

## Before the Building Practitioners Board

	BPB Complaint No. 26641
Licensed Building Practitioner:	Simon Isaac Washbourne (the Respondent)
Licence Number:	BP 129380
Licence(s) Held:	Carpentry

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### Draft 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	Board Inquiry
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	3 April 2025
Finalised Draft Decision Date:	5 June 2025

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Ms E Harvey McDouall, Registered Architect  
Mr C Lang, Building Surveyor and 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 censured and ordered to pay costs of \$700. 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] A High Court judgment was issued that found that the Respondent had been negligent with respect to how building work had been carried out and with regard to the failure to ensure there was a Building Consent in place for the building work. On the basis of the High Court decision, the Board found that the Respondent had conducted himself in a negligent manner.
- [2] The Board censured the Respondent for his conduct and ordered that he pay costs of \$700. The Board did not consider that a more stringent penalty was required because of the quantum of the judgment entered by the High Court against the Respondent. A censure was, however, necessary to uphold the integrity of the licensing regime.

### The Charges

- [3] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [4] In this matter, the disciplinary charge the Board has resolved to further investigate<sup>2</sup> is whether the Respondent may, in relation to building work at [OMITTED], Christchurch, have carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.

### Draft Decision Process

- [5] The Board's jurisdiction is that of an inquiry. It is for the Board to carry out any investigation that it considers necessary prior to it making a decision.
- [6] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> 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.<sup>4</sup>
- [7] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside, and a hearing will be scheduled.

### Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [9] The Respondent was contracted to carry out building work on an existing dwelling. The work was not carried out under a Building Consent. A dispute arose between the owners of the dwelling and the Respondent's building company, 77 Degree Builders Limited, of which the Respondent is a shareholder and director. The dispute resulted

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> 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. 1* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

in High Court proceedings, in which the Respondent was named as a defendant. Neither he nor 77 Degree Builders responded to those proceedings. The High Court proceedings were, as a result, decided on the basis of a formal proof hearing.

- [10] The High Court made various findings against 77 Degree Builders and the Respondent.<sup>6</sup>

### Issue Estoppel

- [11] The Board obtained a copy of the High Court decision.
- [12] The general rule regarding evidence is that all facts in issue or relevant to an issue in a case must be proved by evidence. There is, however, the doctrine of estoppel, which can create a legal bar to asserting a particular position. Estoppel can arise from a court's previous determination of the matter.<sup>7</sup>
- [13] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are that:
- (a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties.<sup>8</sup>
  - (b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action.<sup>9</sup>
  - (c) Issue estoppel can only be founded on findings that are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel regardless of how definite the language in which they are expressed.<sup>10</sup>
  - (d) The purpose of any estoppel is to work justice between the parties. It is, therefore, open to the courts to recognise that in special circumstances, inflexible application of estoppel may have the opposite result<sup>11</sup>. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: "A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice".<sup>12</sup>

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<sup>6</sup> *Wilkins v 77 Degrees Builders Limited* [2024] NZHC 2457

<sup>7</sup> Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

<sup>8</sup> *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352

<sup>9</sup> *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41

<sup>10</sup> *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce

<sup>11</sup> *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry

<sup>12</sup> *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

- [14] The Board considers, in this case, that estoppel applies.
- [15] The High Court decision set out that the building work included insulation sprayed into walls and the skillion roof and the replacement of the timber cladding, all exterior windows and butynol membrane roofing.<sup>13</sup> The decision set out:

*[19] Mr Washbourne proposed that new cladding should be installed: he recommended a James Hardie product, Linea Oblique 200 mm horizontal weatherboard (LOW) as the [OMITTED] requested that the new cladding be durable and easy to maintain. Mr Washbourne identified, introduced and organised all subcontractors and under the contract provided the material, including the LOW cladding. He had two employees who worked on the job whom he instructed and supervised in installing the cladding. Alongside the employees Mr Washbourne himself removed the old cladding and installed the new. Mr [OMITTED] describes that Mr Washbourne was involved in both a supervisory role and hands on: if not working himself "on the tools" he was onsite first thing most weekday mornings to discuss and direct work to be done with his employees or subcontractors. At times, including during recladding work and reinstallation of windows, Mr Washbourne was the main hands-on worker.*

- [16] The High Court decision set out the remedial work that had to be undertaken or arose as a result of defective building work and found that a Building Consent was required for the complete or substantial replacement of the previous direct fix cladding system<sup>14</sup> and for the installation of pumped insulation.<sup>15</sup>
- [17] The Court also found that the Respondent had been negligent as regards the following:<sup>16</sup>

*[75] Mr [OMITTED]'s evidence, who was on site during the building works, is that Mr Washbourne personally undertook the following work or gave the following assurances:*

