Before the Building Practitioners Board

	BPB Complaint No. CB26161
Licensed Building Practitioner:	Scott Lilly (the Respondent)
Licence Number:	BP105432
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

(Recalled and reissued on 15 June 2023)

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	11 April 2023
Final Decision Date:	30 May 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

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 (i) of the Act.

The Respondent is fined $3,000 and ordered to pay costs of $500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary of the Board's Draft Decision

[1] The Respondent substituted the consented roofing material for a material that he imported from China. There was no evidence that the substituted product met Building Code requirements. It was used in more than one instance. The Council was not notified of the change, and it complained about it.

[2] The Board had to consider whether the Respondent had conducted himself in a negligent manner, whether he had carried out building work that was contrary to a building consent, and whether he had brought the licensing regime into disrepute. The Board found that a building consent amendment was required for the product substitution and that as one was not obtained, the Respondent had conducted himself in a negligent manner and that he had carried out building work that was contrary to the building consent issued. Further, the Board found that, as the change was financially motivated and the Respondent had shown contempt for the consenting process, he had brought the regime into disrepute.

[3] The Respondent is fined $3,000 and ordered to pay costs of $500. The fine and costs orders have been reduced on the basis that the matter was dealt with on the papers. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Charges

[4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.[1]

[5] In this matter, the disciplinary charges the Board resolved to further investigate[2] were that the Respondent may, in relation to building work at 8 Talon Drive, Rolleston, 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/or

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.

[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.

Draft Decision Process

[6] 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 necessary prior to it making a decision.

[7] Ordinarily, the Board makes a decision having held a hearing.[3] The Board may, however, 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.[4]

[8] 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. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside a hearing will be scheduled.

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[10] The complaint was made by the Selwyn District Council in its capacity as a Building Consent Authority. It alleged that the Respondent had substituted a Zibo Wangshun Building Materials Company roofing product for the MetalCraft roofing product that had been consented without first obtaining an amendment for the substitution. The complaint also alleged that the substituted roofing product may not have met Building Code requirements. The Complainant alleged that the Respondent had carried out building work in a negligent or incompetent manner, in a manner that was contrary to a building consent, and that he may have brought the licensing regime into disrepute.

[11] In short, a new dwelling at 8 Talon Drive was issued a building consent on the basis that a MetalCraft roof would be installed. MetalCraft utilises Colorsteel products. The dwelling was being constructed for sale by the Respondent's company, New Style Homes Limited. The Respondent was the supervising Licensed Building Practitioner for the carpentry aspects of the build.[6] During the build, which took

[3] Regulation 10 of the Complaints Regulations.

[4] Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

[6] The Respondent provided a record of work stating that he had supervised restricted building work.

place in mid-2020, a decision was made to use leftover roofing materials the Respondent had direct imported from China for a shed build on another property to clad the roof at 8 Talon Drive. The substituted roofing product was installed by another Licensed Building Practitioner, about whom a complaint was also made, without any notice of the change being given to the Building Consent Authority (BCA), and a Code Compliance Certificate was issued in December 2020. The dwelling was then sold. The purchaser noted a deterioration of the roof's paint and complained about it. It came to light that the roof had not been clad in the consented product.

[12] When initially confronted with the issue, the Respondent claimed the roofer had supplied and installed the product and submitted that all that was required to rectify issues at 8 Talon Drive was a repaint. The Respondent later accepted that his company had supplied the substituted roofing product but claimed the Wangshun product met Building Code requirements. He provided correspondence, which he claimed supported his claim. The Respondent stated:

> *NZ Testing of roofing material for thickness and paint thickness was done and confirmed by SGS Industrial (Auckland) – Test Certificate No: INZ73525-01A (copy attached).*
>
> *This testing was undertaken to satisfy the Waimakariri District Council that the substitute roofing iron complied with NZ Building Standards.*
>
> *Waimakariri District Council also undertook their own investigation to confirm the ZIBO WANGSHUN Building Materials Company meets international standards for certification using a local interpreter.*

[13] The Test Certificate only showed results for the thickness of the paint. The correspondence dated 3 August 2021 supplied by the Respondent showed that the BCA was also requesting test results that showed the thickness of the metal and that this was required to determine compliance with New Zealand standards.

