

Before the Building Practitioners Board

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| | BPB Complaint No. 26489 |
| Licensed Building Practitioner: | John Adair (the Respondent) |
| Licence Number: | BP 107998 |
| 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

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Christchurch |
| Hearing Type: | In Person |
| Hearing Date: | 10 March 2025 |
| Decision Date: | 14 April 2025 |

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)(1)(b), (d) and (da)(ii) of the Act.

The Respondent's licence is cancelled, and he may not apply to be relicensed for a period of six (6) months. He is ordered to pay costs of \$4,150. 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 on new residential dwellings. Council inspection records showed that there were significant departures from the building consent and that work had been carried out in a manner that was non-compliant with the consent issued. The departures were serious, and the Board found that the Respondent had carried out and supervised building work in a negligent manner and that, with respect to building consent change processes, he had conducted himself in an incompetent manner. The Board also found that the Respondent had carried out building work in a manner that was contrary to a

building consent and that he had failed to provide a record work on completion of restricted building work.

- [2] The Board decided, because of the level of non-compliance, its findings of incompetence, and the cavalier attitude towards consenting processes, that it would cancel the Respondent's licence and order that he not be able to apply to be relicensed for a period of six months. It also ordered that he pay costs of \$4150. A publication order was made in addition to a record of the distant offending being 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.¹
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, 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; and
 - (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 accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [5] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, it would ill be inquiring into the workmanship matters raised in the site notices and audit inspection reports dated 4 July 2022, 15 July 2022 and 21 July 2023 and into the alleged failure to ensure a minor variation or amendment to the building consent was in place before carrying out the work.

Background to the Decision

- [6] This matter was first set down to be heard on 12 November 2024. The Respondent sought an adjournment on the basis that a witness he wanted to attend the hearing

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.

was not available. An adjournment was granted. The hearing was rescheduled for 4 February 2024. Notice of the new date was issued in November 2024.

- [7] The day before the 4 February 2025 hearing, the Respondent sought a further adjournment to allow him to obtain documentation he considered he needed for the hearing from the Building Consent Authority (BCA). A further adjournment was granted, and the Respondent was advised that the hearing would proceed on 11 March 2024. A Notice of Hearing was issued on 19 February 2025.
- [8] On 9 March 2025, the Respondent filed the documents that he had been seeking from the BCA.
- [9] On the day of the hearing, the Respondent did not appear. No requests for adjournments had been made. He did not initially respond to calls and messages sent to him. The summoned witnesses were present. The Board decided it would proceed and take the evidence of those present, and it would then issue a transcript and directions on how the matter would proceed.
- [10] The Respondent contacted the Case Officer after the hearing had been underway for approximately an hour. He stated he had forgotten and that personal issues were demanding his attention. In a subsequent email, he stated he thought the hearing was on another day, and he provided more details on his personal circumstances.
- [11] The Board noted the expense that had been incurred in convening the hearing and the Respondent's failure to engage in the process. Notwithstanding, the Board was concerned that if it continued the hearing, natural justice principles, and in particular the Respondent's right to appear, be heard and challenge the evidence, may be put at risk.
- [12] The Board decided that it would proceed with the hearing but that it would adopt a procedure that would still afford the Respondent his natural justice rights. The procedure adopted was as follows:
 - (a) the Board would receive the evidence of the witness that was present and would then adjourn the hearing;
 - (b) a transcript of the evidence received would be produced and provided to the Respondent together with a further copy of the hearing file and additional evidence submitted by the Complainant; and
 - (c) a direction would be issued that the Respondent is to advise, no later than 10 working days after the transcript is issued to him, whether he requires that the hearing resume to allow him to cross-examine any of the witnesses and/or to call or give evidence in his defence.
- [13] A Board Minute was issued outlining the above, and the Respondent was directed to advise the Board Officer no later than 10 working days after a transcript and further evidence are issued to him if he requires a resumption of the hearing. He was also informed that if he did not give notice, then the Board would meet and make a

decision on the basis of the evidence before it, including any further evidence or submissions provided by the Respondent.

