

Before the Building Practitioners Board

	BPB Complaint No. CB26167
Licensed Building Practitioner:	Robert Snowdon (the Respondent)
Licence Number:	BP104367
Licence(s) Held:	Roofing – Profiled Metal Roof and/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 Type:	On the Papers
Hearing and Draft Decision Date:	11 April 2023
Finalised Decision Date:	29 May 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

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

Draft Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Contents

Summary of the Board’s Draft Decision	2
The Charges	3
Draft Decision Process	3
Evidence	4
Negligence or Incompetence	5
Has the Respondent departed from an acceptable standard of conduct	5
Was the conduct serious enough	6
Has the Respondent been negligent or incompetent.....	6
Contrary to a Building Consent	6
Penalty, Costs and Publication	7
Penalty	7
Costs.....	8
Publication	8
Section 318 Order	9
Submissions on Draft Decision	9
Request for In-Person Hearing	10
Right of Appeal	10
This decision and the order herein were made final on DATE on the basis that no further submissions were received.	10

Summary of the Board’s Draft Decision

- [1] The Respondent installed a roof that differed from that which was consented and which may not have been Building Code compliant. It was his common practice to install roofs without reference to the building consent. The Board found that this was not an acceptable practice and that the Respondent had been negligent, and that he had carried out building work that was contrary to a building consent.
- [2] The Respondent is fined \$1,000 and ordered to pay costs of \$500. The fine and costs orders have been reduced on the basis that the matter was dealt with on the papers. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Charges

- [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.¹
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at 8 Talon Drive, Rolleston, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and/or
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

Draft Decision Process

- [5] 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.
- [6] 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
- [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 a hearing will be scheduled.

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 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

Evidence

- [8] 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.
- [9] The complaint was made by the Selwyn District Council in its capacity as a Building Consent Authority. It alleged that the Respondent had installed an unconsented roofing product. The consent specified MetalCraft roofing. The main contractor, about whom a complaint was also made, supplied a product that he had direct imported from China, which the Respondent installed without a change to the consent having been issued. The complaint also alleged that the substituted roofing product may not have met Building Code requirements. The Complainant alleged that the Respondent had, by installing the product, carried out building work in a negligent or incompetent manner and in a manner that was contrary to a building consent.
- [10] In short, a new dwelling at OMITTED was issued a building consent on the basis that a MetalCraft roof would be installed. MetalCraft utilises Colorsteel products. The Respondent was the Licensed Building Practitioner who installed the roof. During the build, which took place in mid-2020, a decision was made by the main contractor to use leftover roofing materials direct imported from China for a shed build on another property to clad the roof at OMITTED. The substituted roofing product was installed without any notice of the change being given to the Building Consent Authority (BCA), and a Code Compliance Certificate was issued in December 2020. The dwelling was then sold. The purchaser noted a deterioration of the roof's paint and complained about it. It came to light that the roof had not been clad in the consented product.
- [11] The Respondent replied to the complaint stating that he asked the main contractor to provide assurance that the product met New Zealand standards. He stated he was provided with that assurance. It was not clear, however, whether that assurance was obtained before the roof was installed or as a result of the complaint being made. It appeared that it was the latter.
- [12] The Respondent also stated:
- I only ever received a cut up plan for the materials and did not see any consented plans which is common practice for all the companies that I contract to.*

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

Negligence or Incompetence

[13] 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 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.⁹ 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.¹⁰ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

[14] 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 Code¹¹ and any building consent issued.¹² The test is an objective one.¹³

[15] The Board's considerations relate to the failure to install the consented product.

[16] The Building Act requires that all building work is carried out under and in accordance with a building consent.¹⁴ If changes are going to be made to the building consent, then a process must be used for that change. A Licensed Building Practitioner also needs to sight the approved change for the associated building work is carried out.

[17] In this matter, a consent change was not sought, and an unconsented product was installed. Further, there was no evidence that the unconsented product met Building Code requirements. Under section 17 of the Act, all building work must comply with the Building Code, which sets the required performance standards for all building work. Those standards include durability. Clause B2 provides that building elements

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 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"

¹⁰ *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".

