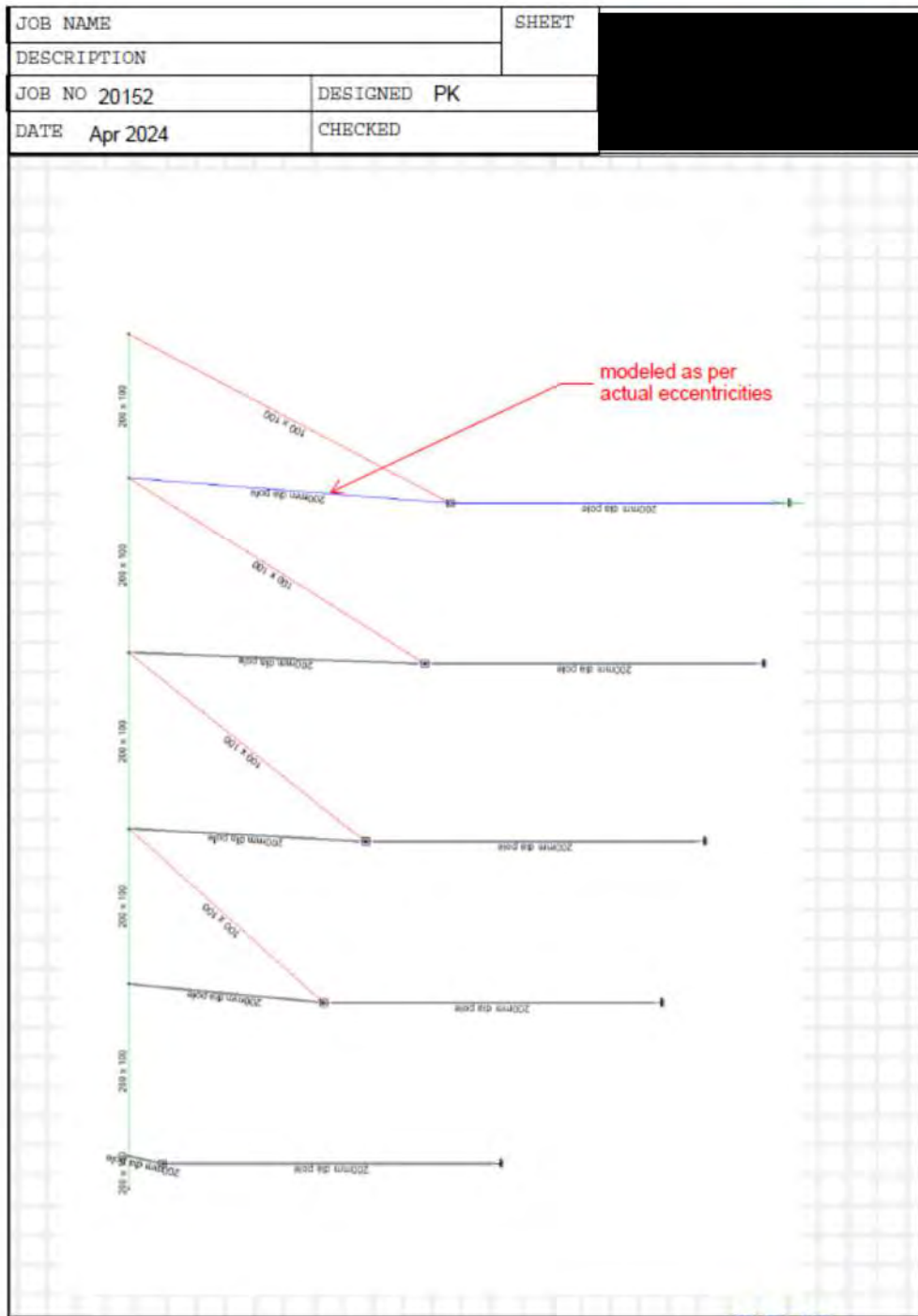
The Following points were discussed:

- The angle/tolerance of the subfloor poles. Engineer's inspection and site notes/solution are required.

