

Before the Building Practitioners Board

	BPB Complaint No. CB26311
Licensed Building Practitioner:	Shalen Prasad Lal (the Respondent)
Licence Number:	BP135220
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 Date:	6 March 2024
Decision Date:	26 March 2024

Board Members Present:

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
Mrs J Clark, Barrister and Solicitor, Legal Member
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 sections 317(1)(b), (d) and (da)(ii) of the Act.

The Respondent is fined \$3,000 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent was engaged by the Complainant to construct an extension to an existing dwelling and a separate sleepout. The homeowner alleged that there were multiple areas to be remedied and that, based on the Council inspections, the work was not completed in accordance with the Building Code and the consented drawings. The homeowner also complained about the Respondent’s failure to provide a Record of Work.
- [2] The Respondent’s main role on the project was as supervisor to his team of employees who carried out the work. The question for the Board was whether the

building work supervised by the Respondent was negligent or incompetent. This required a determination of two issues – had the Respondent departed from an acceptable standard and, if so, was that departure serious enough to warrant a disciplinary finding.

- [3] The further issue before the Board was whether the work had been carried out in a manner contrary to the Building Consent. To determine this issue, the Board has only to find that building work departed from the Building Consent and does not have to consider if that departure was deliberate or negligent. However, the seriousness of the conduct under investigation does have to be taken into account.
- [4] The Board investigated the issues and decided that the Respondent had been negligent in the supervision of the building work and that the building work was not in accordance with the Building Consent.
- [5] This finding was based on issues with the parapet, cavity battens, saddle flashings and structural fixings. In several instances, the Respondent supervised work, which was different from the consented drawings, called for inspections before the work was ready, repeatedly did not address issues raised in Council inspections, failed to ensure consent amendments and/or minor variations had been approved for changes to the consent and supervised work which was completed out of sequence giving rise to safety concerns.
- [6] In addition, the Board found that the Respondent had failed to provide a Record of Work on completion of his Restricted Building Work. The contract was terminated in March 2023, and, as at the date of the hearing, no Record of Work had been provided to the homeowner or the Council.
- [7] The Respondent was given a timeframe after the hearing within which to provide the Record of Work to the homeowner and the Council. He did so. On this basis, the Board moved from its starting point of a \$3,500 fine and decided that the Respondent would be fined \$3,000 and ordered to pay costs of \$3,500.

The Charges

- [8] 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
- [9] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland have:

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.

- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.
- (b) carried out or supervised building work that does not comply with the Building Consent contrary to section 317(1)(d) of the Act.
- (c) failed, without good reason, in respect of a Building Consent that relates to Restricted Building Work that he is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a Record of Work, on completion of the Restricted Building Work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

[10] In further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board inquired into

- (a) issues raised in Council inspections including, but not limited to, those on 6 April 2022, 27 July 2022, and 17 January 2023; and
- (b) possible failures to ensure changes to the Building Consent were appropriately dealt with regarding a change to a parapet detail in that building work may have been completed prior to the change being processed.

Evidence

- [11] 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.
- [12] The Respondent was engaged by the Complainant who was the homeowner, to construct an extension to an existing dwelling and a separate sleepout.
- [13] The Respondent told the Board that he supervised this project. His crew varied over the course of the project between two and five workers. These workers were two apprentices (including his son), labourers (including another son) and a qualified builder. At the time, the Respondent was supervising three other projects, two alteration and addition projects and one new house, spread across Auckland. The Respondent was the only Licensed Building Practitioner supervising all four projects.
- [14] There was disagreement over the amount of time the Respondent spent on site. The Respondent maintained it was a half to a whole day every day before the roof trusses were installed. He said further that he lived close to the site and would call in there first each day. The homeowner did not accept this level of attendance by the

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

Respondent and said, “*out of five days a week lucky if he was there twice for a couple of hours*”. The homeowner lived on site.

- [15] The Complainant had a project manager running the project remotely, based in Christchurch, and the Respondent agreed that he liaised with him. In addition, the Respondent said he had the support of his own engineer project manager [OMITTED] from time to time to assist with issues on site and paperwork.

Negligence or Incompetence

- [16] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.
- [17] The Respondent’s primary role in the build was as the supervisor. He may have carried out some of the building work. However, the Board is focussing on the Respondent’s conduct as a supervisor. The question for the Board is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “*an inability to do the job*”

⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “*Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness*”.

[18] Supervise is defined in section 7 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.

[19] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[20] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[21] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992,⁹ and the Board is guided by those principles in assessing the adequacy of the Respondent's supervision.

Has the Respondent departed from an acceptable standard of conduct?

