

## Before the Building Practitioners Board

	BPB Complaint No. CB25518
Licensed Building Practitioner:	Roneel Kumar (the Respondent)
Licence Number:	BP 130769
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	10 March 2023

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Mrs J Clark, Barrister and Solicitor, Legal Member  
Ms K Reynolds, Construction Manager

#### 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 \$3000 and ordered to pay costs of \$2500. 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 homeowners made a complaint about the workmanship on their new two-storey dwelling. A Council site inspection report set out the instances of unsatisfactory building work and building work which was not in accordance with the building consent. After determining the Respondent’s role on this project, the question for the Board was whether the Respondent’s supervision of the building work was negligent or incompetent. This required a determination of two issues – had the Respondent departed from an acceptable standard, and, if so, was that departure serious enough to warrant a disciplinary finding.

- [2] The further issue before the Board was whether the work the Respondent supervised had been carried out in a manner contrary to the building consent. To determine this issue, the Board has only to find that building work departed from the building consent and does not have to consider if that departure was deliberate or negligent. However, the seriousness of the conduct under investigation does have to be taken into account.
- [3] In addition, the Respondent did not provide a record of work to the Complainant or the Territorial Authority. The Respondent ceased work on the project before its completion, but he did not consider that his restricted building work was complete as he expected to return to the site. There were also outstanding money issues. The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent's restricted building work complete, and, secondly, if it was, did the non-payment of his invoices constitute a good reason not to provide the records of work.
- [4] The Board investigated the issues and decided that the Respondent had been negligent in his supervision of the building work and that the building work was not in accordance with the building consent. The Board also found that the Respondent's restricted building work was complete and that non-payment was not a good reason to withhold his record of work.
- [5] The Board decided that the Respondent would be fined \$3,000 and ordered to pay costs of \$2,500.

### **The Charges**

- [6] 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>
- [7] The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to call and question witnesses to further investigate aspects of the evidence.
- [8] 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], Auckland, have:
- (a) supervised building work in a negligent or incompetent manner (section 317(1)(b) of the Act);

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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.

- (b) supervised building work that does not comply with a building consent (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 has supervised, to provide the owner and the Territorial Authority with a record of work, on completion of the restricted building work (section 317(1)(da)(ii) of the Act).
- [9] The issues raised in the Council site inspection report of 2 October 2020 formed the basis of the Board's inquiry into the Respondent's conduct.
- [10] This matter proceeded as a consolidated hearing with two other Licensed Building Practitioners ([OMITTED] CB26040; [OMITTED] CB26038) involved in the same project, facing the same grounds of discipline. Separate decisions have been issued in respect of each of them.

### **The Respondent's Role**

- [11] The Respondent did not carry out any building work. His role was as a supervisor of approximately four-five employees working on the site. He stated that he was on site once or twice each day, and if there were any problems on site Mr [OMITTED] would call him. Mr [OMITTED] is a Licensed Building Practitioner who carried out some of the work on the project.
- [12] The Respondent provided a record of work to the Investigator, which indicated that he had supervised the ribraft foundation, wall framing, roof trusses, columns and beams, bracing, damp proofing, ventilation system, wall cladding, waterproofing , installation of brick lintels and framing for the schist stone and first floor deck structure.
- [13] Mr [OMITTED]'s record of work indicated that he had carried out the same work items as the Respondent said he supervised. At the hearing, Mr [OMITTED] clarified that he had left the site after he had done the framing (the Respondent agreed) and acknowledged that his record of work was incorrect.
- [14] The Respondent initially considered he was also supervising the work carried out by Mr [OMITTED] but agreed at the hearing that this was not possible. The Board has previously explained that one Licensed Building Practitioner cannot supervise the restricted building work of another Licensed Building Practitioner<sup>3</sup>.
- [15] The Board accepts that the role of the Respondent was as the supervisor for those items of work which Mr [OMITTED] did not carry out.