- [14] Other than providing further details regarding why he could not appear at the hearing, the Respondent has not responded to the Board's notice. Accordingly, the Board has made a decision.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [16] The Respondent was the owner of the property under investigation. He had obtained a building consent to allow for the construction of two attached dwellings with garages. The building work included restricted building work that must be carried out or supervised by a Licensed Building Practitioner (LBP). The Board received evidence that the Respondent was the LBP responsible for the building work but that he was assisted by his father, who was working under his supervision. The following photograph shows a general view of the dwelling:



- [17] During the build, multiple BCA inspections failed, culminating in a Notice to Fix (NTF) being issued on 1 August 2023. The Respondent sold the property in December 2023 due to a change in personal circumstances. The new owner engaged in other LBP who continued with the build.
- [18] The building consent was issued on 11 March 2020. Because the build had not been completed within two years, the BCA reviewed the progress of the build and noted: "the building work associated with this building consent has been substantially

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

abandoned since 19/11/2021". The BCA also noted that numerous areas of work needed to be addressed and that unless reasonable progression was made, the Council might have to consider alternative actions. Also, because building products had been exposed to the elements for an extended period of time, the BCA raised concerns over the durability of the Ecoply barrier and tape systems, the GIB linings and an internal fire-wall, and of truss connections that were showing evidence of rust. The BCA sought assurance from the Respondent's engineer that durability requirements would be met.

[19] On 21 July 2021, an audit inspection was carried out. The report noted:

Due to the time since the Councils last inspection, the numerous issues in those prior inspection reports and the proposed changes, Council undertook this additional audit inspection to establish the compliance level of the building at this point in time.

John Adair (owner and builder) met Robert Copeland and myself (Callum Thornton) on site and went through, observed and discussed various aspects of the building work and building consent.

[20] Robert Copeland and Callum Thornton appeared at the hearing and gave evidence.

[21] The audit inspection report noted:

When inside the building, I first asked if John had the site report from his engineer for the cracks and exposed steel (requested last time). Council requires the engineers acceptance or any remediation for the slab cracks, exposed steel and missing saw cuts at this stage so we can record compliance for this area of work. John stated he has made the engineer aware but did not have any record of this to hand.

Please refer to the request for the required engineers CM reports below.

I then asked if RD Sullivan had inspected the steel, bracing, framing and connections?

John provided the photographed site report from the engineer CON 005 but this recorded the need for remediation of work. I have requested that John engages with his engineer to attend site again complete this specified construction monitoring.

Note: During my walk around the building, I observed many of the bolts to be loose, missing or incomplete structural connections, I have advised that the LBP reviews his structure against the consent and completes these outstanding items before both Council and engineers inspections.

Further variations - In addition to incomplete work, I also discussed some of the observed variations from building consent and the need to get all variations amended before undertaking that work. John is to review the work

and include any (and any further) variations with an application for amendment.

Note: Aspects will need to be clarified such as the need to remove batten and other aspects if wrap is to be placed over all the RAB (ecoply) to the scope/specifications of the appraisal submitted.

[22] Mr Copeland detailed his observations when the audit was carried out. He noted multiple areas of non-compliance with the building consent and/or New Zealand Building Code. The more serious matters were:

- (a) A change in flooring from strandboard to a fibre cement sheet was made. The floors were engineer-designed diaphragm floors. The strandboard had been installed and had been laid under the frames. It had then been cut out and replaced with fibre cement board. The frames had not been lifted when the strandboard was removed, meaning strandboard remained under the frames and extended some 50mm from them. The result was an unconsented change to the building consent and a non-standard connection between the strandboard and the fibre-cement sheets, compromising the engineer-designed diaphragm floor. A lack of blocking under sheet joints was also observed. The following photograph shows the joint between the two types of flooring:



- (b) 10-15% of structural bolt connections were only hand-tight or were missing. Up to 50% of structural connections were missing, including those to a cantilevered double joist. A subsequent LBP addressed the issue.
- (c) Cracking was present in the ground floor concrete slab, and steel mesh was exposed to the concrete surface. The requested engineering review had not been provided. A subsequent LBP addressed the issue in conjunction with the new owner's engineer.

- (d) A change in the finished floor height of the midfloor (60mm lower than expected) resulted in the minimum height for the first step of the access stairs to the first floor not complying with clause D1 of the Building Code. An Alternate Solution for the change was required, which was addressed in a building consent amendment issued after the work had been completed.
- (e) Rusted connections and mould on an incomplete fire-wall.
- (f) Non-compliant framing around dormer windows and gable end bell-casting.
- (g) Deteriorating building materials resulting from exposure to the elements.
- (h) Work progressing without BCA approval:



Observation: Cladding partially installed and stringer partially attached - Work has not been approved to continue to this stage

- (i) A failure to bring changes to the building consent to the BCA's attention prior to the associated work being carried out and then not bringing those changes to the BCA's attention during inspections.
 - (j) A general focus on non-structural finishing work when critical building elements remained outstanding from earlier inspections or unfinished.
- [23] As noted, the Respondent did not attend the hearing or make any post-hearing submissions. He did provide a response to the complaint when it was first made. He noted personal circumstances that impeded the build and issues with a neighbour. In relation to the building work, he stated he got the required consents to put things right, and :

... the flooring got wet at times, and when returning to the site i got a peice of flooring to get tested for strenght and suitability, which it failed and the ecoplay was outside it exposure timme frame, so i got a vairation from the council to replace then with Shera flooring and shera weatherboard, the

branz appriaisal had just expired, and was re appriased by Branz and then the variation progressed.

