

Before the Building Practitioners Board

	BPB Complaint No. CB26009
Licensed Building Practitioner:	Tuhirangi Smith (the Respondent)
Licence Number:	BP 135866
Licence(s) Held:	Roofing – profiled metal roofing or wall cladding

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 Location	Napier
Hearing Type:	In Person
Hearing Date:	12 July 2023
Decision Date:	31 July 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
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) and (d) of the Act.

The Respondent is fined \$2000 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years, and the decision will be published in Code Words (without naming the Respondent).

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Summary

- [1] The Respondent was engaged to install the roof, spouting, skylights and associated flashings at a new dwelling at [OMITTED]. The homeowner alleged that the roof and particularly the flashings to three Velux skylights were inadequately installed, resulting in leaks.
- [2] The Respondent stated that his role on the project was the supervision of his team of employees who carried out the work. The question for the Board was whether the building work supervised by the Respondent was negligent or incompetent. This required a determination of two issues – had the Respondent departed from an acceptable standard, and, if so, was that departure serious enough to warrant a disciplinary finding.
- [3] The further issue before the Board was whether the work had been carried out in a manner contrary to the building consent. To determine this issue, the Board has only to find that building work departed from the building consent and does not have to consider if that departure was deliberate or negligent. However, the seriousness of the conduct under investigation does have to be taken into account.

- [4] The Board investigated the issues and decided that the Respondent had been negligent in the supervision of the building work and that the building work was not in accordance with the building consent.
- [5] This finding was based on the use of cricket flashings for the skylights rather than the consented back tray flashings and the inadequacy of the cricket flashings that were installed. The cricket flashings installed were not wide enough, did not have sufficient overlaps, and did not have a continuous line of silicon. The side flashing did not have a minimum of two crest cover and in some areas restricted water flow in the roofing pan. The Board found that the cricket flashings and side flashings were not compliant with E2/AS1 of the Building Code.
- [6] The Board decided that the Respondent would be fined \$2,000 and ordered to pay costs of \$3,500.

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] 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) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [9] In further investigating the two charges, the Board gave notice that it would be inquiring into the quality and compliance of the installation of the skylights. Further notice was given that the Board would also investigate roof leaks, which the Complainant alleged occurred after the Respondent installed the roof.

Evidence

- [10] 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.
- [11] At the hearing, some further photographs were tabled by Mr [OMITTED], the remedial roofer. These had not previously been seen by the Respondent. He was

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.

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

given a week from the hearing date to comment on these photographs and to provide any photographs he had which were directly relevant to the matters shown in Mr [OMITTED]'s photos.

- [12] On 20 July 2023, the Respondent provided comments and a photograph which the Board viewed and took into account in reaching this decision.
- [13] On 18 July 2023, after the hearing had concluded, the Complainant emailed the Board Officer with further information. The Board did not ask the Complainant to provide any further information and has not been given leave by the Board to do so. The Board has not considered this email in making its decision, and accordingly, it has not been necessary to provide it to the Respondent.

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.

Has the Respondent departed from an acceptable standard of conduct?

- [15] 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 Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹ Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

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”.

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *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.

