

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01167

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[Omitted], Licensed Building Practitioner No. BP [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 25 March 2015 in respect of [omitted], Licensed Building Practitioner (the Respondent).

1.1 The complaint alleged the Respondent has, in relation to building work in respect of [omitted]:

- (a) breached the code of ethics prescribed under section 314A of the Act (s 317(1)(g) of the Act); and
- (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 (s 317(1)(i) of the Act).

1.2 The Respondent is a Licensed Building Practitioner with a Carpentry issued 23 April 2014.

1.3 The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).

1.4 The following Board Members were present at the hearing:

Dianne Johnson	Board Member (Presiding)
Brian Nightingale	Board Member
Mel Orange	Board Member
Robin Dunlop	Board Member

1.5 The matter was considered by the Board in [omitted] on 7 October 2015 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

1.6 The following other persons were also present during the course of the hearing:

Alistair Dumbleton	Registrar's Representative
Gemma Lawson	Board Secretary

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[Omitted]	Respondent
[Omitted]	Witness for the Respondent
[Omitted]	Witness (summonsed by Respondent)
[Omitted]	Complainant

Members of the public were not present.

- 1.7 No Board Members declared any conflicts of interest in relation to the matters under consideration.

2 Board Procedure

- 2.1 The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- 2.2 On 24 July 2015 the Registrar of the Board prepared a report in accordance with regulations 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not to proceed with the complaint.
- 2.3 On 13 April 2015 the Board considered the Registrar’s report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent has 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 (s 317(1)(i) of the Act).
- 2.4 On 9 September 2015 at 9 a.m. a pre-hearing teleconference was convened by Dianne Johnson. The Respondent and Registrar’s Representative were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 9.15 a.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The complaint relates to actions taken by the Respondent in respect of a commercial dispute between the Respondent and the Complainant and whether those actions brought, or were likely to bring, the licensing regime into disrepute.

5 Evidence

- 5.1 The Complainant engaged the Respondent to construct a deck and ramp on the back of a home she owned. A quote was provided on 10 February 2015 for \$12,382 which included a term that a 30% deposit was required on acceptance – with the balance payable on completion. The quote form was very simplistic and did not contain any other terms or conditions. No evidence was given of there being any others terms of contract that were agreed to.

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- 5.2 A deposit of \$4,000 was paid on 14 February 2015 and the work commenced soon thereafter. On 17 February 2015 the Respondent produced a revised quote of \$11,888 which was accepted. The payment and contract terms remained the same. On 1 March 2015 the complainant, at the request of the Respondent, agreed to make an additional payment of approximately \$3,500.
- 5.3 The Complainant worked in [omitted] and, on her evidence, she spent approximately 60% of her time in residence there. The home to which the complaint relates was occupied by various family members. In her absence, she appointed her sister's ex-partner [omitted] who resided in the home to co-ordinate the work with the Respondent.
- 5.4 During the construction of the deck the Respondent began to have concerns over the Complainant's credit history and whether or not he would be paid the balance of the contract price. These concerns came about from comments alleged to have been made by the Complainant's father who resided at the home and other contractors who had worked for the Complainant. At the hearing the Complainant's father, who was called as a witness, refuted that he had made any such comments. No other evidence of a poor credit history was provided by the Respondent and the Complainant denied the allegations when they were put to her by the Respondent. The Complainant further stated that she had left two signed cheques with Terry to pay for the balance of the work. She explained that the two cheques were to allow for an amount to be retained pending satisfaction that the work had been carried out correctly. The cheques were shown to the Board. The Respondent stated he had no knowledge of them and would not have taken the action he subsequently did if he had been advised of them.
- 5.5 The Respondent submitted that he was not, at the time of entering into contract, aware that the Respondent was not living full time in New Zealand and that if he had known he would not have extended credit terms as he had no ability to enforce a Disputes Tribunal order against someone who did not live in New Zealand. He considered she had an obligation to make him aware of the fact that she lived and worked in [omitted].
- 5.6 On the basis of these concerns he demanded payment in full or at least for the funds to be available in New Zealand before he would complete the work he had contracted to do. The Complainant alleged that, on one occasion when she was in New Zealand, he became threatening to her and threatened her property when demanding that his payment terms be met. The Respondent countered that the Complainant demanded clearance of rubble on the site prior to paying and he considered this was an extra.
- 5.7 Matters came to a head on Sunday 22 March 2015 when the Respondent and his wife attended the site with the intention of removing materials as a result of the Complainant not paying in full as he had demanded. The Respondent acknowledged that the deck was not complete at this point in time. Balustrades needed to be fixed and a box seat constructed. He further acknowledged that there was no realisable value in the portion of the deck he removed.
- 5.8 The Complainant was in [omitted] when this occurred but was on the phone with family members during the event. She recounted her recollections of what she heard and was told of the events. She claimed the Respondent was threatening and stated he would destroy the deck he had built unless he was paid \$2,000 in cash. Her father who was at the property stated he felt threatened, went inside the property and called the police. The police attended but considered it a civil matter. The Respondent

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refuted the Complainant's version of events but agreed that he had gone to the property with the intention of obtaining payment and that if he did not get it then he was going to dismantle part of the deck. He and his wife said they were not abusive or threatening.

