

## Before the Building Practitioners Board

	BPB Complaint No. CB26195
Licensed Building Practitioner:	Frederic Chee Kiong Lee (the Respondent)
Licence Number:	BP132771
Licence(s) Held:	Carpentry, Foundations, Site AoP 3

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	27 July 2023
Final Decision Date:	19 October 2023

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Ms K Reynolds, Construction Manager  
Mr G Anderson, LBP, Carpentry and Site AoP 2  
Paul Thompson, LBP, Carpentry

#### Procedure:

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

#### Draft Disciplinary Finding:

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

The Respondent's licence is cancelled. He may not reapply to be licensed for a period of three months. He is ordered to pay costs of \$1,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary of the Board’s Draft Decision

- [1] The Respondent was engaged to carry out building work on a multi-unit development. Over the course of the build, there was a very high number of failed inspections, which related to fundamental non-compliance issues. The Respondent did not take adequate steps to deal with those matters, which escalated to the point where the Council issued a notice under section 365 of the Act, which threatened legal action.
- [2] The Respondent did not engage in the disciplinary process. Given that factor and the amount of clear evidence of non-compliance and of a failure to carry out or supervise building work in accordance with accepted standards, the Board dealt with the matter by way of a Draft Decision. The Board found that the Respondent had

been negligent and had carried out or supervised building work in a manner that was contrary to a building consent. It decided that it would cancel the Respondent's licence and that it would order that he not be able to reapply to be licensed for a period of three months. The Board also ordered that the Respondent pay costs of \$1,000, that the matter be recorded on the Register for three years, and that this decision be published.

### **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.<sup>1</sup>
- [4] The allegations the Board decided to further investigate were that the Respondent may have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
  - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

### **Regulation 9 Decisions**

- [5] The Complainant also alleged the Respondent had failed to provide a record of work on completion of restricted building work contrary to section 317(1)(da)(ii) of the Act, breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act, and had conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.
- [6] The Board decided that regulation 9 applied to those allegations.
- [7] Firstly, in terms of the record of work allegation, regulation 9(a) of the Complaints Regulations applied. It states:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (a) it does not come within the grounds for discipline;*

- [8] The reason is that the building in question fell into the category of a small-to-medium apartment building. The Building (Definition of Restricted Building Work) Order 2011 (the Order) provides a definition of that term:

***small-to-medium apartment building means a building that—***

- (a) contains 2 or more residential units or residential facilities; and*

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

- (b) *does not contain parts that are neither residential units nor residential facilities; and*
- (c) *has a maximum calculated height of less than 10 m.*

[9] The Order also defines the maximum calculated height as:

***maximum calculated height***, in relation to a building, means the vertical distance between the highest point of its roof (excluding structures such as aerials, chimneys, flagpoles, and vents) and the lowest point of the ground

[10] Both blocks of the buildings, in the plans provided to the Board, were over 10 metres in height when measured from the ground to the top of the roof. On the basis of that definition, the building work was not restricted building work, and a record of work was not required.

[11] Secondly, with regard to the allegation of a breach of the Code of Ethics, the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (a) *it does not come within the grounds for discipline;*

[12] The Code of Ethics was introduced by Order in Council by way of the Building (Code of Ethics for Licensed Building Practitioners) Order 2021. The Order specified that it would come into force on 25 October 2022. As such, the disciplinary provision in section 317(1)(g) of the Act only applies to conduct that occurred after 25 October 2022. The matters complained about with respect to the Code of Ethics occurred prior to that date. It follows that they do not come within the specified ground of discipline.

[13] Thirdly, in terms of the allegation of disreputable conduct, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (f) *the investigation of it is—*
  - (ii) *unnecessary; or*

[14] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.<sup>2</sup>

[15] Conduct which brings or is likely to bring the regime into disrepute is that which would be held in low esteem by the public. The courts have consistently applied an objective test when considering such conduct and have found the following conduct to have been disreputable:

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<sup>2</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- criminal convictions<sup>3</sup>;
- honest mistakes without deliberate wrongdoing<sup>4</sup>;
- provision of false undertakings<sup>5</sup>; and
- conduct resulting in an unethical financial gain<sup>6</sup>.

[16] The complaint did not disclose conduct of that type or conduct that reached the required threshold for further investigation. Further, as the Board is dealing with this matter by way of a Draft Decision process, it is aware of the need for clear, unequivocal evidence on which it will make its assessment. As such, the Board will not, as part of a Draft Decision process, carry out any further investigation.

### **Draft Decision Process**

[17] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.