- (a) said he would arrange the entire project;*
- (b) proposed that new cladding should be installed, and recommended that the James Hardie Linea Oblique Weatherboard is used;*
- (c) told the [OMITTED] that the installation of the new weatherboard cladding did not require a cavity, or a building consent;*
- (d) directed how the building work was carried out and supervised the building work;*

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<sup>13</sup> *Wilkins v 77 Degrees Builders Limited* [2024] NZHC 2457 at [10]

<sup>14</sup> *Wilkins v 77 Degrees Builders Limited* [2024] NZHC 2457 at [45]

<sup>15</sup> *Ibid* [55]

<sup>16</sup> *Ibid* [85]

- (e) *selected the sub-contractors and provided the materials;*
- (f) *removed the old cladding, instructed his employees on how to instal the new cladding, and along with his employees installed the new cladding;*
- (g) *reinstalled the windows; and*
- (h) *failed to instal sill pans/trays to the new windows.*

[18] The Court's findings were based on expert evidence received.

#### Counsel's Submissions

[19] The Respondent engaged Counsel, who responded to the complaint on his behalf. In the submissions, it was accepted that Mr Washbourne had supervised the building work. Counsel noted that the High Court proceedings were not contested, so any available defences were not advanced. Counsel submitted that, because of the quantum of the judgment against the Respondent, disciplinary action against the Respondent would, in the circumstances, be excessive and disproportionate.

[20] Counsel set out the basis on which the Respondent considered the building work came within the Building Consent exemptions in Schedule 1 of the Building Act, explanations as to how the manufacturer's details for cladding were not followed, issues with the client, and the reasons why the proceedings were not defended. Submissions were made detailing the impact on the Respondent, and Counsel noted that the Respondent was no longer working in the industry. Counsel submitted:

40. *The High Court judgment was widely reported in the news, including in articles by the New Zealand Herald, The Press, and the Otago Daily Times. The articles named Mr Washbourne personally and some included a photograph of him. Mr Washbourne only discovered the High Court judgment as a result of these articles being published about him. As the judgment and the articles painted Mr Washbourne in a bad light (without any information from his side of the story), it caused fractures in his personal relationships with friends and family. He has also been recognised in public because of the photograph of him that was published. This was an enormously distressing experience and Mr Washbourne has struggled with his mental health in the aftermath.*

41. *Mr Washbourne accepts, and regrets, that he has caused some of the aftermath by avoiding the proceedings when he became aware of them. There is however no public protection element which would deem it necessary for the Board to make any disciplinary orders in necessary that Mr Washbourne undertake any training, for the same reasons. Mr Washbourne has already been heavily penalised both*

*financially, and reputationally, as a result of the judgment and its publication.*

### **Conclusion**

42. *In the circumstances, it is submitted that any further penalty or disciplinary action by the Board would be disproportionate to any shortcomings by Mr Washbourne. Having regard to the disciplinary penalties which the Board may order under s 318(1) of the Act, none of the penalties are necessary or appropriate in the circumstances. Mr Washbourne has already stepped away from his building career and only wishes to move on with his life. He has already suffered, and will continue to suffer, the consequences of his errors, in light of the judgment sum and the High Court's decision being published.*

### **Negligence or Incompetence**

[21] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>17</sup> 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*<sup>18</sup> test of negligence.<sup>19</sup> 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.<sup>20</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>21</sup> If it does not, then a disciplinary finding cannot be made.

### Has the Respondent departed from an acceptable standard of conduct

[22] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must

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<sup>17</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

<sup>18</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>19</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>20</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

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

comply with the Building Code<sup>22</sup> and any building consent issued.<sup>23</sup> The test is an objective one.<sup>24</sup>

[23] The Board's considerations relate to a failure to obtain a Building Consent prior to building work being carried out and to the manner in which the building work was completed.

[24] With respect to both, the Board has proceeded on the basis of the High Court decision and has found that the conduct did not meet an acceptable standard.

### *Building Consent*

[25] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.<sup>25</sup> The burden is on the person carrying out the work to establish that an exemption applies. The building consent process is important as it ensures that the proposed building work is assessed by a Territorial Authority (Council) for compliance with the Building Code prior to it being undertaken<sup>26</sup> and that the consented work is then assessed against the consent issued through scheduled inspections.<sup>27</sup> In *Tan v Auckland Council*<sup>28</sup> the High Court noted that if a person fails to obtain a building consent, that deprives a Council of its ability to check any proposed building work. The Court also held:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[26] The Respondent falls into the category of a person who was in the best position to ensure unconsented work did not occur. He had a duty to assess whether a Building Consent was required prior to the building work being undertaken, and the High Court has found him accountable for a failure to do so.

[27] The question for the Board is whether, by failing to obtain a Building Consent prior to the building being located on the site, the Respondent has departed from an acceptable standard of conduct.

