Before the Building Practitioners Board

	BPB Complaint No. CB26223
Licensed Building Practitioner:	Alexandre Newton (the Respondent)
Licence Number:	BP139260
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding; Roof Membrane

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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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	12 April 2024

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

Procedure:

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

Disciplinary Finding:

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

The Respondent is fined $2,000 for the breach of section 317(1)(b) and censured for the breach of section 317(1)(i) of the Act. He is ordered to pay costs of $2,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

[1] The Respondent was engaged to repair a dorma window in a multi-unit complex. The work, which was on a circa 1970s building, was not completed on a like-for-like basis, and an expert appointed by the Board identified quality and compliance issues with the roofing work that had been completed.

[2] The questions for the Board were whether the Respondent had been negligent by failing to ensure a building consent was in place for the work before it was undertaken and was negligent for how it was completed. The Board decided that he had been negligent in respect of both but that only the quality and compliance issues were serious enough to warrant a disciplinary finding. The Respondent was fined $2,000 for his negligent conduct.

[3] The Board also investigated whether the Respondent had brought the licensing regime into disrepute by representing that his business was a Roofing Association of

New Zealand (RANZ) member when it was not. The Board decided that he had but that the offending was at the lower end of the scale and that he would be censured for the conduct.

[4] The Board ordered that costs of $2,000 be paid. The costs order was reduced on the basis that the matter was heard at a consolidated hearing.

The Charges

[5] 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]

[6] In this matter, the disciplinary charges the Board resolved to further investigate[2] were that the Respondent may, in relation to building work at [OMITTED], Wellington, 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 failed to consider whether a building consent was required for the building work AND all other issues as detailed in the report of the Special Advisor dated 10 November 2023; and/or

(b) conducted himself or herself 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 misrepresented on his company's website that the company and /or he personally were members of the Roofing Association of New Zealand ("RANZ"), when they may not have been.

Consolidation

[7] The Board may, under Regulation 13, consolidate two or more complaints into one hearing. The Board sought and received agreement for consolidation of this matter with Board Inquiry matters [OMITTED] and [OMITTED].

Evidence

[8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[3]. 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

[9] The Board received a complaint from the owner of a residential unit. It was part of a multi-unit complex built circa 1970. The complaint related to remedial work carried out on a dorma window that had been leaking. The Complainant alleged the work did not match what had existed and was different from the dorma windows on other units, including those remediated. He also alleged the work was not Building Code compliant and that the Respondent was representing that he was a RANZ member when he was not.

[10] The Board resolved to appoint an expert to carry out a site visit and produce a report on the quality and compliance of the building work complained about. Mr Simon Cunliffe, a Registered Building Surveyor of Maynard Marks was appointed. His report identified issues with the building work. The expert appeared at the hearing and gave evidence.

Negligence

[11] The Board's finding was that the Respondent had been negligent. 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]

[12] A threshold test applies to negligence. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.[7] If it does not, then a disciplinary finding cannot be made.

<u>Has the Respondent departed from an acceptable standard of conduct?</u>

[13] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act[i] as well as the requirement that all building work must comply with the Building Code[8] and any building consent issued.[9] The test is an objective one.[10]

[14] The issues the Board gave notice that it would investigate under section 317(1)(b) of the Act were whether a building consent was required and those identified by an expert appointed by the Board.

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[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] *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".

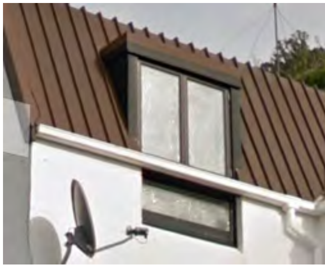
[8] Section 17 of the Building Act 2004

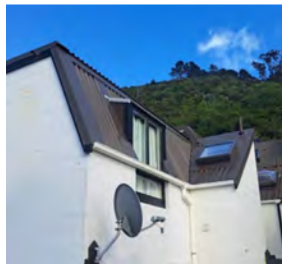
[9] Section 40(1) of the Building Act 2004