- [16] In this case, the Respondent supervised the work of three employees. He described two of them as “still learning”, and one, who was his foreman as having 14 years’ experience. At the time of this project, the Respondent had been in his own business for about two years.
- [17] The Respondent’s engagement was on a labour-only basis. He measured and ordered the materials, but the Complainant paid directly for the materials and was the project manager. The Complainant agreed this was the case.
- [18] The Complainant described the Respondent’s attendance on site as much less than 10% of the time, but the builder, Mr [OMITTED], (a Licensed Building Practitioner) who was on site once or twice a week for an hour or two at a time, said the Respondent was generally present.
- [19] The Respondent explained that the foreman did the flashings and skylight installation and that he had confidence in his foreman and did not check that work until after problems began to occur. The Respondent had three other projects on at the same time, which were “quite some time away”.
- [20] The Complainant gave evidence and provided photographs of the leaks from two of the skylights. He also explained that there were leaks from the roof separately from the skylights, which resulted in water ingress down the living room concrete wall, pools of water on the floor where the two-storey part of the house meets the single-storey part, and a pool of water where the bedroom meets the bathroom.
- [21] There was disagreement between the Respondent and the Complainant as to the adequacy of each party’s testing processes, with the Respondent maintaining that his testing showed no further leaks around the skylights after he did some minor remedial work.
- [22] The Respondent said that in considering the installation of the flashings to the Velux skylights, he was concerned, as it was a low-pitch roof, about the greater flow of water over the three lower skylights and how close they were to each other. As a result, in consultation with the Complainant, the middle skylight was eliminated from over the kitchen area, leaving three skylights instead of the original four. This change was not discussed with or advised to the Council.
- [23] The Respondent said he was also not happy with the consented detail which he stated showed cricket flashings. He raised with the Complainant the use of back tray flashings instead of cricket flashings. The Respondent said it was best practice and would collect a large volume of water. Mr [OMITTED] and Mr [OMITTED] (a Licensed Building Practitioner who did remedial work on the roof) agreed that back tray flashings were the best practice and that they, too, had advised the Complainant of this at the time. The Respondent stated the Complainant did not want a back tray because of how it would look.

- [24] The Board put to the Respondent that the consented drawings showed back tray flashings and not cricket flashings. The Respondent did not consider that the drawings showed back tray flashings.
- [25] Mr [OMITTED], who provided the drawings and specifications for the building consent, pointed out that it was clear that the documents required the manufacturer's specifications to be followed and that this meant back tray flashings and not cricket flashings. He confirmed he was not asked during the project for any guidance on the installation of the flashings to the skylights. He was unaware of the removal of one of the skylights, the change to cricket flashings and the change in the roofing product used.
- [26] The Respondent said none of the details or supporting documents were in the plan that was shown to him by the Complainant. He conceded the building consent drawings were on site (and Mr [OMITTED] confirmed they were accessible by the Respondent). When he was taken by the Board to the relevant page, the Respondent acknowledged the consented drawings required the flashings to be installed in accordance with the Velux Manufacturer's specifications. He did not, however, at the time, look at the Velux installation specifications.
- [27] The Respondent had installed flashings to Velux skylights before, but he did not use the Velux specifications. He said that he was shown how to do them and had always done it that way "rather than as specified or consented". When asked how he determined the width of the flashings, the Respondent said it was to go over two ribs and that he used upstands to mimic the ribs.
- [28] The Respondent did not name any documents that he had referred to in installing the flashings, did not engage with the Council or designer, and did not refer to or use the roofing code of practice or E2/AS1 of the building code.
- [29] In his written response to the complaint, the Respondent had suggested the leaks were a design issue and not a workmanship issue. As a result, the Board requested a Special Advisor review "*the quality and compliance of the design work for the installation of the skylights*" in the roof.
- [30] Mr Rennie, who is a Licensed Building Practitioner with a Design Area of Practice 3 Licence, was appointed. He concluded, in respect of the formation of the flashing arrangement around the skylights, that "*the designer has provided sufficient specification by nominating a means of compliance for any flashing, which was done through reference to the manufacturers detailing, the Metal Roofing Code of Practice and NZBC E2/AS1.*"
- [31] Mr Rennie's report was made available to the Respondent prior to the hearing. The Respondent did not raise this argument further at the hearing.
- [32] In considering the workmanship issues, the Board heard the evidence of Mr [OMITTED], who carried out the remedial work on the skylights. He is a Licensed

Building Practitioner holding Carpentry and Site Area of Practice 1 Licences, and a certified Velux installer.

