

## Before the Building Practitioners Board

	BPB Complaint No. CB26390
Licensed Building Practitioner:	Edward James Rusbridge (the Respondent)
Licence Number:	BP132553
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	21 May 2024
Finalised Draft Decision Date:	29 July 2024

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Ms K Reynolds, Construction Manager

#### 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)(a), (da)(ii) and (i) of the Act.

The Respondent's licence is cancelled for a period of six months, and he is ordered to pay costs of \$875. A summary of the decision will be published, and a record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary of the Board’s Draft Decision

[1] The Respondent was convicted of serious criminal offending and was sentenced to a period of imprisonment. The nature of the criminal charges and the penalties imposed meant that the Respondent had breached section 317(1)(a) of the Act,

which relates to committing criminal charges that reflect adversely on a person's fitness to carry out or supervise restricted building work.

- [2] The Board also found that the Respondent failed to provide a record of work on completion of restricted building work and that he had brought the licensing regime into disrepute. The disrepute finding related to taking funds and not completing the associated work and taking consent documents and retaining them without a right to do so.
- [3] The Board decided that it would be appropriate that the Respondent, who is not currently licensed, not be able to be licensed for a period of six months so that he can work under supervision or on building work that is not restricted and establish that he is a fit person to be licensed.

### The Charges

- [4] A complaint was made about the failure to provide a record of work on completion of restricted building work, and an allegation was made that the Respondent had brought the regime into disrepute. The Board, when it received and considered a Registrar's Report,<sup>1</sup> noted that the Respondent had stated that he was in prison. The Board resolved to investigate whether there had been a breach of section 317(1)(a) of the Act before it made a decision on what, if any, disciplinary charges it would further investigate. In this respect, the prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>2</sup>
- [5] A Criminal and Traffic History for the Respondent was obtained. Having considered it and the other evidence obtained as part of the complaint, the Board decided it would investigate whether the Respondent may:
- (a) have been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work contrary to section 317(1)(a) of the Act;
  - (b) in relation to building work at [OMITTED], have failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance

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<sup>1</sup> Under regulation 8(3) and 20(c) (in respect of Board Inquiries) of the Complaints Regulations, the Registrar must indicate whether regulation 9 or 22 apply.

<sup>2</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act;  
and

- (c) have 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 obtained an unethical financial gain by taking funds without an intention to complete the associated building work and that he may have taken compliance documents that he was not entitled to.

### **Draft Decision Process**

- [6] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [7] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> The Board may, however, depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.<sup>4</sup>
- [8] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside, and a hearing will be scheduled.

### **Evidence**

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [10] The Respondent was engaged to carry out alterations to a dwelling. The work was carried out under a building consent, and aspects of the work were restricted building work for which a record of work is required on completion. The full scope of contractual work was not completed by the Respondent, who did not carry out any work after 12 January 2022. Other contractors completed the work, and the Complainant sought a record of work from the Respondent so that she could obtain

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<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

a Code Compliance Certificate. He did not provide one. A complaint was then made about the non-provision. An allegation of disrepute was also made.

### **Section 317(1)(a) – Criminal Convictions**

[11] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent has been convicted, whether before or after he is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more. The second element of the disciplinary charge is whether the commission of that offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work.

#### The Convictions

[12] As noted, the Board obtained a Criminal and Traffic History. It disclosed an extensive history of criminal offending dating back to 1998. Included were multiple serious offences that carried periods of imprisonment of more than six months, and the Respondent has been sentenced to periods of imprisonment. The history also showed a pattern of the Respondent failing to comply with court orders.

[13] Multiple convictions in the Criminal and Traffic History meet the first criteria of being punishable by imprisonment for a term of more than six months. As such, the Board will consider the second element, the Respondent's fitness.

#### Fitness

[14] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person.

[15] The Supreme Court decision *New Zealand Law Society v Stanley*<sup>6</sup> is the leading case. It involved a person seeking to be admitted as a barrister and solicitor who had previous convictions and consideration of whether he was a fit and proper person. The decision noted:

*[35] The first point to note is the obvious one. That is, the fit and proper person standard has to be interpreted in light of the purposes of the Act.*

[16] The purposes of the Building Act include providing for the establishment of a licensing regime for building practitioners, and 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.<sup>7</sup> In furthering those purposes, the disciplinary regime was established, and more recently, a Code of Ethics has been introduced by Order in Council.<sup>8</sup>

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<sup>6</sup> [2020] NZSC 83

<sup>7</sup> Section 3 of the Building Act 2004.