- 5.9 The Complainant and her father stated that the Respondent then used a chainsaw to cut part of the ramp to the deck off and remove it. Photographs were entered into evidence of the deck before and after the partial removal of the ramp. These showed part of the ramp had been sawn off approximately 200-300 out from the building and that posts, joists and decking had been removed from a portion of it.
- 5.10 In support of the complaint email correspondence was provided which included mention by the Respondent that he would dismantle and remove parts of the deck if he was not paid in full for his work.

6 Board's Conclusion and Reasoning

Disrepute – Legal Principles

- 6.1 The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents.
- 6.2 The Board has also noted the Regulatory Impact Statement issued by the Department of Building and Housing. It considered the provision was needed to catch "poor behaviour" rather than incompetence. It included the example the "Fair-Go" type complaints where a builder had a pattern of taking deposits [from] the elderly for building work but never turns up to complete the job. Whilst this provides the Board with some guidance it is required to apply the principles of statutory interpretation and to follow previous court decisions.
- 6.3 The Board considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed builder. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*¹ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- 6.4 Similarly in a determination of the *Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants*², convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- 6.5 Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary

¹ [2013] NZAR 1519

² 24 September 2014

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defines disrepute as "the state of being held in low esteem by the public"³ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*⁴ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*⁵

- 6.6 As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions⁶;
 - honest mistakes without deliberate wrongdoing⁷;
 - provision of false undertakings⁸; and
 - conduct resulting in an unethical financial gain⁹.
- 6.7 It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed person is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

Board's Findings – Bringing the Regime into Disrepute

- 6.8 The Board notes that it is not able to determine contractual matters or commercial disputes between the parties. However, in so far as the contractual dispute and the conduct of a licenced person has or is likely to bring the regime into disrepute, it can hear the matter.
- 6.9 In this instance the matters between the parties leading up to the deck removal were largely contractual in nature. What brought the Respondent's conduct into question, however, were his actions in destroying and removing part of the deck when his payment demands were not met.
- 6.10 Prior to dealing with this, though, the Board notes the evidence as regards threatening or abusive behaviour by the Respondent was not conclusive and as such that alleged conduct has not formed part of the Board's decision.
- 6.11 What was clear was that the Respondent attended the Complainant's home with the intention of seeking payment by way of using threats of damaging and or removing

³ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

⁴ [2012] NZCA 401

⁵ [2012] NZAR 1071 page 1072

⁶ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

⁷ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁸ *Slack, Re* [2012] NZLCDT 40

⁹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

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the deck or parts of it and that when he did not receive the payment he demanded he proceeded to do just that.

- 6.12 The Respondent's actions need to be considered in light of the contractual relationship. The Complainant had paid the required deposit, had made an additional voluntary payment and was entitled to retain the balance until such time as the work was complete. This is what the parties had agreed.
- 6.13 The contract did not contain any form of a retention of title clause which would have allowed the Respondent to reclaim materials in the event of non-payment (noting that there was no evidence of a contractual payment not having been made).
- 6.14 The Respondent has, on the basis of his suspicions as to credit worthiness of the Complainant, sought to vary the payment terms. To be effective the Complainant would have had to of agreed to such a variation. No such agreement was forthcoming so the original terms remained; payment in full on completion.
- 6.15 The Respondent therefore had no contractual right to demand full payment prior to completion and no contractual right to remove and take possession of parts of the deck which, at the time, were fixed to the Complainant's property.
- 6.16 Turning then to the actions taken by the Respondent which, on his own evidence, were not financially motivated, the Board considers that such deliberate destruction of property without any right to do so is conduct which brings, or is likely to bring, the regime under the Act for licensed building practitioners into disrepute.
- 6.17 Finally, the Board notes that the Respondent could have taken contractual steps to protect him from risks of non-payment at the outset of the contractual relationship and could have carried out due diligence at that point. The Board also notes that if the Complainant had defaulted on payment (which she did not) then there would have been various lawful avenues available to the Respondent to seek recovery.

7 Board Decision

- 7.1 The Board has decided that Respondent has conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act) and should be disciplined.

8 Disciplinary Penalties

- 8.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.
- 8.2 The Board invites the Respondent to make written submissions on the matter of possible disciplinary penalties, up until close of business on 2 November 2015. Such submissions may include information on his personal and financial circumstances.

9 Costs

- 9.1 Under s 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board's the inquiry.
- 9.2 The Board, therefore, is prepared to receive written submissions from the Respondent on the matter of payment of costs up until close of business on 2

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November 2015. Such submissions may include information on his personal and financial circumstances.

10 Publication of Name

- 10.1 Pursuant to s 318(5) of the Act, the Board may publicly notify any disciplinary action taken against a Licensed Building Practitioner in any way it thinks fit.
- 10.2 The Board invites the Respondent to make written submissions on the matter of publication by 4 p.m. on 2 November 2015.

11 Right of Appeal

- 11.1 The right to appeal Board decisions is provided for in s 330(2) of the Actⁱⁱ.

Signed and dated this 15th day of October 2015

Dianne Johnson
Presiding Member

ⁱ 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."*

ii **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.