- [33] Mr [OMITTED] followed BRANZ guidelines for cricket flashings in redoing the flashings on two of the skylights. His opinion of the work he uncovered was that *“95% was almost there but 5 % is where he came unstuck”*. He said the clearance where the trim deck comes to the back of the flashing was only 50mm and should have been at least 100mm. He found the sealant was in a non-continuous line. In Mr [OMITTED]’s opinion, the volume of water flowing down the roof was not able to get away fast enough and became trapped, possibly hindered by leaves, and then found its way in through the weakness in the sealant. His remedial work included making the flashings wider, having bigger overlaps, and having continuous lines of sealant. When asked if he followed the consented plans for the remediation, Mr [OMITTED] was *“not totally sure”*.
- [34] As regards the leaks not associated with the flashing of the skylights, the Complainant suggested they were caused by the absence of turn-ups on the roofing iron. The Respondent said from what he could recall, the turn-ups were done but that he did not actually check that they had been done. He conceded that *“there may not be turn-ups in the area where sheets were replaced by the skylights.”*
- [35] Mr [OMITTED] was unaware of any leaks from the second storey as he had left the site. The Respondent said that he was learning of some of the leaks for the first time at the hearing.
- [36] The Board decided there was insufficient evidence on the cause of the other roof leaks to be able to make a finding as to responsibility for them. It is noted that Mr [OMITTED] was not engaged to look at or remediate those leaks, and as such, the Board did not have the benefit of his findings as it did for the skylight flashings. Speculation by the Complainant that the Respondent failed to turn up the stop ends is not sufficient evidence.
- [37] What is of significance is the workmanship on the flashings for the skylights and it is on this aspect of the workmanship that the Board has based its decision.
- [38] In conclusion, the Respondent said the whole issue comes back to the decision on what type of flashing to use. If what was put forward by him did not come within the Building Code, then the Respondent said he was *“willing to take that”*. He had tried everything to remediate the issues with the skylights. He did not, however, consider the lack of a continuous line of silicon as a reason for the leak.
- [39] When considering the acceptable standard in relation to supervision, the Board considers the definition of supervise in section 7¹² of the Act and the discussion in its

¹² Section 7:

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

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

previous decisions of the supervision levels it considers necessary to fulfil a licensed building practitioner's obligation.¹³

- [40] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992,¹⁴ and the Board is guided by those principles in assessing the adequacy of the Respondent's supervision.
- [41] The work undertaken by the Respondent's employees did not comply with the building code or the building consent. The skylights leaked, and as such, the workmanship cannot have been of an acceptable standard. The evidence of Mr [OMITTED] as to the deficiencies uncovered in the remedial process is clear evidence of the defective workmanship. The Respondent is responsible for the supervision of that work, and in failing to ensure the workmanship issues did not arise, he has failed to meet the acceptable standard of supervision.

Was the conduct serious enough?

- [42] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.
- [43] The supervisory conduct that the Board has focused on in its findings is the supervision of the installation of the flashings to the skylights. Given the known leaks from the skylights and the further potential consequences of these workmanship issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [44] The Board finds the Respondent's supervision departed from an acceptable standard and that he has been negligent but not incompetent. Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent

- [45] 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 work will meet the provisions of the Building Code.¹⁵ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁶ Building consents also stipulate the number and type of inspections the

¹³LBP decision C2-01143

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁵ Section 49 of the Act

¹⁶ Section 40 of the Act

issuing authority will carry out during the build.¹⁷ Inspections ensure independent verification that the building consent is being complied with.

- [46] 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.¹⁸ 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.¹⁹ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [47] The consented drawings and specifications required back tray flashings. The Respondent was unaware of this. He wanted to install back tray flashings as best practice, but the Complainant insisted on cricket flashings due to the aesthetics.
- [48] A further issue was canvassed by the Board – the change of roofing product from MC700 in the building consent to the trim rib 0.55 gauge which was supplied. The Respondent said the two products had the same profile, with the difference only being a brand name. However, the Board put to the Respondent that the two products had different centre widths, which the Respondent accepted but said the difference was very minimal.
- [49] Mr [OMITTED] expressed concern over the change in roofing product due to the low-pitch roof.
- [50] The installation of cricket flashings, the deletion of one skylight and the change in roofing product were all building work which differed from the building consent.

