

## Before the Building Practitioners Board

	BPB Complaint No. 26454
Licensed Building Practitioner:	In Soo Cheong (the Respondent)
Licence Number:	BP 113558
Licence(s) Held:	Carpentry and Site AoP 2

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	8 October 2024
Decision Date:	15 October 2024

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

#### Procedure:

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

#### Disciplinary Finding:

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

The Respondent is fined \$2,500 and ordered to pay costs of \$2,950. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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**Summary**

[1] The Respondent was engaged to carry out building work on a new residential dwelling. During the building process, multiple inspections failed, and inspections noted that building work had departed from the building consent. The Board investigated the failed inspections and found that building work on the foundations, framing and membrane decks had been carried out in a negligent manner and that the Respondent had been negligent for failing to ensure a minor variation had been obtained prior to making changes to a membrane deck. The Board also found that, in relation to changes to the membrane deck, the Respondent had carried out

building work that was contrary to a building consent. Finally, the Board found that the Respondent had failed to provide a record of work on completion of restricted building work.

- [2] The Board fined the Respondent \$2,000 and ordered that he pay costs of \$2,950. The fine was reduced on the basis that the Respondent, following the completion of the hearing, did provide a record of work. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

### 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;
  - (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 or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [5] In further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the following:
- (a) items notated as 6(g) and 6(h) in the complaint (page 27 of the Board's file);
  - (b) the failed items and comments noted in a Foundation (IFO) inspection dated 7 December 2010 (starting on page 1712 of the Boards file), carried out by Karl Sumner;
  - (c) the failed items and comments noted in a Membrane tanking (ITK) inspection dated 27 January 2011 (starting on page 1743 of the Board's file), carried out by William Watson;

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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.

- (d) the failed items and comments noted in a Framing / Remedial (IFG) inspection dated 11 October 2021 (starting on page 1804 of the Board's file), carried out by Lance Van Osenbruggen; and
  - (e) the failed items and comments noted in a Framing / Remedial (IFG) inspection dated 5 November 2021 (starting on page 1827 of the Boards file), carried out by Karl Sumner.
- [6] At the hearing, the Board informed the Respondent that it would not be further investigating item (c) above. It made a decision on the basis that the witness who had been summoned to give evidence in relation to it, a Building Control Officer (BCO), had failed to attend the hearing.

### **Evidence**

- [7] 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.
- [8] The Respondent was contracted to build a new residential dwelling for the Complainant. The full build was not completed by the Respondent, and a commercial dispute between the parties arose. The Complainant is in the process of obtaining a Code Compliance Certificate (CCC). A final inspection has now been passed, but a lack of required documentation is, according to the Complainant, delaying the CCC issue. Amongst those documents was the Respondent's record of work for the restricted building work that he carried out or supervised.
- [9] The Respondent, at the hearing, gave evidence that he both carried out and supervised the building work. He also stated that he was not the only Licenced Building Practitioner (LBP) involved in the build, and in addition to other trades, he contracted LBP carpenters to assist him with the building work. The Respondent stated that he had records of work for the other licensed persons in his position. He was given until 14 October 2024 to provide copies of those records of work to the Board.
- [10] The Respondent provided his record of work within the allowed time frame. No other records of work were provided, and no other LBPs were identified by the Respondent.
- [11] The Respondent was also provided with an opportunity to submit further evidence relating to changes that were made to a membrane deck. In particular, he was invited to provide evidence that he had engaged with either the engineer or the architect prior to making the changes that were noted in inspection reports. He provided that evidence, which has been taken into consideration.

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

## Negligence or Incompetence

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

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

[13] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

## Building Inspection Issues

[14] The Board was investigating three failed inspections. The first was a foundation inspection carried out on 7 December 2020 by Karl Sumner, a PCO who gave evidence at the hearing. The inspection record noted the following:

### *Fail Comments*

1. *Strip foundation width, depth and layout as per plan ( Fail )*
2. *Strip foundations reinforcing size, grade, laps and bends as per plans ( Fail )*
3. *Strip foundation- Reinforcing concrete cover ( Fail )* 4. *Piles/post footing sizes and general layout ( Fail )*

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

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

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

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

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

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

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

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

*Additional Comments*

*Foundation inspection for lower level concrete piles and footings.*

*Piles do not have chairs at the base of the piles to ensure cover of 75mm is achieved as concrete is being poured. currently a number of piles are closer than 75mm and some appear to be touching the sides of the holes. Please remove steel in piles and install "wagon wheel" chairs to these piles cages.*