- [23] The documentation also included a document titled "Additional Structural Calculations" that was issued in April 2024 by a structural engineer from [OMITTED]. The document included the following:

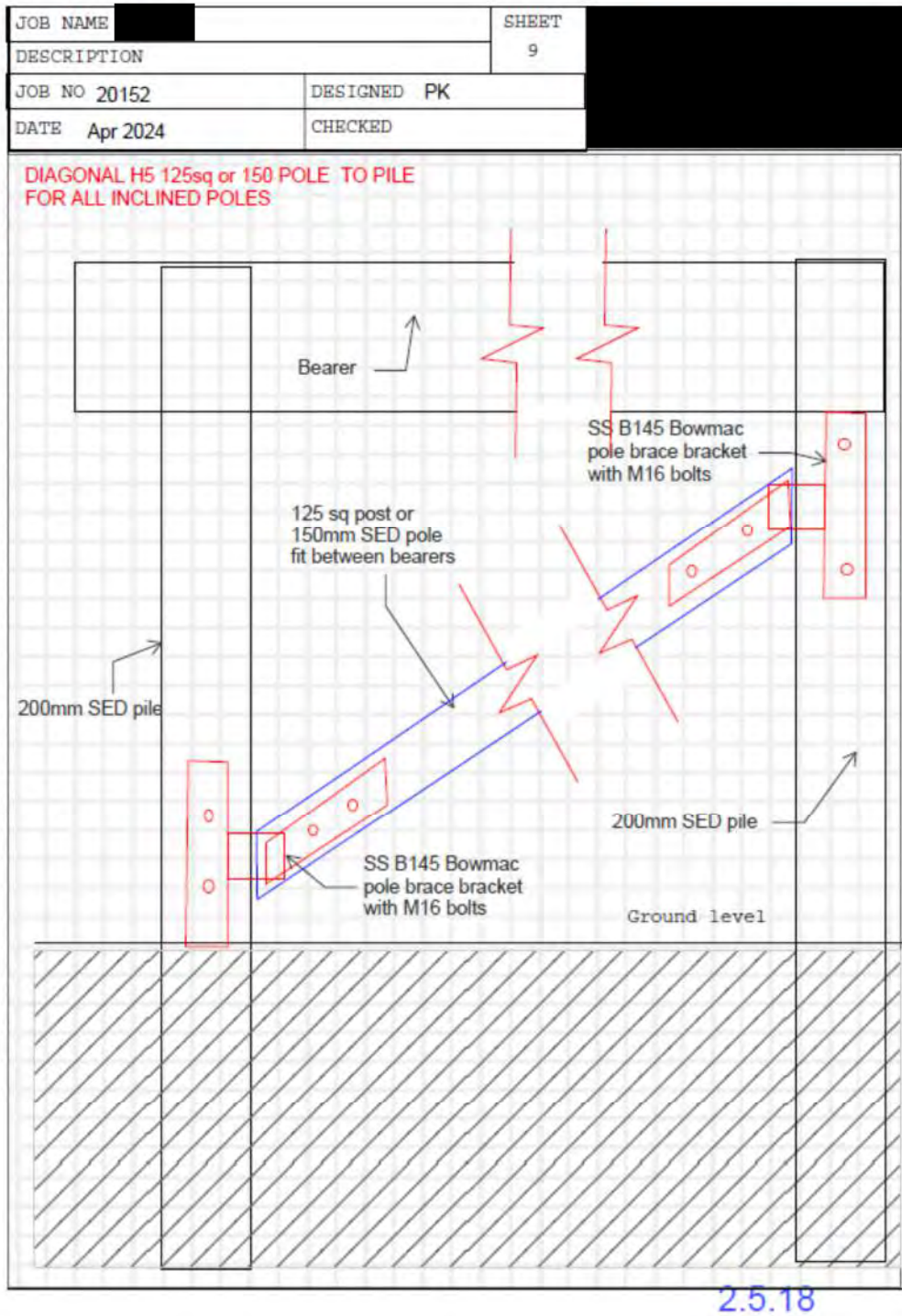
³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1





