

## Before the Building Practitioners Board

|                                 |                                  |
|---------------------------------|----------------------------------|
|                                 | BPB Complaint No. CB26139        |
| Licensed Building Practitioner: | Kheng Kevin Sun (the Respondent) |
| Licence Number:                 | BP136463                         |
| Licence(s) Held:                | Carpentry                        |

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

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|----------------------------|--|
| Complaint or Board Inquiry | Complaint  |
| Hearing Location           | Audio-visual Link                                    |
| Hearing Type:              | In Person  |
| Hearing and Decision Date: | 13 July 2023   |
| Board Members Present:     |  |
|                            | Mr M Orange, Chair, Barrister (Presiding)            |
|                            | Mrs F Pearson-Green, Deputy Chair, LBP, Design 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.

#### Disciplinary Finding:

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

The Respondent's licence is cancelled, and he may not apply to be relicensed for a period of 18 months. He is ordered to pay costs of \$2,625. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary

- [1] The Respondent was engaged to build a new residential dwelling. Partway through the build, the Respondent’s contract was terminated because of quality and compliance issues. A complaint was made.
- [2] The Board found that the Respondent had carried out building work in a negligent and incompetent manner and in a manner that was contrary to a building consent. The findings of negligence and incompetence were made on the basis that the Respondent’s conduct had departed from an acceptable standard, as judged against other Licensed Building Practitioners and that he had displayed a clear lack of the ability, skill, and knowledge required to carry out or supervise building work to an acceptable standard.
- [3] On the basis of the findings, the Board decided that the Respondent’s licence should be cancelled for a period of 18 months so as to punish the Respondent as well as to deter others and protect the public. The Respondent was ordered to pay costs of \$2,625. The Board decided that it would publish its findings.

## The Charges

- [4] 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>
- [5] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], Taupo, 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.
- [6] The Board gave notice that the matters to be further investigated under sections 317(1)(b) and (d) of the Act at the hearing would be the installation and set-up of the Structurally Insulated Panels (SIPs), including the bottom plates and inter-floor structure.

## Service

- [7] Prior to considering the disciplinary charge, the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it. This is to ensure that he is afforded his right to natural justice as section 283 of the Act stipulates that the Board “*must comply with the principles of natural justice*” and with the Complaints Regulations.
- [8] The principles of natural justice require that hearings are conducted in a manner that ensures that a respondent is given a fair opportunity to be heard, to contradict the evidence and that the decision-making process is conducted fairly, transparently and in good faith. In terms of a fair hearing, a respondent should be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. The Complaints Regulations recognise those principles and prescribe a process that must be complied with when a complaint is made. That process includes providing the Respondent with a copy of the complaint and an opportunity to respond to it<sup>3</sup> and the opportunity to appear and be heard at a hearing.<sup>4</sup>

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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 7(2) of the Complaints Regulations.

<sup>4</sup> Regulation 12 of the Complaints Regulations.

[9] In this matter, the Respondent did not appear at the hearing. He had been provided with a Notice of Hearing, and he did engage in the investigation process in that he responded to the complaint.

[10] The Board's Notice of Proceeding and Notice of Hearing were sent to the address that the Respondent maintains on the Register of Licensed Building Practitioners. The response to the complaint was received from that address. In this respect, the Register must contain certain information, including under section 301(1)(d) of the Act, an "address for communications under this Act". Under section 302, the licensed building practitioner must keep their details up to date:

**302 Obligation to notify Registrar of change in circumstances**

(1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*

(2) *Change of circumstances—*

(a) *means any change in the information that the person has provided to the Registrar under this subpart; and*

(b) *includes any change that may be prescribed (if any).*

[11] As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.<sup>5</sup> It is also an offence if a Licensed Building Practitioner fails to update the Register.

[12] The Act also provides for the service of notices in section 394. It provides that:

**394 Service of notices**

(1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*

(a) *delivered personally to the person; or*

(b) *delivered to the person at the person's usual or last known place of residence or business; or*

(c) *sent by fax or email to the person's fax number or email address; or*

(d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*

(5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

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<sup>5</sup> Section 314 of the Act.

- [13] Given the above, the Board finds that the required notices under the Regulations have been provided to the Respondent.
- [14] The Respondent is not obliged to attend a hearing. The requirement is that he is given the opportunity to do so. As that has occurred, natural justice requirements have been met. The Board will consider the matter.
- [15] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not engaging in investigations or appearing at hearings. As such, it is appropriate that it deals with the matter.

### **Evidence**

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</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.