The ecoply, required to have cavity batens removed and building paper installed over ecoply as per there spec's, which was applied for at council and granted.

And

There was a comment from the council, that one bolt on a steel beam was only finger tight, 3 were tight and of course i tightened the one, when told it was loose.

i understand how to install structual connections as per the plans and enginners plans, but i cant be onsite all of the time.....

I have done my best to comply with the building consentand got variations required to make the duplex complying, even when out of my control.

I have never had so many vairations, some because of over exposure to weather, some branz approval expired, and some over sights of companys that i trusted.

The stairs were drawn by nzhouseplans and R.D.Sullivan and both make oversights on stair design and as owner, it was my responsiblity to get them designed to comply, both companys missed the basement floor had a slope on it to the river end and that effected the first stair to be not have correct head clearance. the stairs were redrawn to comply , ie first riser was inside the stair area, with head room there about 4.6m

So stairs were given a bc vairation and if stairs are built as per Mkays staired design the will comply, the stairs were ordered but duplex sold before they were require.

Negligence or Incompetence

[24] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise

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

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

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

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.

- [25] 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
- [26] There were two aspects that the Board was investigating. The first was the quality and compliance of the Respondent's building work. The second was the processes used in conjunction with changes to the building consent that had been issued.

Building work

- [27] The BCA identified numerous non-compliance issues and a pattern of building work that departed from a building consent without any consent change process having been undertaken. Whilst some of the issues arose because materials deteriorated over time, many were the result of the work that the Respondent had either carried out or supervised.
- [28] It is somewhat inevitable that a BCA will identify compliance issues that require remediation. It will, therefore, not necessarily follow that an LBP will be negligent or incompetent because they issue failed inspections. What needs to be considered by the Board are factors such as:
- (a) the extent and seriousness of the non-compliance;
 - (b) whether there is a pattern of continued non-compliance; and
 - (c) what steps are taken when non-compliance issues are raised.
- [29] The Board considers that LBPs should aim to get building work right the first time and not rely on the BCA to identify compliance failings and to assist them in getting it right. Moreover, when compliance failings are identified, the Board expects prompt action to be taken and that the LBP will not repeat the same failings. In this respect,

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.

during the first reading of changes to the Act around licensing,¹² it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [30] The introduction of the LBP regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention of the enabling legislation¹³:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes pride in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [31] Section 3 of the Act, which sets out the Act's purposes, notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*

¹² Hansard volume 669: Page 16053

¹³ Hansard volume 669: Page 16053

- (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act;*
and
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[32] It is within this context that the Board considers that the acceptable standards expected of a reasonable LBP include taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

Consent change processes

- [33] Under section 40 of the Act, there is a requirement to build in accordance with the building consent. If changes to that consent are to be made, a change process must be followed, and the requirement is to have the change approved before the building work is carried out, not after it has been completed.
- [34] The Respondent was both the owner and the LBP carrying out and supervising the build. He had a duty if the building work could not be carried out in accordance with the consented plans to consult with the designer, engineer and/or BCA before changes were made to the consent to establish if the proposed change would still meet building code compliance requirements and be approved. As noted, there is a process that needs to be followed. Changes can be processed through a building consent amendment or, if minor in nature, a minor variation under section 45A of the Act. If an LBP fails to adhere to those processes, the Board can find that they have been negligent or incompetent.

Consideration of the conduct

- [35] There was a high level of non-compliance with multiple aspects of the building work and a disregard for building consent change processes.
- [36] The Respondent called for inspections of work that was clearly not compliant and not ready to be inspected. Building work was not carried out in sequence, and work that needed to be completed to carry on with the build safely and compliantly, such as structural connections, was not completed.
- [37] The Board does accept that some of the failed items related to building element deterioration, and whilst that came about because of the Respondent, it was not as a result of his negligence or incompetence. The same cannot be said of other aspects. In particular, the change to the engineer-designed diaphragm flooring and the manner in which that change was made, continuing with building work when

structural elements were not complete and failing to follow building consent change processes.

- [38] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent to have departed from what the Board considers to be an accepted standard of conduct. The Board has decided that, with respect to the building work, the Respondent has conducted himself in a negligent manner and that, regarding the failure to adhere to building consent change processes, he has conducted himself in an incompetent manner because he has failed to demonstrate the required knowledge and skills relating to those processes.

