

Before the Building Practitioners Board

	BPB Complaint No. CB 25972
Licensed Building Practitioner:	Philip Bary (the Respondent)
Licence Number:	BP 101804
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	11 August 2022
Final Decision date:	25 November 2022
Board Members Present:	
	Mrs F Pearson-Green, LBP, Design AoP 2 (Presiding)
	Ms J Clark, Barrister and Solicitor, Legal Member
	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)(da)(ii) of the Act.

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Summary of the Board’s Final Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

- [2] On 11 August 2022, the Board received a Registrar’s Report in respect of a Complaint about the conduct of the Respondent.
- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10, the Board is required to hold a hearing.
- [5] 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 is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling

¹ Clause 27 of Schedule 3

legislation². As such, it may 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.

- [6] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board did, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, it issued a draft Board decision. The Respondent and/or Complainant were provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directed, or the Respondent requested an in-person hearing, then the Board advised that one would be scheduled.
- [8] The Respondent made a submission and provided further evidence on 19 September 2022. The Board noted his disagreement with the draft decision and decided to proceed to an in-person hearing. The Draft Decision was set aside and a Notice of Proceeding was issued.
- [9] On 25 October 2022, the Respondent emailed questioning the need for an in-person hearing. He was asked if he would prefer that the matter be dealt with on the papers and subsequently agreed to that process.
- [10] On 7 November 2022, a Board Minute was issued with directions, which included that both the Complainant and the Respondent could provide further evidence and make submissions prior to the board making a decision.
- [11] Both the Complainant and the Respondent provided further submissions.

Disciplinary Offence Under Consideration

- [12] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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 with section 88(1) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

- [13] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [14] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁵ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [16] The Respondent was engaged to carry out building work, being alterations to a dwelling in Blenheim, under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent’s building work started on or about 27 July 2020 and came to an end on or about 22 December 2020. A record of work dated 11 April 2022 was on the Territorial Authority file when it was obtained on 16 June 2022.
- [17] The Respondent undertook foundation, framing of subfloor and walls, roofing to an extension, cladding to walls and roofing, damp, and waterproofing work on the Complainant’s home, commencing in July 2020 and leaving the site in December 2020. The Respondent advised the Marlborough District Council on 26 September 2021 that he was no longer finishing the contract. (Document 2.1.22, Page 32 of the Board’s file).
- [18] By emails dated 8 and 14 February 2022, the Complainant requested the record of work from the Respondent. (Documents 2.1.24-2.1.25, Pages 34 and 35 of the Board’s file). The Respondent replied by emails dated 9 February 2022 and an unknown date - *“I am only happy to give you sign off for the work I have done on your home, but as you have stated in one of your emails the job is in dispute so until it is settle I am not happy to sign anything for MDC,”* and *“...I am happy to supply the memorandum to you once the dispute over payment is settle,...”* (Document 2.1.24, Page 34 of the Board’s file).

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [19] By letter dated 16 February 2022, the Marlborough District Council also requested the Respondent's record of work. (Document 2.1.21, Page 31 of the Board's file).
- [20] In his response to the Investigator, the Respondent stated, "*it was never my intent not to issue a memorandum for the work that was carried out...*" (Document 2.2.3, Page 40 of the Board's file). He said further that it was not until he received an email from a senior building officer and advice from his solicitor that he was aware that he needed to provide the record of work even though "*it wasn't finish and money was held back*". The Respondent advised that the record of work was provided to the homeowner and to the Council on 11 April 2022.

Further Evidence and Submissions Received

- [21] Following the Board issuing a Draft Decision, it received a submission from the Complainant dated 7 November 2022, which in part stated -

"It was not until I lodged a complaint and the BPB intervened that he saw fit to supply us with the requested ROW. The ROW was needed to ensure our house was insured and COC could be issued. Mr. Bary did not have to come back to site to sign off as he says as the restricted work his company undertook was all inspected and passed by MDC while he was working here. He just needed to give the record of restricted work that was undertaken by him and his employees."

- [22] The Respondent stated in an email dated 17 November 2022 -

"In all my years of work, this is the first time I have encountered a situation as this. When receiving an email from Mrs [OMITTED] asking for the ROW I replied stating once the account was settled she would receive the ROW. I had been told by a building inspector, the Council has the authority to override the ROW and issue the COC in certain circumstances, this had been done in the past and this would happen in my case, not to worry about it. It wasn't until [OMITTED]'s email that I seeked advice from my solicitor. I had been given wrong advice from the building inspector, this is in a previous email that has been sent to the board. On my solicitors advice a ROW was sent the next day. As Mrs [OMITTED] states, MDC had sign off each stage of work, but some time had passed, work had been done by the owners and others, I was not to know if there had been any changers to the work we had done."

- [23] The Board took the further evidence and submissions into account when making this Final Decision.

Conclusion and Reasoning

- [24] The Board has decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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 with section 88(1) (s 317(1)(da)(ii) of the Act) and **should** be disciplined.

- [25] 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 work⁷.
- [26] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [27] The Board discussed issues with regard to records of work in its decision C2-01170⁸ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [28] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [29] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [30] As to when completion will have occurred is a question of fact in each case.
- [31] In most situations, issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Completion occurred arguably in December 2020 when the Respondent left the site, but certainly by September 2021 when the Respondent advised the Council that he was not finishing the contract. A record of work was not provided until April 2022. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁹ [2018] NZHC 1662 at para 50

- [32] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [33] In this instance, there was an ongoing payment dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [34] The Respondent should also 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.
- [35] The Respondent stated that it was not until he took legal advice that, contrary to what he was allegedly told by a Building Inspector, he realised he was required to provide the record of work. No evidence was submitted to corroborate the conversation with the Building Inspector. The Board notes that ignorance of the law is not an excuse. It is the Licensed Building Practitioner’s responsibility to be aware of his statutory obligations and to fulfil them without being prompted to do so.
- [36] Accordingly, the Board finds that no “good reason” for the failure to provide a record of work has been established.

Penalty, Costs and Publication

- [37] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [38] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs and publication.

Penalty

- [39] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁰ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times,

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹¹ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [41] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

- [42] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [43] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹².
- [44] In *Collie v Nursing Council of New Zealand*,¹³ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [45] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum

¹¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

¹² *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.

¹³ [2001] NZAR 74

for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[46] 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 Act¹⁴. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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.

[47] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.

[48] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁸.

[49] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁹. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[50] Based on the above, the Board **Will Not** order further publication.

¹⁴ Refer sections 298, 299 and 301 of the Act

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (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, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[52] 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.

Right of Appeal

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

Signed and dated this 13th day of December 2022



Mrs F Pearson-Green
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:*

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- (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.*