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<sup>3</sup> LBP Board decision C2-01170 15 December 2015

### Negligence or Incompetence

- [16] 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 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>
- [17] To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to 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

- [18] When considering what an acceptable standard is, the Board considers 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> Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance
- [19] When considering the acceptable standard in relation to supervision, the Board considers the definition of supervise in section 7<sup>12</sup> of the Act and the discussion in its previous decisions of the supervision levels it considers necessary to fulfil a licensed building practitioner's obligation.<sup>13</sup>

<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.

<sup>12</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

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

<sup>13</sup> LBP decision C2-01143

- [20] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992,<sup>14</sup> and the Board is guided by those principles in assessing the adequacy of the Respondent's supervision.
- [21] The Board focussed its questioning on four aspects of the building work identified in the Council site inspection report: brick shelf angles, water runoff for the deck, window flashings with no end caps installed and the welding of the garage lintel.

#### *Brick Shelf Angles*

- [22] Mr Tangi Henry, a Building Control Officer from the Auckland City Council, attended the site inspection meeting on 2 October 2020, and he explained the issue with the brick shelf angles. After observing cracks in the brickwork, he discovered short pieces of brick shelf angle were used to complete longer lengths over the garage door, and the end cuts to those angles had not been galvanised. He gave further evidence that these lengths were neither bolted nor welded as was required. Mr [OMITTED], a Licensed Building Practitioner who carried out the remedial brick work confirmed that the ends of the shelf angles were not galvanised.
- [23] The Respondent confirmed that he had ordered and checked the shelf brackets, and he did not agree that the shelf angles were short. He stated that they were all the same size. However, on being directed to photographs of the shelf angles, the Respondent accepted that "*the workmanship was not great*" and that the pieces were not connected to each other and were only bolted into the framing.
- [24] There was conflicting evidence on who carried out this work. Mr [OMITTED], the bricklayer, said his workers helped the carpenters to do this work. The Respondent said his workers did it, and he supervised it. The Complainant homeowner, who was living on site, said it was done by the bricklayers' workers.
- [25] On balance, the Board prefers the evidence of the Respondent on this issue, and the Board notes that he has accepted supervisory responsibility for this work.
- [26] The Board finds that it is not acceptable to install short pieces of brick shelf angle and not to weld or bolt them or to have cut ends treated against rust and that the installation of the brick shelf angles did not meet the requirements of Clause B2 of the Building Code. This finding is based on the evidence of Mr Henry and the Council site inspection reports. Having found that the work was non-compliant, it follows that the Respondent's supervision of this work was not to an acceptable standard.

#### *Water runoff for the deck*

- [27] Mr Henry outlined this issue. There was no diverter installed around the timber-framed and schist-clad column on the first-floor deck. This left water able to run into the cavity and was not in accordance with E2 of the building code. Mr [OMITTED]

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<sup>14</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

stated that he prepared the deck framing and ply substrate in accordance with the plans. The Respondent said that the waterproof membrane installer usually installed the diverter and that the Respondent would check his work. On this occasion, he accepted that he must have “*overlooked*” it.

- [28] The non-diversion of water from the cavity around the timber-framed post had the potential to cause serious weathertightness issue, and it would not have been in accordance with Clause E2 of the Building Code.
- [29] The Board finds that this work was in breach of the building code and that the supervision of the work by the Respondent was not of an acceptable standard.

#### *Garage Lintel*

- [30] Mr [OMITTED] is a Licensed Building Practitioner who did remedial work on this project. He gave evidence of removing the gib in the garage and discovering there were no packers, only a couple of blocks holding the gib, and bolts were missing from the steel portal. Mr [OMITTED] also gave evidence of finding corrosion in the weld joint.
- [31] The Respondent said that he contracted a person to do this work but that he could not now find him. He said that Mr [OMITTED]’s bricklaying workers assisted this person.
- [32] Mr [OMITTED] agreed that it was an employee of the Respondent who did this work but that none of his workers were involved. However, the Complainants disagreed and said that Mr [OMITTED] and his workers did this task.
- [33] On balance, the Board found that Mr [OMITTED] was responsible for the supervision of this work, and it has addressed this in that decision. The Board did not rely on this item of work in finding that the Respondent’s supervision was not of an acceptable standard.