[22] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹ as well as the requirement that all building work must comply with the Building Code¹⁰ and any Building Consent issued.¹¹ The test is an objective one.¹²

[23] The Board proceeded by investigating key items in the Council inspections.

⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

Council Inspections

[24] The Council inspection of 6 April 2022 set out a number of issues. It stated in part:

Timber wall framing: steel beams and fixings (Fail) Garage portal fixed to concrete floor fixings to trim studs to complete.

Parapet framing as per plan (Fail) Parapet design has changed from overhang to upstands amendment required for main dwelling and minor dwelling...

Previous history reviewed. Not confident that work completed is in accordance with consented approved plans...

Change proposed from parapets with soffit overhang to parapets with upstands, amendment required.

Roof has been covered with 17mm CDL Plywood membrane without approval.

Steel portal connections require completion.

Type F Lintels require jack stud connections lintel to jack stud and jack stud to top plate...

Not to proceed with cavity wrap

Stop work and book a Site Meeting with Senior Inspector...

[25] Mr Wallace, the Council Building Inspector who carried out the inspection, gave evidence that he had safety concerns at that inspection. The lack of point load connections was a concern because of the weight of the plywood on the roof. He contacted the team leader and said a Stop-Work Notice was needed. He left the Council employment after that and had no further involvement.

[26] Instead of contacting the team leader for a site meeting as required by the inspection of 6 April 2022, the Respondent booked another inspection. When the Board queried why he did this, the Respondent said he “*should have listened to Council*” but he was under client pressure. It was “*my mistake, my fault*”.

[27] Mr Coburn, another Council Building Inspector, gave evidence of the site meeting on 26 April 2022. The report of that site meeting said: “*Discussed on-site with [Respondent] the amendment. I was informed by [Respondent] the amendment has got been applied for....Outcome: I advised the [Respondent] that I would be proceeding with a framing inspection until the matter of the amendment has been resolved.*”

[28] Mr Coburn gave evidence that the report was intended to read: “*Discussed on-site with [Respondent] the amendment. I was informed by [Respondent] the amendment has **NOT** been applied for....Outcome: I advised the [Respondent] that I would **NOT** be*

proceeding with a framing inspection until the matter of the amendment has been resolved.” (Emphasis added).

- [29] The required change to the written report was explained by Mr Coburn as now accurately reflecting the conversation on site. It makes it clear that the necessary amendment had not been applied for after the 6 April 2022 Council inspection had advised that one was necessary. The 3 May 2022 Council inspection carried out by Andrew Jack also references the paperwork still being required. The minor variation was not approved until 12 July 2022. The amendment was in relation to a change in parapet and is discussed in more detail below.
- [30] Many of the matters recorded in the 6 April 2022 Council inspection were still present as unresolved in the subsequent Council inspection of 27 July 2022. These included: top and bottom plate sizes and fixings, and top plate to studs and lintel connections.
- [31] In addition, the following new items were listed – *“Timber wall framing: bracing connections/systems (Fail) ... Roof framing: purlin/batten sizes, centres and fixings (Fail) Trusses installed as per truss plan: Types, Spacings, connections and saddles (Fail).”*
- [32] At the 17 January 2023 Council inspection, it is recorded: *“multiple issues to be resolved full re check required ...MV required for existing dwelling to new addition junction, designer to provide...top parapet soffit detail to be confirmed, requires drip edge...”*
- [33] The Respondent told the Board that he called for inspections and supplied materials to the site. He admitted that inspections were called for even though the work was not ready. When asked why he did not ensure the work was done correctly the first time he said that there were some specific details missing from the plans and *“our mistake”, “overlooked”* and there was *“a lot of pressure”*. In respect of the fixings, he acknowledged that some but not all fixings were in place, and it was *“our mistake”* and that he should have used the specified rods or bolts.
- [34] It was also put to the Respondent that the number of projects he was supervising at the same time may have added to the pressure. The Respondent maintained that all the other projects were *“flowing well”*, and the pressure was only on this project. He considered that he could handle all the projects.

Parapet

- [35] This item was noted in the Council inspection of 6 April 2022 as a fail because the parapets had not been constructed in accordance with the consented drawings. The parapet had changed from *“over hang to upstands”*.
- [36] The Respondent said that there was a lack of design detail for the parapets and what was drawn was not achievable. After the roof trusses turned up on site, the Respondent built to the truss design. This meant he changed the parapet and gutter

design to accommodate the truss design. The “as built” is, therefore, contrary to the Building Consent plans.