Was the conduct serious enough?

- [51] The Respondent expressed a desire to install back tray flashings and a recognition that this was best practice. However, this was not motivated by knowledge of the building consent or the requirement to comply with it. If the Respondent had installed back tray flashings, he would fortuitously have complied with the building consent – but not consciously.

¹⁷ Section 222 of the Act

¹⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁹ *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".

- [52] He acknowledged that he did not reference the manufacturer's specifications, the Roofing Code of Practice, or the building consent in installing the flashings to the skylights. Further, he removed one skylight from the consented plans and installed a roofing product which differed from that consented. No steps were taken by the Respondent to seek an amendment to the building consent for these changes or to raise the matter with the Complainant or the designer.
- [53] As with the Board's finding under negligence, the departures from the building consent were serious enough to make a finding under section 317(1)(d) of the Act.

Has the Respondent breached section 317(1)(d) of the Act?

- [54] The Respondent has committed the disciplinary offence under section 317(1)(d) of the Act. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected, and, as such, they will be treated as a single offence when the Board considers penalty.

Board's Decisions

- [55] The Respondent has committed disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

Penalty, Costs and Publication

- [56] 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.
- [57] The Board heard evidence during the hearing relevant to penalty, costs and publication 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

- [58] 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.²⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²¹
- (a) protection of the public and consideration of the purposes of the Act;²²
 - (b) deterring other Licensed Building Practitioners from similar offending;²³

²⁰ *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]

²¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²² Section 3 Building Act

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- (c) setting and enforcing a high standard of conduct for the industry;²⁴
- (d) penalising wrongdoing;²⁵ and
- (e) rehabilitation (where appropriate).²⁶

- [59] 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 cases²⁷ and applying the least restrictive penalty available for the particular offending.²⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁹ that is consistent with other penalties imposed by the Board for comparable offending.³⁰
- [60] 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.³¹
- [61] In this matter, the Board adopted a starting point of a fine of \$2,500 because the Respondent showed a wilful lack of understanding of the importance of the building consent documents and the need to comply with them. In considering a fine of this amount the Board was mindful of the need to deter other Licensed Building Practitioners from similar offending and signalling the standard required and expected from the industry.
- [62] The Respondent's failures were two-fold. First, the Respondent should have been aware of what was required by the consented drawings. Second, if the Complainant was insisting on different flashings, the Respondent should have required the designer to make those changes and had the building consent amended.
- [63] It was, however, a mitigating factor that the Respondent wanted to do what was best practice – that is, back tray flashings. If he had followed this methodology, as the building consent documents required, there would likely have been no issue.
- [64] Taking the noted mitigating factor into account, the Board decided to reduce the fine from the starting point. The Respondent is to pay a fine of \$2,000.

²⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁶ *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

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

³⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³¹ 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.

Costs

- [65] 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.³²
- [66] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁴.
- [67] 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 moderate. The usual tariff for a half-day moderate hearing is \$3,500, and there are no adjustments to be made to this.
- [68] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

Publication

- [69] 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,³⁵ 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.
- [70] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁶ 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.³⁷
- [71] Based on the above, the Board will order further publication in Codewords, but the Respondent is not to be named in the publication.

³² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁴ *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.

³⁵ Refer sections 298, 299 and 301 of the Act

³⁶ Section 14 of the Act

³⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[72] 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 \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision which will be publicly available on the Board's website. The decision is to be published in Codewords (without the Respondent being named).

[73] 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

[74] 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 **6 September 2023**. The submissions should focus on mitigating matters as they relate to the 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

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

Signed and dated this 15th day of August 2023



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:*

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- (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.*