

Before the Building Practitioners Board

	BPB Complaint No. 26451
Licensed Building Practitioner:	Rory Alexander Funnell (the Respondent)
Licence Number:	BP 129400
Licence(s) Held:	Bricklaying and Blocklaying – Veneer and Structural Masonry

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

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	27 May 2024
Reissued Date:	24 September 2024
Board Members:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Procedure:

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

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent is fined \$2,500 and ordered to pay costs of \$875. 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 Decision

- [1] The Respondent carried out or supervised the installation of a brick veneer on two dwellings (Lot 1 and Lot 2). The veneer was installed on both lots in a non-compliant manner, and with respect to one of the dwellings, the work was aesthetically poor. The Respondent did not provide records of work on completion.
- [2] The Board found, on the basis of building inspections for Lot 2 and a report from a Master Brick and Blocklayer for Lot 1, that the work had not been carried out or supervised to an acceptable standard. The Board also found that the Respondent had failed to provide two records of work. It did not accept a submission that he could not provide them because of a company liquidation as the obligation is personal, not company-related, and there was adequate time prior to the liquidation for them to be provided.

Background to the Reissued Decision

- [3] On 19 January 2024, the Board received a complaint alleging the Respondent had failed to provide a record of work on completion of restricted building work.
- [4] On 27 May 2024, the Board decided that it would issue a Draft Decision upholding the complaint. The Respondent was invited to make submissions on it or to seek a hearing. The Respondent made submissions on 26 July 2024. He set out the reasons why he did not believe he had committed a disciplinary offence.
- [5] On the basis of the submission, the Draft Decision was set aside, and a hearing was scheduled. A Notice of Proceeding was issued. In it, the Board noted that if it had misinterpreted the Respondent's submission or if the Respondent did not want to proceed to a hearing, he could request that the Board revert to the Draft Decision.
- [6] On 20 September 2024, after the Board had issued the Notice of Proceeding, the Respondent emailed requesting that the Draft Decision be reinstated.
- [7] Given the request, the Board has decided to reissue the Draft Decision, which is now a Final Decision. The Notice of Proceeding that was issued is withdrawn.

The Charges

- [8] 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
- [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; and
 - (b) 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.

Draft Decision Process

- [10] 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.

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.

- [11] 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
- [12] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. It noted, however, that there may have been further evidence in relation to the matter that the Board was not aware of. To that end, it issued a Draft Decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. The Board further noted that if the Respondent requested an in-person hearing, then the Draft Decision would be set aside, and a hearing would be scheduled.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

Negligence or Incompetence

- [14] The Board's finding was that the Respondent had carried out or supervised building work (brickwork) in a negligent manner.
- [15] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁶ 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*⁷ test of negligence.⁸ A threshold test applies. Even if the Respondent has been negligent, the Board must also decide if the conduct fell seriously short of expected standards.⁹ If it does not, then a disciplinary finding cannot be made.

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 *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.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ 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)

⁹ *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".

Has the Respondent departed from an acceptable standard of conduct

- [16] 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 Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²
- [17] The Respondent was engaged by the main contractor (the Complainant's employer) to complete the brick veneer on two residential dwellings referred to as Lot 1 and Lot 2.
- [18] The Respondent did not provide any evidence or submissions as regards the quality and compliance of the brickwork other than to note his good history as a bricklayer and tough market conditions at the time.

Lot 2

- [19] During the work on Lot 2, inspections were failed as follows:

- (a) 16 June 2023

Reason for decision:

- Mortar joints 15mm more so at the 2nd course.
- Unable to sight the brick shelves, fixing taping.

- (b) 20 June 2023

issues to resolve

Cavity to be cleaned out see photos

dass to be cleared off bricks

Additional Comments

some areas of brick not completed to first lift

Compliance to be shown for shelf angles Fixing and tape

Roof to wall junctions

note

Bricks have been installed before lower roof cladding

- (c) 22 June 2023

OUTSTANDING: Additional Comments

At upper level more brick to be disassembled [Omitted] - PSA number required to provide PS3 and photos of bolted lintel installation at base of second storey to prove compliance

Mortar courses at base still exceeding 15mm in places deconstruct

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

Dags still evident - remove Washouts not being cleared

Re-do with bricks second storey where mortar courses exceed 15mm - re-lay to no more than 600mm below soffit to permit inspection inside cavity

All dags to be removed as work proceeds and washouts to be actually washed out.

Scaffold at lower level with lower roof to have upper lift removed to allow safe laying of brick

Scaffold planks to be re-instated where removed at upper level. There is so much material deposited on the scaffold that safe transit is not possible - please remedy this asap before proceeding

SITE INSTUCTION:

The LBP needs to oversee this work and not send out an apprentice, who will not be involved in any remedial work, to front for this second brick re-check.