- [37] The Respondent agreed that he ordered the trusses but said that he did not approve their design or sign off on the manufacturer’s drawings. He said that the trusses were just *“randomly supplied that did not match the drawings”*.
- [38] The Respondent admitted that he did not get advice on the change to the parapets and gutters until after it was raised by the Council on 6 April 2022.
- [39] The documents show that the need for an amendment was raised by Council on 6 April 2022, the drawings for the amendment were dated 30 May 2022, and it was granted on 12 July 2022 as a minor variation on site. The Respondent acknowledged in evidence that he *“should have gotten an amendment”*.
- [40] The Respondent should have sought advice from the designer and engineer when he thought that the parapet designs were inadequate. Further, he should not have built the parapets to accommodate the roof truss design without also consulting the designer.
- [41] The Respondent offered as an explanation that he was under pressure from the homeowner’s project manager. He alleged that he had been told by the project manager to continue work before the Building Consent amendment for the parapet was obtained. The Respondent was offered the opportunity to provide, after the hearing, emails he said would support this statement.
- [42] The Respondent provided some emails dated May and June 2022, which related to the connection of the existing house to the new sleepout. The Board does not consider that these emails support the contention that the Respondent was under pressure to build the parapet before the Building Consent amendment was obtained. They do evidence general pressure being applied by the homeowner (not the project manager, as the Respondent had suggested). However, the Board’s view is that a Licensed Building Practitioner is required to build in accordance with the Building Act and not succumb to pressure to build contrary to these legislative requirements.

Saddle Flashings

- [43] Contrary to the consented plans, butynol flashings were installed on the parapet instead of saddle flashings. Cavity battens were installed before the saddle flashing, even though drawings showed the cavity battens were to go on over the saddle flashing. This work was evidenced by the Council inspection notes. Again, this work was not in accordance with the consented drawings.
- [44] The explanation the Respondent gave for this work being out of sequence and contrary to the Building Consent was that the flashings were late. He said he could not order the flashings any earlier because he was waiting for the membrane gutter to be completed to get the exact measurements. The Board put to him that the

membrane gutter was completed in early December, and there was no reason not to order the flashings then. He had no response to this.

Was the conduct serious enough?

[45] The supervisory conduct that the Board has focused on in its findings is the supervision of the parapet construction, the installation of the cavity battens before the saddle flashings and missing structural fixings. In addition, the Board considers there was repeated booking of Council inspections before the work was ready for inspection and a pattern of not addressing serious issues from one inspection to the next. Given these issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

[46] The work supervised by the Respondent did not comply with the Building Code or the Building Consent. The Respondent called for inspections when he should not have, failed to address serious issues raised in the Council inspections and ignored an instruction to call a senior team leader after the 6 April 2022 inspection. The Respondent supervised work, which was not done in the correct sequence or with the correct methodology, creating safety issues, as Mr Wallace explained in evidence. The Respondent has supervised building work in a negligent manner.

[47] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent

[48] 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.¹³ Once issued, there is a requirement that the building work be carried out in accordance with the Building Consent.¹⁴ Building Consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁵ Inspections ensure independent verification that the Building Consent is being complied with.

[49] 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.¹⁶ 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

¹³ Section 49 of the Act

¹⁴ Section 40 of the Act

¹⁵ Section 222 of the Act

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

also decide if the conduct fell seriously short of expected standards.¹⁷ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the Building Consent?

- [50] The parapet, installation of some flashings, cavity battens and structural fixings were not in accordance with the Building Consent.
- [51] Furthermore, the Respondent constructed the parapet contrary to the Building Consent and before an amendment was obtained.
- [52] Once a Building Consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the Building Consent. The extent of the change to the Building Consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a Building Consent cannot continue if an amendment is applied for.

Was the conduct serious enough?

- [53] As with the Board's finding under negligence, the departures from the Building Consent were serious enough to make a finding under section 317(1)(d) of the Act.

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

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

Failure to Provide a Record of Work

- [55] A Licensed Building Practitioner must provide a Record of Work for any Restricted Building Work that they have carried out or supervised to the owner and the Territorial Authority on completion of their Restricted Building Work.¹⁸
- [56] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a Record of Work to the owner and the Territorial Authority on completion of Restricted Building Work¹⁹ unless there is a good reason for it not to be provided.²⁰

¹⁷ *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".

¹⁸ Section 88(1) of the Act.

¹⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁰ Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise Restricted Building Work?

- [57] The Respondent supervised building work under a Building Consent. His work included the addition of a bedroom, prayer room and triple garage to an existing one-storey dwelling and the construction of a new sleepout with two bedrooms and a rumpus room. This work was Restricted Building Work because it forms part of the primary structure and/or external moisture management system of a residential dwelling.²¹

Was the Restricted Building Work complete?

