

Before the Building Practitioners Board

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| | BPB Complaint No. CB26421 |
| Licensed Building Practitioner: | Philip John Stirling (the Respondent) |
| Licence Number: | BP104340 |
| Licence(s) Held: | Carpentry |

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

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|----------------------------|------------------------------------|
| Complaint or Board Inquiry | Complaint continuing as an Inquiry |
| Hearing Location | by audio-visual link |
| Hearing Type: | In Person |
| Hearing Date: | 27 August 2024 |
| Decision Date: | 29 August 2024 |

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Ms K Reynolds, Construction Manager
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 (g) of the Act.

The Respondent **has not** committed disciplinary offences under sections 317(1)(da)(ii) of the Act.

The Respondent is censured and fined \$2,000 and ordered to pay costs of \$2,150. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

[1] The Board investigated four disciplinary offences. Two of them related to changes that were made to a building consent during a build. With respect to those, the

Board investigated whether an appropriate building consent change process had been used. The Board found that the Respondent had not dealt with minor variations in an appropriate manner or in a manner that accorded with the requirements of the Act. On that basis, the Board decided that the Respondent had conducted himself in a negligent manner and that he had carried out or supervised building work that was contrary to a building consent.

- [2] The third disciplinary allegation related to the failure to provide a record of work on completion of restricted building work. In respect of that matter, the Board decided that a record of work had been provided within a reasonable time of completion. The finding was based on the completion date being determined as the date when the contractual relationship came to an end, and it was clear that the Respondent would not be carrying out any further restricted building work.
- [3] The final allegation related to an alleged breach of the Code of Ethics. The grounds of the breach were that the Respondent had failed to provide the prescribed checklist and disclosure documentation and that he had also failed to provide a written contract, all of which are mandated by Part 4A of the Act and the Building (Residential Consumer Rights and Remedies) Regulations 2014.
- [4] The Board found that the Respondent had breached clause 10 of the Code, which stipulates that a licenced building practitioner must comply with the law and, in particular, the provisions and Part 4A of the Act and the Building (Residential Consumer Rights and Remedies) Regulations 2014.
- [5] On the basis of the disciplinary findings, the Board decided that it would fine the Respondent \$2,000 for carrying out or supervising building work in a negligent manner and which was contrary to my building consent. With respect to the Code of Ethics breach, the Board censured the Respondent. The censure was ordered on the basis that the Code is relatively new and practitioners are still getting used to having to comply with it.
- [6] The Board also ordered that the Respondent pay the sum of \$2,150 in costs. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

The Charges

- [7] 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
- [8] The hearing arose as a result of a complaint. The Respondent believed the complaint had been withdrawn and questioned why the hearing was proceeding. In order for a matter to be withdrawn, a Complainant must give the Board written notice. No such

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.

notice was received. At the hearing, evidence was given to the effect that, as part of a settlement, it was agreed that the complaint would not be pursued. The disciplinary process in the Act cannot be contracted out of. However, given the foregoing, the Board proceeded with the matter as a Board Inquiry, which it is entitled to do under section 317 of the Act and regulation 17(2) of the Complaints Regulations.

- [9] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act;
 - (c) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act; and
 - (d) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [10] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, it would be inquiring into:
- (a) whether the foundation was constructed in accordance with the building consent and, if not, whether a building consent change process was undertaken prior to changes being made; and
 - (b) whether the roof was constructed in accordance with the building consent and, if not, whether a building consent change process was undertaken prior to changes being made; and
 - (c) the quality and compliance of the installation of exterior cladding.
- [11] With respect to the allegation that the Respondent breached the Code of Ethics, the specific provisions of the Code that the Board gave notice that the matters that would be further investigated at the hearing would be the failure to provide a contract and disclosure information in breach of clause 10 of the Code:

10 You must comply with the law:

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.

- (1) When you carry out or supervise building work, you must ensure that the building work complies with the following:
 - (a) the Building Act 2004, specifically Part 4A:
 - (c) the Building (Residential Consumer Rights and Remedies) Regulations 2014.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [13] After the Board had made its decision, the Respondent sent an unsolicited written submission. That submission contradicted evidence received as sworn testimony at the hearing in relation to the way in which roofing work was undertaken. It has not been taken into consideration.