[14] The Board was not able to identify the translated correspondence in the file that the Respondent referred to.

[15] Following his initial response, the Respondent also submitted correspondence dated 14 July 2021 from the BCA, which he claimed showed the BCA had accepted the product. He stated:

> *This email below is the confirmation that the Waimakariri District Council was happy with the substitution product for roofing – however we decided not to import any further lots of material, mainly due to cost of shipping etc.*
>
> *The other matters discussed in the email were all resolved and they were happy for us to continue using the imported material as long as we specified what roofing material was being used.*

[16] The Respondent's perception of the correspondence from the BCA was, at the least, an overstatement. The email from the BCA Building Unit Manager, which predated the correspondence requesting conformation of the metal thickness, stated:

> *As a follow up to the initial email and our most recent telephone conversation there are a handful of things that need to happen to enable Council to be satisfied the product in question complies with the Building Code.*
>
> *1. Evidence needs to be provided that confirms the roofing material in question complies with AS/NZS 2728:2013 (reference standard)*
> *2. Evidence needs to be provided that the paint coating complies with AS/NZS 2728:2013*
>
> - *We have examined the mill certificate (20210706) from Zibo Wangshun Building Material Co Ltd dated 06/07/2021*
> - *The certificate states the thickness of the material as being 0.4mm and has been manufactured to AS/NZS 2728:2013*
> - *We have been able to verify the address and location of the company through baidu, the Chinese equivalent of Google. On this basis Zibo Wangshun Building Material Co Ltd appears to be a legitimate company.*
> - *We are seeking confirmation from New Style Homes through testing by an independent company that the paint coating complies with AS/NZS2728:2013*

[17] As noted in the 3 August 2021 correspondence with the BCA, no evidence has been provided to show that the metal thickness met compliance requirements. The Board could not identify any evidence that the metal thickness had been tested. Also, it is noted that the BCA is the Complainant in this matter, which runs contrary to the claim that the BCA had accepted and approved the substituted product.

[18] Finally, the Respondent submitted that the Council had not required an amendment to the building consent for other projects where the Wangshun product had been used and that there were no other known issues with the product at other properties where it had been installed. Countering this is the fact that the BCA can only require amendments for product substitutions that it is aware of.

Negligence or Incompetence

[19] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,[7] 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*[8] test of negligence.[9] To

[7] *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.
[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[9] 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)

make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.[10] 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.[11] If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

[20] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act[i] as well as the requirement that all building work must comply with the Building Code[12] and any building consent issued.[13] The test is an objective one.[14]

[21] The Board's considerations relate to the failure to obtain an amendment to a building consent for a change of roofing product prior to the associated building work being carried out.

[22] The Building Act requires that all building work is carried out under and in accordance with a building consent.[15] If changes are going to be made to the building consent, then a process must be used for that change. There are two ways that this can be done. The first is by way of an application for a building consent amendment under section 45(4) of the Act. The second is by way of a minor variation under section 45A of the Act.

[23] There are two fundamental differences between the two options. The first is that if an amendment is required, no building work can be carried out until such time as it is formally approved by the Building Consent Authority (BCA). This contrasts to a minor variation where the BCA uses a less formal change process, and the building work can continue while it is being considered. The second fundamental difference recognises the proceeding in that there are limits to when a minor variation can be used. Put simply, a minor variation is, as it states, for minor as opposed to major changes. In this respect, the Building (Minor Variations) Regulations 2009 defines a minor variation as:

[10] 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"

[11] *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".

[12] Section 17 of the Building Act 2004

[13] Section 40(1) of the Building Act 2004

[14] *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.

[15] Refer sections 40 of the Act.