Was the conduct serious enough

- [39] The conduct was serious. The levels of the Respondent's departures were significant and more than mere error or oversight. There was a pattern of non-compliant work and indifference to the building consent. A disciplinary outcome is warranted.

Has the Respondent been negligent or incompetent

- [40] The Respondent has carried out and supervised building work in a negligent and incompetent manner contrary to section 317(1)(b) of the Act.

Contrary to a Building Consent

- [41] 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.¹⁴ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁵ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁶ Inspections ensure independent verification that the building consent is being complied with.
- [42] 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.¹⁷ 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.¹⁸ If it does not, then a disciplinary finding cannot be made.

¹⁴ Section 49 of the Act

¹⁵ Section 40 of the Act

¹⁶ Section 222 of the Act

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *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,

Was there building work that differed from the building consent

- [43] As set out in the evidence and findings above in relation to negligence and incompetence, there were significant departures from the building consent.

Was the conduct serious enough

- [44] For the reasons set out in relation to the Respondent's negligent and incompetent conduct above, the Board finds that the conduct was serious enough.

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

- [45] The Respondent has carried out and supervised building work that was contrary to the building consent issued contrary to section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [46] 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.¹⁹
- [47] 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 work²⁰ unless there is a good reason for it not to be provided.²¹

Did the Respondent carry out or supervise restricted building work

- [48] The Respondent both carried out and supervised 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 restricted building work.²²

Was the restricted building work complete

- [49] The Respondent's involvement in the build came to an end in December 2023 when he sold the property. That was when completion occurred, and it was when he had an obligation to provide a record of work to the new owner and the Territorial Authority.

Has the Respondent provided a record of work

- [50] The Respondent has not provided a record of work. The Board confirmed this by obtaining a copy of the Territorial Authority file, which did not contain a record of work from the Respondent.

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".

¹⁹ Section 88(1) of the Act.

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²¹ Section 317(1)(da)(ii) of the Act

²² Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

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

[51] No good reasons have been stated.

Did the Respondent fail to provide a record of work

[52] The Respondent has failed to provide a record of work on completion of restricted building work contrary to section 317(1)(da)(ii) of the Act.

Board Decisions

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

Penalty, Costs and Publication

[54] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

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

Penalty

[56] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.²³ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁴

- (a) protection of the public and consideration of the purposes of the Act;²⁵
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;²⁶
- (c) setting and enforcing a high standard of conduct for the industry;²⁷
- (d) penalising wrongdoing;²⁸ and
- (e) rehabilitation (where appropriate).²⁹

²³ *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]

²⁴ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁵ Section 3 Building Act

²⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁷ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁹ *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

- [57] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases³⁰ and applying the least restrictive penalty available for the particular offending.³¹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³² that is consistent with other penalties imposed by the Board for comparable offending.³³
- [58] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.³⁴
- [59] The Board's starting point for this matter was the cancellation of the Respondent's licence. It was considered that cancellation was warranted on the basis that the Respondent has, amongst other things, been found to be incompetent and because of the cavalier attitude he has displayed toward the building consent and consent change processes.
- [60] The Board also notes the licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to a home's safe and healthy functioning. A practitioner who fails to display the required competencies puts those objects at risk.
- [61] When the Board makes a cancellation order, it must also consider what timeframe it will impose before an LBP can reapply to be relicensed. The Board's starting point was a period of 12 months. The Board noted, however, that the building work was not carried out for a client, and there were personal circumstances which impacted the build. Whilst those factors do not excuse the conduct, the Board considered they were mitigating factors. On the basis of them, it has reduced the cancellation period to six (6) months.
- [62] The Respondent should note that whilst the Board has cancelled his license, he can still carry out non-restricted building work and restricted building work under the supervision of an LBP.

Costs

- [63] 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.³⁵

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

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

³⁴ 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.

³⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [64] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁷.
- [65] 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.
- [66] The Board's normal costs order for a moderate hearing is \$2,950. Extra expense has, however, been incurred because of the adjournments that have been granted and because of the process that had to be adopted because of the Respondent's failure to appear. As such, the Board has decided to impose costs of \$4,150. The amount is significantly less than 50% of actual costs.

Publication

- [67] 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,³⁸ 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.
- [68] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁹ 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.⁴⁰
- [69] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the

³⁶ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁷ *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.

³⁸ Refer sections 298, 299 and 301 of the Act

³⁹ Section 14 of the Act

⁴⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$4,150 (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.

- [71] 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

- [72] 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 **3 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.

Right of Appeal

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

Signed and dated this 12th day of May 2025.



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—*

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- (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.*