[18] Ordinarily, the Board makes a decision having held a hearing.<sup>7</sup> 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.<sup>8</sup>

[19] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside a hearing will be scheduled.

[20] Included in the Board's decision-making process was the fact that the Respondent has not engaged in the investigation process and has not responded meaningfully to the allegations. As such, the Board considers that a hearing may be of limited value.

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<sup>3</sup> *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

<sup>4</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>5</sup> *Slack, Re* [2012] NZLCDT 40

<sup>6</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>7</sup> Regulation 10 of the Complaints Regulations.

<sup>8</sup> Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

## Evidence

- [21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>9</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [22] The Respondent was engaged to carry out and supervise building work on two three-storey blocks of terraced dwellings. The complaint included the building consent file. The file showed that there was an unusually high number of failed inspections. It was on the basis of those failed inspections that the Board decided that it would deal with this matter on the basis of a Draft Decision.

## Negligence or Incompetence

- [23] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>10</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>11</sup> test of negligence.<sup>12</sup> To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>13</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>14</sup> If it does not, then a disciplinary finding cannot be made.

## Has the Respondent departed from an acceptable standard of conduct

- [24] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>15</sup> and any building consent issued.<sup>16</sup> The test is an objective one.<sup>17</sup>

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<sup>9</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>10</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

<sup>11</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>12</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>13</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

<sup>14</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

<sup>15</sup> Section 17 of the Building Act 2004

<sup>16</sup> Section 40(1) of the Building Act 2004

<sup>17</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

[25] The building project was complex, and a high number of building consent inspections are expected. In this build, there were some 75 inspections between 6 October 2020 to 28 July 2022 and 6 Site meetings. What is not expected is a high number of failed inspections (30 failed versus 26 passed or partially passed with the remainder having been cancelled or, in a few instances, waived) or inspections resulting in failed inspections or them failing as a result of basic or fundamental building work failures. Over time, the number of failed inspections, compared to passed inspections, increased.

[26] Looking at an example of the failed inspections, a Cavity Wrap inspection on 1 September 2022,

1. Building wrap installation and restraint ( Fail )
2. Building wrap: joinery tape flashings installed as per manufacturer details ( Fail )
3. Apron flashing ( Fail )
4. Flashings at junctions ( Fail )
5. Head/ sill/ jamb flashings/ wanz support bars ( Fail )
6. Cavity battens as per plan and installed correctly ( Fail )
7. Pipe Penetrations and Installation ( Fail )
8. Cavity batten fixing to studs ( Fail )
9. Cavity batten treatment and grade as per plan ( Fail )
10. Cavity closer- vermin proofing/ drainage enabled ( Fail )
11. Top of cavity sealed from roof space ( Fail )

[27] Importantly, the inspection contained the following notes:

*FREDERIC LEE-PLEASE READ THE FOLLOWING NOTES THOROUGHLY AND FOLLOW THEM.*

*You are breaching section 365 in the Building Act 2004-A person must comply with a direction given by a person who is authorised to give the direction by this Act or by the regulations. You also have responsibilities under section 14e-A builder is responsible for(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates*

*And section 17-All building work must comply with the building code to the extent required by this Act*

[28] What followed was an extensive list of non-compliance items that had to be rectified. The notes are reproduced as an appendix to this decision.

[29] As the Respondent has not engaged in the complaint process, it is not clear whether he was carrying out or supervising the building work. He was present at 24 of the Council inspections, and, as such, his connection to the building work is established.

[30] As noted, there were a high number of failed inspections. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not, therefore, necessarily follow that a licensed building practitioner will be negligent because of failed inspections. What needs to be considered by the Board are factors such as:

- (a) the extent and seriousness of the non-compliance;
- (b) whether there is a pattern of continued non-compliance; and
- (c) what steps are taken when non-compliance issues are raised.

[31] The Board considers that licensed building practitioners should aim to get building work right the first time and not rely on the Building Consent Authority (BCA) to identify compliance failings and to assist them in getting it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing<sup>18</sup> it was noted by the responsible Minister:

*In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[32] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation<sup>19</sup>:

*The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes pride in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*

*We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers*

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<sup>18</sup> Hansard volume 669: Page 16053

<sup>19</sup> Hansard volume 669: Page 16053



*must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[33] Section 3 of the Act, which sets out its purposes, includes promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

**14E Responsibilities of builder**

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
  - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;*
  - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
  - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act;*  
*and*
  - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[34] It is within this context that the Board considers that the acceptable standards expected of a reasonable Licensed Building Practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[35] Looking at the evidence, there were repeated failed inspections, the rate of failed inspections increased, and the Respondent failed to deal with issues as they were raised. The extent of the non-compliance reached the point where the Respondent was threatened with legal action under section 365 of the Act in an attempt to get him to attend to his responsibilities. The 365 notice was, in effect, a direction that no further work was to be carried out until non-compliance matters were dealt with. Notwithstanding the threat, he did not take action, the contract for his services was cancelled, and a complaint was made to the Board.