Negligence or Incompetence

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

Contrary to a Building Consent

- [15] 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

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

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

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

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

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

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

work will meet the provisions of the Building Code.⁹ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁰ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹¹ Inspections ensure independent verification that the building consent is being complied with.

- [16] 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.¹² The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.¹³ If it does not, then a disciplinary finding cannot be made.

The Conduct Under Investigation

- [17] As per the Notice of Proceeding, there were three areas that were being investigated. They related to the foundations, the roof and cedar cladding.

Cedar Cladding

- [18] The Board established at the commencement of the hearing that the building work in relation to exterior cladding had been carried out or supervised by a different Licenced Building Practitioner (LBP), and the Respondent was on holiday outside of New Zealand at the time. That LBP had not, at the time of the hearing, provided a record of work for his restricted building work as per the requirements of section 88(1) of the Act. As such, there were no records of the other LBP having been involved in the building work. The requirement for a record work from each and every LBP who carries out or supervises restricted building work is one of the reasons why records of work must be provided as it creates a complete record of all the LBP's involved in the build. On the basis that the Respondent was not the responsible LBP for the cladding work, the Board did not further investigate that issue. It should be noted that had the Respondent informed the Board that another LBP had carried out the cladding work, or had the other LBP filed a record of work, then the Board would not have included the issue in the Notice of Proceeding.
- [19] After the hearing had ended, the Board was provided with a record of work dated 27 August 2024 from the LBP who carried out the cladding.

⁹ Section 49 of the Act

¹⁰ Section 40 of the Act

¹¹ Section 222 of the Act

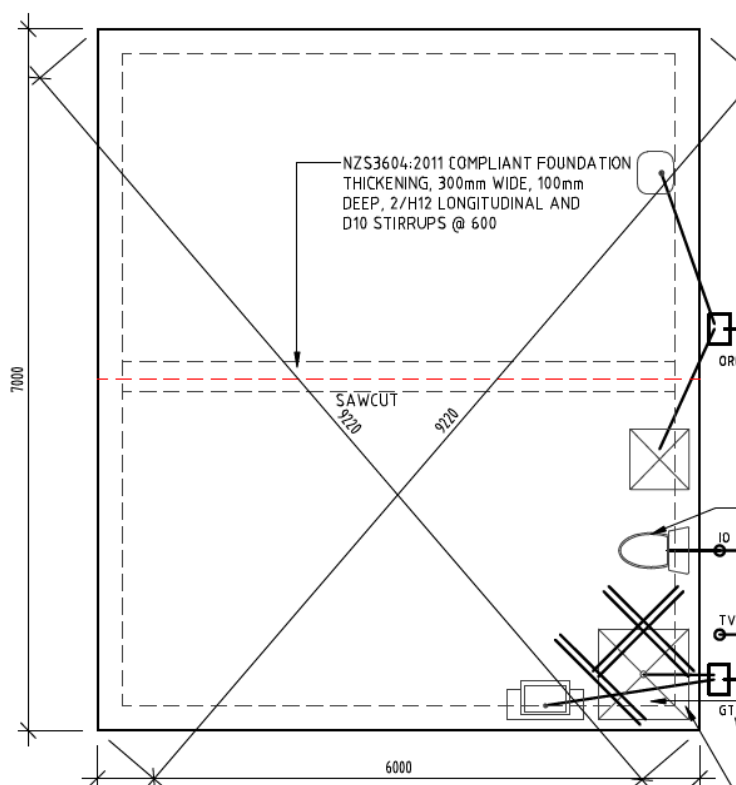
¹² *Blewman v Wilkinson* [1979] 2 NZLR 208

¹³ *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".