#### *Window flashing stop ends.*

- [34] The Respondent said that he supervised and checked this work and that all stop ends were installed as required. He said he was “*totally sure it was installed*”. Mr Henry said there were a couple of instances of missing stop ends but that he did not personally do the inspection. Mr [OMITTED] said that there were 6-8 pairs of stop ends not done. The Complainants said the majority of the windows they checked had no stop ends. Mr Henry explained that the absence of the stop ends was significant as without them, water can ingress behind into the cavity space and cause damage. The Complainant said that water was coming into the house from the areas with missing hand flashing end caps.
- [35] Photographs were identified, which showed the stop ends in place as required. Mr [OMITTED] accepted that the bricklayers may have removed the stop ends in the course of doing their work and failed to replace them. Mr Henry agreed that this was common practice by bricklayers.

[36] The Board found, on the balance of probabilities, that the stop ends were initially installed correctly and were likely removed at a later stage by persons that were not being supervised by the Respondent. The Board has not relied on this item of work in its finding that the Respondent's supervision was not of an acceptable standard.

Was the conduct serious enough

[37] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.

[38] The supervisory conduct that the Board has focused on in its findings is the supervision of the brick shelf angles and water diversion from the timber post on the deck. Given the potential consequences of the workmanship issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent

[39] The Board finds the Respondent's supervision departed from an acceptable standard and that he has been negligent but not incompetent. The Board makes this finding by focusing on the brick shelf angles and the water runoff for the deck. Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

**Contrary to a Building Consent**

[40] 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>15</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>16</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>17</sup> Inspections ensure independent verification that the building consent is being complied with.

[41] 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>18</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

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<sup>15</sup> Section 49 of the Act

<sup>16</sup> Section 40 of the Act

<sup>17</sup> Section 222 of the Act

<sup>18</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

decide if the conduct fell seriously short of expected standards.<sup>19</sup> If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

[42] The installation of the brick shelf angles and the non-diversion of the water around the timber column on the deck were both building work that differed from the building consent.

Was the conduct serious enough

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

Has the Respondent supervised building work contrary to a building consent

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

**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.<sup>20</sup>

[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 work<sup>21</sup> unless there is a good reason for it not to be provided.<sup>22</sup>

Did the Respondent carry out or supervise restricted building work

[47] The Respondent, through the record of work he completed, acknowledged he supervised restricted building work. Whilst there was some overlap between the work the Respondent has accepted responsibility for and the work Mr [OMITTED] carried out (which the Respondent cannot supervise), the Board finds that there were numerous areas that the Respondent did supervise after Mr [OMITTED]'s departure from the site. Significantly those included the brick shelf angle installation and water diversion around a timber column.

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<sup>19</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>20</sup> Section 88(1) of the Act.

<sup>21</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>22</sup> Section 317(1)(da)(ii) of the Act

Was the restricted building work complete

- [48] The Respondent maintained that his restricted building work was incomplete, and he expected to return to the site. The evidence from the Complainants, however, was that the Respondent did not respond to requests to remediate the work and that they engaged other builders. The Respondent said that he did not know that other builders had been engaged but agreed that he received a copy of the 2 October 2020 site inspection report from the Council, which records that new builders had been engaged.
- [49] The restricted building work regime exists to ensure that there is a permanent record of all of the Licensed Building Practitioners who have carried out or supervised restricted building work. If the Board accepted the Respondent's argument, then the obligation to provide a record of work would never arise, given that others had finished what the Respondent had started.<sup>23</sup> That would defeat the purpose of the legislative provision.
- [50] As such, the Board finds that completion occurred when the Respondent's engagement on the build came to an end, which was at the latest October 2020 when he became aware of the engagement of new builders, and that was when a record of work was due.

Has the Respondent provided a record of work

- [51] The Respondent acknowledged that he had not provided a record of work to the Homeowners or to the Council. He provided records of work for himself (dated 3 April 2020), Mr [OMITTED] (dated 28 February 2020) and Mr [OMITTED] (dated 1 March 2020) to the Investigator on 29 April 2022 as part of the hearing process.
- [52] Mr [OMITTED] and Mr [OMITTED] gave evidence that they provided their records of work to the Respondent when their respective work was complete and that it was their practice to give them to the main contractor.