Take ownership of this job please. Works are very unsatisfactory by 3rd party subcontractors.

- [20] The work was noted to have been remediated on 23 June 2023. The remediation included removing and replacing brickwork.
- [21] The brickwork work on Lot 2 was found to be non-compliant by the Building Consent Authority (BCA) as the work progressed. The extent and level of the departures from compliance requirements were such that aspects of the work had to be removed and re-done. From comments made in the 22 June 2023 inspection, it would appear that the work was completed under the Respondent's supervision. Disconcertingly in this respect, the BCA's notes included the following statement:

The LBP needs to oversee this work and not send out an apprentice, who will not be involved in any remedial work, to front for this second brick re-check.

Take ownership of this job please. Works are very unsatisfactory by 3rd party subcontractors.

- [22] A BCA will often identify compliance issues that require remediation. It will, therefore, not necessarily follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:
- (a) the extent and seriousness of the non-compliance;
 - (b) whether there is a pattern of continued non-compliance; and
 - (c) what steps are taken when non-compliance issues are raised.

- [23] The Board considers that licensed building practitioners should aim to get building work right the first time and not rely on the building consent authority to identify compliance failings and to assist them to get it right. In this respect, during the first reading of changes to the Act around licensing¹³ it was noted by the responsible Minister:

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

- [24] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁴:

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

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

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

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*

¹³ Hansard volume 669: Page 16053

¹⁴ Hansard volume 669: Page 16053

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

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

[27] It is apparent to the Board from both the failings noted and the comments made by the BCA that the Respondent was not taking responsibility and was not providing adequate supervision.

[28] Supervise is defined in section 7¹⁵ of the Act. The definition states:

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

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[29] When considering supervision, the Board needs to consider what type of supervision was required and how well that supervision was undertaken. The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[30] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992.¹⁶ The definition of supervision in that Act is consistent with the definition in the Building

¹⁵ Section 7:

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

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

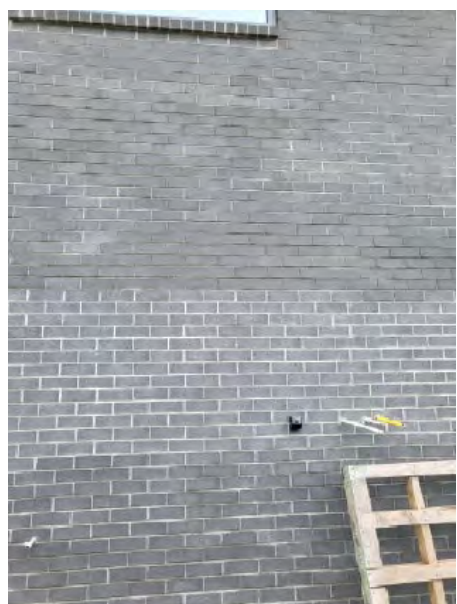
Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated in paragraph 24:

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

- [31] The evidence the Board received clearly showed that the brickwork completed was not compliant and that the Respondent was not ensuring that it was being done in an acceptable and compliant manner as it progressed.
- [32] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent to have departed from what the Board considers to be an accepted standard of conduct.

Lot 1

- [33] With respect to Lot 1, the Complainant obtained a report from Warren Charlton, a Master Brick and Blocklayer. He noted, amongst other things:
- (a) Walls not straight, plumb or within tolerance;
 - (b) mortar joints outside of tolerance;
 - (c) inconsistent mortar joint gauge and raking;
 - (d) inconsistent mortar colour and texture;
 - (e) weep holes and vents not aligned and sized correctly;
 - (f) inconsistent bond pattern; and
 - (g) mortar splash and staining.
- [34] The report included photographs. The following is a selection that demonstrate some of the issues:



- [35] There were compliance and aesthetic issues with the building work on Lot 1. The compliance issues were not as extensive as Lot 2, but the aesthetic issues were widespread and significant. As with Lot 1, the evidence indicates that the work was completed under the Respondent's supervision. The same comments regarding supervision above apply to Lot 1.
- [36] Building to an acceptable standard is not limited to compliance, and this is noted in the Ministry of Business Innovation and Employment Guide to Tolerances, Materials and Workmanship in New Residential Construction 2015.¹⁷ With respect to the Respondent's work, the Board notes the following requirements for brick veneers, which have not been adhered to:
- Perpend or vertical joints vertically align to within 10% of the brick length.
 - Joints are evenly coloured, clean, neatly finished (pointed), free of excess mortar and have a consistent appearance from the normal viewing position of 6.1 m.
 - Joints have an average thickness of 10 mm ± 3 mm (NZS 4210:2001).
 - Pointing and mortar repairs match existing mortar as closely as practicable.
 - Bricks are blended in accordance with manufacturers' instructions.
- [37] Again, given those factors and the level of aesthetic issues as shown in the report provided and photographs, the Board finds that the Respondent has departed from an accepted standard of conduct and has been negligent.