Foundations

- [20] The consented foundation plans contained the following notation, and the consented detail:

NZS 3604:2011 COMPLIANT FOUNDATION
THICKENING, 300mm WIDE, 100mm
DEEP, 2/H12 LONGITUDINAL AND D10 STIRRUPS @ 600



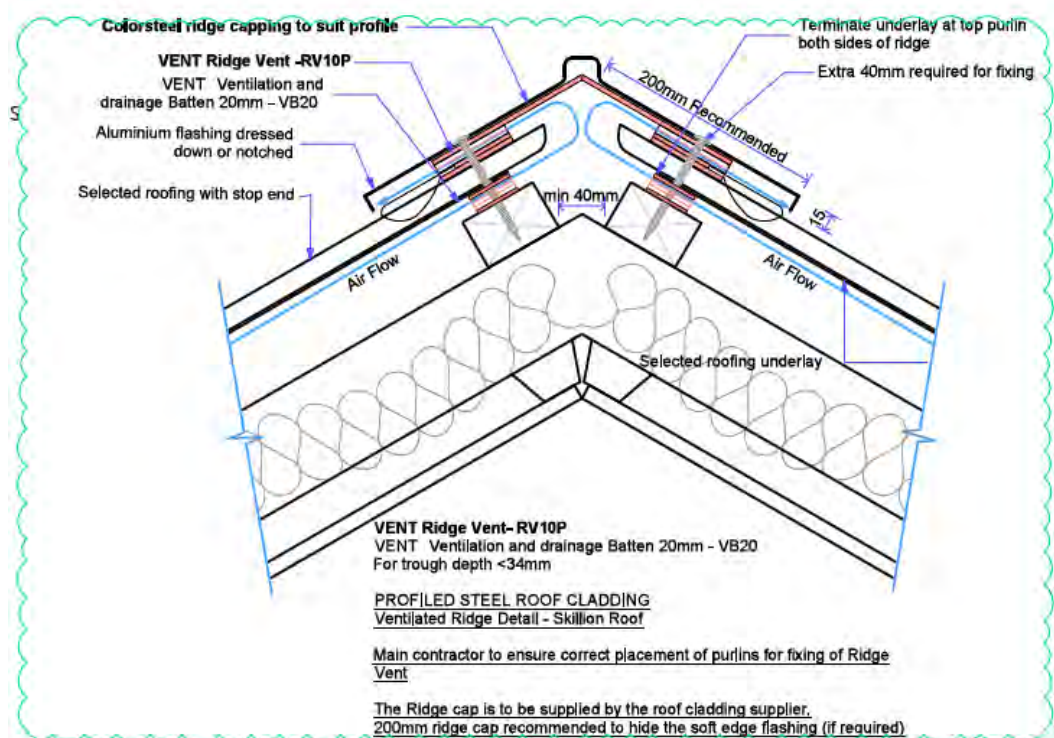
- [21] Under section 40 of the Act, there is a requirement that all building work be completed in accordance with the building consent issued.
- [22] Evidence was heard that during the construction of the foundation, a decision was made to incorporate 50mm polystyrene as insulation. As a result, the foundation design was changed. The Respondent stated that the footings were made larger and that the thickening notated above was deleted. The Complainant in the Respondent's evidence differed as to how the change came about. For the purposes of this decision, that is not relevant as what is under investigation is the building consent change process used.
- [23] Regarding the change process, the Respondent did not consult with the designer Before the change was made. He stated that he made an assessment that the thickening was what was required on the basis that the frame and rafter supplier had carried out an assessment and advised him that it was not necessary.
- [24] The Respondent did not make an application for a minor variation. He took the position that a minor variation could be applied for at the end of the build, together

with an application for any other changes to the consent made during the build. A Building Control Officer (BCO) from the Building Consent Authority (BCA) present at the hearing gave evidence that the appropriate process was to apply for the minor variation prior to the building work being carried out. The BCO did state that a minor variation can be granted on site by a building inspector. There were no records on the associated building inspection of an on-site minor variation having been requested or granted. The Respondent gave evidence that the change was discussed with the inspector who carried out the foundation inspection, which was passed. The BCO conceded that an on-site conversation may have occurred that was not recorded on the inspection notes, as it should have been.

[25] The Complainant gave evidence that when he ascertained that the thickening in the foundation had not occurred, he contacted the designer, who, in turn, instructed an engineer to review the change. A minor variation supported by the engineer's opinion, which was that the thickening was not necessary for Building Code compliance, was then filed.

