

Before the Building Practitioners Board

	BPB Complaint No. CB26343
Licensed Building Practitioner:	Marcos Elias (the Respondent)
Licence Number:	BP135817
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	7 November 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

W Alexander for the Respondent

Procedure:

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

Disciplinary Finding:

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

The Respondent is fined \$2,500 and ordered to pay costs of \$2,950. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent was contracted to undertake complex additions and alterations to an existing dwelling. He both carried out and supervised the building work, which he started but did not complete. During the period when he was carrying out and supervising building work, an engineer made observations of non-compliant building work. Following the termination of this contract and the engagement of a new builder, further non-compliant building work was identified. The Board investigated both.
- [2] The Board found that the Respondent had both carried out and supervised building work in a negligent manner and in a manner that was contrary to a building consent

that had been issued. There were serious departures from acceptable standards with respect to how the work was carried out and how the Respondent supervised his staff. The Board also found that the Respondent had failed to provide a record of work on completion of restricted building work.

- [3] The Board fined the Respondent \$2,500 and ordered that he pay costs of \$2,950. The fine was reduced on the basis of mitigating factors. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

The Charges

- [4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a Complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (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 a building consent contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she 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.
- [6] The Board gave notice that in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, it would be inquiring into the remedial work noted as required in the engineer's invoices on pages 52-56 of the Board's file and the items listed at numbers 1-4, 6 and 7 in the complaint at page 26 of the Board's file.

Evidence

- [7] 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.

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

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

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

- [8] The Respondent was contracted to carry out extensive and complex alterations and additions to an existing dwelling. The Respondent both carried out and supervised the building work. He was assisted by his staff, including an apprentice who had approximately three years of experience and another apprentice who was relatively new to building work. The Respondent had other building work on at the same time. The other work involved two other renovations, one of which was substantial. The Respondent was the only Licensed Building Practitioner (LBP) for the carpentry work on the three building sites. He split his time across them.
- [9] The Respondent was involved in the build for some twenty months. In the early stages of the build, the Respondent was more involved on-site than he was towards the end when his other building projects were also underway. At the latter stage of the build, he left the building work, including ordering materials, to his staff but continued to supervise.
- [10] During the build, the engineer engaged by the Complainant attended the site and made various observations, which were noted in his invoices. Those notations formed part of the issues the Board resolved to investigate at the hearing.
- [11] The Respondent progressed but did not finish the building work. Another LBP was engaged to continue with the work. The Respondent was aware that another LBP had taken over. The new LBP raised compliance issues with the building work that had been completed before his engagement. Those issues also formed part of the issues under investigation.

Negligence or Incompetence

- [12] 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.

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,

Has the Respondent departed from an acceptable standard of conduct

- [13] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹

Engineering Issues

- [14] An engineer's invoice for construction monitoring services dated 31 October 2022 noted:

Remedial as noted below required

- *vertical steel reinforcement needs to be replaced with grade 500E (grade 300E used)*
- *cover to steel needs to be 75mm (steel is in contact with ground)*

- [15] The engineer gave evidence that the required grade of steel was clear in the engineering design and that 500E was necessary because of the heavy loads the steel would be bearing. The engineer noted that the steel does have markings to distinguish it from 300E steel. The Respondent's evidence was that the wrong grade of steel had been ordered by his employee. The Respondent did not check the delivery docket to ensure the correct steel had been ordered and did not identify the error when it was installed.

- [16] With respect to the steel cover, the engineer's evidence was that the wrong chairs had been used (50 mm, not 75 mm as required), and, in some places, the steel was sagging and touching the ground. The Respondent's evidence was that he thought 50 mm chairs would be adequate and that some chairs sank due to soft ground. Again the cover requirements were clearly stipulated in the consented plans.

- [17] The Respondent confirmed that he both carried out and supervised the above work.

- [18] The same invoice also identified the following matters requiring remediation:

Remedial as noted below required

- *Vert steel reinf to be shifted to give 60mm cover to earth face*
- *Block control joint to have horizontal 800mm long bar de-bonded only one side*
- *Horiz reinf at top bond beam to be continuous over the control joint*

ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

- *Plastic safety cap, loose & broken blk to be removed from blk cavity*

[19] The engineer confirmed the issues were related to a block wall. As such, the Board did not further investigate them because each licensed trade is responsible and accountable for their work.

