

Before the Building Practitioners Board

	BPB Complaint No. CB25551
Licensed Building Practitioner:	Benjamin Lewis (the Respondent)
Licence Number:	BP 107008
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Draft Decision Date:	11 February 2021
Final Decision Date:	24 March 2021

Board Members Present:

Mr M Orange, Barrister, Deputy Chair (Presiding)
Mr R Dunlop, Retired Professional Engineer
Mr R Shao, LBP, Carpentry and Site AOP 1
Mr F Thomas, LBP, Roofing, Registered Plumber

Procedure:

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

Disciplinary Finding:

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

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Summary of the Board’s Draft Decision

- [1] The Respondent has supervised restricted building work in a negligent manner and in a manner contrary to a building consent. He is fined the sum of \$1,000 and ordered to pay costs of \$500.

The Charges

- [2] On 11 February 2021, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

- [5] The complaint to the Board also contained allegations that the Respondent had 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) (s 317(1)(da)(ii) of the Act).
- [6] With regard to those allegations, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) the investigation of it is—*
(ii) unnecessary; or

- [7] In Board Decision *Hanif* [2019] BPB 25132, the Board decided that the provisions of section 88(1) of the Act had been satisfied when a record of work was provided to the territorial authority but not the owner in a timely manner. In the present matter, the Respondent was engaged to carry out building work on a new residential build under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started came to an end on or about 1 December 2017. The Respondent provided a record of work dated 28 November 2019 to the Territorial Authority on 19 December 2019. A code compliance certificate was issued on 31 January 2018.
- [8] As the record of work was provided to the Territorial Authority within a short period of time of completion and taking the Board's decision in *Hanif* into account, the Board has decided that further investigation of the allegation under section 317(1)(da)(ii) of the Act is not necessary.

Disciplinary Offences to be Investigated

- [9] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [10] Under regulation 10, the Board is required to hold a hearing in respect of those matters.

Draft Decision Process

- [11] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [12] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [13] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [14] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [15] The Respondent supervised the installation of a vertical cedar weatherboard system as part of a new residential build. When a final inspection was carried out by the Building Consent Authority (BCA), issues with the exterior cladding were identified. Earlier BCA inspections had not identified the issues.
- [16] The Board was provided with a Building Report carried out by Mr Nick Roberts, a Chartered and Registered Building Surveyor of Castlebridge Surveys Limited. It identified two main issues:
- 1. Inadequate installation of the external cedar vertical weatherboards fixed not in accordance with the cedar cladding manufacturer's installation details (Refer photos 16 to 60)*

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

Poor nail fixing of the cedar weatherboards to all elevations. All of the external cedar cladding shiplap weatherboards have been nail fixed incorrectly contrary to the Herman Pacific VertiLine Vertical Shiplap Weatherboard Cavity System manufacturer's installation specification and fixing details included in Appendix B.

2. Some timber framed walls are not built straight (Refer photos 61 to 68)

At least three sections of timber framed walls were not built straight with some curvature measured with a straight edge. The cedar cladding manufacturer's installation details states that in order to achieve an acceptable wall finish, it is imperative that framing is straight and true. Framing tolerances must comply with the requirements of NZS 3604:2011 which have not been achieved in these localised locations.

Recommendations

The building does not appear to be suffering from any significant weathertightness problems at present. Due to the presence of the cavity built behind cedar claddings, I consider it is unlikely that further destructive investigations would uncover the existence of underlying widespread moisture induced decay damage requiring urgent extensive remedial repairs to be undertaken now.

The whole purpose of the precise nail fixing and correct installation of the cedar boards is to secure the cedar boards and their vertical shiplap joints and ensure they remain durable and weathertight over time.

The lack of attention to detail when fixing the cedar boards is a poor workmanship issue and a long term durability concern regarding the lifespan of the cedar claddings. The cedar claddings durability performance cannot be guaranteed as it is fixed contrary to the cladding manufacturer's technical installation specifications.

In my opinion, as the cedar boarding age and weathers, the incorrectly fixed cedar boards and their shiplap vertical joints increases the risk of board movement, cupping and distortion which will reduce the life expectancy of the cedar boards.

Scope of repair

Retrospective re-nailing the existing cedar boards or targeted cedar repairs to try and address the deficiencies would not be an acceptable long term solution.

The cedar boards needs to be fully replaced and redone correctly on all elevations, so as to reduce risk of water ingress through the nail fixing points and shiplap board joints. The only way to resolve the poor cedar cladding installation and long term durability concerns would be to fully replace the

cedar cladding boards with new cedar boards and fix them correctly in strict accordance with the relevant Herman Pacific cladding manufacturer's installation specification and details with a valid warranty provided at completion.

[17] The report included photographs of the building work referred to.

[18] The Respondent provided a response to the allegations. The Respondent stated, in relation to the cladding:

2017 : I was contracted to build the house at [Omitted]. This was the first cedar clad house we as a team had done. I was the main builder/project manager With another qualified builder and two apprentices who have now qualified. I was present for most of the project except for a small amount of time off at the start Of the cladding where I left the other builder in charge, as I was in hospital having An ACL reconstruction. I returned to work on crutch's a week later.