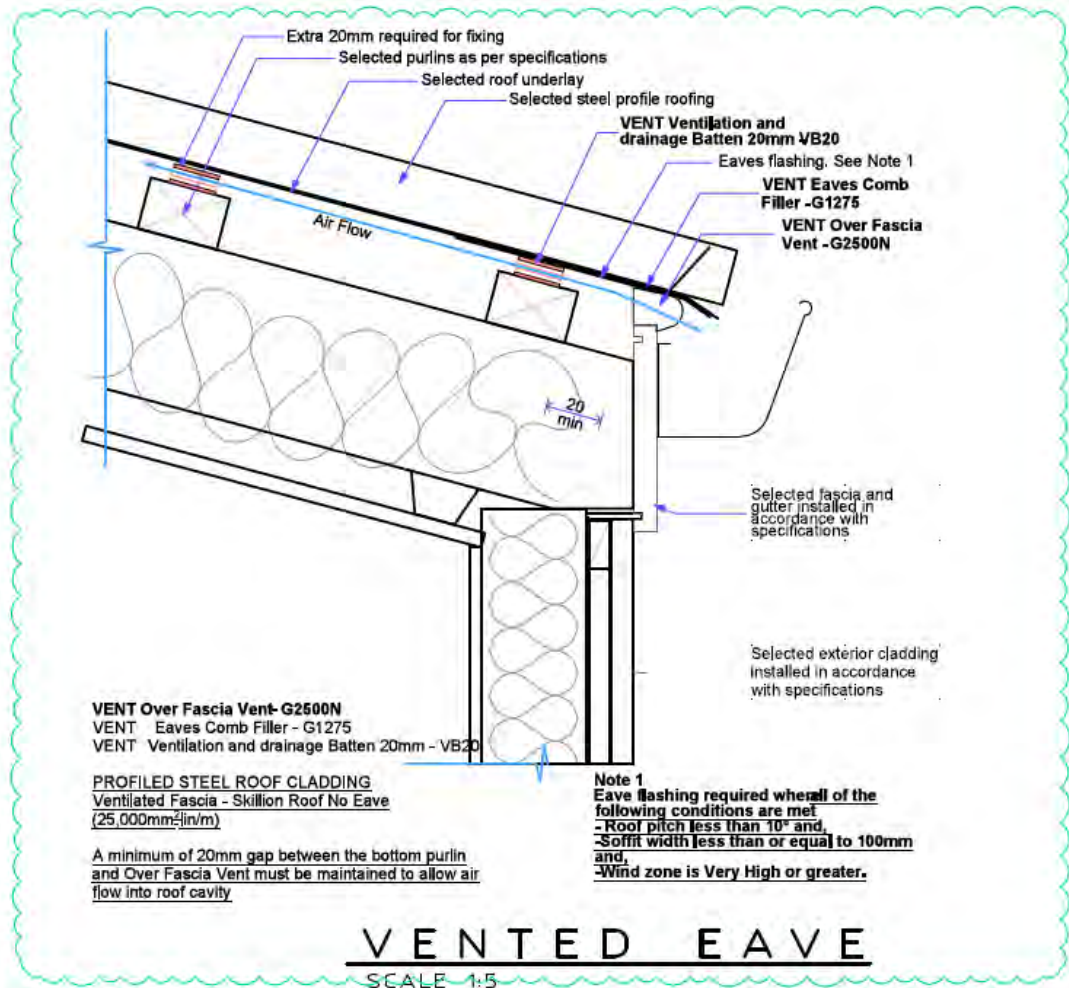
Ventilated Roof

[26] The roof was designed and consented as a ventilated system with a ventilated eave and ridge. The following are the consented details. I show a ventilation and drainage batten 20mm (VB20) on top of the purlin, roof underlay on top of the ventilation and drainage batten, and the roof cladding Installed on top of the underlay. The design provisioned for airflow as part of the external moisture management system on a skillion roof.