*There are steps in the foundations that have not been followed by the steel cages and also these cages are up to 400mm out of level.*

*The steel in some of these footings are out of the ground.*

*It was also noted that the nova coil has not been installed at the base of the timber retaining wall. This only applies to the lower level wall. upper wall is ok.*

*Geotech and structural note for the retaining wall have been photo'd and remediation work completed.*

*Geotech for footing to lower level received and ok. Structural for lower level received but required remediation and now as the piles need to be removed will require reinspection . HD 16 laps in places only 400. and being formed over piles.*

*No concrete is to be poured before council have re- inspected and passed.*

- [15] The Respondent stated that he carried out the foundation work in conjunction with another LBP.
- [16] The inspection report was supported by photographs of the non-compliant work. Mr Sumner, the BCO, gave evidence that the main issue was the use of incorrect chairs, and that the chairs that were used were not adequate to support the weight of the reinforcing steel and that the required cover between the steel and the concrete would not have been maintained. The evidence heard was that the reinforcing steel was removed and that the correct type of chairs (wagon wheel chairs) were installed.
- [17] Evidence was also heard that the required cover at the bottom of the pile holes may not have been maintained. The Respondent stated that he did pour a concrete pad at the bottom of each pile whole prior to inserting the reinforcing steel. There was no corroborating evidence of this.
- [18] The second inspection being investigated was carried out by Lance Van Osenbruggen, a BCO, on 11 October 2021. The following non-compliance, supported by photographs, was noted:

*Fail Comments*

1. *Work completed in accordance with plans (Work requires minor variation)*
2. *Balcony joists as per plan (Fail)*
3. *Balcony/ deck: cladding clearance from deck level (Fail)*
4. *Balcony membrane substrate fixings/nogs/slope (Fail)*
5. *Balcony: slope of substrate (Fail)*
6. *Balcony/ deck: barrier construction as per plan (Fail)*
7. *Balcony framing treatment and grade- joists, beams, barrier, substrate etc as per plan (Fail)*
8. *Balcony Stormwater outlet/ overflow (Fail)*

*Additional Comments*

*Deck substrate inspection areas found \*Falls not compliant*

*\*Screwing off required 150 ccs perimeter and 200ccs internals \*Overflows required to be completed one per internal gutter as plans show*

*\*MV required to update deck substrate plans.*

*\*Peno thru floor for kitchen details required for waterproofing tbc. \*Fireplace details for waterproofing to be confirmed is h1.2 \*By fireplace steel beam capping to be completed \*Ply joints unsupported*

*\*Exterior boundarys missing connections and engineer to specify double boundary joist connections for glass to be confirmed*

*\*Nogging at 400ccs required specifications for membrane required to confirm*

*\*Missing joist hangers in places*

*\*Pergola roof bracket peno details to be confirmed tanking. \*Bolts missing in structure.*

*\*Detail for tanking to house how to finish required and into door etc.*

*FULL RE CHECK REQUIRED for structure and substrate.- MV to be completed prior.*

*Possibly site meeting to be done first to approve plans/mv then framing re inspection.*

[19] Mr Van Osenbruggen gave evidence that what had been built did not reflect the consented plans. In particular, he noted that the deck had different falls (the

direction and angle by which surface moisture is directed off of the deck) from what was consented. As noted above, a Minor variation was required.

- [20] The Respondent stated that he had carried out the work, and he noted that subsequent inspections of the work had been passed. The Complainant gave evidence that the Respondent had complained about the design and that he had given the Respondent the architect's details so that the Respondent could raise the issue with the architect.
- [21] The Board questioned the Respondent as to whether he had engaged with the architect or engineer prior to carrying out building work that differed from the building consent. He stated that he did. The Board requested that he provide evidence of the amended plans or details that he was following.
- [22] The additional evidence that the Respondent provided showed that he contacted the architect on 8 October 2021, prior to the 11 October 2021 inspection. The engagement with the architect, however, was after he had altered the design and constructed the works on site. In essence, the Respondent was seeking an endorsement from the architect after he had made the changes, not before. In this respect, an email from the Respondent requested that the plans be altered for a minor variation to match what had been built. It stated:

*Please see updated deck layout with minor variation form.*

*As explained I'm not totally convinced the way your team have done on-site is compliant, council can be a bit ambiguous with what is and isn't a gutter. But we have drawn as you have built it and it will be up to the building inspector to decide.*

- [23] Also, an email after the 11 October 2021 inspection dated 13 October 2021 made reference to changes needed to satisfy the BCO on-site request.
- [24] On the basis of the above evidence, the Board finds that the Respondent altered the design and carried out the building work before getting advice from the architect or a minor variation approval.
- [25] The Board also notes that the issues raised in the inspection, including the requirement for a Minor variation for changes to the building consent, were still being noted in a subsequent inspection carried out on 5 November 2021.
- [26] Turning to the 5 November 2021 inspection, it was carried out by Mr Sumner. An inspection notice supported by photographs of non-compliant work was provided. The non-compliant work in it was noted as:

*Fail Comments*

1. *Timber wall framing: point load stud locations/fixings ( Fail ) triple studs forme post at NE corner are completely saturated but have been*

*wrapped. The external wrap must be removed in order to let this dry out.*

2. *Timber wall framing: top and bottom plate sizes and fixings ( Fail ) Only a few ramsets.*
3. *Timber wall framing: bracing connections/ system ( Fail ) All g1 no fixing.*
4. *Balcony membrane substrate fixings/nogs/slope ( Fail ) No perpendicular support to ply. ie ply runs along joists not at right angles to it.*

*Many fixings have missed joists.*

*Some joists have 2 separate packers above. are the screws penetrating to joists?*

*Most joins have no support. up to 20mm gaps.*

#### *Additional Comments*

*Preline build booked for upstairs.*

*History show failed framing due to the over flows for the deck being too small. these have now been changed and are 75x150.*

*A review of the history show all framing complete except for wall framing down stairs.*

*While completing the lower level walls it was unavoidable to see the substrate fixing for the membrane deck above is of very poor quality. see photo's and checklist.*

*In Soo asked if he could line ceiling upstairs but many ceiling battens have been run different direction in the same rooms so no gib to be installed.*

*Also noted windows not fixed correctly. only 1m centers, 450 required*

*Bottom plates generally at 20%.*

- [27] The Board noted that issues raised in the earlier inspection had not been rectified. The Board questioned the Respondent as to why they had not been attended to. The Respondent stated that he had asked his worker to do the remedial work but that it had not been done.
- [28] The Board also questioned the Respondent about inspections being booked when related building work may not have been ready to be inspected. The Respondent stated that he was at fault in that respect.

### **Deck Issues**

- [29] The decks issues identified by the Complainant related to the deck discussed above. The Complainant stated that posts were not straight, and not all of the fixings were stainless steel, noting that the dwelling is in a sea spray zone. He stated that he had to use epoxy resin paint to protect the galvanised fixings that had been installed. The Respondent denied using anything other than stainless steel fixings.
- [30] The Respondent provided photographs as part of his post-hearing submissions that showed stainless steel fixings and he stated that all the fixings were stainless steel.
- [31] The Board accepts the Complainant's evidence with respect to this issue. He is in the painting trade, and he was clear in his evidence that he had to apply coatings to protect non-stainless steel fixings.
- [32] With respect to posts were not straight, there was insufficient evidence provided to the Board to establish whether this was an issue.

### **Negligence**

- [33] The Board, which includes persons with extensive industry experience and knowledge, finds that the Respondent has carried out building work in a negligent manner. His conduct has fallen below an acceptable standard with respect to how the work on the foundations, framing and decks was carried out, including a failure to obtain a minor variation for changes to a membrane deck prior to the building work being carried out.

#### Was the conduct serious enough

- [34] The matters complained about did not arise because of mere error, oversight or inadvertence. There was a pattern of non-compliant building work that was not being attended to in a timely manner. Further, the Respondent failed to use an acceptable process when he made changes to a membrane deck. The engagement with design professionals came after, not before, the changes, which is unacceptable because the practice carries with it the risk that the changes made will not be Building Code compliant.

#### Has the Respondent been negligent or incompetent

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

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

- [36] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.<sup>12</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building

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<sup>12</sup> Section 49 of the Act

consent.<sup>13</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>14</sup> Inspections ensure independent verification that the building consent is being complied with.

- [37] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.<sup>15</sup> The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>16</sup> If it does not, then a disciplinary finding cannot be made.