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[24] Because of the eccentricity of the poles, the engineer required additional bracing to be installed between the inclined poles, as follows:



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[25] The manner in which the poles and subfloor were installed resulted in issues with the floor levels. This was noted in correspondence from the flooring cover provider dated 1 December 2023, wherein it was noted that the subfloor was out of acceptable tolerances and that substantial work was required to remediate the issue. Floor levelling compounds were used to remediate the issue, as shown in the representative photograph below:



- [26] The Board received evidence at the hearing that substantiated the above issues. The builder engaged to continue with the build and carry out remedial work noted that 90% of the piles were deflected from plumb by 150-300 mm over the length of the pile, equating to 75 mm over 1 m. He had measured the deflection with a laser and had provided his details to the engineer, who then carried out the structural redesign. The engineer and turn noted that when he went to site, he was able to ascertain by just looking at the poles that they were not correct. His remediation design was required so as to correctly carry and transfer the load from the dwelling through the poles. He noted that if the additional engineering had not been installed, the load-bearing capacity of the subfloor would have been reduced. He achieved this by introducing additional lateral bracing so as to create a continuous brace. The engineer also noted that two additional bearers had to be installed because bearers in the vicinity of a cantilever had been spliced, whereas the building consent and SED did not allow for splicing. The engineer rated the seriousness of the pole and subfloor issues as a 7 1/2 or 8 out of 10. A Council Site Meeting dated 14 November 2023, recorded the floor being out of tolerance and a lack of subfloor connections, regarding which, the building work on top of the floor structure had continued whilst the floor structure itself was not structurally stable or secure, including that a pole installed in a creek was only 1.8 metres deep whereas it should have been at a depth of 4 metres and was installed with bagged concrete.
- [27] The Board also received evidence regarding bathroom tanking that established that a suitably licensed tradesperson had carried out the work, and, on that basis, the Board did not further investigate that specific issue.

Record of Work

- [28] Regarding the record of work allegation, the Complainants gave evidence that, as the owners, a record of work was received through the board after the complaint had been made. The Complainants confirmed that the contract with the Respondent's company had been cancelled in October 2023 and that the Respondent did not carry out any further restricted building work after that date, and that another contractor had continued with and completed the build.
- [29] The Respondent's response and correspondence that he provided indicated that there was an ongoing commercial dispute and that the record of work may have been provided by the Respondent's lawyer on 16 November 2023 to the Complainant's lawyer.

Code of Ethics

- [30] After the contract came to an end in October 2023, a contractual dispute arose about materials the Complainants claimed had been paid for but not supplied and the extent to which the building work had been completed, and service connections. The Board investigated the Respondent's conduct regarding whether he was instructed to purchase materials early in order to avoid cost fluctuations and the arrangements for connections with Vector and Watercare.
- [31] The Respondent advised the Complainants that prices for materials were going up and that the materials could be secured prior to the price increases by them being ordered and paid for in advance. They were provided with pricing information from Placemakers. The Complainants proceeded to make an early payment, and they alleged that not all of what had been paid for had been supplied or installed. The Complainants provided a spreadsheet with their calculations and provided evidence on what they considered their losses had been.
- [32] Regarding water and electricity supplies, various connection options were being investigated due to site complexities and restrictions. More than one water supply and meter location option was being considered. One of the water supply options being considered was not viable because an infrastructure upgrade was required. A Vector application request for a site connection was cancelled due to non-payment, and a subsequent application was made. Communications between the Respondent and the Complainants were not clear, and the services were not connected during the Respondent's contract.

Negligence or Incompetence

- [33] 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

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.

the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [34] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹
- [35] The manner in which the Respondent carried out and supervised the installation of structural foundation poles failed to meet an acceptable standard, as did the failure to install required subfloor fixings, the splicing of a cantilevered bearer. The work did not comply with the structural provisions of the Building Code or the approved building consent, and the building's structure was significantly compromised as a result.

