

Before the Building Practitioners Board

	BPB Complaint No. CB26363
Licensed Building Practitioner:	David Driver (the Respondent)
Licence Number:	BP114128
Licence(s) Held:	Bricklaying and Blocklaying – Veneer and Structural Masonry

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 Decision Date:	21 May 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms K Reynolds, Construction Manager

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 (h) of the Act.

The Respondent is fined \$3,500 and ordered to pay costs of \$1,750. 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, who holds a Bricklaying and Blocklaying – Veneer and Structural Masonry Area of Practice Licence, built a deck incompetently and failed to ensure a building consent was in place for a retaining wall that exceeded 1.5 metres in height and which had a surcharge on it. The Board also found that the Respondent had carried out building work (construction of a deck) that was outside of his personal competence. The deck did not meet Building Code requirements and was potentially unsafe. The disciplinary contraventions were serious.
- [2] The Board, considered a suspension or cancellation of the Respondent’s licence but decided against such action on the basis that the incompetence related to carpentry work, and not the type of work for which the Respondent is licensed. Instead, it decided to impose a fine of \$3,500, to order costs of \$1,750, and make a publication order in addition to the matter being recorded on the public Register for 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], Christchurch, 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) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act.
- [5] The Board gave notice that it would, in further investigating the Respondent's conduct under section 317(1)(b) of the Act, be inquiring into:
- (a) the quality and compliance of a deck that was constructed and, in particular, with respect to the issues noted in the reports issued by [OMITTED] (pages 38-46 of the Board's file) and [OMITTED] (page 60 and 61 of the Board's file), and the issues noted by [OMITTED], who deconstructed the deck;
 - (b) whether a building consent was required for the construction of the deck, which may have been more than 1.5 metres above the ground; and
 - (c) whether a building consent was required for the construction of a retaining wall that may have been higher than 1.5 metres.
- [6] The Board also gave notice that it would, in further investigating the Respondent's conduct under section 317(1)(h) of the Act, be inquiring into whether the Respondent carried out building work (design work) that was outside of his competence in designing the deck that was built.

Procedure

- [7] The Respondent provided a brief response to the complaint when it was first brought to his attention, and the matter was set down to be heard as an in-person audio-visual hearing. The Respondent has not engaged in the investigation process since the initial response.
- [8] In preparation for the hearing, a pre-hearing conference was scheduled. The Respondent did not respond to an invitation and could not be contacted. The Board ascertained from Immigration New Zealand that the Respondent left New Zealand on 28 February 2024 and that he had not returned. A decision was made that the matter would be determined on the papers. In making that decision, the Board

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.

noted that its 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 making a decision. 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

- [9] In this matter, it was decided that a formal hearing was not necessary as there was sufficient evidence in the documents filed for a decision to be made on the papers, and it was unlikely that the Respondent would appear if a hearing is convened. In making the decision, section 283 of the Act directs that the Board “*must comply with the principles of natural justice*” and with the Complaints Regulations was taken into account. 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. To ensure natural justice requirements are met, the Respondent was provided with an opportunity to make submissions or request an in-person hearing. He did not take up those offers.

Evidence

- [10] 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.
- [11] The Respondent, who holds a Bricklaying and Blocklaying Licence (Veneer and Structural Masonry Areas of Practice), was contracted to construct a deck and retaining wall. A complaint was made about the quality and compliance of the work.

Negligence or Incompetence

- [12] 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

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

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

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)

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

[13] 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

[14] There were two areas of building work that were under investigation: a deck and a retaining wall.

Deck

[15] There were two issues under investigation. The first was the quality and compliance of the work. The second was whether a building consent was required.

[16] The Complainant sought professional opinions on the quality and compliance of the deck following its completion. [OMITTED], a Licensed Building Practitioner of [OMITTED], carried out two reviews and provided two reports supported by photographic evidence. The first review was a non-invasive inspection of the completed work. For the second review, decking boards were lifted to check the sub-structure.

[17] The first [OMITTED] report concluded that there was a risk of at risk of collapse in the northeast corner, and it noted specific non-compliance and quality issues:

There were several issues noted that were non-compliant with the New Zealand Building Code NZS 3604.

Decks should be built should be built with a 2.0kPa floor load. This is higher than a standard house floor as decking areas are likely to carry a large number of people at one time. Unless appropriately designed, a deck may not be able to withstand the load.