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

- [38] The building work carried out on the deck was on the basis of the evidence outlined above in relation to negligence, carried out in a manner that was contrary to the building consent. This finding is made on the basis that the changes to the building consent were completed prior to a consent change process being followed and approval being granted.

- [39] It is important to note that when changes to a building consent are going to be made, an acceptable process be followed to ensure that the work will meet building code compliance and that, if a minor variation is being sought, that one will be granted and that the BCA will not require a formal amendment. Carrying out building work without following such process puts the work at risk of non-compliance and further rework or deconstruction.

#### Was the conduct serious enough

- [40] For the same reasons as the finding under negligence, the Board finds that the conduct was serious.

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

- [41] The Respondent has carried out building work that was contrary to the building consent.
- [42] The Board does note that the findings under section 317(1)(b) and (d) of the Act regarding the deck are similar. That is a factor that will be taken into consideration when the Board determines the appropriate penalty.

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<sup>13</sup> Section 40 of the Act

<sup>14</sup> Section 222 of the Act

<sup>15</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>16</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".

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

[43] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>17</sup>

[44] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>18</sup> unless there is a good reason for it not to be provided.<sup>19</sup>

### Did the Respondent carry out or supervise restricted building work

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

### Was the restricted building work complete

[46] The Respondent stated that the contract was terminated on 1 December 2021. The Complainant stated termination was mid-January 2022. Irrespective of which date is taken, completion occurred in or about the end of 2021 or the start of 2022 as, after that date, no further restricted building work could have been carried out by the Respondent.

### Has the Respondent provided a record of work

[47] The Respondent has not provided a record of work to the owner or to the Territorial Authority. In a written response to the complaint sent on 16 February 2024, the Respondent stated that:

*Manpower can not provide the owner the CCC application documents, if the project is not completed by manpower, this was explained to the owner verbally and through email multiple times.*

[48] With respect to the Respondent's record of work, he submitted in a written response sent on 15 April 2024:

*I sent the recorder work to the Manpower construction ltd at the time.*

[49] Manpower Construction is the Respondent's company. It was removed from the company register on 23 August 2023. The Respondent was its sole director and shareholder.

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<sup>17</sup> Section 88(1) of the Act.

<sup>18</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>19</sup> Section 317(1)(da)(ii) of the Act

<sup>20</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

[50] The Respondent provided a record of work following the completion of the hearing. That was dated 8 October 2021, which is an indication that completion occurred in 2021. As noted above, it has not, until now, been provided.

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

[51] There are no good reasons why the Respondent has not provided a record of work.

[52] The Board notes that there was an ongoing payment dispute. Whilst this was not put forward as a reason for non-provision, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed Building Practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.

Did the Respondent fail to provide a record of work

[53] The Respondent has failed to provide a recorder work on completion of restricted building work.

**Board Decisions**

[54] The Respondent has breached sections 317(1)(b), (d) and (da)(ii) of the Act.

**Penalty, Costs and Publication**

[55] 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.

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

Penalty

[57] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>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>

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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

- (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>

[58] 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>

[59] 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.<sup>32</sup>

[60] In this matter, the Board adopted a starting point of a fine of \$2,500. The fine has been set at a level that will deter the Respondent and other Licensed Building Practitioners, and it is consistent with other fines imposed by the Board for similar types of offending.

[61] The Board did not consider that there were any mitigating factors that it should take into consideration, other than the late provision of a record of work. A reduction of the fine of \$500 will be applied in recognition of that late provision. The fine is set at \$2,000.

### Costs

[62] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>33</sup>

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<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.

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

- [63] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>34</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>35</sup>.
- [64] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderately complex. Adjustments are then made.
- [65] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,950 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a moderately complex in-person hearing, and it is significantly less than 50% of actual costs.

#### Publication

- [66] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<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.
- [67] 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 stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>38</sup>
- [68] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

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<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

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

### Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to \$2,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,950 (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.**

[70] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### Submissions on Penalty, Costs and Publication

[71] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **24 November 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### Right of Appeal

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

Signed and dated this 4<sup>th</sup> day of November 2024.



**M Orange**  
Presiding Member

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

*This Act has the following purposes:*

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

**ii Section 318 of the Act**

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

**iii Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
- (a) *do both of the following things:*
    - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*

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- (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.*

**<sup>iv</sup> Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
  - (b) *to take any action referred to in section 318.*

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*