Was the conduct serious enough

- [36] The failings were serious. The manner in which the foundation poles were installed had repercussions on the rest of the build. As a result of the Respondent's negligent work on the poles, the floor levels were out of tolerance, and remedial work was required. Remedial work was also required on the poles themselves, with lateral braces having to be installed to ensure the building structure load would be transferred to the ground. Missing subfloor fixings compromised the integrity of the building, which had progressed well beyond the subfloor. One pole was not installed with a foundation posthole depth in accordance with the approved building consent. The building as a whole was structurally compromised because of the Respondent's failings. The reality of the situation is that the Respondent should have rectified the

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

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

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

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

issues with the poles before proceeding with any further building work. He did not, and the issues created compounded.

- [37] The Board considered that the departures were not mere inadvertence, error or oversight. As was noted by the engineer, the poles were out of alignment to the extent that it was visibly noticeable. The lack of fixings would also have been evident through a visual inspection, and the splicing of a cantilevered bearer should not have occurred if due care and diligence had been paid to the building work.

Has the Respondent been negligent or incompetent

- [38] The Respondent has carried out and supervised building work in a negligent manner.

Contrary to a Building Consent

- [39] 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.¹² Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹³ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁴ Inspections ensure independent verification that the building consent is being complied with.

- [40] 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 the departure was deliberate or a result of negligent conduct.¹⁵ 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.¹⁶ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

- [41] The issues that the Board has found that the Respondent was negligent, the foundation poles, one posthole depth, subfloor fixings, and the splicing of a cantilevered bearer, are also aspects of the building work that did not comply with the building consent.

Was the conduct serious enough

- [42] The departures were significant and serious. As noted in relation to the negligence finding, the structure had been compromised and should have been obvious to a

¹² Section 49 of the Act

¹³ Section 40 of the Act

¹⁴ Section 222 of the Act

¹⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁶ *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".

competent practitioner that the work had departed from what was specified in the building consent.

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

- [43] The Respondent has carried out and supervised building work that did not comply with the building consent.
- [44] There is a degree of commonality between the findings of negligence and contrary to a building consent. The Board will take into consideration when it determines the appropriate penalty.

Failure to Provide a Record of Work

- [45] 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.¹⁷
- [46] 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 work¹⁸ unless there is a good reason for it not to be provided.¹⁹

Did the Respondent carry out or supervise restricted building work

- [47] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure and the external moisture management system of a residential dwelling, both of which are types of restricted building work.²⁰

Was the restricted building work complete

- [48] The Respondent's engagement in building work came to an end on or about October 2023. Technically, that is when completion occurred and when a record of work was due. However, there was a period thereafter when there was a commercial dispute, and there was a possibility that the Respondent may have returned to carry out further restricted building work. In those circumstances, completion was deferred. A point did arise, where it was apparent that the contractual relationship was at an end and that no further restricted building work would be carried out or supervised by the Respondent. At about that time (16 November 2023), he provided a record of work to his lawyer with the expectation that it would be provided to the owners and the territorial authority. That did not occur.

Has the Respondent provided a record of work

- [49] The Board has decided that, because the parties to the contract were in dispute, there was a possibility the Respondent may return to carry out supervise further

¹⁷ Section 88(1) of the Act.

¹⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁹ Section 317(1)(da)(ii) of the Act

²⁰ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

restricted building work, and that he provided a record of work to his legal advisor for provision to the owners at about the time of it becoming apparent that he would not do so, the disciplinary offence had not been committed.

Did the Respondent fail to provide a record of work

[50] The Respondent did not fail to provide a record of work on completion of restricted building work.

Code of Ethics

[51] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.²¹ 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 regimes²² for some time, and the Board has taken guidance from decisions made in other regimes.

[52] 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.

[53] 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*,²³ 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.

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

The conduct under investigation

[55] The Board was investigating whether materials were pre-purchased in order to avoid cost fluctuations, and the arrangements for water and power connections.

[56] Looking at the pre-ordering of materials, whilst it was clear that there was correspondence about materials being pre-ordered and that payments were made, the Board was not able to clearly reconcile the evidence before it, whether what had

²¹ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

²² Lawyers, Engineers, Architects and Accountants, for example

²³ [1992] 1 NZLR 720 at 724

been paid for had been provided. On that basis, the Board decided it would not further consider the issue.