### Was the conduct serious enough

[36] The conduct shows a pattern of non-compliance and a reluctance or unwillingness to deal with the issue raised. The conduct was not inadvertence, oversight or error. It was sustained, and whilst it may not have been deliberate, the Respondent was, given the number and seriousness of the failed inspections, on notice and aware of what was occurring and what was required. Given that he took no steps, the Board finds that the conduct was serious and that a disciplinary offence has been committed.

### Has the Respondent been negligent or incompetent

[37] The Respondent has conducted himself in a negligent manner in that his conduct has fallen below the standard reasonably expected of a Licensed Building Practitioner.

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

[38] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.<sup>20</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>21</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>22</sup> Inspections ensure independent verification that the building consent is being complied with.

[39] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.<sup>23</sup> The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>24</sup> If it does not, then a disciplinary finding cannot be made.

### Was there building work that differed from the building consent

[40] The Council inspection records provide a long and comprehensive list of items that had been completed in a manner that was contrary to the building consent. The annexed inspection notes are a sample of those items. It is not necessary to list any

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<sup>20</sup> Section 49 of the Act

<sup>21</sup> Section 40 of the Act

<sup>22</sup> Section 222 of the Act

<sup>23</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>24</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

further items. Accordingly, the Board finds that the Respondent has carried out or supervised building work that was contrary to the building consent.

#### Was the conduct serious enough

[41] As with the finding of negligence, and for the same reasons, the conduct is serious enough.

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

[42] The Respondent has carried out or supervised building work in a manner that was contrary to a building consent.

#### **Board's Decision**

[43] The Respondent has breached sections 317(1)(b) and 317(1)(d) of the Act, and he should be disciplined.

#### **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 Act<sup>ii</sup>, 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, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

#### Penalty

[46] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>25</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>26</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>27</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>28</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>29</sup>
- (d) penalising wrongdoing,<sup>30</sup> and

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<sup>25</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>26</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>27</sup> Section 3 Building Act

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

<sup>29</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>30</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

(e) rehabilitation (where appropriate).<sup>31</sup>

- [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 cases<sup>32</sup> and applying the least restrictive penalty available for the particular offending.<sup>33</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>34</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>35</sup>
- [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.<sup>36</sup>
- [49] Given the seriousness of the offending and the extent of it, the Board adopted a starting point of the cancellation of the Respondent's license. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home. A practitioner who fails to adhere to the standards expected of a Licensed Building Practitioner puts that at risk.
- [50] The Respondent's failure to engage in the process is an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*,<sup>37</sup> the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [51] Taking those factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.
- [52] The Board is not aware of any mitigating factors. The Respondent will, however, be given an opportunity to present any mitigating factors prior to the Respondent making a final penalty decision.
- [53] On the basis of the above, and taking into account that the penalty should be the least restrictive needed to give effect to the purpose of imposing a penalty, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of three (3) months.

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<sup>31</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

<sup>33</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>34</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>35</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>36</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>37</sup> [2011] 3 NZLR 850.

## Costs

- [54] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>38</sup>
- [55] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>39</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>40</sup>.
- [56] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderately complex. Adjustments are then made. The Board's scale amount for a matter of this nature dealt with on the papers is \$1,000. The Board sees no reason to depart from that amount.

## 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,<sup>41</sup> and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [58] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>42</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>43</sup>
- [59] Based on the above, the Board will order further publication. The decision is to be published in Code Words or such similar industry newsletter or publication.

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<sup>38</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>39</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>40</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>41</sup> Refer sections 298, 299 and 301 of the Act

<sup>42</sup> Section 14 of the Act

<sup>43</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision, which will be publically available on the Board's website.

[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 Draft Decision

[62] The Board invites the Respondent to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[63] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **18 October 2023**.

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

[65] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

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

### **Request for In-Person Hearing**

- [67] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [68] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **18 October 2023**.
- [69] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

### **Right of Appeal**

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

Signed and dated this 26 day of September 2023



**M Orange**  
Presiding Member

**This decision and the order herein were made final on 19 October 23 on the basis that no further submissions were received.**

Signed and dated this 7<sup>th</sup> day of November 2023



**M Orange**  
Presiding Member

## Cavity Wrap Inspection Notes

Cavity inspection for lots 4-7

Have expressed concerns with weathertightness to customer. Explained these critical areas need to be rectified before continuing. This applies to all lots.