VENTED RIDGE

SCALE 1:5



[27] A subcontractor who was engaged to install the roof cladding gave evidence that when they attended the site the battens were on top of the underlay, not underneath it, as specified in the consent, as shown in the following photograph:



- [28] The Respondent took the position that it was a change that could be made during the build and then a minor variation could be applied the completion of the build. He did not discuss the change with the designer or the BCA. He stated that the methodology used was inspected and passed by the BCA during the build. The Respondent was asked if he had brought the change to the BCA inspector's attention when the inspection was carried out. The Respondents stated it would have been obvious to the inspector that a change had been made.
- [29] The Complainant gave evidence that he ascertained that the vented cavity had not been installed. He rang the designer who advised that the cavity was required. The roofing work that had been completed was removed and replaced, utilising a cavity system.
- [30] The BCO gave evidence that the BCA would expect a minor variation to be sought and approved prior to the associated building work being carried out. There was no record on the BCA file of a minor variation being sought or granted.

Has the Respondent departed from an acceptable standard of conduct?

- [31] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code¹⁴ and any building consent issued.¹⁵ The test is an objective one.¹⁶
- [32] As noted, section 40 of the Act requires strict compliance with building consents. It provides:
- 40 Buildings not to be constructed, altered, demolished, or removed without consent**
- (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.
- [33] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Issuing a building consent ensures independent verification that the Building Code has been complied with and that the building work will meet the required performance

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ *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.

criteria in the Building Code. In doing so, the building consent process protects owners of works and the public. This accords with the purposes of the Act.

[34] A building consent was in place for the building work. What is in issue was whether changes to that consent should have been sought prior to the building work that differed from the building consent being carried out.

[35] 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: a minor variation under section 45A of the Act; or 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 required. In this respect, section 45(4) of the Act states:

- (4) *An application for an amendment to a building consent must,—*
 - (a) *in the case of a minor variation, be made in accordance with section 45A; and*
 - (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[36] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably, it states:

45A Minor variations to building consents

- (1) *An application for a minor variation to a building consent—*
 - (a) *is not required to be made in the prescribed form; but*
 - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A building consent authority that grants a minor variation—*
 - (a) *must record the minor variation in writing; but*
 - (b) *is not required to issue an amended building consent.*

[37] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

3 Minor variation defined

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

- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
- (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
 - (b) *minor wall bracing changes:*
 - (c) *a minor construction change (for example, changing the framing method used around a window):*
 - (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
- (3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

- [38] It is clear from section 45A of the Act that whilst the process for a minor variation is not onerous, there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly, the building consent authority retains the discretion to refuse a minor variation¹⁷. To aid the process of applying for a minor variation, most building consent authorities have a minor variation application form.
- [39] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow, not precede, the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect, it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a Certificate of Acceptance sought¹⁸.
- [40] Looking at the changes that were made by the Respondent, it is questionable as to whether the changes would have been minor, especially as regards the remove all of a vented cavity system associated with the roof. This shows the importance of a change process being followed. Had the work on the roof continued without the vented system, there was a very real possibility that the building work would not have complied with the Building Code.
- [41] Turning to the Respondent's accountability and responsibilities regarding voting consent changes, in *Tan v Auckland Council*,¹⁹ the High Court noted:
- [37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

¹⁷ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

¹⁸ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

¹⁹ [2015] NZHC 3299 [18 December 2015]

[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.

- [42] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.
- [43] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as an LBP, have a duty to ensure that building consent processes are adhered to. It follows that failing to do so can fall below the standards expected of an LBP.
- [44] Looking at the facts, the Respondent made two changes to the building consent. The first, which related to the foundations, might have been discussed with a BCA inspector and approved by him on-site. Notwithstanding, the Board would have expected the Respondent to have consulted with the designer prior to making the change and to have obtained design details for the changes he made. This is particularly the case as not only did he remove the thickening in the centre of the foundation, but he also widened the footings. Given the extent of the changes, the Board is surprised that the BCA inspector did not record the changes if they were discussed on-site as claimed by the Respondent.
- [45] The second change, which related to the vented system for the roof, was not discussed with the designer or the BCA. The Board took the view that the Respondent was not aware of the requirement for a vented system, and the Board Members noted that the Respondent struggled to understand what the consented plans showed as regards the details for where battens and underlay were to be placed when the consented plans were put to him during the hearing.
- [46] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considers the Respondent has departed from what the Board considers to be an accepted standard of conduct and that he has conducted himself in a negligent manner with regard to the failure to follow a change process for building consent changes and that he has carried out building work in a manner that was contrary to a building consent.