- [57] With respect to power and water connections, the Board considered that there was some uncertainty as to how those services could be provided and, because matters were not, on the evidence that was before the Board, clear, the Board did not consider it could make a finding in relation to the allegation.

Did the conduct breach the Code

- [58] When considering conduct of this type, the courts have stated that it has to be viewed objectively. The subjective views of the practitioner or other parties involved are irrelevant.²⁴
- [59] Looking at the Respondent's conduct objectively, on the basis of the foregoing, the Board finds that it cannot make findings that the Respondent breached the Code.
- [60] The Board did note, however, that the Respondent's Communications with the Complainants could have been clearer and that the lack of clarity contributed to the confusion on both issues. The Respondent's conduct did not, however, reach the threshold for disciplinary action.

Board Decisions

- [61] The Respondent **has** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.
- [62] The Respondent has **not** committed disciplinary offences under section 317(1)(da)(ii) or (g) of the Act.

Penalty, Costs and Publication

- [63] 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.
- [64] The Board received and heard evidence relevant to penalty, costs, and publication. Because the Respondent has not engaged any further in the hearing process, the Board has decided that it will make an order and issue the appropriate orders.

Penalty

- [65] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.²⁵ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁶

²⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁵ *Ellis v Auckland Standards Committee 5* [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

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

- (a) protection of the public and consideration of the purposes of the Act;²⁷
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;²⁸
- (c) setting and enforcing a high standard of conduct for the industry;²⁹
- (d) penalising wrongdoing;³⁰ and
- (e) rehabilitation (where appropriate).³¹

[66] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases³² and applying the least restrictive penalty available for the particular offending.³³ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁴ that is consistent with other penalties imposed by the Board for comparable offending.³⁵

[67] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.³⁶

[68] In this matter, the Board adopted a starting point of a fine of \$4,500. Whilst the Board was considering three disciplinary matters in relation to the Respondent at the same time, the fact is that the Respondent has not appeared previously before the Board. Because of that, the Board cannot consider this to be a second or subsequent disciplinary offence. However, it can apply the totality principle and consider the Respondent's conduct in light of the other matters before it. In that respect, the Board noted a cavalier attitude towards compliance and failure to engage in and take responsibility for issues and faults arose across all three matters, putting the conduct at the higher end of the scale. It was on this basis that the Board adopted a starting point of a fine of \$4,500. There are no known mitigating factors. As such, the fine will not be adjusted from the starting point.

Costs

[69] 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

²⁷ Section 3 Building Act

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

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

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

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

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

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

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

³⁶ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁷

- [70] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁸. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁹.
- [71] 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, and was made more complex by the respondent's approach to the disciplinary matter. Adjustments are then made.
- [72] Regarding the Respondent's approach to the matter, the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*,⁴⁰ the High Court held that it was permissible to take into account as an adverse factor when determining costs that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the board allowed adjournments at the respondent's request in order to allow him to present evidence, which he did not do. As such, additional expense has been incurred.
- [73] With the above in mind, the Board's scale costs for a complex hearing are \$4,850. There have been two additional hearings, which the Board will rate as simple and for which an additional \$1,500 and costs for each will be imposed. The total amount of costs the Respondent is to pay is \$7,850.

Publication

- [74] 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,⁴¹ 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.
- [75] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴² 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.⁴³

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

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

³⁹ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

⁴⁰ [2011] 3 NZLR 850.

⁴¹ Refer sections 298, 299 and 301 of the Act

⁴² Section 14 of the Act

⁴³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[76] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication. There is public interest in the matter, and it is important that others learn from the Respondent's conduct. The article is to be published in the Wrap Up and in any other publication that the Registrar thinks fit.

Section 318 Order

[77] 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 \$4,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$7,850 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website, and the Registrar is directed to publish an article in the Wrap Up summarising the matter

[78] 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

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

Signed and dated this 29th day of October 2025



Mr M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*

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

ii Section 318 of the Act

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

iii Section 318 Disciplinary Penalties

- (1) *In any case to which section 317 applies, the Board may—*
- (a) *do both of the following things:*
 - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (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.*