

Before the Building Practitioners Board

	BPB Complaint No. CB26286
Licensed Building Practitioner:	Craig John Rogers (the Respondent)
Licence Number:	BP104173
Licence(s) Held:	Carpentry and Site AoP 2

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	Christchurch
Hearing Type:	In Person
Hearing Date:	12 March 2024
Decision Date:	18 March 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

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 not** committed a disciplinary offence.

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Contents

Summary	2
The Charges	3
Evidence	3
Negligence or Incompetence	4
Has the Respondent departed from an acceptable standard of conduct?	4
<i>Building Consent Changes</i>	4
<i>Building Work</i>	9
Was the conduct serious enough?.....	10
Has the Respondent been negligent or incompetent?	11
Contrary to a Building Consent	11
Has the Respondent breached section 317(1)(d) of the Act	11
Board’s Decisions	12

Summary

- [1] The Respondent built a new residential home. During the build, he decided to use substituted building products for the roof and wall cladding and for a deck balustrade. He also completed work on roof eave and garage door flashings and on window jamb sealing, which differed from what was in the Building Consent. The Respondent did not seek design directions when making the changes. He did not seek the Building Consent Authority (BCA) authorisation for the changes.
- [2] The issue for the Board was whether the Respondent had been negligent or incompetent during the build or he had carried out building work contrary to the Building Consent. In respect of both allegations, whilst the Board found that the Respondent’s conduct did not reach acceptable standards, the conduct did not reach the threshold for a disciplinary finding.
- [3] The Respondent is, however, cautioned as regards his conduct. In future, he must adhere to the provisions of a Building Consent and take note of and apply the Specification contained within it. If departures from the Building Consent are envisaged, then a process to manage those changes must be used, and approval from the BCA must be obtained in advance of the building work.

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], may have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
 - (b) carried out or supervised building work that does not comply with a Building Consent contrary to section 317(1)(d) of the Act.
- [6] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, the Board would be inquiring into:
- (a) whether the correct Building Consent processes were used for changes to wall and roof cladding materials and deck balustrade system;
 - (b) the quality and compliance of building work on the following building elements:
 - (i) roofing eave flashings;
 - (ii) garage door head flashings;
 - (iii) sealing of window joinery and the methodology of window installation.

Evidence

- [7] 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.
- [8] The Respondent was engaged through his company to build a new residential dwelling for the Complainants. The Respondent both worked on and supervised the build together with his employees, who were experienced builders. The build has been substantially completed, and the contractual relationship between the Respondent and the Complainants has come to an end, and they are in dispute. The build is yet to pass a final inspection. The reasons include the issues that are under investigation.

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

Negligence or Incompetence

[9] 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.

Has the Respondent departed from an acceptable standard of conduct?

[10] 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

[11] There were two general areas of investigation. The first relates to Building Consent changes. The second relates to the quality and compliance of three aspects of the build. Each is dealt with below.

Building Consent Changes

[12] The Respondent introduced the Complainants to the architectural designer who developed the Building Consent application; a Licensed Building Practitioner with a Design Area of Practice 2 Licence (the Designer). The Complainants worked directly with the Designer. The Designer did not provide observation services during the build.

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

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

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

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

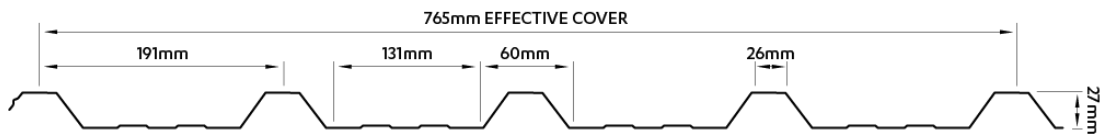
⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously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

⁹ Section 17 of the Building Act 2004

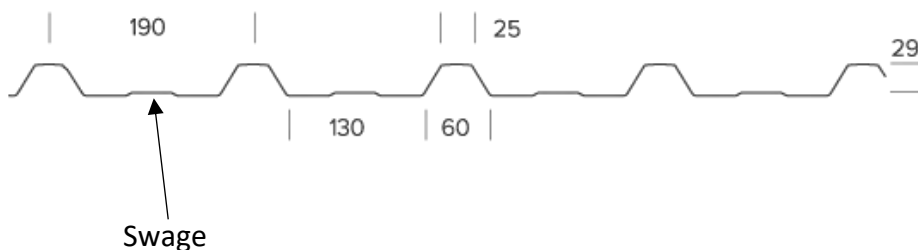
¹⁰ Section 40(1) of the Building Act 2004

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.

