

Before the Building Practitioners Board

	BPB Complaint No. CB25971
Licensed Building Practitioner:	Nicholas Mavroyannis (the Respondent)
Licence Number:	BP114527
Licence(s) Held:	Design AoP 1

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

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Decision Date:	18 March 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mrs J Clark, Barrister and Solicitor, Legal Member

Procedure:

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

Disciplinary Finding:

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

The Respondent's licence is cancelled for a period of three (3) months, and 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.

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) of the Act.

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Summary

- [1] The Respondent was engaged to prepare resource consent and building consent documentation for two projects. Both were multi-unit, two-storey dwellings. In respect of one address, the Council rejected the application, and for the other, the Complainant withdrew the documents from Council consideration to address the same issues.
- [2] The Board needed to consider whether the Respondent had negligently or incompetently carried out the provision of the resource consent documents. This required a determination of two issues – had the Respondent departed from an acceptable standard, and if so, was that departure serious enough to warrant a disciplinary finding?
- [3] The Board was assisted by the report of a Special Advisor who concluded that the design documentation was not of an acceptable standard and had, in significant respects, failed to address matters necessary for the Council to determine the application.

- [4] The Board held that the documents produced by the Respondent showed a lack of skill and knowledge and an inability to do the job required of him. As such, the Board found that the Respondent had carried out building work in an incompetent manner and that it was serious enough to warrant a disciplinary outcome.
- [5] The Board decided to cancel the Respondent's licence and order that he may not apply to be re-licensed for a period of three (3) months.
- [6] There was also an allegation of disreputable conduct in the charging of fees for design documents, which were either not provided or were not of a standard expected of a Licensed Building Practitioner. On this ground, the Board held that there was insufficient evidence to establish the offence had, on the balance of probabilities, been committed.

Background to the Hearing

- [7] By Notice of Proceeding dated 3 November 2022, the Board advised the Respondent that it would further investigate specified grounds of discipline and the matter was then set down for a hearing on 9 March 2023. In January 2023, the Respondent applied for and was granted an adjournment of the hearing on medical grounds. At that point, he was offered the option of a decision on the papers, but he did not respond.
- [8] Further inquiries of the Respondent on 5 May 2023 and the provision of further medical evidence resulted in the matter continuing to be adjourned.
- [9] On 16 June 2023, the Respondent advised that he was still unwell. The matter was further adjourned and the Presiding Member ordered that another review of the Respondent's status and ability to attend a hearing, including by way of videoconference, be made in September 2023.
- [10] The Respondent advised in August 2023 that he was still unwell and unable to attend a hearing by way of videoconference. In a Board Minute dated 19 September 2023, the Board expressed its concern that the right to appear and be heard had to be balanced against the need to determine a matter and ensure that the purpose of the regulatory regime was maintained.
- [11] At that stage, given the fundamental requirement of fairness and the risk that the Respondent might be disadvantaged if he was not able to give his account of events, the Board decided that it would put forward three options for the matter to be dealt with.
- [12] The options were an in-person hearing in Auckland no later than 30 November 2023, a hearing by way of audio-visual link no later than 30 November 2023, a decision on the papers on the basis of the evidence before the Board at the time that the decision was made, with a provision for the Respondent to make written submissions prior to the on the paper's decision being made.

[13] In the absence of any election by the Respondent, the Board directed that the last option – a decision on the papers - would proceed. The Respondent was given until 30 September 2023 to respond, but he did not.

Reasoning for proceeding with on the papers decision.

[14] In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*,¹ the Court, which was dealing with an appeal from an occupational tribunal decision, noted that the right to a fair process is absolute. The Court went on to consider the circumstances under which a hearing could proceed in a Respondent's absence but still be fair. It adopted *R v Jones*,² and set out various principles relevant to the Board and proceedings before it. In particular, the Court noted the general right to be present at a hearing but a discretion for a tribunal to hold a hearing in the absence of a Respondent, which is what is under consideration.

[15] The Court noted a discretion must be exercised with great care, and it is only in rare and exceptional cases that it should be exercised in favour of a hearing taking place. In exercising a discretion, fairness is of prime importance, and the tribunal must have regard to all the circumstances of the case, including, in relation to the present matter:

- (a) the nature and circumstances of the Respondent's behaviour in absenting himself and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
- (b) the likely length of an adjournment;
- (c) the extent of the disadvantage to the Respondent in not being able to give his account of events, having regard to the nature of the evidence against him;
- (d) the risk of the Board reaching an improper conclusion about the absence of the Respondent;
- (e) the seriousness of the offence, which affects the Respondent, the Complainants and the public;
- (f) the general public interest and the particular interest of the Complainants and witnesses that a hearing should take place within a reasonable time of the events to which it relates; and
- (g) the effect of delay on the memories of Witnesses.