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<sup>22</sup> Section 17 of the Building Act 2004

<sup>23</sup> Section 40(1) of the Building Act 2004

<sup>24</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

<sup>25</sup> Refer sections 40, 41 and 42A of the Act.

<sup>26</sup> Section 49 of the Act.

<sup>27</sup> Section 222 of the Act.

<sup>28</sup> [2015] NZHC 3299 [18 December 2015]

[28] In *Tan v Auckland Council*,<sup>29</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[29] Justice Brewer in *Tan* also noted:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[30] 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.

[31] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a Licensed Building Practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a Licensed Building Practitioner.

### *Building Work*

[32] Errors were made during the build, and the Respondent has been found to be accountable and responsible for those errors by the High Court. The Board considers that Licensed Building Practitioners should aim to get building work right the first time and not rely on others to identify compliance failings. In this respect, during the first reading of changes to the Act around licensing,<sup>30</sup> 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.*

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<sup>29</sup> [2015] NZHC 3299 [18 December 2015]

<sup>30</sup> Hansard volume 669: Page 16053

- [33] 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 of the enabling legislation<sup>31</sup>:

*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.*

- [34] 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—*
  - (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.*

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<sup>31</sup> Hansard volume 669: Page 16053

- [35] Within this context, 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.

#### Was the conduct serious enough

- [36] Counsel has submitted that the Respondent should not be disciplined. The Board does not agree. The Board considers that Counsel's submissions go to mitigating factors in terms of penalty, not to the seriousness of the conduct. In this respect, the Board also notes that the licensing regime was established to promote quality and accountability and to protect consumers. Protection includes consumers being adequately informed when they choose a Licensed Building Practitioner. This is achieved, in part, through disciplinary records of the public Register. As such, it is important that a record of the Respondent's conduct be maintained, and whilst he is not presently licensed, he may decide to return to the industry, at which time the record will be important.
- [37] The Board's finding is that the conduct was serious, and the Board needs to be consistent in its disciplinary findings with other matters that have come before it. In that respect, the Board has, on multiple previous occasions, found that carrying out building work that requires a Building Consent without one is serious. Also, the degree of departure from an acceptable standard of the building work the Respondent carried out and supervised was more than minimal and warrants a disciplinary outcome.

#### **Board's Decision**

- [38] The Respondent **has** conducted himself in a negligent manner.

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

- [39] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [40] The matter was dealt with on the papers. Included was information relevant to penalty, costs, and publication. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

#### Penalty

- [41] The Board has the discretion to impose a range of penalties.<sup>iii</sup> 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.<sup>32</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>33</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>34</sup>
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;<sup>35</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>36</sup>
- (d) penalising wrongdoing;<sup>37</sup> and
- (e) rehabilitation (where appropriate).<sup>38</sup>

[42] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>39</sup> and applying the least restrictive penalty available for the particular offending.<sup>40</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>41</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>42</sup>

[43] 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.<sup>43</sup>

[44] The Board accepts that there are significant mitigating factors. The quantum of the judgment against the Respondent, in particular, is significant. On that basis, the Board has decided that it will issue a censure regarding the Respondent's conduct. A censure is a public expression of disapproval, and it will suffice to ensure that, should the Respondent return to the building industry as a Licensed Building Practitioner, a record of his past conduct will be recorded. The Board does not consider that any further penalty action is required.

### Costs

[45] 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

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<sup>32</sup> *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]

<sup>33</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>34</sup> Section 3 Building Act

<sup>35</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>36</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>37</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>38</sup> *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

<sup>39</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>40</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>41</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>42</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>43</sup> 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.

that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>44</sup>

- [46] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>45</sup>. The starting point can then be adjusted up or down, depending on the particular circumstances of each case<sup>46</sup>.
- [47] 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.
- [48] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$ 700 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.

### Publication

- [49] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>47</sup> 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.
- [50] However, because the Respondent is not currently licensed, his name is not recorded on the Register. In the event that he re-licenses within the three-year time frame, the disciplinary record would then be noted.
- [51] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>48</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>49</sup>
- [52] 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

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<sup>44</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>45</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>46</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>47</sup> Refer sections 298, 299 and 301 of the Act

<sup>48</sup> Section 14 of the Act

<sup>49</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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**

[53] 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.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$700 (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.**

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

### **Submissions on Draft Decision**

[55] The Board invites the Respondent to:

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

[56] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **Wednesday 4 June 2025**.

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

[58] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

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

### **Request for In-Person Hearing**

[60] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.

- [61] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **Wednesday 4 June 2025**
- [62] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

**Right of Appeal**

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

Signed and dated this 13<sup>th</sup> day of May 2025



**Mr M Orange**  
Presiding Member

**This decision and the order herein were made final on 5 June 2025 on the basis that no further submissions were received.**

Signed and dated this 6<sup>th</sup> day of June 2025



**Mr M Orange**  
Presiding Member

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

*This Act has the following purposes:*

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

**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.*