CAVITY TO BE FULLY COMPLETED AND PASSED FOR ALL LOTS BEFORE CONTINUING WITH CLADDING

INSPECTIONS. No more partial passes doing bits here and there.

ITEMS TO BE ADDRESSED CAVITY:

1. Apron flashing to be installed/made weathertight at step/ledge by IT wall on 1st floor on north elevation between lot 4 and 5
2. All roof to wall junctions to be flashed/be made weathertight
3. Some areas at roof to wall junctions are not flush which will cause weathertightness issues (particularly end of lot 4 around the upper roof to wall junction)
4. Lower level cavity to be completed
5. Chase flashings required at step in slabs on north elevation
6. Slab sitting proud of framing on north elevation in step area- To be made weathertight
7. All chase flashings to be rechecked
8. Customer has installed cladding on 2nd and 1st floor areas where he was told not to at previous inspection. Cladding to be removed end of lot 4 wall east and north elevation. Wall framing/ cavity not straight (see photos), not vermin proof (looking from underneath), back of cladding blown out when nailed, roof to wall junction not sighted/weather tight end of lot 4 upper level, customer was instructed not to clad this area at previous inspections.
9. Advised customer today to stop filling and painting cladding where it has not been inspected.
10. There are multiple other areas where the customer has installed the cladding and painted it without being inspected by council.



11. Looking from underneath there are large gaps/cladding not straight. Customer to remove and rectify these areas. Full cladding inspection required ONLY AFTER cavity has been passed

NEXT INSPECTOR: PLEASE PAY CLOSE ATTENTION TO ALL ASPECTS OF THIS JOB AND ASK CUSTOMER TO REMEDY ANYTHING YOU NOTICE THAT IS NOT LISTED ABOVE AS HE HAS GONE AHEAD AGAINST OUR INSTRUCTIONS

NO CLADDING INSPECTION IS TO BE CARRIED OUT UNTIL CAVITY IS FULLY PASSED

AS PER PREVIOUS SITE MEETING NOTES MUST FOLLOW

After reviewing history and speaking with Fredric the following immediate issues are of concern

#### LOT 1

- Postline still required for soffit to under 1st floor decks and fire collars for front and rear of lot 1 (IPL)
- it appears that preline building was passed on 17/06/2021 with preline plumbing passed on 11/06/2021 (IPB)
- A Cavity is required to view stopping to fyreline joins, battens and fire collars (ICA)
- a final cladding inspection will be required as unable to determine if cladding has been cleared.at the moment it shows as a partial pass (ICL)
- intumescent panels to be sighted as many are missing
- penetrations schedule required
- front detail at block wall/cladding junction required
- cladding clearances to ground levels required and cladding to be cut where required and primed underneath

#### LOT 2

- Postline still required for soffit to under 1st floor decks and fire collars for front and rear of lot 1 (IPL)

- it appears that preline building was passed on 17/06/2021 with preline plumbing passed on 11/06/2021 (IPB)
- A Cavity is required to view stopping to fyreline joins, battens and fire collars (ICA)
- a final cladding inspection will be required as unable to determine if cladding has been cleared.at the moment it shows as a partial pass (ICL)
- intumescent panels to be sighted as many are missing
- penetrations schedule required
- front detail at block wall/cladding junction required (IT Wall area)
- cladding clearances to ground levels required and cladding to be cut where required and primed underneath collars for front and rear of lot 1 (IPL)
- IPB inspection has no history that it was checked although IPL shows as a partial pass
- A Cavity is required to view stopping to fyreline joins, battens and fire collars (ICA)
- a final cladding inspection will be required as unable to determine if cladding has been cleared.at the moment it shows as a partial pass (ICL)
- intumescent panels to be sighted as many are missing
- penetrations schedule required
- front detail at block wall/cladding junction required (IT Wall area)
- cladding clearances to ground levels required and cladding to be cut where required and primed underneath

#### LOT 3

- Postline still required for soffit to under 1st floor decks and fire collars for front and rear of lot 1 (IPL)
- IPB inspection has no history that it was checked although IPL shows as a partial pass
- A Cavity is required to view stopping to fyreline joins, battens and fire collars (ICA)
- a final cladding inspection will be required as unable to determine if cladding has been cleared.at the moment it shows as a partial pass (ICL)
- intumescent panels to be sighted as many are missing
- penetrations schedule required

- front detail at block wall/cladding junction required (IT Wall area)
- cladding clearances to ground levels required and cladding to be cut where required and primed underneath