[16] Considering those factors, it is noted that the Respondent has not engaged in the disciplinary process for this or another complaint against him in that he has not provided any form of response to either of them. In this respect, the Respondent is,

¹ [2013] NZHC 83

² [2002] UKHL 5, [2003] 1 AC 1

in the context of disciplinary proceedings, expected to cooperate and to be prepared to answer the allegations,³ including by engaging in the initial investigation process.

- [17] Notwithstanding the lack of a response, the Board does have a high volume of relevant evidence from the Complainants and the Building Consent Authority, and the complaints are of a technical nature and relate, in the main part, to design documentation that the Respondent prepared and which is in the possession of the Board.
- [18] The length of the possible adjournments is unknown. The complaints are now over 18 months old, and the hearing of them has now been adjourned for a year. The Board does have a concern, given the length of time, over the witnesses' recollection of matters.
- [19] The alleged disciplinary offences are serious. This complaint and a further complaint before the Board include allegations that the Respondent has carried out design work in a negligent or incompetent manner and that the Respondent may have brought the licensing regime into disrepute. The Respondent has previously been before the Board in relation to disciplinary matters, his licence is currently suspended by the Registrar, and that suspension will remain in place until such time as the Board determines the disciplinary proceedings.⁴ Whilst the suspension protects the public, it is also impacting the Respondent, and there is, given the Respondent's previous history, a public interest in the matter being determined.
- [20] Countering those factors is the absence of evidence from the Respondent. That, however, is a result of the Respondent's failure to engage and to respond, which may be a result of his reported ongoing illness or simply a matter of him avoiding the complaints and disciplinary process.
- [21] The Board considers that the Respondent has been given many opportunities to engage with the disciplinary process and to present any further evidence and/or submissions for the Board's consideration. He has not availed himself of these. Finally, the Respondent had until 30 November 2023 to provide any further evidence or submissions (as advised to the Respondent in the Board Minute of 19 September 2023). He has not done so.
- [22] Accordingly, after weighing the factors above and given the clear election options put to the Respondent in September 2023, the Board determined to make a decision on the grounds of discipline based on the evidence before it.

Notice of Complaint

- [23] There has been a lack of engagement by the Respondent in the complaint investigation process and subsequently in response to the Board's minutes seeking

³ *In re C. (A Solicitor)* - [1963] NZLR 259 and *Vatsyayann v Professional Conduct Committee of The New Zealand Medical Council*, HC, Priestley J CIV-2011-419-511, CIV-2011-419-968

⁴ Section 295(2)(a) of the Act

an election on the hearing process. The Board is, however, satisfied that this is a choice by the Respondent and is not due to any lack of notice or failure to receive the relevant documents. The email address to which all complaint information and Board minutes were sent is the one on the Licensed Building Practitioner's Register⁵ and the one from which the Respondent has periodically communicated in relation to medical issues.

The Charges

- [24] 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.⁶
- [25] In this matter, the disciplinary charges the Board resolved to further investigate⁷ were that the Respondent may, in relation to building work at [OMITTED], Auckland and [OMITTED], Auckland, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1) (b) of the Act, IN THAT, he may have undertaken design work and prepared resource consent documents in a substandard manner relating to two multi-unit projects; and/or
 - (b) 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, IN THAT, he may have been paid for services which he either did not provide at all or did not provide to a standard expected of a Licensed Building Practitioner and may have ceased communication with and become uncontactable by the Complainant.

Evidence

- [26] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁸ 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.
- [27] The Respondent was engaged by the Complainant to complete the resource consent and building consent design for two projects at [OMITTED] and [OMITTED], respectively. Both projects were multi-unit two-storey dwellings. The Complainant

⁵ The Register of Licensed Building Practitioners must contain certain information, including under section 301(1)(d) an "address for communications under this Act". Under section 302 the Licensed Building Practitioner must keep their details up to date and section 314 of the Act makes it an offence to fail to update the Register. Section 394 of the Act provides that email is sufficient service.

⁶ 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.

⁷ 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.

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

alleged that a significant portion of the contract price for both projects had been paid to the Respondent and that the Complainant does not now have useable resource consent documents.