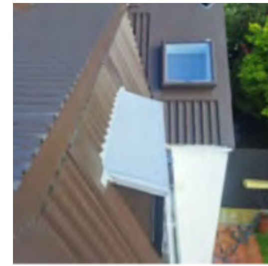
[10] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

Building Consent

[15] The work was not carried out under a building consent. Before and after photographs show the differences in construction methodology:


Original


Replacement


Aerial view

[16] The original dormer window roof had perimeter 'parapet walls' with an internal membrane roof. The reconstructed version did not have parapet walls. It has a membrane-covered lean-to roof, which is visibly different to the original. Mr Cunliffe expressed an opinion that a building consent may have been required. He noted:

> *As the roofing works progressed, the dormer works increased in scale resulting in a rebuild of the dormer roof in a manner that we consider to not comply with the requirements of Schedule 1 as in our opinion it no longer is 'an assembly in the same position' as the design and position has changed (from a parapet enclosed roof with outlet to a lean too roof situation).*
>
> *We consider that this change in design results in the building work no longer meeting the requirements of Schedule 1 and therefore the dormer roof portion of the work required a Building Consent to be uplifted.*

[17] The differences in construction methodology are evident in the photographs above.

[18] In his written submissions, the Respondent submitted that he could not rebuild the dorma using the same construction methodology because the original building work using that method had failed. Mr Cunliffe noted that the original construction had met Building Code durability requirements and that other units had been remediated using the original methodology.

[19] At the hearing, the Respondent further submitted that the work came within the provisions of section 41(1)(c) of the Act in that it was urgent work. The Respondent did not consult anyone to ascertain whether the work could come within section 41(1)(c) or check any guidance documentation.

[20] Section 41(c) of the Act can only apply where the building work has to be carried out under urgency "for the purpose of saving or protecting life or health or preventing serious damage to property". If it is relied on, a Certificate of Acceptance must be obtained as soon as practicable after completion. The Respondent did not ensure that one was obtained.

[21] In *Tan v Auckland Council,*[11] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[22] Justice Brewer in *Tan* also noted:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[23] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[24] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a Licensed Building Practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a Licensed Building Practitioner.

[25] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those who seek to rely on an exception to show that the building work comes with that exception.

[26] The Respondent initially relied on Clause 1 of Schedule 1, which is an exemption provided under section 41 of the Act. It provides:

> ***1 General repair, maintenance, and replacement***
>
> *(1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*
>
> *(2) Replacement of any component or assembly incorporated in or associated with a building, provided that—*
>
> *(a) a comparable component or assembly is used; and*
>
> *(b) the replacement is in the same position.*

[11] [2015] NZHC 3299 [18 December 2015]

[27] Clause 1 is generally referred to as “like for like” replacement in that a comparable component needs to be installed in the same position. Mr Cunliffe’s opinion was that the work was not comparable or in the same position and that Clause 1 could not be relied on. The Board agreed. The changes that the Respondent instigated meant that the building work differed to the extent that Clause 1 could not be relied on.

[28] The Respondent’s submission was that he could not rebuild in a like-for-like manner because the original work had failed. Clause 1 does contain an exclusion in that it cannot be relied on when the associated building work has failed the durability requirements under the Building Code, which is 15 years from a Code Compliance Certificate being issued. That period has passed, and as such, the work could have been carried out on a like-for-like basis. Also, the Respondent’s assessment that the work could not have been done on a like-for-like basis should have made him aware that a building consent was needed.