Was the conduct serious enough?

- [47] The implications of the change to the vented roof system and the Respondent’s conduct in relation to the change was serious. The conduct relating to the foundations may have been somewhat mitigated by the BCA possibly having failed to note an on-site approved change. The Board does note, however, that even if an on-site discussion occurred, best practice would have required a discussion with the designer and the Board does not know what the extent of the disclosures to the BCA were. In this respect, the Respondent, in his evidence, tended to take the approach that it was for the BCA to identify changes he had made as opposed to him having an

obligation to bring them to their attention. Overall, the Board formed the view that the Respondent had a cavalier attitude towards consent changes. This was evidenced by his stated approach of dealing with minor variations at the end of a build as opposed to during it and prior to changes being made, as per the requirements of the Act. Given those factors, the Board has decided that the Respondent's conduct has reached the threshold required for the Board to make a disciplinary finding.

Has the Respondent been negligent or incompetent?

[48] The Respondent **has** conducted himself in a negligent manner by failing to follow a building consent change process for minor variations.

Was there building work that differed from the building consent?

[49] The Respondent **has** carried out or supervised building work that differed from a building consent in respect of changes to the foundations and a vented roof system.

Failure to Provide a Record of Work

[50] 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.²⁰

[51] 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 work²¹ unless there is a good reason for it not to be provided.²²

Did the Respondent carry out or supervise restricted building work?

[52] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure and external moisture management system of a residential dwelling.²³ As such, he carried out or supervised restricted building work. He, therefore, had an obligation to provide a record of work on completion of his restricted building work.

Was the restricted building work complete?

[53] The Respondent's building work ended on or about 21 November 2023. After that date, the parties to the contract were involved in a contractual dispute, and the contract was brought to an end on or about 7 February 2024. On that date, the Respondent uplifted cedar cladding that was to be replaced on the basis that he would not be carrying out that or any further building work. given those facts, the Board finds that 7 February 2024 was the completion date for the purposes of

²⁰ Section 88(1) of the Act.

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² Section 317(1)(da)(ii) of the Act

²³ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

section 88(1) of the Act, as that was the date when it became clear that the Respondent would not be carrying out any further restricted building work.

Has the Respondent provided a record of work?

- [54] The Respondent's record of work, dated 17 March 2024, was provided to the owner on 19 March 2024 and to the Territorial Authority on 3 April 2024. The Board therefore finds that the Respondent did provide a record of work within a reasonable time frame of completion.
- [55] Given the above, the Respondent **has not** committed an offence under section 317(1)(da)(ii) of the Act.

Code of Ethics

- [56] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.²⁴ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes²⁵ for some time, and the Board has taken guidance from decisions made in other regimes.
- [57] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [58] The disciplinary provision in the Act simply states, "has breached the code of ethics". Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,²⁶ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [59] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. The Threshold test are similar to those for negligence and incompetence, as set out above.²⁷

²⁴ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

²⁵ Lawyers, Engineers, Architects and Accountants, for example

²⁶ [1992] 1 NZLR 720 at 724

²⁷ Refer *Collie v Nursing Council of New Zealand* [2001] NZAR 74

[60] Finally, when considering alleged breaches of the Code of Ethics, the Board needs to consider whether the conduct, if upheld as a breach of the Code, reaches the threshold for a disciplinary finding of disrepute, which is a more serious disciplinary finding.

The Conduct

[61] The specific allegation was that the Respondent may have breached clause 10 Code of Ethics, which stipulates that an LBP must comply with the law. In this instance, legal provisions that the Respondent may have breached were Part 4A of the Building Act 2004, specifically and the Building (Residential Consumer Rights and Remedies) Regulations 2014.