[20] A further engineer's invoice dated 28 February 2023 identified issues with subfloor construction. Those issues did relate to the Respondent's work, and the Board further investigated them. They were noted as:

Remedial as noted below required

- *backspan joist under rumpus 140x45 was too short and did not span from bearer to bearer (Photo 5)*
- *internal bearer size of 3/240x45 is not as per building consent plan size of 3/290x45 (Photo 3)*
- *external bearer size of 2/240x45 is not as per building consent plan size of 3/290x45 (Photo 4)*
- *southwest corner external bearer does not span from pile to pile (Photo 4)*
- *clearance between bottom of bearer and clearer ground level is not adequate (Photo 6)*
- *redesign of the sub-floor joist, bearer, pile and connection will be required using as-built structure and strengthening with additional new structure and additional new connection. Engineer will provide supporting supplementary design calculations, engineering drawings, Producer Statement Design PS1 and COW for builder to submit to Council Building Inspector for variation approval*

[21] The Respondent gave evidence that the building work on the above-noted items was carried out by his staff in his absence. He stated that one of his staff members, an apprentice who had approximately one year of experience, had gone beyond what he had been instructed to do and that when the Respondent returned to the site after two to three days, he found the substructure had been covered and with plywood. He was not aware of the non-compliant items that were later found. The Respondent accepted that the covered building work would have required a Building Consent Authority (BCA) inspection prior to being closed in. Notwithstanding, he did not remove the plywood and inspect the underlying building work.

[22] The backspan joist noted as not spanning from bearer to bearer related to bearers that did not span to or connect to cantilevered joists. The remedial builder who was present at the hearing gave evidence that the bearers were one span of piles short of the cantilevered joists they were supposed to be connected to.

- [23] Regarding the undersized joists and bearers, the Respondent stated that his staff had ordered the wrong materials. Again, the Respondent did not check that the correct materials had been ordered and installed.
- [24] The engineer gave evidence that the failings were serious and that the building work would not have complied with clause B2 of the New Zealand Building Code. He stated that the issues were remediated after recalculation by installing additional timber elements to provide greater strength and that the minor variation for the change had been discussed with the BCA inspector but had not yet been processed.
- [25] The Respondent submitted that he had intended to rectify the issues but was not given the opportunity to do so because, firstly, he was not informed of them, and secondly, his contract came to an end.
- [26] The Board's finding with respect to the above matters was that the Respondent's conduct had fallen below an acceptable standard. In terms of the foundations' issues, the Respondent should have been aware that the incorrect grade of steel had been ordered and installed and that a minimum of 75 mm of cover was required for reinforcing steel. As he failed to ensure that the building work in relation to these matters was not as per the building consent, the Board finds he has been negligent as his conduct has fallen below the standard expected of an LBP with a carpentry license. Turning to the subfloor issues, the Board finds the Respondent failed to adequately supervise the building work carried out by his staff. Again, as conduct has fallen below an acceptable standard. If the Respondent paid closer attention to the building work being carried out by his staff, including what materials were being ordered and installed, the issues would not have arisen.

Issues Identified by the Remedial Builder

- [27] In addition to the above items, the following items were identified by the LBP engaged after the Respondent's contract had come to an end:
- 2) Hardfill-Marcos had excavated too much dirt when doing excavation of ground and the engineer made Marcos backfill up to required height. Marcos has put too much hardfill in here and we have had to dig all this out to get required height under bearers and joists. We had to do this as per code and engineers advice. This involved a lot of xtra work.*
- 3) The block retaining wall-Marcos has put a sealer coat on the back of the blocks yet this is not allowed to waterproof the wall. A labourer was hired to come and grind the sealer coat of the block wall to enable the correct waterproof membrane to be installed.*
- 4) The setout of the rumpus room is not as per plans-The measurements for the length and width of the room is not as per the plan. This took the new builders a while to measure and remeasure to determine what he has done here. The blockwall on the west under rumpus window is far longer than plan specified.*

6) Marcos cut 2 piles off when he didnt need to and was advised by the architect to reinstate straight away to keep integrity of the building up to date. This took us a lot of extra time and materials to install new piles and concrete in to support house that shouldve been done when Marcos was advised by architect.

