

Before the Building Practitioners Board

	BPB Complaint No. 26606
Licensed Building Practitioner:	Benjamin Jones (the Respondent)
Licence Number:	BP 129447
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 Decision Date:	4 April 2025
Finalised Draft Decision Date:	22 May 2025

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Ms S Chetwin CNZM, Barrister and Solicitor, Professional Director
Mr C Lang, Building Surveyor and Quantity Surveyor

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)(i) of the Act.

The Respondent is fined \$3,500 and ordered to pay costs of \$700. 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 Decision

- [1] A complaint was made about a failure to submit a Master Builders guarantee and to undertake building work after substantial payments had been made. The Board decided that there was insufficient evidence on which to make a finding in relation to the Master Builders guarantee but that the evidence did establish that the Respondent had obtained payments but had not provided the related services. On that basis, the Board decided that he had obtained an unethical gain and that he had brought the licensing regime into disrepute.
- [2] The Respondent does not hold a practice licence. As such, the Board was limited in its penalty options to a fine. It decided a fine of \$3,500 was appropriate and that the Respondent would be ordered to pay costs of \$700. A record of the disciplinary action will be recorded on the public Register for a period of three years.

The Charges

- [3] 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
- [4] In this matter, the disciplinary charge the Board resolved to further investigate² was that the Respondent may, in relation to [OMITTED] 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.

Draft Decision Process

- [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 necessary prior to it making a decision.
- [6] Ordinarily, the Board makes a decision having held a hearing.³ 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.⁴
- [7] 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

- [8] The Board must be satisfied on the balance of probabilities that the alleged disciplinary offence has been committed⁵. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

³ Regulation 10 of the Complaints Regulations.

⁴ 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

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Disrepute

- [9] 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 convictions⁶;
 - honest mistakes without deliberate wrongdoing⁷;
 - provision of false undertakings⁸; and
 - conduct resulting in an unethical financial gain⁹.
- [10] The Courts have consistently applied an objective test when considering such conduct.¹⁰ 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.¹¹
- [11] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,¹² 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.¹³

The conduct complained about

- [12] On or about 29 November 2021, the Respondent entered into a contract to provide building services with the Complainant by way of his company Jonesy Construction Limited. On 2 December 2021, a contract deposit of \$59,885.03, being 10% of the contract price was paid. The contract included an additional clause that stated:
- The deposit in this contract is to cover the work required to achieve building consent.*
- [13] Prior to the contract being entered into, the Respondent provided the Complainant with rudimentary designs, generic specifications (which did not relate to the design presented) and Master Builder guarantee documentation. The Complainant says the Master Builder guarantee forms were completed and given to the Respondent. A costing schedule showed that \$7,500 had been allowed for a guarantee. A copy of the guarantee form was provided. It was dated 1 December 2021.
- [14] The Respondent, in a written submission, alleged the guarantee was a fraudulent document. His position was that it had been created after Jonesy Construction went

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

¹⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹¹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹² *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.

¹³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

into liquidation and that he had never met the Complainant in-person. He also noted that Master Builders will not accept a guarantee application without a full design.

- [15] On 2 December 2022, the Complainant paid the deposit. The Complainant alleged the Respondent had advised him to pay early to avoid price escalations. The Respondent stated that was generic advice he was giving to all of his customers at the time. The Respondent submitted:

At this time, our schedule was very busy and the only comments that were likely to be provided to the Complainant was along the lines of if you want to secure a build spot for next year, we will need a signed contract, which is a standard procedure, we would not save and dedicate upcoming resources without commitment.

- [16] On 21 February 2021, an invoice was issued by the Respondent for \$25,000. The invoice stated it was for:

Lump sum payment claim for architectural and engineering documentation for building consent.

- [17] On 22 February 2022, the Respondent represented in text messages that the design was ready to go to the Council for a building consent.

- [18] The Complainant provided evidence that the invoice was paid on 24 February 2022.

- [19] A building consent was not applied for, and the Complainant did not receive any design documentation from the Respondent besides the rudimentary documentation provided during the contract negotiations.

- [20] The Respondent set out, in response to the allegation that design work had not been carried out, that the Complainant was provided regular updates on the design process leading up to council submission, there were issues with the foundation design due to a non-build covenant at the rear of the section, and that he had records of communication with the structural engineer. He did not provide copies to substantiate the response. The Respondent also stated he had been invoiced for work by the engineer and architect but did not provide any evidence. He noted that a liquidation meant he could not access business records. He denied that he had conducted himself in a disreputable manner.

- [21] The Complainant stated he was given a start date of late April but that from 3 May 2022, the Respondent could not be contacted.

- [22] On 11 May 2022, Jonesy Construction Limited was placed into liquidation. The First Liquidator's Report notes:

The Director has advised that throughout 2019 and 2020, the Company was undertaking work for a developer who faced financial difficulty, resulting in substantial losses to the Company, however, it was anticipated that these losses would be recouped from future work and contracts.

And

Following an assessment of the business' financial position, advice and the inability for the Director to continue working in the business due to health issues, it was decided that the Company should be placed into liquidation to prevent further losses to creditors.

- [23] The Fourth Liquidator's Report notes six secured creditors filed claims totalling \$765,922, that \$1,722,418 of claims had been made by trade creditors, \$5,211,275 of claims by homeowners and that there were \$64,919 of unsecured claims from employees.