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.

The deck at [OMITTED] has been constructed without any piles and is supported by landscaping pegs (50mm square pegs and 75x25mm pegs). Landscaping pegs are not designed for this purpose. It is likely that the pegs will sink with use of the deck. If 200kg per square metre load was applied (2kPa) the deck would likely collapse. It is also possible that the deck will settle in wet conditions.

Other structural defects noted:

- *The bearers are undersized 100mmx50mm.*
- *Unsupported joins noted in bearers.*
- *The northeast corner of the deck has a cantilevered 100x50mm joist. 720mm that is supporting the whole deck in this area. The decking is sagging and is at risk of collapse.*
- *The stairs have treads of 220mm. Stair treads should be a minimum of 275mm for safe foot placement.*
- *The decking timber has been installed tight with no gaps for ventilation or drainage. Kwila decking should be installed with a gap of 4-6mm.*
- *The decking has been screwed too far from the edge of the boards which will cause the decking to cup over time.*
- *The ground is in contact with the subfloor framing in areas.*
- *The retaining wall appears to have no drainage. This could allow water to build up behind the wall and cause the retaining wall to fail.*

Poor workmanship noted:

- *The joists run at an angle to the decking.*
- *Cracked boards noted.*
- *Several board with missing fixings.*
- *Raised fixings*
- *Fixings not aligned and random spacings.*
- *Blue paint noted from the Kwila supplier to seal the end grains.*
- *The decking does not line up with the original decking.*
- *The edge board around the perimeter has only one screw at each joist at random heights.*
- *The perimeter board is not level with the deck in areas.*
- *The decking has not been cut in a straight line around the spa.*

- [18] Photographs supplied included a photograph of the unsupported corner that was at risk of collapse.



- [19] The above photograph also indicates that the height from the ground at the northeast corner may have been greater than 1.5 metres, meaning a building consent would have been required. It is also evident that there is no balustrading around the deck.
- [20] The second invasive report noted that structural timber piles had not been used. Rather 75x100 fence posts had been used, and they were attached to undersized 100x50 bearers attached with bugle screws, none of which complied with the Building Code. He also noted that joists and bearers, which were not treated for ground contact, were in contact with the ground in several areas, risking timber decay. Again, supporting photographs were supplied.
- [21] The Complainant also provided video footage of the deck being deconstructed, which confirmed the findings noted by [OMITTED].
- [22] The Complainant also obtained an opinion from [OMITTED], a Structural Engineer of [OMITTED]. He noted:

*The “piles” supporting the deck appear to 50*50 stakes driven into the ground which are fixed to 100*50 bearers via a bugle head screw (shear connection). The bearers are 100*50 rough sawn timber (only one piece of timber has been used) Some of the bearers are unsupported by piles and are supported by the underlying ground itself (they are laid directly on the ground). The joists are 100*50 rough sawn timber at approx. 450mm centres which cantilever around 600mm from the bearer line at the north western projection and deflect noticeably under pedestrian loading. All of the above elements are unlikely to meet the requirements of the New Zealand building regulations.*

The deck also has no provision for the attachment of a balustrade along the north western edge. The height of the deck at this point is over 1m and therefore requires a balustrade meeting the requirements of the building regulations. The deck has been constructed with no edge joist (a single

*140*19 Kwila decking board screwed to the ends of the joists has been used as an edge joist). This is insufficient to fix a balustrade to.*

The workmanship of the deck is poor with no gaps between the decking boards to allow drainage, joists not parallel to each other and screw lines not straight.