[62] Part 4A of the Act includes section 362D, which stipulates that a building contractor must provide information before residential building contracts are entered into, and section 362F, which provisions for minimum requirements for residential building contracts over a certain value. Those sections state:

362D Building contractor must provide information before residential building contract entered into

- (1) *This section applies to a residential building contract if—*
 - (a) *the price for the building work is not less than the prescribed minimum price (if any); or*
 - (b) *the client has requested the prescribed disclosure information (if any) and prescribed checklist (if any).*
- (2) *A building contractor must not enter into a residential building contract to which this section applies unless the building contractor has first provided to the client (or each client if there is more than 1)—*
 - (a) *the prescribed disclosure information (if any); and*
 - (b) *a prescribed checklist (if any).*
- (3) *The disclosure information and the checklist must each be in the form prescribed by regulations (if any).*
- (4) *A person who contravenes subsection (2)(a) or (b) commits an infringement offence and is liable to a fine not exceeding \$2,000.*
- (5) *A person must not, in any communication or document required to be made or given under subsection (2)(a), knowingly make a statement that is false or misleading in a material particular or knowingly make a material omission.*
- (6) *A person who fails to comply with subsection (5)—*
 - (a) *commits an offence; and*

- (b) *is liable on conviction,—*
 - (i) *in the case of an individual, to a fine not exceeding \$50,000:*
 - (ii) *in the case of a body corporate, to a fine not exceeding \$150,000.*

362F Minimum requirements for residential building contract over certain value

- (1) *This section applies to a residential building contract if the price for the building work is not less than the prescribed minimum price (if any).*
- (2) *A residential building contract to which this section applies must—*
 - (a) *be in writing; and*
 - (b) *be dated; and*
 - (c) *comply with regulations (if any) made under section 362G.*
- (3) *A building contractor must not enter into a residential building contract to which this section applies unless the requirements of subsection (2) have been complied with.*
- (4) *A person who contravenes subsection (3) by entering into an unwritten contract commits an infringement offence and is liable to a fine not exceeding \$2,000.*

[63] The provision for fines for contravening the sections and the level of those fines indicates that breaches of the sections are serious.

[64] Part 4A also allows for regulations to be made to give effect to sections 362D and 362F, and the Building (Residential Consumer Rights and Remedies) Regulations 2014 were, on that basis, established. The regulations apply to any building contract that is greater than \$30,000 in value. The contractual relationship on this matter far exceeded that amount (circa. \$149,000 plus GST). As such, Part 4A of the Act and the regulations apply.

[65] Regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations states:

5 Prescribed disclosure information and prescribed checklist

- (1) *For the purposes of sections 362D and 362F of the Act,—*
 - (a) *the prescribed disclosure information is the information in the form set out in Schedule 1:*

(b) *the prescribed checklist is the checklist in the form set out in Schedule 2.*

(2) *The prescribed disclosure information and prescribed checklist must be disclosed by a building contractor to a client before the contractor and the client enter into a residential building contract if—*

(a) *the price for the building work is not less than the prescribed minimum price; or*

(b) *the client requests either the disclosure information or the checklist.*

(3) *Despite section 52 of the Legislation Act 2019, the forms of the prescribed disclosure information and prescribed checklist may not contain any differences from the forms that are prescribed in Schedules 1 and 2.*

[66] Regulation 6 details the prescribed content for residential building contracts. It provides a comprehensive list of contractual provisions that must be included in a residential building contract. Under regulation 7, if there is no written contract then the oral contract between the parties is deemed to include contractual terms set out in Schedule 3 of the regulations. Regulation 7 provides a degree of protection for a consumer where the builder has not complied with his or her obligations under regulation 6.

[67] Turning to the matters under investigation, the Respondent provided an estimate that was accepted by the Complainant. The estimate detailed building work as:

ONE BED UNIT WITH KITCHEN, BATHROOM & LOFT

NOT INCLUDED.

KITCHEN JOINERY

HEAT PUMP

MAINS CABLE TO UNIT

TILING

SHELVING

DECK

PLUMBING FIXTURES

[68] The Respondent accepted that he had not provided the prescribed disclosure information or checklist as required by the regulations. He stated that the failure was a mistake and that they should have been provided.