The boys had made a great start on the cladding and everything was going smoothly. I had no idea at the time that the nails were incorrectly nailed. It wasn't until much later when the rep arrived and pointed it out. We were 90 % complete at that stage and finished up. Council inspections passed and we carried on with the rest of the project.

[19] In respect of walls not being straight, he stated:

We had issues with walls not being straight internally from the internal downpipes Being lagged in insulation(80mm downpipe with 10mm lagging around it trying To fit into a 90mm wall was a design nightmare that became our nightmare. With the walls bowing and a series of gibboard screws popping in some walls the Clients made us replaster and paint the entire inside at our cost. They wanted a level 5 finish on a level 4 budget.

[20] The Respondent provided a report from FairWay Resolution Limited. With respect to the two issues noted in the Castlebridge Report, it noted:

1 Two internal and two external walls are not straight

Opinion:

- internal wall is to standard and within tolerance when viewed from normal viewing position*
- the external wall is in line with cladding item no 6*

Remedial action Suggested:

- no remedial action required*
- 6. Exterior cedar cladding not nailed as per specifications and cupping is present*

Opinion:

- *Cedar cladding is not nailed to specification and there is cupping present.*

Remedial action Suggested:

- *Remove nails and replace it at the right location with the holes plugged made good and replace the cupped boards.*

[21] The Respondent also traversed his contractual relationship with the Complainant, issues with regard to a commercial dispute, and background information in respect of his building business.

Draft Conclusion and Reasoning

[22] The Board has decided that the Respondent **has:**

- carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)

and **should** be disciplined

[23] The reasons for the Board's decisions follow.

Negligence

[24] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁴ test of negligence which has been adopted by the New Zealand Courts⁵.

[25] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁶. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[26] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act⁷.

⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁵ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁶ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner⁸.

[27] The Board notes that the purposes of the Act are:

3 Purposes

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.*

[28] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code⁹ and be carried out in accordance with a building consent¹⁰. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[29] There was evidence before the Board of two issues: cladding installation and the straightness of framing. The Board was provided with two reports. The Castlebridge Report identified both matters as significant issues. The FairWay Resolution Report identified issues with the cladding but recommended a different course of remedial action. The FairWay Report considered the framing was within acceptable tolerances.

[30] Both reports identified the cladding as an issue. Cladding is integral to the weathertightness of a dwelling. A failure to install cladding in accordance with the manufacturer's instructions and in a manner that accords with the Building Code can put the long-term integrity of a home at risk. On that basis, the Board has decided that the cladding is a matter it should consider within the context of negligence.

⁸ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

Given the divergence of opinion on the framing, the Board will not further consider that issue.

- [31] The cladding issues were not initially identified by the BCA. They were picked up during a final inspection. They were not identified by the Respondent, who was the supervising Licensed Building Practitioner.
- [32] With regard to the BCA, it should be noted that its role is to check that the building work has been carried out in accordance with the building consent. A BCA may not pick up every contravention. Moreover, the Board considers that Licensed Building Practitioners should be aiming to get building work right the first time and not to rely on the BCA to identify compliance failings. In this respect, during the first reading of changes to the Act around licensing,¹¹ 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.

- [33] It is not, therefore, acceptable for a Licensed Building Practitioner to put forward the BCA's failure to identify an issue as an excuse or reason for non-compliant work.
- [34] It is noted that the Respondent did not carry out the work but that he did supervise it. Supervise is defined in section 7¹² of the Act. The definition states:

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.*

- [35] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances and ultimately on whether the work met the requirements of the building code and if not the level of non-compliance.
- [36] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹³. The definition of supervision in that Act is consistent with the definition in the Building

¹¹ Hansard volume 669: Page 16053

¹² 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.*

¹³ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Act, and as such the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[37] The Respondent was not present when some, if not all, of the cladding work was carried out. He did return to the site when it was fully or partially complete. As the supervising Licensed Building Practitioner, he had an obligation, as per the above, to review the work and ensure it complied with the building consent and the Building Code. His review of the work should have identified the issues. It did not. On this basis, the Board has decided that the Respondent’s conduct has fallen below an acceptable standard.

[38] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴, the Court’s noted, as regards the threshold for disciplinary matters, that:

[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.

[39] The Respondent’s negligence was at the higher end of the scale. Put simply, he failed in his duty as a Licensed Building Practitioner to supervise the restricted building work in relation to the exterior cladding that was being undertaken. Given this and the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[40] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

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

¹⁴ [2001] NZAR 74

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [41] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.
- [42] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [43] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence, contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established¹⁵.
- [44] The cladding was not installed in accordance with the manufacturers specifications. Those specifications formed part of the building consent. It follows that the building consent has not been complied with.
- [45] The Board does, however, note the commonality between the negligence charge and the finding under section 317(1)(d) of the Act. This will be taken into account when the board considers what the appropriate penalty for the offending should be.