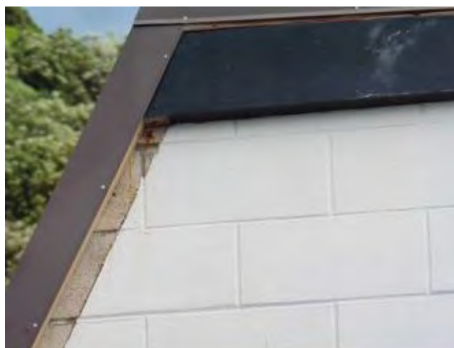
[29] In terms of the Respondent’s submission that it was urgent work, the deterioration had occurred over a long period of time, and the Respondent did not undertake the work with any urgency. Further, there was no evidence that there was an immediate risk to persons or property. Also, a Certificate of Acceptance was not sought after the work had been completed, which indicates that section 42 was not being relied on.

[30] The Board did not accept that any exemptions applied. The work was not completed on a like-for-like basis, and it was not urgent work. As such, a building consent was required, and the Respondent should, as a Licensed Building Practitioner, have turned his mind to the need for one and ensured that one was in place prior to the work being started. On that basis, the Board found that the Respondent had been negligent.

[31] At the hearing, the Respondent stated that he had made a mistake with respect to building consent issues.

Building Work Issues Noted by the Expert

[32] A replacement fascia that was smaller than the original was also complained about. The reduced size exposed unsealed blockwork, as shown in the following photograph:



[33] Mr Cunliff noted:

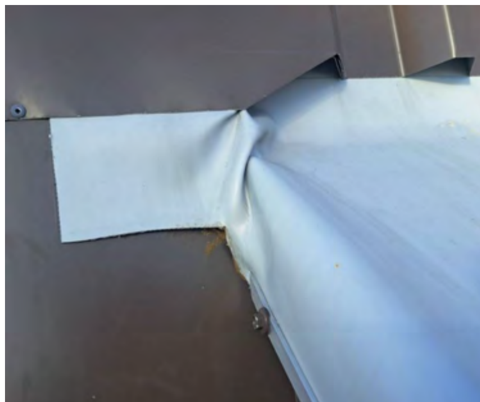
> *We consider that the smaller fascia installation presents a risk of code clause E2 – External Moisture being breached due to the lack of cover to underlying junctions and porous substrates. Although we are not able to provide evidence of this occurring at present, we consider it to be a future risk that will likely manifest over time.*

[34] The difference between old and new is evident in the photograph above.

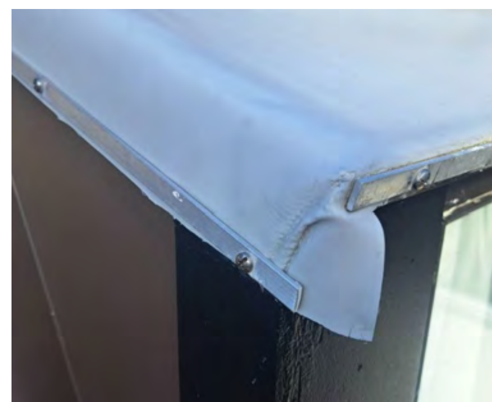
[35] Mr Cunliffe also noted the following non-compliance with the membrane roof:

> *The installation is aesthetically untidy, and we consider there to be several issues that are likely to result in future Building Code failure. These include:*
>
> - *Metal roofing in contact with the butyl membrane – Front edge of membrane roof – The front edge of the membrane roofing does not have an adequate downturn or drip edge.*
> - *Front edge of membrane roof – The front edge of the membrane roofing does not have an adequate downturn or drip edge.*
> - *Front edge of membrane roof – The front edge of the membrane roofing does not have an adequate downturn or drip edge.*
>
> *We recommend that the membrane roof is removed and replaced with new. In replacing the roof to replicate most of the original design (and diversion/drainage) features, some reconstruction work is needed to reinstate the parapets, etc.*

[36] The following photographs show the issues raised:



Membrane in contact with metal roof



Turn down edges

[37] Other issues noted by Mr Cunliffe were:

> *We recommend that the flashings to the perimeter of the window are removed and replaced.*
>
> *We consider that the apron flashing at the inter tenancy junction is required to be remediated to remove reliance on the exposed sealant and protect the*

> *partially exposed flashing tape, otherwise this will likely cause a future breach of New Zealand Building Code Clauses E2 External Moisture and B2 Durability.*

[38] When he responded to the complaint, the Respondent stated that another Licensed Building Practitioner, Mr [OMITTED], had carried out 90% of the roofing work. On that basis, the Board resolved to initiate an inquiry into Mr [OMITTED].