- [23] There was clear evidence of poor-quality building work that did not comply with the Building Code. 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). It provides minimum performance standards that buildings must meet to ensure safety and performance.
- [24] There are various means by which a Licensed Building Practitioner (LBP) can establish compliance with the Building Code. The most common is building to an Acceptable Solution, which provides deemed compliance with the Code. For the work that was undertaken, the applicable Acceptable Solution is NZS 3604. The Board would expect a competent LBP to know of NZS 3604 and to build in accordance with it. The evidence clearly established that the building work had not been carried out in accordance with NZS 3604 or any other compliance method.
- [25] Looking at the level of non-compliance and the fundamental nature of the compliance failings, such as the risk of collapse, the use of non-compliant materials and fixings, and timber that was not ground-treated in contact with the ground, the Board decided that the Respondent was incompetent. In short, it was clear that he did not have the knowledge or skills to carry out the building work to an acceptable standard.
- [26] In making this decision, the Board has noted that the Respondent has a Bricklaying and Blocking Licence. He may well be competent in that type of work. He was clearly not competent in carpentry work, an area where he is not licensed.
- [27] The Respondent raised in his response to the complaint that the work was not restricted building work (RBW). He did not elaborate on the relevance of the submission. It may have been that he considered there was no disciplinary liability for building work other than RBW.
- [28] The disciplinary provision in section 317(1)(b) of the Act relates to “building work”, which is a defined term in the Act and which includes the type of work carried out by the Respondent. RBW is a subset of building work, and the Board’s jurisdiction under section 317(1)(b) is not limited to it.
- [29] Turning to the building consent issue, other than a photograph showing a possible height from the ground that may have exceeded 1.5 metres, there was no other supporting evidence. Neither of the persons who reviewed the work had noted a requirement for a building consent, and as the Engineer had noted the height of a retaining wall as a building consent issue, it is reasonable to assume he would have

raised the same issue with the deck if it had been an issue. As such, the Board does not make a finding as regards the building consent issue.

Retaining Wall

- [30] The Complainant also obtained an engineering review of a retaining wall. [OMITTED], a Structural Engineer of [OMITTED], noted that the retaining wall exceeded 1.5 metres in height and that a building consent was required. He noted:

The regulations require any retaining wall over 1.5m high or any retaining wall which has a surcharge (a load on the soil behind the wall) to require a building consent and be designed specifically according to the New Zealand building regulations. The timber retaining wall which has been built as part of your new deck structure is 1.7m high and the soil behind it supports the neighbours concrete wall (it has a surcharge).

- [31] The requirement for a building consent is set out in the Act. Section 40 of the Act states that all building work be carried out under a building consent unless an exemption available under the Act applies.¹⁴ 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 undertaken¹⁵ and that the consented work is then assessed against the consent issued through scheduled inspections.¹⁶ In *Tan v Auckland Council*,¹⁷ the High Court noted that if a person fails to obtain a building consent, that deprives a Council of its ability to check any proposed building work. The Court also held:

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

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

- [32] 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.
- [33] Looking at the exceptions to the requirement for a building consent, they are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act.
- [34] With regard to retaining walls, clause 20 of Schedule 1 provides an exemption. The clause states:

¹⁴ Refer sections 40, 41 and 42A of the Act.

¹⁵ Section 49 of the Act.

¹⁶ Section 222 of the Act.

¹⁷ [2015] NZHC 3299 [18 December 2015]

20 Retaining walls

Building work in connection with a retaining wall that—

- (a) retains not more than 1.5 metres depth of ground; and*
- (b) does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles).*

[35] The Engineer's review noted that the wall was higher than 1.5 metres and that there was a surcharge. As such, a building consent was required. The Respondent should have turned his mind to this and should have ensured a building consent was in place before the building work was carried out. He did not, and the Board has found, on the basis of *Tan*, that his conduct has fallen below an acceptable standard and that he has conducted himself in a negligent manner.

Was the conduct serious enough

[36] The Board has found that the Respondent has conducted himself in an incompetent manner with respect to the construction of the deck and in a negligent manner with respect to the failure to ensure a building consent was obtained for the construction of a retaining wall. The failings with respect to both are serious, particularly in relation to the construction of the deck. It was poorly constructed, non-compliant and potentially unsafe. It is appropriate that a disciplinary finding is made and that the Respondent is disciplined.

Has the Respondent been negligent or incompetent

[37] The Board finds that the Respondent has been both negligent and incompetent.

Misrepresentation or Outside of Competence

[38] The second charge was that the Respondent may have breached section 314B(b) of the Act. The section stipulates that a Licensed Building Practitioner must carry out or supervise building work only within his or her competence.

[39] Under section 314B(b) of the Act, a Licensed Building Practitioner must only work within their individual competence. If a Licensed Building Practitioner undertakes work outside of their licence class,¹⁸ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is non-compliant or is in some way deficient.

[40] The Board has already made a finding that the Respondent carried out carpentry work in an incompetent manner. Given that finding, it follows that the Respondent has also carried out building work outside of his competence. Again, it is to be noted

¹⁸ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

that the charge relates to “building work”, not “restricted building work”. As such, the Board can make a finding on the work that the Respondent carried out.