- [58] The Complainant advised that the work was carried out on the project between 27 September 2021 and 16 June 2023, and the Respondent did not dispute those dates. The contract between the parties was terminated on 16 March 2023.
- [59] In this instance, completion occurred in March 2023 when the Respondent's engagement in the building work came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further Restricted Building Work.

Has the Respondent provided a Record of Work?

- [60] The Complainant requested the Record of Work from the Respondent by emails dated 16 March 2023, 19 April 2023, and 30 June 2023. The Respondent replied on 20 June 2023 – *"I have already informed my engineer to get the ROW ready for sign off and cover only the works which is done by using ROW. I will chase him up today to get it ready ASAP."*
- [61] The Respondent advised at the hearing that he had not provided a Record of Work to date.

Was there a good reason for the Respondent to withhold his records of work?

- [62] At the hearing, the Respondent said that he was unsure how to deal with work already done by other builders before he was engaged on the project. He further stated that he spoke to his engineer to assist him in *"filling out"* the Record of Work. When it was put to him by the Board that it was his responsibility to do the Record of Work, not his engineer's, he admitted that it was *"my fault"*.
- [63] Further, the Board notes that the Council inspection of 13 October 2021 records the Respondent as the new LBP *"carrying out new work with new RoW....Council to be satisfied on reasonable grounds that all previous work has been completed as per consent- this is to be established before new work proceeds...RoW to be resolved for completed works."*
- [64] This indicates to the Board that the matter of the Record of Work and, more particularly, the issue of the Respondent taking over from another builder, which the

²¹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Respondent said was concerning him 18 months later, was discussed with the Council before he commenced work.

[65] The Respondent acknowledged the delay and submitted he was not sure how to do a Record of Work for work that was not complete. At the same time, there was no evidence that he took any steps to try and determine what he should have done. In this respect, the Respondent should bear in mind that a Record of Work can capture not only what has been done but also what has not been done by the Licensed Building Practitioner. By providing adequate detail within the Record of Work, they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.

[66] The Board finds that there was no “good reason” to withhold the Record of Work.

Did the Respondent fail to provide a Record of Work?

[67] The Respondent failed to provide a Record of Work on completion of his Restricted Building Work and has committed the offence under section 317(1)(da)(ii) of the Act.

Board’s Decisions

[68] The Respondent has:

- (a) supervised building work in a negligent manner
- (b) supervised building work that is contrary to the Building Consent
- (c) failed to provide a Record of Work on completion of his Restricted Building Work.

Penalty, Costs and Publication

[69] 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.

[70] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[71] 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.²² It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²³

- (a) protection of the public and consideration of the purposes of the Act;²⁴
- (b) deterring other Licensed Building Practitioners from similar offending;²⁵
- (c) setting and enforcing a high standard of conduct for the industry;²⁶
- (d) penalising wrongdoing;²⁷ and
- (e) rehabilitation (where appropriate).²⁸

- [72] 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 cases²⁹ and applying the least restrictive penalty available for the particular offending.³⁰ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³¹ that is consistent with other penalties imposed by the Board for comparable offending.³²
- [73] 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.³³
- [74] In this matter, the Board adopted a starting point of a fine of \$3,500 because this is comparable to penalties ordered for similar levels of offending.
- [75] The Board has taken into account, as a mitigating factor, that the Respondent took up the Board's invitation to provide the Record of Work to the homeowner and Council. He did so by way of an email dated 12 March 2024. There are no aggravating factors.
- [76] Taking the noted factors into account, the Board decided that the Respondent is to pay a fine of \$3,000.

²² *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]

²³ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁴ Section 3 Building Act

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

²⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

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

²⁸ *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

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

³⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³³ 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

- [77] 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.³⁴
- [78] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁵. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁶.
- [79] 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.
- [80] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

Publication

- [81] 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,³⁷ 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.
- [82] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁸ 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.³⁹
- [83] 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 entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

³⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁵ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁶ *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.

³⁷ Refer sections 298, 299 and 301 of the Act

³⁸ Section 14 of the Act

³⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[84] 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 \$3,000

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

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

[85] 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

[86] 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 April 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.

Right of Appeal

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

Signed and dated this 3rd day of April 2024



Mrs F Pearson-Green
Presiding Member

i Section 3 of the Act

This Act has the following purposes:

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

ii Section 318 of the Act

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

iii Section 318 Disciplinary Penalties

- (1) *In any case to which [section 317](#) applies, the Board may—*
 - (a) *do both of the following things:*
 - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*

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

iv Section 330 Right of appeal

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*