<sup>8</sup> Building (Code of Ethics for Licensed Building Practitioners) Order 2021 which came into effect on 25 October 2022.

[17] The Supreme Court also noted that the fit and proper person evaluation is a forward-looking exercise and that it is a matter of undertaking an “evaluation as to the risks to the public or of damage to the reputation of the profession” if, in the Respondent’s case, he was to retain his licence.<sup>9</sup> The evaluation is an objective exercise in that the Board should not be influenced by sympathy for the Respondent,<sup>10</sup> and it is a protective exercise, not a punitive one.<sup>11</sup>

[18] The Supreme Court summarised the relevant principles as follows:

*[54] From this discussion, the relevant principles can be summarised in this way:*

- (a) The purpose of the fit and proper person standard is to ensure that those admitted to the profession are persons who can be entrusted to meet the duties and obligations imposed on those who practise as lawyers.*
- (b) Reflecting the statutory scheme, the assessment focusses on the need to protect the public and to maintain public confidence in the profession.*
- (c) The evaluation of whether an applicant meets the standard is a forward looking exercise. The Court must assess at the time of the application the risk of future misconduct or of harm to the profession. The evaluation is accordingly a protective one. Punishment for past conduct has no place.*
- (d) The concept of a fit and proper person in s 55 involves consideration of whether the applicant is honest, trustworthy and a person of integrity.*
- (e) When assessing past convictions, the Court must consider whether that past conduct remains relevant. The inquiry is a fact-specific one and the Court must look at all of the evidence in the round and make a judgement as to the present ability of the applicant to meet his or her duties and obligations as a lawyer.*
- (f) The fit and proper person standard is necessarily a high one, although the Court should not lightly deprive someone who is otherwise qualified from the opportunity to practise law.*
- (g) Finally, the onus of showing that the standard is met is on the applicant. Applications are unlikely to turn on fine questions of onus.*

[19] The Board also notes that whilst the Supreme Court stated that the onus is on the applicant to show that the fitness standard has been met, the Board considers,

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<sup>9</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [38]

<sup>10</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [39]

<sup>11</sup> *Ibid* [40]

within the context of a disciplinary matter, that it is for the Board to determine, on the balance of probabilities, whether the Respondent is or is not a fit person. Put another way, the Respondent does not carry the burden of proof.

### Consideration of Fitness

[20] The Respondent has not yet made a submission on fitness. He will be given that opportunity as part of the Draft Decision process and may call for a hearing for the matter to be determined.

[21] The Board, having reviewed the Criminal and Traffic History, noted that the Respondent has multiple violence, property, and drug convictions. As previously noted, the history also indicated a pattern of the Respondent failing to comply with court orders and sentences.

[22] An assessment of fitness is a forward-looking assessment taking into consideration conduct that occurred in the past. It is the Respondent's future fitness that must be assessed. In *Stanley*, the Supreme Court put it as:

*[45] ... the decision maker is essentially trying to assess whether the convictions remain relevant to whether the applicant meets the fit and proper person standard and, if so, to what extent the conduct remains relevant at the time of the current inquiry. The inquiry into relevance will commonly require consideration of the circumstances of the offending and of whether the applicant can be seen to have moved on in the sense of being either reformed or having undertaken steps towards rehabilitation. Alternatively, there may be other features of character which mean that the convictions should assume less relevance. That it is not always easy to draw the line emphasises the fact-specific nature of the inquiry.<sup>12</sup>*

[23] An assessment of fitness is not, however, an evaluation of a person's competence. The factors outlined in *Stanley* that must be considered are whether:

- (a) the Respondent can be entrusted to meet the duties and obligations imposed on a Licensed Building Practitioner;
- (b) the need to protect the public and to maintain public confidence in the Licensed Building Practitioner regime;
- (c) the risk of future misconduct or of harm to the Licensed Building Practitioner regime; and
- (d) whether the Respondent is honest, trustworthy and a person of integrity;

[24] Looking at those factors and taking into account the extent and seriousness of the Respondent's criminal history, the Board formed the view that the Respondent is not a fit person. The Board is not confident that the Respondent is a person who can be trusted to undertake the duties and obligations imposed on a Licensed Building

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<sup>12</sup> *New Zealand Law Society v Stanley* [2020] NZSC 83 at [45]

Practitioner, and the current complaint demonstrates that. It is also to be noted that the licensing regime now includes an obligation to comply with an extensive Code of Ethics. The Respondent's criminal history indicates that he would struggle to comply with it.