- [28] By letter dated 1 February 2022 in respect of [OMITTED] the Auckland City Council advised that it was unable to accept the application as *“it is incomplete and fails to meet the requirements of section 88 and Schedule 4 of the Resource Management Act 1999”*.
- [29] The Complainant then withdrew the application in respect of [OMITTED], stating in a letter dated 10 March 2022 that: *“on review of what the previous architect had completed we have identified numerous items that need to be addressed and resubmitted”*.
- [30] The Board appointed a Special Advisor, Mr Ron Pynenburg, under section 322(1)(d) of the Act to assist the Board. Mr Pynenburg is a registered Architect with extensive experience as an expert witness. He was asked to advise on the following matters-
- (a) Was the Respondent’s design work substandard considering what would be expected from a competent designer;
 - (b) Had the Respondent identified the non-compliances relating to the projects that required resource consents;
 - (c) Whether the resource consents’ documentation was to an acceptable standard for submission to Council;
 - (d) With respect to [OMITTED], whether the responses to the requests for information and/or application rejection notification were dealt with appropriately; and
 - (e) Any further issues noted and raised by the Special Advisor.
- [31] In addressing these issues Mr Pynenburg considered the documents in the complaint file and the application documents prepared by the Respondent for each project namely: drawings dated 20 December 2021 by the Respondent, assessment of environmental effects by the Respondent and stormwater, sewer and drainage report dated 20 December 2021 by [OMITTED].
- [32] The Respondent did not provide a substantive response to the allegations.

Negligence or Incompetence

- [33] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁹ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of

⁹ *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.

the same class of licence. This is described as the *Bolam*¹⁰ test of negligence.¹¹ 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.¹² 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.¹³ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [34] 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 Code¹⁴ and any building consent issued.¹⁵ In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design¹⁶.
- [35] The Board can have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct. The test is an objective one.¹⁷
- [36] There are 12 standards identified in the Unitary Plan against which compliance has to be identified and addressed within an assessment of environmental effects (AEE) in order for a Council to be able to properly consider a resource consent application.
- [37] Mr Pynenburg assessed the Respondent's documentation to determine whether he had adequately identified and addressed the non-compliances.
- [38] For both projects, there were six applicable standards for which the Respondent had to identify the non-compliance. Of these Mr Pynenburg stated that he did so correctly for one (H4 6.10 – landscaped area), incorrectly identified the extent of non-compliance for two (H4.6.5 -height in relation to boundary and H4.6.9 – building coverage) and did not identify or quantify three (H4.6.14 – front, side and rear fences and walls and H4.6.11 – outlook space and H4.6.13 – outdoor living space).In

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹ 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)

¹² 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”

¹³ *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”.

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

¹⁷ *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.

addition, the Respondent failed to identify non-compliance in respect of parking and access (access width, apron width, and reverse manoeuvring).

- [39] Mr Pynenburg concluded on the AEE for both properties that they *“did not in any useful way address any of the relevant matters of discretion or assessment criteria contained in the AUP [Auckland Unitary Plan] The Auckland Council has not received a document that is of any use to it for the purposes of assessing the resource consent application.”*
- [40] The Special Advisor further stated that the drawings for both projects were missing information, illegible, and did not include all of the necessary information to identify and describe the non-compliances. He did not consider that the documentation was of an acceptable standard for submission to the Council and the design work was substandard.
- [41] Finally, Mr Pynenburg expressed the opinion that *“A reasonable check or review of the documents prior to their submission for resource consent would have made it obvious that much remained to be done to produce a set of drawings and an AEE that was suitable.”*
- [42] Mr Pynenburg was also asked to consider the Respondent’s response to the Council on [OMITTED]. He pointed out that the Council did not request further information from the Respondent but had rejected the application altogether. However, he was of the view that the rejection letter was a *“starting point from which the Respondent could have commenced a review of the application documentation and considered what an appropriate response could be to either the Complainant and/or the Council”*.
- [43] The Board considers the Respondent did not meet the standard of conduct of a competent and responsible practitioner. His failure to identify and address a significant number of the projects’ non-compliances meant that the majority of the information required for the assessment of the application was not provided. The [OMITTED] document was of no use to the Council and was rejected by it. The same failures in the [OMITTED] document led to the Complainant withdrawing it from the Council. Accordingly, based on the assessment of the Special Advisor, the Board finds that the work was not carried out to an acceptable standard.

Was the conduct serious enough?

- [44] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.
- [45] The documentation produced by the Respondent was so inadequate that it was rejected by the Council on one project and withdrawn by the Complainant from consideration on the other. This was a failure by the Respondent to not only fulfil his contractual obligations to the Complainant but also to meet his professional ones. The consequences were expensive for the Complainant. The Board, which includes persons with extensive experience and expertise in the building industry, decided

that the Respondent's conduct was sufficiently serious to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [46] The Respondent demonstrated through the significant inadequacies in his documentation that he lacked the skills and knowledge required of a Licensed Building Practitioner and, therefore, that he was incompetent. Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. In *Beattie v Far North Council*,¹⁸ Judge McElrea noted it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,¹⁹ it was stated as “*an inability to do the job*”.
- [47] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act of carrying out building work in an incompetent manner.