7) The piles for Stage 2 extension downstairs, the piles are in the wrong place. The pile next to rumpus room is outside the line of the building. New foundation will have to be added here.

- [28] Overfill: the Respondent stated the overfill arose as a result of his excavations with a machine. His evidence was that in one area, more headroom was needed to be able to install piles, but rather than step the excavation, he excavated the entire area at the lower level. This resulted in hardfill having to be installed to bring the level back up to that, which is required by the building consent. The manner in which the Respondent carried out the excavation work was such that the Board decided that he had been negligent.
- [29] Tanking: the Respondent's evidence was that a subcontractor had been engaged to install the waterproofing membrane on the outside of the block wall but that the work had not started. The remedial builder gave evidence that there was a sealant coat on the block work and that it had to be removed prior to the correct membrane being installed. The Board considered that there was insufficient evidence on which to make a finding with respect to the issue.
- [30] Rumpus room set out: the remedial builder gave evidence that the set out was approximately 100 mm out of the length of the room and 70 mm out on the width of the room. Again, the Board considered that the Respondent had carried out building work in a negligent manner.
- [31] Cut-off piles: the Respondent gave evidence that piles were disconnected (cut off) underneath the subfloor in an existing part of the dwelling because the base of the piles had been washed out, and the subfloor was carrying the weight of the pile structure. He stated that he installed steel beams to carry the load the piles had been carrying. The remedial builder gave evidence that the steel beams were not carrying the load of those piles. The Board considered that there was insufficient evidence on which to make a finding with respect to the issue.
- [32] Piles outside of the building line: the remedial builder gave evidence that two of the piles installed underneath the existing dwelling, which were designed to marry up to the existing dwelling, were outside of the building line by approximately 60 to 100 mm, resulting in a step in the external wall line, which would have required a cladding flashing. The Respondent stated he had used a plumb-bob to ascertain the position of the piles and did not know why they were not in the correct position. The Board decided that the Respondent had carried out building work in a negligent manner with respect to this issue.

Was the conduct serious enough

- [33] The Board has made negligence findings with respect to building work the Respondent carried out on the foundations, as noted in engineering observations, and with respect to the excavation of foundations and piles being installed in an incorrect position. The Board has also made negligence findings with respect to the supervision of building work in relation to subfloor construction. The question for the Board was whether those departures from an acceptable standard were serious enough to warrant a disciplinary finding.
- [34] The Board found that the departures, with the exception of the rumpus room being built to the wrong dimensions, were serious. In particular, the Respondent failed in his supervision of unlicensed persons who were carrying out building work. The Respondent also failed with respect to his own building work to ensure it was carried out in a compliant manner. The departures were numerous, and those that related to the structural elements carried with them significant implications for the safety and performance of the structure.
- [35] The Board also notes that LBPs should aim to get building work right the first time and not rely on others, such as an engineer or the BCA, to identify compliance failings and to assist them in getting it right. In this respect, during the first reading of changes to the Act around licensing,¹² it was noted by the responsible Minister:
- [36] The introduction of the LBP regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention of the enabling legislation:¹³

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.

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 prides 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

¹² Hansard volume 669: Page 16053

¹³ 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.

- [37] Within this context, the Board considers that the acceptable standards expected of a reasonable LBP include 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, they will be dealt with and learnt from.

Has the Respondent been negligent or incompetent

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

Contrary to a Building Consent

- [39] 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.¹⁴ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁵ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁶ Inspections ensure independent verification that the building consent is being complied with.
- [40] 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.¹⁷ 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.¹⁸ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

- [41] The building work in relation to which the Board has made findings of negligence also instances where the building work was carried out in a manner that was contrary to or differed from the building consent.

¹⁴ Section 49 of the Act

¹⁵ Section 40 of the Act

¹⁶ Section 222 of the Act

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *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".

Was the conduct serious enough

- [42] For the same reasons noted in relation to the negligence findings, the Board finds that the conduct was serious enough.