- [13] The Respondent worked with the Complainants during the preliminary design phase. The engagement included assisting with product choices and preliminary pricing from concept designs.
- [14] A Building Consent was issued based on the Designer’s design. The Building Consent included a specification that stipulated the use of specific products (the Specification). Relevant to this matter, the Building Consent specified brand-named roof and wall cladding materials with specific profiles. For the roof, Steel and Tube Plumbdeck five-ribbed trapezoidal cladding was specified. For wall cladding, ITI Timberspec Cedar weatherboards with P58 profile. A Metro performance cantilevered balustrade with AP65 intermediary posts was also specified. The specified products were not installed. The Respondent supplied and installed substituted products. In general, the Respondent submitted that he installed the products that he had priced during the preliminary design phase, which were products supplied by his normal suppliers. He did not reference the Building Consent Specification. He took the approach that the Specification did not have to be strictly complied with.
- [15] The roof cladding was changed from Steel and Tube Plumbdeck five-ribbed to Metalcraft T Rib. The Designer gave evidence that a trapezoid product with a colour steel coil was specified to meet site conditions and construction requirements. The Steel and Tube Plumbdeck five-ribbed trapezoidal cladding profile is shown below:

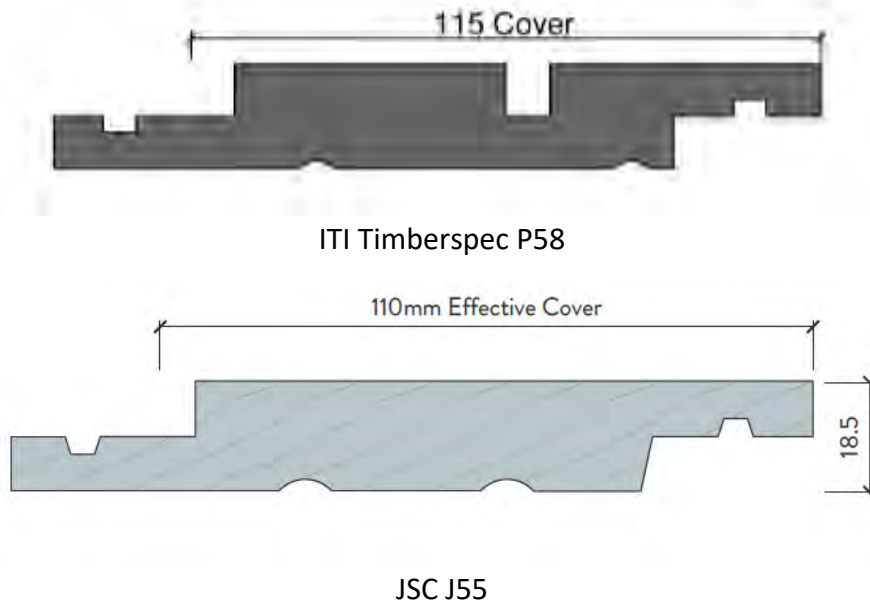


- [16] The Respondent installed Metal Craft T Rib. It is also a trapezoid product. Its profile is shown below:

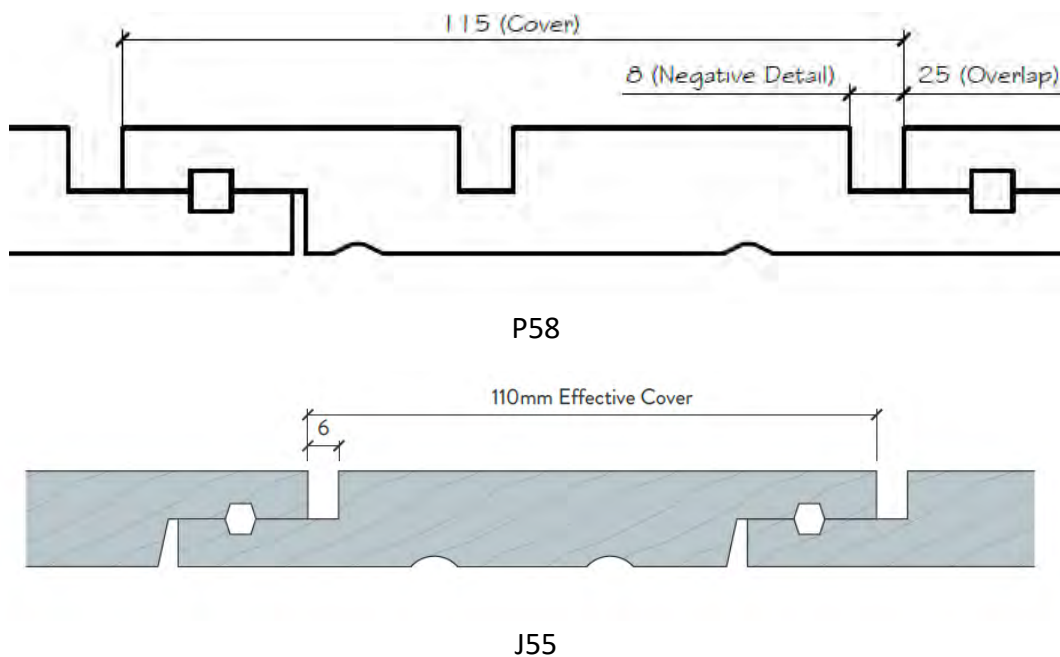


- [17] The effective difference between the two products is that the T-Rib product only has one swage, and the installed product has a 2mm deeper trough. A swage is a raised rib used to minimise distortion.

- [18] The wall cladding was changed to JSC cedar weatherboards with a J55 profile. The products have similar amounts of cover between laps but have different groove profiles. The widths and profiles are shown below:



- [19] The Designer gave evidence that he had chosen the P58 product because the central groove gave the appearance that there were two boards, not one, and that the design outcome could be achieved without having to have as many boards or joints, with the added benefit of reducing labour fixing costs. The difference can be seen below:



- [20] The Respondent's evidence was that he had taken the Complainants to the Hermpac showroom and that they had taken a sample of the HP55 product away with them. On that basis, he believed they had chosen that product. The Respondent gave evidence that the JSC vertical cedar profile J55 was identical to the Hermpac HP55 vertical cedar profile chosen. JSC products were available through his merchant. The Complainants stated that they had not discussed the choice of weatherboards with the Designer.
- [21] The balustrade was changed from a Metro Glass system to a Juralco system supplied by Stake Glass. The systems were similar, but a different fixing method was used. The change was necessitated by fixing to the 180 PFC edge beam and the installation of the interior linings prior to the exterior cladding. The Respondent stated that he dealt with an engineer in relation to the change and that he had documentation to verify the engineer's instructions. He provided copies of the engineer's instructions dated 20 October 2021.
- [22] All building work must comply with the Building Code¹² and be carried out in accordance with the Building Consent issued.¹³ Once a Building Consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the Building Consent. The extent of the change to the Building Consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a Building Consent cannot continue if an amendment is applied for.
- [23] The Board has viewed the product changes as product substitutions that required minor variations. Guidance documentation issued by the Ministry of Business Innovation and Employment (MBIE)¹⁴ notes that the Building Consent Authority (BCA) should be notified of changes:

Notify the Building Consent Authority promptly of your intent to substitute a product

If a product is substituted without approval from a Building Consent Authority (BCA), then you may encounter a problem when the BCA goes to issue the code compliance certificate (CCC), as the building work will not match what is on the consent.

If you are thinking about substituting a product you need to:

- *Consider the legal context; for example, understand your responsibilities under the Building Act 2004 (the Building Act) or as stated in your contract with the owner.*

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ Issued under section 175 of the Act.