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ *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.

¹⁴ Refer sections 40 of the Act.

must continue to satisfy the requirements of the Building Code for specified time periods. For roofing products, it is a minimum of 15 years. There was no evidence that the substituted product would meet this requirement.

- [18] The Respondent was not necessarily responsible for obtaining the consent change. He was responsible for ensuring the consented product was installed. In this respect, it is noted that the Respondent did not have a copy of the consented plans and that it was his common practice to carry out building work without reference to it. That is not an acceptable practice. Compliance with a building consent requires an awareness of what it provides and requires. It is with respect to the failure to obtain and build in accordance with the building consent that the Board finds that the Respondent's conduct has fallen below an expected standard and that he has been negligent.

Was the conduct serious enough

- [19] The failure to ensure the consented building product was installed has had a detrimental impact on the compliance of the associated building. It has an unconsented and potentially non-compliant roof.
- [20] In addition to this, the Respondent has stated that it is his common practice to install roofs without reference to the associated building consent. That is a disconcerting practice and one that makes the conduct serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent

- [21] The Respondent has been negligent.

Contrary to a Building Consent

- [22] For the same reasons, the Respondent has also carried out or supervised building work that does not comply with a building consent as, once issued, there is a requirement that the building work is carried out in accordance with the building consent.¹⁵ That did not occur. The offence has been committed.
- [23] The Board does, however, note that there is a commonality between the findings that the Respondent has carried out building work in a negligent manner and the finding that he has carried out building work contrary to a building consent. In recognition of this, the Board will, for the purposes of determining the appropriate action to take as a result, treat the two offences as a single matter.

¹⁵ Section 40 of the Act

Penalty, Costs and Publication

- [24] 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.
- [25] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [26] 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.¹⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁷
- (a) protection of the public and consideration of the purposes of the Act;¹⁸
 - (b) deterring other Licensed Building Practitioners from similar offending;¹⁹
 - (c) setting and enforcing a high standard of conduct for the industry;²⁰
 - (d) penalising wrongdoing;²¹ and
 - (e) rehabilitation (where appropriate).²²
- [27] 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 cases²³ and applying the least restrictive penalty available for the particular offending.²⁴ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁵ that is consistent with other penalties imposed by the Board for comparable offending.²⁶

¹⁶ *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]

¹⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁸ Section 3 Building Act

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²² *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

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

²⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

²⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [28] 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.²⁷
- [29] In this matter, the Board adopted a starting point of a fine of \$2,000. The starting point reflects the seriousness of the offending and is consistent with other penalties imposed by the Board for similar conduct. The Respondent has a clean disciplinary history. There are no known aggravating factors. It is also proportionate to the fine the Board has imposed on the other Licensed Building Practitioner that was complained about.
- [30] The matter has, to date, been dealt with on the papers. A hearing has not been held. It is common, in situations where disciplinary offending is accepted, for a penalty to be reduced in recognition of this. Making a finding on the papers, if it is accepted, is akin to an acceptance of responsibility. As such, the fine, if this decision is accepted, will be reduced to \$1,500.

Costs

- [31] 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.²⁸
- [32] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁰.
- [33] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. Adjustments are then made.
- [34] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

- [35] 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,³¹ and he will be named in

²⁷ 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.

²⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁰ *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.

³¹ Refer sections 298, 299 and 301 of the Act

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.

[36] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³² 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.³³

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

Section 318 Order

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

Penalty: Pursuant to section 318(1) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

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

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[39] 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

[40] 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.

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

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

³² Section 14 of the Act

³³ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [43] 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.
- [44] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [45] 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.
- [46] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 May 2023**.
- [47] 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

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

Signed and dated this 8th day of May 2023.



Mr M Orange
Presiding Member

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

Signed and dated this 29th day of May 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:*
 - (i) cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*

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- (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.*