> *A minor variation is a minor modification, addition, or variation to a Building that does not deviate significantly from the plans and specifications to which the building consent relates.*

[24] Minor variations still have to be applied for and granted by a BCA prior to the associated work or, in this case, the change of roofing product, being carried out.

[25] In this instance, the change was from one roofing product to another. This is what is commonly referred to as a product substitution. Neither an amendment nor a minor variation was sought for the substitution, and the BCA was not given any notice of it.

[26] There is no question that one or the other of an amendment or a minor variation was required prior to the substitution taking place. The question for the Board is which form of change process should have been used, as this goes to the seriousness of the Respondent's conduct. The failure to obtain an amendment is more serious than failing to obtain a minor variation.

[27] The Building (Minor Variations) Regulations note that a product substation is an example of a minor variation. Guidance issued by the Ministry of Business Innovation and Employment notes the following example:

> *The building inspector visits a new dwelling to inspect the roof installation. During the inspection, the building inspector identifies that although the specifications and drawings show profiled metal roofing the owner wants to use pressed metal tiles instead. The roofer asks the building inspector to give approval to a minor variation on site.*
>
> *The building inspector considers this a minor variation because compliance with the Building Code is still achieved and the change is well within the scope of the original building consent design. The building inspector approves the minor variation and records the proposed minor variation on the inspection notes and consent file, as well as dates and initials on the approved building consent plans. However, the building inspector informs the roofer that, upon completion of the work and before issue of CCC, revised plans illustrating this change will be required. When back at the office the building inspector also updates relevant consent records.*

[28] Using the above example, it could be said that the product substation of a MetalCraft Roof for the Zibo Wangshun Building Materials Company roofing material was a minor variation. However, a critical passage is "compliance with the Building Code is still achieved".

[29] Under section 17 of the Act, all building work must comply with the Building Code, which sets the required performance standards for all building work. Those standards include durability. Clause B2 provides that building elements must continue to satisfy the requirements of the Building Code for specified time periods. For roofing products, it is a minimum of 15 years.

[30] The Act goes on to specify how products can be assessed to determine if they meet Building Code requirements. One method is CodeMark, a product certification scheme that shows that a building product meets the requirements of the Building Code. Product appraisals can also be used. An appraisal is a technical opinion of a building product or system's fitness for purpose. It involves testing and verification of Building Code compliance and is done by an independent appraisal organisation, such as BRANZ.[16] Appraisals have no legal standing, but they can form a useful part of the evidence of compliance.

[31] Looking at the Zibo Wangshun product, it is not CodeMarked, and there was no evidence that an appraisal had been carried out and accepted by the BCA at the time it was used. It should also be noted that the burden of proving that a product meets Building Code requirements sits with the person who seeks to use it. As such, there was no basis on which the Zibo Wangshun product could be considered a comparable product.

[32] Further, had the proposed change been put to the Council as the BCA, it would have then sought product information and made a professional judgement to determine whether the product could be used by way of a minor variation. In this respect, as it was not a CodeMarked or appraised product, it is most likely that the Council would have required a building consent amendment accompanied by acceptable evidence that the Zibo Wangshun product met Building Code requirements. If compliance could not be established, it is probable that the amendment would not have been approved.

[33] On the above basis, the Board finds that a building consent amendment was required for the product substitution. As one was not obtained, the question then becomes, has the Respondent conducted himself in a negligent manner.

[34] The Respondent, as the Licensed Building Practitioner who was directing and controlling the build, had a duty to ensure the building consent was complied with or to ensure changes to that consent were approved as the build progressed. This also accords with section 89 of the Act, which places a positive duty on a Licensed Building Practitioner to notify a BCA of any breaches of a building consent and with the findings of the High Court in *Tan v Auckland Council*[17] where the High Court stated:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[16] Building Research Association of New Zealand
[17] [2015] NZHC 3299 [18 December 2015]

[35] In failing to ensure an amendment to the consent was obtained, the Respondent has, in essence, allowed unconsented building work to take place because he was in the best position to ensure unconsented work did not occur.