[39] At the hearing, the Respondent accepted that Mr [OMITTED] involvement had been limited. He stated that he took responsibility for the work and accepted that he had both supervised and carried out the work. He also accepted Mr Cunliffe's findings. He apologised to the Complainants for the events that had led to the complaint. He noted that he has improved his business practices since the complaint was made.

[40] The work was not completed to the standard expected of a Licensed Building Practitioner. There were multiple non-compliance issues, and, in general, the work was not completed to a high standard. On that basis, the Board finds that the Respondent's work was carried out and supervised in a negligent manner.

<u>Was the conduct serious enough?</u>

[41] There are two findings to consider. The first is with respect to the failure to ensure that a building consent was in place for the work. The second is in relation to the quality and compliance of the roofing work.

[42] As noted above, a threshold test applies. In *Collie v Nursing Council of New Zealand,*[12] it was expressed as:

> *[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.*

[43] Applying that test, the Board found that the building consent issue was not serious enough but that the quality and compliance of the building work was.

[44] With respect to the building consent, the Board notes that the interpretation and application of Clause 1 of Schedule 1 of the Act is not straightforward, and whilst the Respondent could and should have done more to ascertain whether Schedule 1 applied, the Board decided that the conduct was, because of the difficulties Clause 1 of Schedule 1 can present, it would not make a disciplinary finding. The Respondent is, however, cautioned that, in the future, he needs to apply more due diligence to the question, and the Board recommends that he seek the advice of qualified professionals or of a Building Consent Authority. Regarding the claim that the work was urgent and done under section 41(c) of the Act, that was clutching at straws. Again, the Respondent is cautioned about future conduct.

[12] [2001] NZAR 74

[45] The quality and compliance of the work was a different story. It was poorly executed, there were multiple quite fundamental Building Code failings, and it was prone to long-term failure. The Respondent's conduct went beyond inadvertent error or oversight. It was a serious departure from an acceptable standard, and the Board decided that the Respondent should be disciplined for it.

Has the Respondent been negligent or incompetent?

[46] The Respondent has carried out and supervised building work (roofing work) in a negligent manner.

Disrepute

[47] 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 convictions[13];
- honest mistakes without deliberate wrongdoing[14];
- provision of false undertakings[15]; and
- conduct resulting in an unethical financial gain[16].

[48] The Courts have consistently applied an objective test when considering such conduct.[17] 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.[18]

[49] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,[19] that the Respondent has brought the regime into disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.[20]

The conduct complained about

[50] A complaint was also made about the Respondent representing that he was a member of the RANZ when he was not. The Board received evidence from the Chief Executive of RANZ, who confirmed that neither the Respondent nor his company were or had even been members. The evidence that he provided established that an application had been made in February 2021, but had not been progressed by the Respondent's company. Notwithstanding, the Respondent used RANZ branding within its business, including on vehicles, buildings, on the website, and in social

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[13] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[14] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[15] *Slack, Re* [2012] NZLCDT 40
[16] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[17] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[18] *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519
[19] *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.
[20] *Collie v Nursing Council of New Zealand* [2001] NZAR 74

media posts. The branding has since been removed. The Respondent accepted that neither he nor his company were members and that he should not have used the branding. He explained the situation as an administrative slip by staff who should have progressed the application. He apologised to the RANZ Chief Executive.

[51] The Complainant stated that RANZ membership was not a factor in their decision to engage the Respondent and his company. However, he did note that he initially sought to resolve issues with the Respondent by contacting RANZ to elicit their assistance. Because Newton Roofing was not a member, RANZ was not able to assist.

Was the conduct serious enough?