- [25] Further, given the nature and extent of the Respondent's criminal offending is such that the Board does not consider that the Respondent is honest, trustworthy or a person of integrity, and it considers there is a very real risk of future misconduct or harm to the Licensed Building Practitioner regime. There is a need to protect the public and maintain public confidence in the Licensed Building Practitioner regime, which the Board can achieve through a penalty order.
- [26] Accordingly, the Board finds that the second element of section 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work. The disciplinary offence has been committed.
- [27] The Board does, however, recognise that the Respondent may yet prove himself to be a fit person. For that reason, its penalty order will take that possibility into account.

#### Is the Respondent a fit person

- [28] The Respondent is not a fit person under the licensing regime. He **has** breached section 317(1)(a) of the Act.

#### **Failure to Provide a Record of Work**

- [29] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>13</sup>
- [30] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>14</sup> unless there is a good reason for it not to be provided.<sup>15</sup>

#### Did the Respondent carry out or supervise restricted building work

- [31] The Respondent was engaged to carry out and/or supervise building work on an alteration to a residential dwelling under a building consent. His work included work on the primary structure and external moisture management systems, both of which are restricted building work because they form part of the primary structure and/or external moisture management system of a residential dwelling.<sup>16</sup>

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<sup>13</sup> Section 88(1) of the Act.

<sup>14</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>15</sup> Section 317(1)(da)(ii) of the Act

<sup>16</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011



Was the restricted building work complete

[32] The Respondent did not complete all of the contracted work. His involvement came to an end in or about August 2021 when he abandoned the contract. Other contractors completed the building work.

[33] In *Ministry of Business Innovation and Employment v Jeffrey Bell*,<sup>17</sup> the High Court stated:

*In my view the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work.*<sup>18</sup>

[34] The Respondent had completed his work. There was no further work that he could undertake, as it had been completed by others. As such, the restricted building work was complete.

Has the Respondent provided a record of work

[35] A record of work has not been provided. The Respondent has stated that he will provide one when he is released from prison.

[36] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations. Because he did not provide one in or about August 2021, when he was in a position to do so, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

Was there a good reason

[37] There are no known good reasons for the failure to provide a record of work. Again, the Respondent can raise any good reasons that may have existed when he responds to the Draft Decision.

Did the Respondent fail to provide a record of work

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

**Disrepute**

[39] 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<sup>19</sup>;

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<sup>17</sup> [2018] NZHC 1662

<sup>18</sup> Ibid at paragraph [50]

<sup>19</sup> *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

- honest mistakes without deliberate wrongdoing<sup>20</sup>;
- provision of false undertakings<sup>21</sup>; and
- conduct resulting in an unethical financial gain<sup>22</sup>.

[40] The Courts have consistently applied an objective test when considering such conduct.<sup>23</sup> 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.<sup>24</sup>

[41] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,<sup>25</sup> 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.<sup>26</sup>

#### The conduct complained about

[42] The Complainant alleged that the Respondent had invoiced her for cladding work in June 2021 and that she had paid the invoice. Notwithstanding the payment, the Respondent did not carry out the associated building work and removed critical documents from the site. The Complainant stated:

*Our builder failed to complete the work leaving suddenly during covid. We paid an amount of \$6730.72 in June 2021 but he never showed up again. Leaving the work unfinished. He also took with him the "site book" containing all the documentation. We attempted to locate Jimmy (Edward) Rusbridge but have been unable to locate him.*

*We have just applied for CCC and have passed the final inspection (completed on 30/08/2023). However we are missing the documentation.*

[43] The Respondent has received funds but has not applied them for the purpose for which he was paid. That amounts to an unjust enrichment. He has not engaged with the client to advise why he has not completed the work he was paid for or made any attempt to repay the funds. The Complainant has had to pay another contractor to complete the work.

[44] The Respondent has also taken documents from the building site that do not belong to him. He did not have the right to take or retain them. In doing so, he has inconvenienced the Complainant and made obtaining a Code Compliance Certificate more difficult.

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<sup>20</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>21</sup> *Slack, Re* [2012] NZLCDT 40

<sup>22</sup> *Collie v Nursing Council of New Zealand* [2000] NZAR 7

<sup>23</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>24</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>25</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

<sup>26</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

[45] The Board considers that the above conduct is disreputable in that it would, from an objective standpoint, lower the reputation of Licensed Building Practitioners.

Was the conduct serious enough

[46] The conduct is at the lower end of what has come before the Board, but in the absence of any explanation from the Respondent, it is considered to be serious enough to warrant disciplinary action. It is conduct that should be sanctioned to ensure the Respondent and others are deterred from such conduct.

Has the conduct brought the regime into disrepute

[47] The Respondent has brought the licensing regime into disrepute.