- [41] There is a similarity between the finding under section 317(1)(b) of the Act and this finding. The Board will take this into account when it considers what the appropriate penalty should be by treating the two findings as single disciplinary finding.

Has the Respondent carried out building work outside of his competence

- [42] The Respondent has carried out building work (the construction of a deck) that was outside of his competence.

Board Decision

- [43] The Respondent has committed the following disciplinary provisions:

- (a) Section 317(1)(b) of the Act; and
- (b) Section 317(1)(h) of the Act.

Penalty, Costs and Publication

- [44] 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.
- [45] The matter was dealt with on the papers. Included was information relevant to penalty, costs, and publication. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [46] 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.¹⁹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁰
- (a) protection of the public and consideration of the purposes of the Act;²¹
 - (b) deterring other Licensed Building Practitioners from similar offending;²²
 - (c) setting and enforcing a high standard of conduct for the industry;²³

¹⁹ *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]

²⁰ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²¹ Section 3 Building Act

²² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

- (d) penalising wrongdoing;²⁴ and
- (e) rehabilitation (where appropriate).²⁵

- [47] 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 cases²⁶ and applying the least restrictive penalty available for the particular offending.²⁷ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁸ that is consistent with other penalties imposed by the Board for comparable offending.²⁹
- [48] 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.³⁰
- [49] In this matter, the Board considered adopting a starting point of a suspension or cancellation of the Respondent's licence because of the seriousness of the offending.
- [50] Cancellation and suspension are the most restrictive penalties the Board can impose. They are not imposed lightly. The seriousness of the contraventions with regard to the deck requires a penalty that protects the public and which punishes the Respondent. A cancellation or a suspension could provide the Respondent with an opportunity to reflect, and could be rehabilitative.³¹
- [51] Cancellation or suspension would also be consistent with the comments of the Full Court of the High Court in *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins*,³² where the Full Court stated professional disciplinary penalties are primarily directed at two purposes: public protection (for example, by preventing repetition of the misconduct by the practitioner through suspension or strike-off); and maintaining the reputation of, and public confidence in, the profession by setting appropriate standards.³³ The Court noted a previous Full Court had said that to "maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards".³⁴

²⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁵ *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

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

²⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³⁰ 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.

³¹ *Shehata v Director of Proceedings* [2019] NZHC 615 at [75].

³² *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 1709, [2022] 3 NZLR 452.

³³ At [45]–[46].

³⁴ At [46] citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, [2011] NZAR 639 (HC) at [34].

[52] Countering the above, the Board notes that the incompetence finding related to carpentry work, not bricklaying and blocklaying, which is the class of licence the Respondent holds. In essence, the Board has not found that he is incompetent at bricklaying or blocklaying. If it had, a cancellation or suspension would have been the appropriate decision because it would, in turn, protect the public. Because it has not, and because the Respondent does not require a licence to carry out the type of work that resulted in the complaint, a lesser penalty aimed at punishment and deterrence is warranted. On that basis, the Board has decided that a fine is appropriate. It is set at \$3,500, which is comparable with fines imposed by the Board for similar disciplinary offences. There are no known mitigating or aggravating factors that the Board considers it should take into account.

Costs

- [53] 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.³⁵
- [54] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁷.
- [55] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderate. Adjustments are then made.
- [56] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,750 toward the costs of and incidental to the Board's inquiry. That is the Board's scale amount for a matter of this nature.

Publication

- [57] 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,³⁸ 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.
- [58] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁹ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the

³⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁶ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁷ *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.

³⁸ Refer sections 298, 299 and 301 of the Act

³⁹ Section 14 of the Act

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.⁴⁰

- [59] Based on the above, a summary of the decision will be published in an appropriate Licensed Building Practitioner newsletter. The Respondent will be named in that publication.

Section 318 Order

- [60] 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 \$3,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,750 (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.

A summary of the Board's decision is to be published by the Registrar.

- [61] 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

- [62] 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 26 July 2024. 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.

⁴⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 5th day of July 2024



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:*

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- (f) order that the person pay a fine not exceeding \$10,000.
 - (2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
 - (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
 - (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
 - (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”

iii **Section 318 Disciplinary Penalties**

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

iv **Section 330 Right of appeal**

- (2) A person may appeal to a District Court against any decision of the Board—
 - (b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) *within any further time that the appeal authority allows on application made before or after the period expires.*