- *Consider the broader implications of using a different product to that specified, including whether it is fit for the same purpose and still meets the owner's needs.*
- *Implement any changes; for example, if substituting the product requires an amendment to a Building Consent.*

[24] The guidance documentation goes not to note:

Product substitutions (using different products to those specified in the original Building Consent application) will fall into one of the following categories:

- *those that can be done outright as they do not involve building work (e.g. changing skirting or decorative mouldings, or using wallpaper instead of paint); or*
- *minor variations, which need to be approved first by the BCA and then recorded on the consent file (these may require updated drawings or new technical information to be provided); or*
- *an amendment to the Building Consent will be required for more substantial changes.*

[25] There were no apparent issues regarding the compliance of the products with the Building Code. It is for that reason that the Board has viewed the changes as product substitutions, which had to be approved by way of minor variation applications.

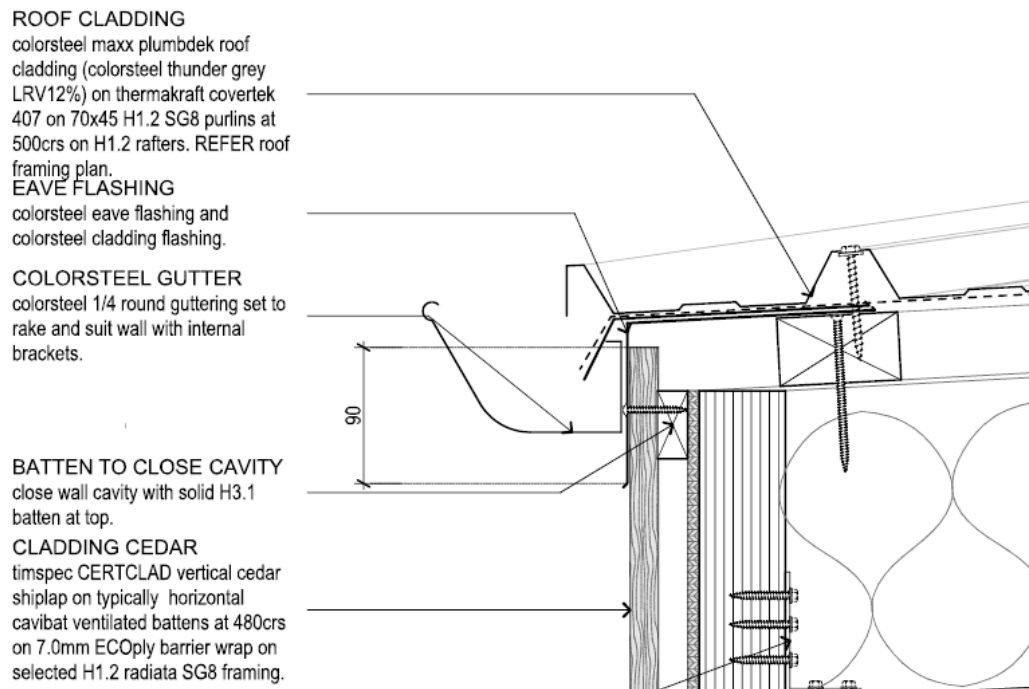
[26] What is in question is whether the Respondent followed any form of process prior to the products being substituted for those that were consented. The Respondent did not consult with the Designer or engage with the BCA prior to the products being substituted. He did not seek any minor variations for the changes, which are still outstanding.

[27] It was clear to the Board, from the Respondent's answers to its questions, that the Respondent was not aware of the products that had actually been specified or that he had to follow any sort of a process if changes to the specified products were made. He worked off what he had originally priced, utilised his normal suppliers, and did not refer to the Specification when carrying out the build.

[28] The Board considers that a competent Licensed Building Practitioner should be aware of the processes relating to product substitutions, particularly the need to obtain BCA approval before making them. In failing to adhere to the Building Consent Specification and failing to follow a Building Consent change process, the Board finds that the Respondent has departed from what the Board considers to be an accepted standard of conduct and has been negligent.