### **Negligence or Incompetence**

- [17] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>7</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>8</sup> test of negligence.<sup>9</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>10</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>11</sup> If it does not, then a disciplinary finding cannot be made.
- [18] 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>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>7</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>8</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>9</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>10</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>11</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>12</sup> and any building consent issued.<sup>13</sup> The test is an objective one.<sup>14</sup>

- [19] The complaint was made by the Taupo District Council's Building Inspections and Processing Manager. He noted multiple compliance issues, which were supported by inspection records.
- [20] The Board was also provided with photographs of non-compliant structural connections. A Site Notice issued by the Council noted:

*Posi strut floor joists not butting into walls and are unable to be connected with joist hangers correctly to SIPS panels. A number of floor joists are unconnected to walls and are at risk of failure to support upper floor. Joist hangers as connected will not function as intended to carry floor joist loading from above. This area of the building in particular displayed evidence of poor workmanship and a lack of supervision for the licensed building practitioner.*

*Frames out of plumb and not correctly secured to adjoining walls.*

*Walls out of plumb. Wall at back of ensuite in particular is out of plumb. Other walls out of plumb as building is constructed upwards and this is potentially contributing to the floor joists being too short to butt into walls and the ensuing lack of correct structural connection from floor joists to walls.*

*The ground floor as currently constructed at this point in time (26/8/22) was looked over and appeared to be correct and constructed in a more tradesman like manner to the loft subfloor and first floor frames.*

*Met with Kevin Sun on site.*

*Inspection failed due to failed items noted above. No further inspections allowed until all issues noted are addressed.*

*Loft floor may have to be removed for remedial work to be carried out.*

*The items noted may not be a full and final list of all non complaint items. It remains the responsibility of the LBP to comply with the relevant building code clauses and standards as per the building consent.*

*No further inspections can be booked until these matters are resolved.*

*A further recheck & re-booking of this inspection is required to address outstanding matters.*

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<sup>12</sup> Section 17 of the Building Act 2004

<sup>13</sup> Section 40(1) of the Building Act 2004

<sup>14</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.

[21] The homeowner, who raised issues with the Council, also noted:

*A major issue we also had is the walls are not square leaving the house roofless and partial teardown required. PlateLoks have not been installed and steel portals not secured. It is almost as if they just did some work to show progress without following the actual plans for construction of a house.*

*Our panels could only be out in the elements for around 6 weeks which we discussed with him but we have been left for some 4 month before having to spend \$60k+ with a new builder to remedy the work.*

[22] At the hearing, the homeowner confirmed the above. He stated that the building, which had the two floors of walls and floors constructed and was ready for the attic to be built, had to be deconstructed because the tops of the walls were 200mm wider than the bottom. He described it as a trapezoid shape, the result of which was that the roof would not fit on the walls as the walls were too wide. The deconstruction was done on the advice of an engineer and two other builders. His evidence was that the deconstruction and reconstruction had cost him approximately \$140,000 and that he had not been able to recover anything from the Respondent as he had liquidated his company.

[23] The Respondent provided a response to the complaint. He put forward that the issues arose because he was rushed by the homeowner. He considered the house should not have been built during the winter. The Respondent did note that the walls were out of plumb, but he put the blame on the homeowner who, he stated, “just put it up its fine”. The Respondent stated he would have sorted out the problem, but his company was liquidated. The Respondent did state:

*I think the problem was I should have been on site more to oversee these problems, or my foreman should have made contact with me if there was a problem before carrying on. I would have thought he was competent enough as we didn't have problems before on our other job sites.*

[24] The homeowner gave evidence that the Respondent was on-site approximately 60 per cent of the time and that he was carrying out the work in conjunction with three staff members.

[25] It was clear from the evidence before the Board that the building work was carried out in a substandard and non-compliant manner. The failings were fundamental and numerous. Basic errors that compromised compliance with Clauses E2 and B2 of the Building Code were made. The issues with the foundation cannot easily be rectified, and they will have an ongoing impact on the building.

[26] It was also apparent from the evidence that the Respondent was both carrying out and supervising the building work. The building work included restricted building work, so there was a legal requirement that it be carried out or supervised by a

Licensed Building Practitioner.<sup>15</sup> That requirement applies even if it is the homeowner who is carrying out or assisting with the building work.

- [27] The Respondent is responsible for his own work and for the work of his employees. In this respect, he expected to supervise to an acceptable standard. Supervise is defined in section 7 of the Act.<sup>16</sup> The definition states:

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

*(a) is performed competently; and*

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

- [28] 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<sup>17</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the Court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

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

- [29] On the facts before the Board, there was clear and compelling evidence of non-compliant work and a failure to deal with those issues as and when they arose.
- [30] Given the above, the Board finds that the Respondent’s conduct has fallen well short of an expected standard. The only question for the Board is whether the Respondent was negligent, incompetent, or both. As noted above, negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. Given the fundamental nature of the building work failings and the level of non-compliance

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<sup>15</sup> Section 84 of the Act.