[52] Whilst the Respondent apportioned blame to staff and administrative errors, the Respondent is the sole Director and Shareholder of his company, Newton Roofing & Trade Services Limited, is active in the business and is responsible for what is done in its name. He accepted that he had not received any notification of acceptance as a RANZ member. The RANZ Chief Executive gave evidence that the RANZ logo is issued to members to use once membership is confirmed. It is not clear how Newton Roofing obtained the RANZ logo, but it was clear that it was not through RANZ. The use of the RANZ logo was for an extended period. It was removed sometime after the complaint was made in March 2023, and RANZ informed Newton Roofing that it could not use the logo.

[53] Membership of RANZ gives consumers reassurance. It states its mission as: *Delivering a high-performing roofing industry that protects New Zealand's most important assets.* It can facilitate the resolution of disputes, and it has a "Disputes Process".

[54] The Complainant did not engage Newton Roofing because of its RANZ membership. At the same time, RANZ could not assist the Complainant in resolving a dispute because Newton Roofing was not a member. Putting the complaint to one side, the Respondent obtained the benefit of portraying Newton Roofing as a RANZ member when it was not. The Board does not know if this has benefited the Respondent. However, the mere fact that he wanted to portray that he was a member shows that he saw some value in it. The other side of this is that there was the potential for the RANZ brand to be damaged by a business that falsely represented that it was a member. In those circumstances, the has decided that the Respondent has conducted himself in a disreputable manner.

Has the conduct brought the regime into disrepute?

[55] The Respondent has brought the regime into disrepute.

Board Decisions

[56] The Respondent has:

(a) Breached section 317(1)(b) of the Act; and

(b) Breached section 317(1)(i) of the Act;

in the manner set out above.

Penalty, Costs and Publication

[57] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act[ii], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

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

Penalty

[59] 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.[21] It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:[22]

(a) protection of the public and consideration of the purposes of the Act;[23]

(b) deterring other Licensed Building Practitioners from similar offending;[24]

(c) setting and enforcing a high standard of conduct for the industry;[25]

(d) penalising wrongdoing;[26] and

(e) rehabilitation (where appropriate). [27]

[60] 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[28] and applying the least restrictive penalty available for the particular offending.[29] In all, the Board should be looking to impose a fair, reasonable, and

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[21] 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]

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

[23] Section 3 Building Act

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

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

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

[27] *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

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

[29] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty [30] that is consistent with other penalties imposed by the Board for comparable offending.[31]

[61] 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.[32]

[62] There are two disciplinary findings. Dealing with the negligence finding first, the Board adopted a starting point of a fine of $3,000, an amount which reflects the seriousness of the offending, is consistent with other penalties imposed by the Board and creates a deterrence to others. There are no aggravating factors. The Respondent has apologised and accepted responsibility. Those are mitigating factors. The fine is reduced to $2,000.

[63] Turning to the disrepute finding, it was at the lower end of the scale of offending, and the Respondent has apologised. Taking those factors into account, the Board decided that a censure would suffice. A censure is a public expression of disapproval.

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.[33]

[65] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings[34]. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case[35].

[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. The current matter was moderate. Adjustments are then made.

[67] Based on the above, the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry. In setting the costs order, the Board noted that the matter proceeded as a consolidated hearing and that whilst the normal order for a matter of this nature would be $3,500, it was appropriate to reduce the costs to $2,000.

[30] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[31] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354
[32] 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.
[33] *Collie v Nursing Council of New Zealand* [2001] NZAR 74
[34] *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011
[35] *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.

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,[36] 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.[37] 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.[38]

[70] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

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

Penalty: **Pursuant to sections 318(d) and 317(1)(f) of the Building Act 2004, the Respondent is censured and ordered to pay a fine of $2,000**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (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(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.

[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.

[36] Refer sections 298, 299 and 301 of the Act
[37] Section 14 of the Act
[38] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 21st day of May 2024.

Mr M Orange
Presiding Member

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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.*