**Board's Decision**

[48] The Respondent has breached the following disciplinary provisions:

- (a) Section 317(1)(a) of the Act;
- (b) Section 317(1)(da)(ii) of the Act; and
- (c) Section 317(1)(i) of the Act.

**Penalty, Costs and Publication**

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

[50] The matter was dealt with on the papers. Included was information relevant to penalty, costs, and publication. 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

[51] The Board has the discretion to impose a range of penalties.<sup>ii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>27</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>28</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>29</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>30</sup>

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<sup>27</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

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

<sup>29</sup> Section 3 Building Act

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

- (c) setting and enforcing a high standard of conduct for the industry;<sup>31</sup>
- (d) penalising wrongdoing;<sup>32</sup> and
- (e) rehabilitation (where appropriate).<sup>33</sup>

- [52] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>34</sup> and applying the least restrictive penalty available for the particular offending.<sup>35</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>36</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>37</sup>
- [53] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.<sup>38</sup>
- [54] The Respondent is not presently licensed. He was at the time the conduct occurred. He may still be incarcerated.
- [55] In this matter, the Board adopted a starting point of a cancellation of the Respondent's licence because of the seriousness of the offending. Cancellation is the most restrictive penalty the Board can impose. A cancellation or a suspension could provide the Respondent with an opportunity to reflect and can be rehabilitative.<sup>39</sup>
- [56] Cancellation would be consistent with the comments of the Full Court of the High Court in *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins*,<sup>40</sup> where the Full Court stated professional disciplinary penalties are primarily directed at two purposes: public protection (for example, by preventing repetition of the misconduct by the practitioner through suspension or strike-off); and maintaining the reputation of, and public confidence in, the profession by setting appropriate standards.<sup>41</sup> The Court noted a previous Full Court had said that to "maintain public confidence in the profession, members of the public need to have a general understanding that the legal profession, and the Tribunal members

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<sup>31</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>32</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>33</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

<sup>35</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>36</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

<sup>38</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>39</sup> *Shehata v Director of Proceedings* [2019] NZHC 615 at [75].

<sup>40</sup> *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 1709, [2022] 3 NZLR 452.

<sup>41</sup> At [45]–[46].

that are set up to govern conduct, will not treat lightly serious breaches of standards".<sup>42</sup>

- [57] The Board also considers that a period of time is required following the Respondent's return to the workforce for him to establish that he is a fit person to hold a licence once again and to ensure the public is protected in the interim period. On that basis, and taking into account the seriousness of the Respondent's criminal offending, the Board has decided that the imposition of a six-month period from the issue of this decision within which the Respondent cannot be licensed is appropriate.
- [58] The Respondent should note that, over the period, he will be able to work in the building industry. A licence is only required where a person is carrying out or supervising restricted building work. The Respondent will, without a licence, be able to carry out building work that is not restricted building work, which covers a large scope of work, and he will be able to carry out restricted building work under the supervision of a licenced person.

### Costs

- [59] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>43</sup>
- [60] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>44</sup>. The starting point can then be adjusted up or down with regard to the particular circumstances of each case<sup>45</sup>.
- [61] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderately complex. Adjustments are then made.
- [62] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$875 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a moderately complex matter that has been dealt with at an in-person hearing way of a Draft Decision. It is significantly less than 50% of actual costs.

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<sup>42</sup> At [46] citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, [2011] NZAR 639 (HC) at [34].

<sup>43</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>44</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>45</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

## Publication

- [63] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>46</sup> and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [64] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>47</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>48</sup>
- [65] 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**

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 6 months from the date this decision is issued.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$875 (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, the Respondent will be named in this decision, which will be published on the Board's website.**

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<sup>46</sup> Refer sections 298, 299 and 301 of the Act

<sup>47</sup> Section 14 of the Act

<sup>48</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [67] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### **Submissions on Draft Decision**

- [68] The Board invites the Respondent to:
- (a) provide further evidence for the Board to consider; and/or
  - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [69] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **26 July 2024**.
- [70] If submissions are received, then the Board will meet and consider those submissions.
- [71] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [72] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

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

- [73] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [74] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 July 2024**.
- [75] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

### **Right of Appeal**

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

Signed and dated this 5<sup>th</sup> day of July 2024



**M Orange**  
Presiding Member

**This decision and the order herein were made final on 29 July 2024 on the basis that no further submissions were received**

Signed and dated this 14<sup>th</sup> day of August 2024



**M Orange**  
Presiding Member

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**<sup>i</sup> 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.”*

**<sup>ii</sup> 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:*



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- (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.*

iii **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.*