Has the conduct disreputable

- [24] There were two matters complained about: a failure to submit or process a Master Builders guarantee and payments made for goods and services that have not been provided.

Guarantee

- [25] The Respondent denied that a Master Builders guarantee was signed by him. The deposit paid did not reference a Master Builders guarantee, and there was no evidence other than the Complainant's assertions that the guarantee form had been executed and provided to the Respondent. On that basis, and because the matter has been dealt with using a Draft Decision process, the Board has decided that there is insufficient evidence to establish the alleged conduct.

Payments made

- [26] The Complainant has paid \$84,885.03 and has received nothing of value in return. The deposit was stated to be for plans and consent, and another \$25,000 was obtained for the same purposes. The second payment was obtained just over two months prior to the Respondent's company going into liquidation.
- [27] The Respondent was the sole shareholder and director of Jonesy Construction. He either knew or should have known that his company was not in a strong financial position and that it may not have been able to complete the work that it had promised to complete and, if he was unaware, he would, given the size of the company's failure, have been in dereliction of his duties as a director.
- [28] Critically, with respect to disreputable conduct, there is no evidence that establishes that the design services that had been paid for and which the Respondent represented had been completed had been undertaken. The Respondent had indicated that the designs, including engineering, had been developed to the point where a building consent application could be made. An application was not made, and those designs have not been developed or, if they have, they have not been provided.
- [29] The evidence indicates the Respondent has not done what he promised, has provided false assurances, and obtained and retained payments on that basis.

[30] Moreover, after the Respondent obtained a deposit to cover consenting, he sought further payment for the same or similar services not long before his company was put into liquidation, with no evidence that any further services had been provided.

[31] The Board, on the basis of the above, has decided that the Respondent, when he sought a further \$25,000 payment, obtained an unethical financial gain because the services invoiced for had not been obtained or provided and because the Respondent took the funds knowing he was in financial difficulty and would not be able to fulfil the contract or deliver on his promises. In those circumstances, the Board finds that the conduct was disreputable. It is conduct that would lower the reputation of Licensed Building Practitioners in the eyes of the public.

Was the conduct serious enough

[32] The Board's position was that the conduct was serious. It was deliberate and calculated and has caused significant harm.

Board's Decision

[33] The Respondent **has** brought the regime into disrepute.

Penalty, Costs and Publication

[34] 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.

[35] 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

[36] The Board has the discretion to impose a range of penalties.ⁱⁱ 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.¹⁴ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁵

- (a) protection of the public and consideration of the purposes of the Act;¹⁶
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁷

¹⁴ *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]

¹⁵ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁶ Section 3 Building Act

¹⁷ *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;¹⁸
 - (d) penalising wrongdoing;¹⁹ and
 - (e) rehabilitation (where appropriate).²⁰
- [37] 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 cases²¹ and applying the least restrictive penalty available for the particular offending.²² In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²³ that is consistent with other penalties imposed by the Board for comparable offending.²⁴
- [38] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.²⁵
- [39] The Respondent was disciplined by the Board in 2023 in relation to two complaints. The conduct investigated in those matters was that the Respondent had brought the regime into disrepute. Conduct also related to the period just prior to the liquidation of his company. The Board found that he had brought the regime into disrepute, and it cancelled his licence.
- [40] Additionally, the Board recently dealt with another case where the same conduct was alleged, indicating a pattern of behaviour. However, as the two matters occurred at about the same time, the Board will not treat the other matter as an aggravating factor.
- [41] The Respondent does not currently hold a practising licence. In order to obtain one, he will have to apply and meet licensing requirements.
- [42] Because the Respondent does not hold a licence, the Board cannot consider cancellation or suspension as a penalty. In effect, the Board's penalty options are limited to the imposition of a fine. It is to be noted, however, that if the Board imposes a fine, the Respondent will not be able to be re-licensed until such time as that fine is paid. On that basis, the Board has decided that a fine is the appropriate form of penalty. In terms of a starting point, the Board considers that the sum of \$3,500 is appropriate and consistent with other fines imposed by the Board for similar offences and with the action taken by the Board on other matters relating to the Respondent.

¹⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁰ *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

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

²⁵ 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.

[43] There are no mitigating factors. As such, the fine will not be adjusted.

Costs

[44] 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.²⁶

[45] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings.²⁷ The starting point can then be adjusted up or down, depending on the particular circumstances of each case.²⁸

[46] 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.

[47] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$700 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 by way of a Draft Decision. It is significantly less than 50% of actual costs.

Publication

[48] 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,²⁹ 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.

[49] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁰ 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.³¹

[50] Based on the above, and because the matter has been dealt with on the papers, 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

²⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁷ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁸ *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.

²⁹ Refer sections 298, 299 and 301 of the Act

³⁰ Section 14 of the Act

³¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

[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 \$3,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$700 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

[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.

Submissions on Draft Decision

[53] 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.

[54] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **Wednesday 21 May 2025**.

[55] If submissions are received, then the Board will meet and consider those submissions.

[56] 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.

[57] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[58] 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.

- [59] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **Wednesday 21 May 2025**.
- [60] 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

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

Signed and dated this 30th day of April 2025.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 22 May 2025 on the basis that no further submissions were received.

Signed and dated this 26th day of May 2025.



Mr M Orange
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:*

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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 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 318 Disciplinary Penalties

- (1) *In any case to which section 317 applies, the Board may—*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*

- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

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.*