Draft Decision on Penalty, Costs and Publication

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

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

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

Penalty

- [48] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁶ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [49] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ 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 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.
- [50] The disciplinary offending was serious. As previously noted, ensuring weathertightness is fundamental to the integrity of homes. Taking responsibility for building work that is carried out under supervision, and ensuring it is compliant, is fundamental to the Licensed Building Practitioner regime. On the basis of these factors, the Board has adopted a starting point of a fine of \$2,000.
- [51] The matter has, to date, been dealt with by way of a Draft Decision. A reduction in the penalty is warranted. There is also evidence of a commercial dispute, and the Respondent has put forward a good history of building work. Taking those factors into account, and on the basis of the process used, the fine is reduced to \$1,000.

Costs

- [52] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [53] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁸.

- [54] In *Collie v Nursing Council of New Zealand*¹⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

- [55] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [56] 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 Act²⁰. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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.

- [57] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.
- [58] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. The High Court provided

¹⁸ *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.

¹⁹ [2001] NZAR 74

²⁰ Refer sections 298, 299 and 301 of the Act

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁴.

[59] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁵. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[60] Based on the above, the Board will not order further publication.

Draft Section 318 Order

[61] 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 \$1,000.

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

[62] 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 Draft Decision

[63] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[64] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 18 March 2021. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new compelling evidence that was not available at

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

the time the regulation 9 decision not to proceed was made then a further complaint in respect of the matter may be made .

- [65] If submissions on the Board's Conclusion and Reasoning or on matters relating to penalty costs and publication are received, then the Board will meet and consider those submissions.
- [66] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [67] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [68] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [69] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 18 March 2021.

Submissions Made

- [70] The Board received a submission from the Complainant on 3 March 2021 and from the Respondent on 17 March 2021.
- [71] Both submissions traversed issues that were not dealt with in the Draft Decision.
- [72] With respect to the matters the Draft Decision did deal with, being the cladding and the straightness of walls, the Complainant stated that the Respondent was present for most of the cladding installation and that his medial issue did not arise until late in the installation. The Complainant maintained that the walls complained about were not straight. The Complainant stated:

We have had continuous issues with Lewis build, with almost all areas of our job this is not through any fault of ours. Ben Lewis consistently does not read instructions, and tries to cut corners wherever he can to try and save costs. Whilst I am incredibly disappointed with this result, we are looking forward to putting it behind us.
- [73] The Respondent's submission was that he was present for the start of the cladding prior to him having surgery and that he attended late in the project to advise on nailing locations.
- [74] The Board notes that whether the Respondent was present or not is somewhat irrelevant. The work was restricted building work which must be carried out or supervised by a Licensed Building Practitioner. The Respondent was the supervising Licensed Building Practitioner. As such, he is responsible for the quality and compliance of the work that was carried out.

- [75] The Respondent also submitted that a different weatherboard was used and that this affected the outcome:

*[Omitted]'s first visit to site was to bring samples of bandsawn cedar:
Mixed grain (cheaper)
Quartersawn (more expensive).*

[Omitted] also brought samples of stain as the client wanted a dark colour on the cedar.

This was clearly advised that a black stain on a mixed grain board will cause some cupping and sideways movement.

Nails will not stop this !

The clients decided on the cheaper mixed grain with the black stain against the advice.

The product was ordered and preprimed.

- [76] The note that a different cladding to that specified raises a question as to whether the building consent was complied with. The Respondent's statement implies that there was a change of product. If that was the case, then a change to the building consent, by way of a minor variation or an amendment, should have been made. A failure to deal with the change correctly can, in itself, be a ground for disciplinary action.

- [77] The Board notes, however, notwithstanding the submission from the Respondent, that the weight of evidence before it supports the Board's findings as notified in its Draft Decision.

- [78] With regard to the straightness of walls the Respondent maintained that it was within tolerance and that this was supported by the Fairway report.

- [79] The Respondent also submitted:

Whenever an issue has arisen I have been at the forefront to get it addressed as quickly as I can. I've sent guys up to [Omitted] on countless trips to deal with whatever has arisen.

We definitely do not cut corners and are continually trying to please our clients.

I go above and beyond to get the job done and first to absorb the cost if need be.

We have an array of awesome projects we have completed with many happy clients that refer us on.

We work closely with 3 architects who trust us to deliver to a high standard which I'm really proud about.

I am heavily involved with Bcito training and gateway program for st Kent's college.

I would also like to put this behind me and just move on.

[80] Neither the Complainant nor the Respondent requested an in-person hearing. The Board has also noted the desire from both the Complainant and the Respondent to move on from the matters that lead to the complaint. As such, the Board has decided to issue a Final Decision.

Final Decision

[81] Given the above, the Board affirms its draft decision and penalty.

Final Section 318 Order

[82] 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 \$1,000.

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

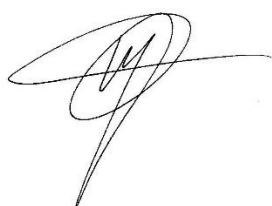
Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

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.

Right of Appeal

[83] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱ.

Signed and dated this 13th day of April 2021



Mr M Orange
Presiding Member

ⁱ 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*

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- (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."*

ii 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.*