

Before the Building Practitioners Board

	BPB Complaint No. 26472
Licensed Building Practitioner:	Wei Chen (the Respondent)
Licence Number:	BP 138332
Licence(s) Held:	Carpentry

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	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	8 October 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Procedure:

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

Disciplinary Finding:

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

The Respondent is fined \$2,000 and ordered to pay costs of \$2,100. 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 contracted to undertake renovations, including upgrading a bathroom and ensuite to create tiled showers. A building consent was not obtained for the building work, and the work, which was supervised by the Respondent, was not completed in a compliant manner and would not have met the requirements of clause E3 of the Building Code. The Respondent accepted that he should have ensured a consent was in place before commencing the work and that his supervision was not adequate.

- [2] The Board decided that the Respondent had carried out building work in a negligent manner by failing to ensure that a building consent was in place for the building work and that he had supervised building work in a negligent manner with respect to the quality and compliance of the building work completed. The Respondent was fined \$2000 and ordered to pay costs of \$2100. The fine was reduced to recognise the Respondent’s acceptance that his conduct did not meet an acceptable standard. 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 [Omitted], have carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, in respect of:
- (i) failing to consider whether a building consent was required for the work undertaken; and
 - (ii) the installation and fixings of the tiling substrate and internal wall linings, specifically whether the tiling substrate and wall lining complied with the manufacturer's specifications and NZ Building Code E3/AS1.

Evidence

- [5] 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.
- [6] The Respondent was contracted to carry out renovations on a residential dwelling. The contracted work included work on an ensuite and a bathroom. Both were to be tiled on the floors and walls, and both were to have existing showers removed and tiled showers installed. The existing showers were not tiled. The ensuite had wall linings and a stainless steel tray. The bathroom was a shower over a bath with wall linings. The work was not completed under a building consent.

Negligence or Incompetence

- [7] 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

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

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)

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

- [8] 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
- [9] There were two issues being investigated. The first was whether a building consent was required. The second was the quality and compliance of the building work.

Building Consent

- [10] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.¹² The burden is on the person carrying out the work to establish that an exemption applies. The building consent process is important as it ensures that the proposed building work is assessed by a Territorial Authority (Council) for compliance with the Building Code prior to it being undertaken¹³ and that the consented work is then assessed against the consent issued through scheduled inspections.¹⁴ In *Tan v Auckland Council*,¹⁵ the High Court noted that if a person fails to obtain a building consent, it deprives a Council of its ability to check any proposed building work. The Court also held:

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

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

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.

¹² Refer sections 40, 41 and 42A of the Act.

¹³ Section 49 of the Act.

¹⁴ Section 222 of the Act.

¹⁵ [2015] NZHC 3299 [18 December 2015]

- [11] The Respondent falls into the category of a person who was in the best position to ensure unconsented work did not occur. As such, he had a duty to assess whether a building consent was required prior to the building work being undertaken.
- [12] Tiled or wet area showers do not come within the exemptions and schedule one of the building act and that they require building consents. This is made clear in Ministry of Business Innovation and Employment (MBIE) guidance and on the Auckland Council website under building consents.
- [13] The Respondent accepted that he knew a consent was required. His evidence was that he had informed the Complainant that consent should be obtained for the building work but that the Complainant did not want to obtain one. The Complainant denied having received any such advice. The Complainant did, however, state that completion of the work was time-critical because the property had been recently purchased, and he and his family wanted to move in. When further questioned about the requirement for a building consent, the Respondent accepted that he should not have proceeded with the work without one.

Building Work

- [14] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code). The obligation applies even if the work is carried out without a building consent.
- [15] The Respondent stripped out the ensuite and bathroom and then left the building work to a contractor who he had previously worked with. He described the contracted labour as having about two years of training experience.
- [16] The Respondent supplied the materials for the work. He stated he provided Aqualine plasterboard for the ensuite and bathroom walls but accepted that the following photographs showed that not all of the linings had been removed and that not all of the new linings were Aqualine. A remedial contractor also confirmed those details.
- [17] The remedial contractor also stated that there was, as is shown in the photograph below, which was taken after the Respondent's work was removed, insufficient noggling. He stated that the linings were flexible and not strong. The Respondent accepted that he had not turned his mind to the need for additional noggling that might have been needed for tiled walls.



- [18] The following photographs of the plaster board under the waterproofing membrane were taken when remedial work was undertaken.



- [19] The Respondent accepted that the work had not been completed to an acceptable standard, and the Board finds that the work would not have complied with the requirements of E3/AS1, an acceptable solution for compliance with Building Code, which deals with internal moisture management.
- [20] The Respondent stated that he attended the site when the work was being completed but did not check the quality and compliance of it. He accepted that his supervision was not up to the required standard.

[21] Supervise is defined in section 7¹⁶ of the Act. The definition states:

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

(a) is performed competently; and

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

[22] In this instance, the work was not performed competently, and, on the basis of the evidence and the Respondent's acceptance that his supervision was inadequate, the Board finds that he has supervised building work in a negligent manner.

Was the conduct serious enough

[23] Both the failure to ensure a building consent was in place for the building work and the Respondent's failure to provide appropriate supervision are serious. The departures from an acceptable standard were not mere error oversight or inadvertence. With respect to the building consent issue, the Respondent knew a consent was required but proceeded regardless, and, in terms of these quality and compliance of the building work, the Respondent simply did not supervise. Given those factors, it is appropriate that the Board makes a distillery finding.

Has the Respondent been negligent or incompetent

[24] The Respondent has carried out and supervised building work in a negligent manner.

Penalty, Costs and Publication

[25] 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.

[26] The Respondent made submissions at the hearing regarding penalty, costs, and publication.

Penalty

[27] 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

¹⁶ 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.

aggravating factors present.¹⁷ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁸

- (a) protection of the public and consideration of the purposes of the Act;¹⁹
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;²⁰
- (c) setting and enforcing a high standard of conduct for the industry;²¹
- (d) penalising wrongdoing;²² and
- (e) rehabilitation (where appropriate).²³

[28] 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 cases²⁴ and applying the least restrictive penalty available for the particular offending.²⁵ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁶ that is consistent with other penalties imposed by the Board for comparable offending.²⁷

[29] 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.²⁸

[30] In this matter, the Board adopted a starting point of a fine of \$2,500. The starting point is consistent with other penalties the Board has imposed for similar discipline reoffending, and it reflects the seriousness of the offending, which was low to mid level. There are mitigating factors. In particular, the Respondent took a responsible attitude at the hearing and accepted that his conduct had not met an acceptable standard. On the basis of his acceptance of responsibility, the Board reduced the fine by \$500. The fine is set at \$2,000.

¹⁷ *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]

¹⁸ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁹ Section 3 Building Act

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²³ *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

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

²⁸ 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

- [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.²⁹
- [32] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁰. The starting point can then be adjusted up or down with regard to the particular circumstances of each case³¹.
- [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 \$2,100 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a simple in person hearing. It is significantly less than 50% of actual costs.

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,³² 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.
- [36] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³³ 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.³⁴
- [37] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other

²⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁰ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³¹ *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.

³² Refer sections 298, 299 and 301 of the Act

³³ Section 14 of the Act

³⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

[38] 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 \$2,100 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

[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.

[40] The Respondent should further note that he can ask for time to pay the fine and costs by making a request to the Registrar.

Right of Appeal

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

Signed and dated this 30th day of October 2024.



M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

(a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*

(i) *people who use buildings can do so safely and without endangering their health; and*

- (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

ii Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (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:*

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- (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.*