#### LOT 4

- ceiling battens and solid nogging for fire rated ceilings
- detail at block wall/cladding junction required (front and back)
- top level junction at lot 4 wall to lot 5 roof junction detail required
- east elevation inter storey flashing under first floor roof to be remedied
- parapet wall at split level second floor between lots 4 and 5 to be remedied (back of unit)
- head flashings required on vents on exterior
- junction ground level back of unit between lots 4 and 5 IT Wall (roof/wall and parapet wall)
- mineral wool to be installed
- ICA inspection required to be completed
- head flashings will be required to be sighted at ICA inspection (I have advised Frederic that the flashings can not go past cladding and be in the cavity (this is at internal corner areas of walls)
- tray flashing front of unit requires remediation at wall junction
- concrete slab at back of unit to be remedied

#### LOT 5

- ceiling battens and solid nogging for fire rated ceilings
- detail at block wall/cladding junction required (IT Wall) front and back
- front door/garage concrete floor requires remediation
- concrete slab at back of unit to be remedied
- mineral wool to be installed
- head flashings required on vents on exterior
- head flashings will be required to be sighted at ICA inspection (I have advised Frederic that the flashings can not go past cladding and be in the cavity (this is at internal corner areas of walls)

- membrane deck with correct corner mouldings (membrane required to be installed before continuing with cavity) details to be followed as per Drawing 601/10.7 and 601/10.9
- ICA inspection required to be completed
- degree slope first floor IT Wall at deck areas
- saddle flashings
- fire damper to be installed on second floor bathroom lot 5
- Engineer's site note for SED framing for LOT 5. - Lot 5 Structural Steel - Remedial work required (see report)
- Engineer to review - L3 lintel incorrect size, - FB3 beam missing, - no slab underneath bottom plate. - Lot 5 Structural Steel - Remedial work required (see report)
- All steel portal fixings to be completed as per SED detail. Lot 5 Structural Steel - Remedial work required

#### LOT 6

- ceiling battens and solid noggings for fire rated ceilings
- detail at block wall/cladding junction required (IT Wall)
- garage door slab to be remedied - Slab will need to be cut back or a solution to be provided as steel portal on ground floor is sitting well inside concrete slab and will need to be made weathertight.
- head flashings required on vents on exterior
- concrete slab at back of unit to be remedied
- mineral wool to be installed
- ICA inspection required to be completed
- head flashings will be required to be sighted at ICA inspection (I have advised Frederic that the flashings can not go past cladding and be in the cavity (this is at internal corner areas of walls)
- saddle flashings
- membrane deck with correct corner mouldings (membrane required to be installed before continuing with cavity) details to be followed as per Drawing 601/10.7 and 601/10.9

#### LOT 7

- ceiling battens and solid noggings for fire rated ceilings
- detail at block wall/cladding junction required (IT Wall)
- concrete slab at back of unit to be remedied
- mineral wool to be installed
- head flashings required on vents on exterior
- head flashings will be required to be sighted at ICA inspection (I have advised Frederic that the flashings can not go past cladding and be in the cavity (this is at internal corner areas of walls)
- ICA inspection required to be completed
- saddle flashings
- membrane deck with correct corner mouldings (membrane required to be installed before continuing with cavity) details to be followed as per Drawing 601/10.7 and 601/10.9

#### LOT 8

- ceiling battens and solid noggings for fire rated ceilings
- detail at block wall/cladding junction required (IT Wall)
- ICA inspection required to be completed
- tray flashing front of unit requires remediation at wall junction
- head flashings required on vents on exterior

NOTE - the above issues are the immediate issues. the following program in my opinion for continuation of job should be as such and in the following order. the reason being the completion of these outstanding items are being delayed which in turn could cause more problems with things being sighted at previous inspections either being removed or lost. the expectation would be that the progression of job follows in a timely and orderly manner

#### PROGRAM

- 1 - complete outstanding issues for lots 1 - 3 (it is imperative to clear all fire rated issues and external moisture issues)

- 2 - complete membrane decks on units 5,6,7 (this includes a full reinspection of decks)
- 3 - install membrane on decks
- 4 - while membrane decks are being remedied and membrane installed have the slab issues remedied for lots 4 - 8
- 5 - reinspect all fire rated framing and SED framing for lots 4 - 8 (sight all fire dampners that have been installed at this stage too) 6 - once the above items are completed then continue with cavity inspection and remainder of construction

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***i Section 3 of the Act***

*This Act has the following purposes:*

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

***ii Section 318 of the Act***

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

- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

### **iii Section 318 Disciplinary Penalties**

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

### **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.*