[36] The building consent process, including the amendment process, ensures independent verification that the Building Code will be complied with. It provides protection for owners and the public at large. In *Tan v Auckland Council,*[18] the High Court stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[37] Given the importance of the consenting process, the Respondent's close connection to the product substitution and the failures noted, the Board finds that the Respondent's conduct has, in this respect, fallen below an expected standard and that he has therefore been negligent.

Was the conduct serious enough

[38] The decision to substitute the roofing product was calculated and, on the face of it, appears to have been done to save money. There is no evidence that there was a lack of availability of the consented product or any other reason why the change was necessary. Irrespective of the motivations, in addition to the Respondent failing to process the change, at no stage did he inform the BCA of it. Given those factors, the Respondent's failure was not inadvertence or carelessness. The conduct was deliberate, and it reached the threshold for the Board to impose a disciplinary sanction.

Has the Respondent been negligent or incompetent

[39] The Respondent has been negligent.

Contrary to a Building Consent

[40] For the same reasons, the Respondent has also carried out or supervised building work that does not comply with a building consent as, once issued, there is a requirement that the building work is carried out in accordance with the building consent.[19] That did not occur. The offence has been committed.

[41] The Board does, however, note that there is a commonality between the findings that the Respondent has carried out building work in a negligent manner and the finding that he has carried out building work contrary to a building consent. In recognition of this, the Board will, for the purposes of determining the appropriate action to take as a result, treat the two offences as a single matter.

[18] [2015] NZHC 3299 [18 December 2015]
[19] Section 40 of the Act

Disrepute

[42] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:

- criminal convictions[20];
- honest mistakes without deliberate wrongdoing[21];
- provision of false undertakings[22]; and
- conduct resulting in an unethical financial gain[23].

[43] The Courts have consistently applied an objective test when considering such conduct.*[24]* The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.*[25]*

[44] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,*[26]* that the Respondent has brought the regime into disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.[27]

<u>The conduct complained about</u>

[45] In addition to the matters outlined above in relation to negligence, the complaint also noted that the dwelling had been sold with the representation that the roof was a MetalCraft roof, which utilised ColorSteel materials. Further, the complaint stated that a number of new builds that the Respondent's company may have constructed used the same substituted product. A spreadsheet of possible locations was provided. The Respondent, in reply, stated that it was used on "some current (at the time) houses being built". No definitive number of dwellings was given by him. He also stated that he is no longer using the material, mainly because of shipping costs.

<u>Was the conduct disreputable</u>

[46] As noted in the findings about negligence, the Respondent failed to obtain a building consent amendment. There is evidence that it was not an isolated instance. The actual number of instances is not known, but the fact that it was more than one points toward it being sustained conduct.

[47] The properties where the substituted product was used were then sold. The purchasers would have believed they were purchasing a home with a MetalCraft

[20] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[21] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[22] *Slack, Re* [2012] NZLCDT 40
[23] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[24] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[25] *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519
[26] *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.
[27] *Collie v Nursing Council of New Zealand* [2001] NZAR 74

roof that met Building Code requirements backed by product guarantees issued in New Zealand. That was not the case. Rather, they have purchased homes that have unconsented building work, a roofing product that may not meet compliance requirements, and no reassurance that they are covered by comprehensive guarantees in the event of a product failure.

[48] The Respondent initially denied that he had supplied the roofing product. His approach to the matter was to deal with it as a commercial dispute. He focused on Consumer Guarantees Act rights and remedies and submitted that a repaint would suffice. The Respondent does not appear to have appreciated the impact of his conduct on those that have purchased the homes.

[49] The conduct was motivated by financial gain. Given the manner in which it arose, the Board finds that the gain falls into the category of an unethical financial gain.

[50] The Board also finds that the Respondent has displayed a reckless and dangerous attitude toward the consenting process. The conduct went beyond negligence. It put the purposes of the Building Act at risk.