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

- [53] The Respondent has put forward that his restricted building work was not complete, he was never asked for the record of work and that there were payment issues as reasons for not providing the record of work. The Board has already found that the Respondent's restricted building work was completed in October 2020, and the obligation to provide a record of work arose then. Therefore, this is not a good reason.
- [54] 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

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<sup>23</sup> The Licensed Building Practitioner who finished off the work is also required to provide a record of work.

be a matter of routine. Outstanding payment issues are not a good reason to withhold a record of work.

- [55] The Respondent has also stated that no requests were made. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations. This also is not a good reason to withhold the record of work.

#### Did the Respondent fail to provide a record of work

- [56] The Respondent has failed to provide a record of work on the completion of restricted building work, and he has committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

#### **Board's Decisions**

- [57] The Respondent has committed disciplinary offences under sections 317(1)(b)(d) and (da)(ii) of the Act.

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

- [58] 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.
- [59] The Board heard evidence during the hearing relevant to penalty, costs and publication 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

- [60] The purpose of professional discipline is to uphold the integrity of the profession. The focus is the enforcement of a high standard of propriety and professional conduct. In determining the penalty, however, the Board necessarily has to consider whether the Respondent should be punished and how it can deter other Licensed Building Practitioners.<sup>24</sup>
- [61] In *Lochhead v Ministry of Business Innovation and Employment*,<sup>25</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

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<sup>24</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>25</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[62] The Board considered the offending to be in the mid-range of seriousness. A starting point of \$2,500 was adopted. There were aggravating factors. Three offences have been upheld (noting, however, that for penalty purposes, sections 317(1)(b) and (d) are considered as one offence). The Respondent has, as the main contractor, had more responsibility than the other Licensed Building Practitioners involved in this project. It is particularly noted that the Respondent held onto not just his own record of work but also those of Mr [OMITTED] and Mr [OMITTED]. Because of the aggravating factors, the penalty has been increased to \$3,000.

### 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.<sup>26</sup>
- [64] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>27</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>28</sup>.
- [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 moderate. Adjustments are then made.
- [66] Ordinarily, the costs order for a full-day hearing, as this was, is \$7,000. As this was a consolidated hearing, the Board has adopted a total costs award to be apportioned between the three Licensed Building Practitioners will be \$5,000.
- [67] This matter had previously been partially heard in respect of the Respondent only on 27 April 2022. It was adjourned and put on hold pending Board Inquiries into two Licensed Building Practitioners whose involvement in the project was revealed at that hearing. After that hearing, the Respondent also provided copies of the records of work to the Investigator.
- [68] The Board resolved to proceed de novo with this consolidated hearing, and no costs award was made in respect of the adjourned hearing. However, the Respondent had a potential costs exposure on the first half-day hearing of \$3,500. The expense of a further hearing and Board Inquiries was required because the Respondent did not initially fully engage with the process and provide the information concerning the involvement of the other Licensed Building Practitioners.

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<sup>26</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>27</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>28</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.

- [69] Accordingly, the Board considers that the Respondent should bear a greater proportion of the cost of this consolidated hearing than the other two Licensed Building Practitioners.
- [70] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board's inquiry.

#### Publication

- [71] 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>29</sup> and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [72] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>30</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>31</sup>
- [73] Based on the above, the Board WILL NOT order further publication.

#### **Section 318 Order**

- [74] 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 \$3,000.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

**In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

- [75] 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.

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<sup>29</sup> Refer sections 298, 299 and 301 of the Act

<sup>30</sup> Section 14 of the Act

<sup>31</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

### Submissions on Penalty, Costs and Publication

[76] 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 **28 April 2023**. 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

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

Signed and dated this 5<sup>th</sup> day of April 2023



**Mr M Orange**  
Presiding Member

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

*This Act has the following purposes:*

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

#### <sup>ii</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*

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- (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 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.*