Building Work

- [29] There were three matters under investigation: roof eave flashings, garage door-head flashings and window joinery installation.
- [30] With each, the Respondent departed from what was consented. The most serious was the failure to install a colour steel cladding flashing, shown in the following detail copied from the consented plans. In this respect, the Board heard evidence that the Respondent was not sure whether the flashing was installed or not, but that he did roof drip edge flashing. The Board, on the basis of the evidence received, found that it had not been installed.



- [31] The Respondent gave evidence that the flashing could have been installed after the cladding had been installed. The Designer stated his design intention was to provide additional protection to an exposed area in an extra-high wind zone. The flashing was, in essence, to act as a fascia. The Designer stated the flashing should have been installed as part of the roof cladding installation and that the weatherboards should have been slipped underneath the flashing.
- [32] With the garage door head flashing detail, the Respondent stated that there were stop ends in place to the head flashing, and photographs confirmed the same. The Respondent stated that he used the JSC corner moulding detail to return the cladding into the garage door jamb. The vertical cedar above the head flashing was notched down close to the head flashing in order to provide greater protection. He did not discuss the change with the Designer.

- [33] With respect to the windows, the consented foam bond breaker sealant was not used on the exterior of the windows. The Respondent stated he was going to use silicone and that the foam was not used because the gap was too tight, and the foam would have distorted when weatherboards were installed. Again, the Respondent did not consult over the change. The Board noted that ordinarily, windows would be temporarily installed so that they could be moved out to install the cladding and foam before being moved in and fixed. However, because the internal plasterboard linings had been installed before the cladding, that was not possible.

Was the conduct serious enough?

- [34] The main issue for the Board, and the conduct with regard to which the Board has decided the Respondent has been negligent, is whether the failure to obtain minor variations for the building work was serious enough to warrant disciplinary action.

- [35] In *Collie v Nursing Council of New Zealand*,¹⁵ the Court stated, as regards the threshold for disciplinary matters:

[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.

- [36] In *Pillai v Messiter (No 2)*,¹⁶ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, the Court stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [37] Applying those tests, the Board has decided that a disciplinary finding with regard to the Building Consent allegations should not be made.

- [38] The Respondent should note that it was only by a small margin that the Board did not uphold the charge. The Respondent displayed a worrying disregard for the Specification that formed part of the Building Consent. A Specification is not a guidance document. It is a mandatory part of the Building Consent, and it must be adhered to. If changes are made, a process to ensure that change is approved and recorded by the BCA must be followed. The Respondent is cautioned as regards his future actions. The Respondent should note that any future infractions may result in disciplinary action.

- [39] Further, had the product substitution changes to the Building Consent impacted Building Code compliance, then the Board's decision would have been different.

¹⁵ [2001] NZAR 74

¹⁶ (1989) 16 NSWLR 197 (CA) at 200

[40] Finally, in making this decision, the Board notes that the changes resulted in the aesthetics of the building being changed, especially as regards the cladding. That is an important factor and one that is not to be taken lightly. It is a factor that can be dealt with through civil remedies. In the context of the disciplinary regime, however, it is not one that the Board can place a great deal of weight.

Has the Respondent been negligent or incompetent?

[41] The Respondent **has not** been negligent or incompetent.

Contrary to a Building Consent

[42] 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.¹⁷ As noted above, once issued, there is a requirement that the building work be carried out in accordance with the Building Consent.¹⁸

[43] 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.¹⁹ 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.²⁰ If it does not, then a disciplinary finding cannot be made.

[44] In this matter, because the Board has made the finding it has as regards seriousness with respect to negligence and incompetence, it follows that the Board must make the same finding on this allegation. The same cautions and warnings to the Respondent also apply to this allegation.

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

[45] The Respondent **has not** breached section 317(1)(d) of the Act.

¹⁷ Section 49 of the Act

¹⁸ Section 40 of the Act

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²⁰ *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".

Board's Decisions

[46] The Respondent has not committed a disciplinary offence.

Signed and dated this 28th day of March 2024



M Orange
Presiding Member

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.*