[51] The unethical financial gain and the approach to the building consent process are types of conduct that the Board finds disreputable.

Was the conduct serious enough

[52] The conduct was calculated and sustained. It has impacted those who have purchased homes with the substituted products. The Respondent has shown a contemptuous disregard for consenting processes. He has represented that the substituted product has been accepted as compliant. There is no evidence to support that contention. He has not taken the matter seriously. In those circumstances, the Board finds that the conduct was serious enough.

Has the conduct brought the regime into disrepute

[53] The Respondent has brought the regime into disrepute.

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 Act[ii], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[55] 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

[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.[28] It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:[29]

(a) protection of the public and consideration of the purposes of the Act;[30]

(b) deterring other Licensed Building Practitioners from similar offending;[31]

(c) setting and enforcing a high standard of conduct for the industry;[32]

(d) penalising wrongdoing;[33] and

(e) rehabilitation (where appropriate). [34]

[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 cases[35] and applying the least restrictive penalty available for the particular offending.[36] In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty [37] that is consistent with other penalties imposed by the Board for comparable offending.[38]

[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.[39]

[59] In this matter, the Board adopted a starting point of a fine of $3,500. The starting point reflects the seriousness of the offending and the fact that the Board has made a finding that the Respondent's conduct has gone beyond negligence to bringing the regime into disrepute. It is also proportionate to the fine the Board has imposed on the other Licensed Building Practitioner that was complained about.

[60] The Respondent has previously been disciplined by the Board. In 2015, the Board disciplined the Respondent.[40] That matter also dealt with a failure to adhere to consenting processes. He was found to have been negligent, to have been negligent, to have carried out building work contrary to a building consent, and to have

[28] 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]
[29] Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]
[30] Section 3 Building Act
[31] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[32] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724
[33] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[34] *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
[35] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[36] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818
[37] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[38] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[39] 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.
[40] Matter C2-01160

brought the regime into disrepute. He was fined $3,000. This matter is, therefore, a second offence. It is also more serious, and this is reflected in the higher starting point. As it is a second offence, an uplift in the fine is warranted. The fine is lifted to $4,000.

[61] The matter has, to date, been dealt with on the papers. A hearing has not been held. It is common, in situations where disciplinary offending is accepted, for a penalty to be reduced in recognition of this. Making a finding on the papers, if it is accepted, is akin to an acceptance of responsibility. As such, the fine, if this decision is accepted, will be reduced to $3,000.

Costs

[62] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.[41]

[63] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings[42]. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case[43].

[64] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. Adjustments are then made.

[65] Based on the above, the Board's costs order is that the Respondent is to pay the sum of $500 toward the costs of and incidental to the Board's inquiry.

Publication

[66] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,[44] and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.

[67] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.[45] 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

[41] *Collie v Nursing Council of New Zealand* [2001] NZAR 74
[42] *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011
[43] *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.
[44] Refer sections 298, 299 and 301 of the Act
[45] Section 14 of the Act

stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.[46]

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

Section 318 Order

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

Penalty:	**Pursuant to section 318(1) 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 $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.

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

Submissions on Draft Decision

[71] The Board invites the Respondent 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.

[72] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **26 May 2023**.

[73] If submissions are received, then the Board will meet and consider those submissions.

[74] 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.

[75] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

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

Request for In-Person Hearing

[76] 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.

[77] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 May 2023.**

[78] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 5th day of May 2023.

Mr M Orange
Presiding Member

This decision and the order herein were made final on 30 May 2023 on the basis that no further submissions were received.

Signed and dated this 7th day of June 2023.

Mr M Orange
Presiding Member

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[i] ***Section 3 of the Act***

This Act has the following purposes:

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

(i) people who use buildings can do so safely and without endangering their health; and

(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(iii) people who use a building can escape from the building if it is on fire; and

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[ii] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[iii] ***Section 318 Disciplinary Penalties***

(1) In any case to which section 317 applies, the Board may—

(a) do both of the following things:

(i) cancel the person's licensing and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(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.