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

- [43] The Respondent has carried out and supervised building work that was contrary to the building consent issued.
- [44] The Board notes the commonality in the negligence and contrary to a building consent findings. For the purposes of determining the appropriate penalty, the Board has treated them as a single incident.

Failure to Provide a Record of Work

- [45] 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.¹⁹
- [46] 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 work²⁰ unless there is a good reason for it not to be provided.²¹

Did the Respondent carry out or supervise restricted building work

- [47] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included building work on the primary structure of a residential dwelling.²² It follows that he both carried out and supervised restricted building work.

Was the restricted building work complete

- [48] The Respondent did not finish all of the building work that he contracted to do. This engagement came to an end in late January 2023, and he was aware that another builder had taken over and that he would not be returning to carry out any further restricted building work. Because the Respondent knew he would not be returning, his restricted building work had come to an end and, for the purposes of the provision of a record of work, completion had occurred.

Has the Respondent provided a record of work

- [49] The Respondent has not provided a record of work. At the hearing, he stated he would now provide one.

¹⁹ Section 88(1) of the Act.

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²¹ Section 317(1)(da)(ii) of the Act

²² Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

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

[50] At the hearing, the Respondent stated that he had not provided a record of work because he needed to do an inspection of the work he had previously completed. Providing a record of work is not “signing off”. It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. On that basis, the Board finds that the Respondent did not have a good reason for not providing a record of work on completion of restricted building work.

Did the Respondent fail to provide a record of work

[51] The Respondent has failed to provide a record of work on completion of restricted building work.

Board Decisions

[52] The Respondent has breached:

- (a) section 317(1)(b) of the Act in that he has carried out and supervised building work in a negligent manner;
- (b) section 317(1)(d) of the Act in that he carried out and supervised building work that was contrary to a building consent; and
- (c) section 317(1)(da)(ii) of the Act in that he failed to provide a recorder work on completion of restricted building work.

Penalty, Costs and Publication

[53] 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.

[54] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

[55] 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.²³ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁴

²³ *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]

²⁴ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

- (a) protection of the public and consideration of the purposes of the Act;²⁵
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;²⁶
- (c) setting and enforcing a high standard of conduct for the industry;²⁷
- (d) penalising wrongdoing;²⁸ and
- (e) rehabilitation (where appropriate).²⁹

[56] 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 cases³⁰ and applying the least restrictive penalty available for the particular offending.³¹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³² that is consistent with other penalties imposed by the Board for comparable offending.³³

[57] 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.³⁴

[58] The Respondent outlined in his penalty submissions that, as a result of this complaint, he has changed his business model. He no longer employs staff and accepted that the issues would not have arisen if his supervision had been better. He also limits himself to less complex work when he is more confident with his knowledge and skills. He noted the cultural differences between where he learned his trade and New Zealand and stated that he is now aware that he needs to pay close attention to the consent of documentation. He also stated that he is committed to compliance, and he apologised to the Complainants. He noted the impact a suspension of his license would have on him and his ability to derive an income.

[59] On the basis of the mitigation submissions, the Board decided it would not impose a training order or restriction on the Respondent's licence and that it would adopt a starting point of a fine. The Board decided the appropriate starting point for the fine would be \$3,500. The Board then reduced that amount to \$2,500 to recognise the

²⁵ Section 3 Building Act

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

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

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

²⁹ *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

³⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

³⁴ 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.

Respondent's acceptance that his supervision had not been adequate and to acknowledge the other mitigating factors present.

Costs

- [60] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁵
- [61] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁷.
- [62] 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.
- [63] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,950 toward the costs of and incidental to the Board's inquiry.

Publication

- [64] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,³⁸ and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [65] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁹ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.⁴⁰
- [66] 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

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

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

³⁷ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

³⁸ Refer sections 298, 299 and 301 of the Act

³⁹ Section 14 of the Act

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

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,950 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

[68] 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.

Right of Appeal

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

Signed and dated this 26th day of November 2024.



M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*

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

ii Section 318 of the Act

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

iii Section 318 Disciplinary Penalties

- (1) *In any case to which section 317 applies, the Board may—*
- (a) *do both of the following things:*
 - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (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.