[69] The Respondent and the Complainant's evidence differed regarding whether the Complainant requested or required a written contract prior to the commencement of the building work. The Respondent's position was that the Complainant had not required a building contract and that it was only after completion that one was requested and, at that point, one was provided. Whether a contract was requested

at the start of the build or not is not a matter that the Board needs to determine as Part 4A of the Act and the regulations make the provision of a written contract is mandatory.

Has there been a Breach?

[70] Based on the facts as outlined above, there have been clear breaches of sections 362D and 362F of Part 4A of the Act and of regulations 5 and 6 of the Building (Residential Consumer Rights and Remedies) Regulations. On that basis, there has been a breach of the Code of Ethics.

Was the Conduct Serious Enough?

[71] The Respondent is a member of [OMITTED], who provide members with pro forma disclosure documentation checklists and contracts, and has an extensive history in building. The Respondent acknowledged that he should have, but did not, provide disclosure documentation and a checklist prior to commencing the building work. As such, he was aware of his obligations. The Respondent should have also been aware of the mandatory requirement for a written contract and contract.

[72] Part 4A and the related regulations were established to protect consumers. The prescribed checklists and disclosure information allow consumers to make informed choices, and written contracts provide certainty, especially when issues or disputes arise. They are important, and the sanctions provided for in the Act and respect of non-compliance bear this out.

[73] Given that the Part 4A obligations have been in place since 2014, and taking into account the Respondent's background as a builder and business owner, the Board finds that his failure to provide prescribed checklists and disclosure documentation and his failure to provide a written contract before the building work started was serious. His conduct was not mere inadvertence oversight or error.

Has the Respondent Breached the Code of Ethics?

[74] The Respondent **has** breached clause 10 of the Code of Ethics.

Board Decisions

[75] The Respondent **has** breached sections 317(1)(b), (d) and (g) of the Act.

[76] The Respondent **has not** breached section 317(1)(da)(ii) of the Act.

Penalty, Costs and Publication

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

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

Penalty

- [79] 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
- [80] 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 cases³⁵ 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 penalty³⁷ that is consistent with other penalties imposed by the Board for comparable offending.³⁸
- [81] 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
- [82] The Respondent has committed three disciplinary offences. There is a high degree of commonality between the findings under sections 317(1)(b) and (d) of the Act and the Board will treat them as a single instance of disciplinary offending when determining the appropriate penalty. For those matters, the Board adopted a starting point of a fine of \$2,000, an amount that is consistent with penalties imposed by the Board for similar offences. The level of the fine reflects the seriousness of the offending, which was in the mid-range of negligence and building

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.

contrary to a building consent. There are no mitigating factors that the Board considers it should take into consideration. The Respondent's cavalier attitude towards consent changes could be seen as an aggravating factor. The Board has not, however, decided to increase the fine because of it. The fine remains at \$2,000.

- [83] Turning to the breach of the Code of Ethics, the Code is new, and whilst the provisions and part 4A of the Act are not and the Respondent should have known better, the Board has been taking an educative approach towards breaches of the Code. On that basis, the Board has decided that it will impose a censure for the breach. A censure is a public expression of disapproval of conduct. The Respondent and other LBPs should take note, however, that a point in time will come when LBPs should be familiar with the Code and abide by it. When that occurs, the Board will not be so lenient, and the penalties that it imposes.

Costs

- [84] 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.⁴⁰
- [85] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings⁴¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴².
- [86] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderately complex. Adjustments are then made.
- [87] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,150 toward the costs of and incidental to the Board's inquiry. The amount is the Board's scale costs for a hearing of this type.

Publication

- [88] 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,⁴³ 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.

⁴⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

⁴¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴² *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.

⁴³ Refer sections 298, 299 and 301 of the Act

- [89] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁴ 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.⁴⁵
- [90] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured for the breach of section 317(1)(g) of the Act; and

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is to pay a fine of \$2,000 for the breaches of section 317(1)(b) and (d) of the Act.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,150 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

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

Submissions on Penalty, Costs and Publication

- [93] 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 **9 October 2024**. The submissions should focus on mitigating matters as they relate to the

⁴⁴ Section 14 of the Act

⁴⁵ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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

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

Signed and dated this 18th day of September 2024.



Mr M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

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