<sup>16</sup> 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.*

<sup>17</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011



with the Building Code, the Board finds that both apply. The Respondent is found to have been both negligent and incompetent.

### **Contrary to a Building Consent**

- [31] 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.<sup>18</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>19</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>20</sup> Inspections ensure independent verification that the building consent is being complied with.
- [32] 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.<sup>21</sup> 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.<sup>22</sup> If it does not, then a disciplinary finding cannot be made.
- [33] Again, there was clear and compelling evidence of building work that did not comply with the building consent and that the departures from the consent were fundamental. The Respondent's conduct has, again, fallen well short of what is expected.

### **Board's Decisions**

- [34] The Respondent has:
- (a) carried out or supervised building work in a negligent and 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.

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

- [35] 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,

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<sup>18</sup> Section 49 of the Act

<sup>19</sup> Section 40 of the Act

<sup>20</sup> Section 222 of the Act

<sup>21</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>22</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".

whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [36] The Board received evidence 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

- [37] 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>23</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>24</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>25</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>26</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>27</sup>
  - (d) penalising wrongdoing;<sup>28</sup> and
  - (e) rehabilitation (where appropriate).<sup>29</sup>
- [38] 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>30</sup> and applying the least restrictive penalty available for the particular offending.<sup>31</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>32</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>33</sup>
- [39] 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.<sup>34</sup>

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<sup>23</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>24</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>25</sup> Section 3 Building Act

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

<sup>27</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>28</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>29</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>30</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>31</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

<sup>33</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>34</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.

[40] Whilst the focus of disciplinary action is not punishment, the Board does note that the High Court in *Patel v Complaints Assessment Committee*<sup>35</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[41] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>36</sup>. The High Court, when discussing penalty, stated:

*[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner’s conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner’s offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner’s decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[42] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[43] The Respondent has committed three disciplinary offences. The Board, does however, note the commonality in the disciplinary offending in the negligence and incompetence finding and the finding as regards building contrary to a building consent. As such, it will treat those as a single offence. The conduct is, however, serious, especially as regards the finding of negligence and incompetence.

[44] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. Restricted building work, in turn, is that building work which is integral to the safe and healthy functioning of a home, and the licensing regime was established so as to ensure persons with the requisite competencies, as set out in the Licensed Building Practitioners Rules 2007, carry out or supervise that work.

[45] The Respondent’s offending has been aggravated by his failure to take responsibility (the Respondent put his company into liquidation and then left New Zealand),

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<sup>35</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>36</sup> [2012] NZAR 481

apportioning blame to those working under his supervision, and failing to address the issues he caused or to respond to them during the Board's investigations.

- [46] The Respondent has failed to understand that as a Licensed Building Practitioner, he is responsible for his work and those under his supervision. He has shown little understanding of the licensing regime under which he carried out restricted building work. In all, the Respondent has not taken any responsibility for his conduct.
- [47] The Board has also taken into consideration that two complaints were made about the Respondent. Whilst it has considered them separately, it has noted that the findings were similar (negligent and incompetent building work and building work that was contrary to a building consent) and that, given there were two complaints, there was a pattern of non-compliant building work. This matter was, however, more serious than the other.
- [48] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [49] Further, in respect of the finding of incompetence, which is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard, the Board notes that the licensing regime is predicated on licensed building practitioners holding the required abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities. Cancellation of the Respondent's licence will ensure, should he seek to be relicensed, that the required competencies are reassessed.
- [50] On the basis of the above, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of 18 months.
- [51] The Board will not take any further action as, under section 318(2) of the Act, the Board cannot impose an additional penalty when ordering that a license be cancelled.

### Costs

- [52] 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.<sup>37</sup>

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<sup>37</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [53] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>38</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>39</sup>.
- [54] 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.
- [55] The Board's tariff for a half-day hearing by an audio-visual link is \$2,625. The Board sees no reason to vary that amount. The Board orders that the Respondent is to pay the sum of \$2,625 toward the costs of and incidental to the Board's inquiry.

### Publication

- [56] 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>40</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.
- [57] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>41</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>42</sup> This is especially the case when the Board has decided to cancel a practitioner's licence.
- [58] Based on the above, the Board will order further publication. The publication will be by way of the web and through Code Words or such other industry publication as is appropriate.

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<sup>38</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>39</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>40</sup> Refer sections 298, 299 and 301 of the Act

<sup>41</sup> Section 14 of the Act

<sup>42</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 18 months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,625 (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 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.

[60] 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

[61] 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

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

Signed and dated this 15<sup>th</sup> day of August 2023



**M Orange**  
Presiding Member

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**i Section 3 of the Act**

*This Act has the following purposes:*

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

**ii Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**iii Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
  - (a) *do both of the following things:*

- 
- (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*
  - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
  - (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

<sup>iv</sup> **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.*