Disreputable Conduct

- [48] It was alleged that the Respondent may have been paid for services which he either did not provide at all or did not provide to a standard expected of a Licensed Building Practitioner.
- [49] The Board notes the evidence of the Complainant that across the two projects, he paid over \$100,000 to the Respondent for documentation, which fell significantly short of the Council's requirements. This is evidenced by the Council's rejection letter for [OMITTED], the decision by the Complainant to withdraw very similar documentation for [OMITTED] and supported by the Special Advisor's opinion that the documents for both projects were not “*of any use to it for the purposes of assessing the resource consent application.*” The Complainant has attempted to recover this sum from the Respondent and advised that the Respondent has been “*disengaged and basically uncontactable.*”
- [50] There has been no substantive response to this allegation from the Respondent. The Board notes that the contracts for both projects set out the design fees, and the sums paid are in line with these provisions.
- [51] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:
- criminal convictions²⁰;
 - honest mistakes without deliberate wrongdoing²¹;
 - provision of false undertakings²²; and

¹⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

²⁰ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²² *Slack, Re* [2012] NZLCDT 40

- conduct resulting in an unethical financial gain²³.

- [52] The Courts have consistently applied an objective test when considering such conduct.²⁴ The subjective views of the practitioner or other parties involved are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.²⁵
- [53] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,²⁶ that the Respondent has brought the regime into disrepute and that the conduct was sufficiently serious enough for the Board to make a disciplinary finding.²⁷
- [54] In this instance, the Board has decided that there is insufficient evidence to find on the balance of probabilities that the conduct was disreputable. This is, to an extent, a result of making a decision on the papers and not having the direct evidence of the Complainant and the Respondent. Unlike the issue of carrying out building work in a negligent or incompetent manner, this allegation is not supported by independent corroborating evidence.
- [55] Accordingly, the Board finds that the Respondent has not committed the disciplinary offence under section 317(1)(i) of the Act of conducting himself in a disreputable manner.

Penalty, Costs and Publication

- [56] Having found that one 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.
- [57] 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

- [58] 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

²³ *Collie v Nursing Council of New Zealand* [2000] NZAR 7

²⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁶ *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.

²⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

aggravating factors present.²⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁹

- (a) protection of the public and consideration of the purposes of the Act;³⁰
- (b) deterring other Licensed Building Practitioners from similar offending;³¹
- (c) setting and enforcing a high standard of conduct for the industry;³²
- (d) penalising wrongdoing;³³ and
- (e) rehabilitation (where appropriate).³⁴

- [59] 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 cases³⁵ and applying the least restrictive penalty available for the particular offending.³⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁷ that is consistent with other penalties imposed by the Board for comparable offending.³⁸
- [60] 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.³⁹
- [61] In this matter, the Board adopted a starting point of a cancellation of the Respondent's licence because the more serious finding of incompetence has been made, and the Board considers such a penalty serves the purpose of protecting the public. Cancellation of a licence is the equivalent of striking off within the Licensed Building Practitioner regime. There were no mitigating or aggravating factors.
- [62] Based on the above, the Board's penalty decision is the cancellation of the Respondent's licence and a direction that he cannot re-apply for a Licensed Building Practitioner's licence for a period of three (3) months.

²⁸ *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]

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

³⁰ Section 3 Building Act

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

³² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³⁴ *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

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

³⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁹ 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.

[63] The Board has made a decision on another matter with respect of the Respondent (CB26084). The penalty imposed in that matter and the penalty in this matter will run concurrently.

Costs

[64] 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.⁴⁰

[65] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings⁴¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴².

[66] 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. Adjustments are then made. The current matter was decided on the papers and was moderate.

[67] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

[68] 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,⁴³ 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.

[69] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁴ 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.⁴⁵

[70] Based on the above, the Board will not order further publication.

⁴⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

⁴¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴² *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.

⁴³ Refer sections 298, 299 and 301 of the Act

⁴⁴ Section 14 of the Act

⁴⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[71] 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 re-licensed before the expiry of three 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 not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

[72] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a Licensed Building Practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

[73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **23 April 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 2nd day of April 2024.



Mr M Orange
Presiding Member

i Section 3 of the Act

This Act has the following purposes:

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

ii Section 318 of the Act

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

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- (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.*