Was the conduct serious enough

- [38] The conduct was serious. It was apparent that the Respondent had not provided the level of supervision or the required care to ensure that the work was to the required quality and compliance standards. It went beyond what could be considered inadvertence, error or oversight.
- [39] Even if the work was carried out by the Respondent, as opposed to being supervised by him, the quality and compliance were not what is to be expected by a Licensed Building Practitioner.

Has the Respondent been negligent or incompetent

- [40] The Respondent has been negligent.

Failure to Provide a Record of Work

- [41] 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.¹⁸

¹⁷ Issued under section 175 of the Act.

¹⁸ Section 88(1) of the Act.

[42] 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 work¹⁹ unless there is a good reason for it not to be provided.²⁰

Did the Respondent carry out or supervise restricted building work

[43] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included the installation of a brick veneer on two dwellings, which is restricted building work because it forms part of the external moisture management system of a residential dwelling.²¹ Two records of work were required.

Was the restricted building work complete

[44] The Respondent's work came to an end in or about June 2023. That was when a record of work was due.

Has the Respondent provided a record of work

[45] The Respondent has not provided the required records of work.

[46] The requirement is for the Licensed Building Practitioner to provide a record of work. The owner or Territorial Authority does not have to demand one. The Respondent was required to act of his own accord and not wait for others to remind him of his obligations.

Was there a good reason

[47] The Respondent has submitted that his business was placed in liquidation and that he could not provide a record of work because of it.

[48] Companies Office records show that the company was put into liquidation on 9 August 2023. There was sufficient time before the liquidation for the Respondent to provide the records of work.

[49] Further, the liquidation of a company is not a good reason. The obligation to provide a record of work is an individual one. It is not a company obligation, so a liquidation does not impact it.

Did the Respondent fail to provide a record of work

[50] The Respondent has failed to provide two records of work on completion of restricted building work.

¹⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁰ Section 317(1)(da)(ii) of the Act

²¹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Board's Decision

[51] The Respondent **has**.

- (a) carried out or supervised building work in a negligent manner; and
- (b) failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

[52] 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.

[53] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision.

Penalty

[54] 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.²² It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²³

- (a) protection of the public and consideration of the purposes of the Act;²⁴
- (b) deterring other Licensed Building Practitioners from similar offending;²⁵
- (c) setting and enforcing a high standard of conduct for the industry;²⁶
- (d) penalising wrongdoing;²⁷ and
- (e) rehabilitation (where appropriate).²⁸

[55] 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 cases²⁹ and applying the least restrictive penalty available for the particular offending.³⁰ In all, the Board should be looking to impose a fair, reasonable, and

²² *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]

²³ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁴ Section 3 Building Act

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

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

²⁸ *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

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty³¹ that is consistent with other penalties imposed by the Board for comparable offending.³²

- [56] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.³³
- [57] The conduct is in the mid-range of seriousness. The Board adopted a starting point of a fine of a fine of \$3,500. The penalty is consistent with fines imposed for other disciplinary matters, and it is for both disciplinary findings.
- [58] The Respondent submitted that he has a good business and work history and that the preceding period was the toughest, from a business perspective, that he had experienced. Those factors have been taken into account when setting the starting point.
- [59] The Board has dealt with the matter without having held a hearing using a Draft Decision process. The fine will be reduced by \$500 to take that into account. A further reduction of \$500 will be applied because of the Respondent's submission that he did not provide a record of work on the advice of the liquidator. With the reductions, the fine is set at \$2,500.

Costs

- [60] 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.³⁴
- [61] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁵. The starting point can then be adjusted up or down, depending on the particular circumstances of each case³⁶.
- [62] 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.
- [63] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$875 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a moderately complex matter that has been dealt with by way of a Draft Decision. It is significantly less than 50% of actual costs.

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³³ 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.

³⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁵ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁶ *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.

Publication

- [64] 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,³⁷ 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.
- [65] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁸ 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.³⁹
- [66] 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

- [67] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,500.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$875 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.
- In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.**
- [68] 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.

³⁷ Refer sections 298, 299 and 301 of the Act

³⁸ Section 14 of the Act

³⁹ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 15th day of October 2024.



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.*

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- (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.*