

Before the Building Practitioners Board

	BPB Complaint No. CB26129
Licensed Building Practitioner:	Gareth Brown (the Respondent)
Licence Number:	BP124807
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 Date:	20 March 2023
Draft Decision Date:	20 March 2023
Final Decision Date:	11 May 2023
Board Members Present:	

Mrs F Pearson-Green, LBP, Design AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
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.

Draft Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Respondent has not committed disciplinary offences under sections 317 (1)(b),(d) and (i) of the Act.

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Summary

- [1] The Respondent was engaged to carry out building work consisting of alterations to an existing dwelling. The work started but was not finished by the Respondent. The homeowners sought a record of work from the Respondent, but he did not respond to any attempts to contact him.
- [2] The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent’s restricted building work complete, and, secondly, if it was, did he have a good reason not to provide the records of work.
- [3] The Board found that the Respondent’s restricted building work was complete and that no good reason to withhold the records of work was put forward. The Board decided that the Respondent would be fined \$1,500 and ordered to pay costs of \$500.
- [4] There were also allegations made of negligent or incompetent building work, not building in accordance with the building consent and disreputable conduct. The

Board considered that those allegations did not reach the threshold for the matters to be dealt with as a disciplinary matter.

Regulation 9 Decisions

- [5] The complaint to the Board also contained allegations that the Respondent had:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) 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).
- [6] With regard to those allegations, the Board decided¹ that Regulation 9 (f)(ii) of the Complaints Regulations applied. It provides:
- Complaint not warranting further investigation***
A complaint does not warrant further investigation if—
- (a) *the investigation of it is—*
 - (ii) *unnecessary*
- [7] In considering whether the investigation of a complaint is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter.² That assessment requires the Board to determine whether the behaviour fell seriously short of what was acceptable.
- [8] The Complainant alleged that the placement of the clearance to gully traps was contrary to the building consent. This is the responsibility of the drainlayer and not the Respondent. The other matters raised by the Complainant – unsafe scaffolding, delays in progress and unfinished building items, are in the view of the Board, contractual disputes.
- [9] As such, the Board does not consider that these allegations reach the threshold necessary for them to be dealt with as disciplinary matters. The Board will not proceed with these allegations.
- [10] The allegations of disreputable conduct were that the Respondent used photographs of others' work on his website, a work assistant of the Respondent's entered the property without notice to remove the scaffolding, and the Respondent has not returned a house key.

¹ 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 or to proceed with the complaint and hold a hearing.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74; *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA) at 200

- [11] When this disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted it should only be exercised in the most serious cases of poor behaviour.
- [12] The Board has previously considered³ the disrepute provision and discussed the legal principles that apply. In applying this provision, the Board views the conduct objectively,⁴ and is guided by findings in other occupational regimes.⁵
- [13] On the basis of the above matters, and the facts as presented in the complaint, the Board has decided that the allegations of disreputable conduct do not reach the threshold to warrant further investigation. The Board will not proceed with these allegations.

Regulation 10 Decision

- [14] In this matter, the disciplinary charges the Board resolved to further investigate⁶ were that the Respondent may have failed, without good reason, in respect of a building consent that relates to restricted building work 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) of the Act. The Board's considerations related to restricted building work at [OMITTED], Tauranga.

Draft Decision Process

- [15] The Board's jurisdiction is that of an inquiry. Board Inquiries 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 procedures⁷. 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 legislation⁸. 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.
- [16] 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.

³ Board decision C2-01111 2 July 2015

⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519; *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401; *Slack, Re* [2012] NZLCDT 40; *Collie v Nursing Council of New Zealand* [2000] NZAR 7

⁶ The Board received a Registrar's report on 20 March 2023. The Board is required to proceed to a hearing under regulation 10 of the Complaints Regulations or to determine that the complaint does not warrant further investigation under regulation 9 of the Complaints Regulations. In this case, the Board decided that a hearing was required.

⁷ Clause 27 of Schedule 3

⁸ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- [17] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, this decision is a draft Board decision. The Respondent will be 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 directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁹. 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.

Records of work

- [19] 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.¹⁰
- [20] 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 work¹¹ unless there is a good reason for it not to be provided.¹²

Was the restricted building work complete

- [21] The Respondent carried out restricted building work on the Complainant's home. This included re-cladding the existing dwelling, adding new bedrooms and ensuite, new roof structure and roofing.
- [22] The Complainants stated that he commenced work on 21 January 2021, and by 14 March 2022, he had abandoned the work before its completion.
- [23] The Respondent did not respond to the complaint being sent to him by the Investigator. He was then telephoned, and he confirmed that the email address used to send the complaint to him was correct. The Respondent subsequently emailed the Investigator and acknowledged receipt of the complaint. He stated that he would provide a response. No response has been received.
- [24] The Board finds that completion occurred at the latest when the Respondent abandoned the building work in March 2022, and that was when a record of work was due.

⁹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

¹⁰ Section 88(1) of the Act.

¹¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹² Section 317(1)(da)(ii) of the Act

Has the Respondent provided records of work

[25] The Complainant, as at the date of lodging the complaint,¹³ has not received a record of work from the Respondent. She stated that emails, calls, voice messages and texts to the Respondent had all been ignored. The Council file was obtained on 8 November 2022, and it did not contain a record of work from the Respondent.

[26] The Respondent has not provided a record of work.

Was there a good reason for the Respondent to withhold his records of work

[27] The Respondent has not provided any reason for his failure to provide the record of work. The Board finds that the Respondent did not have a good reason.

Has the Respondent committed a disciplinary offence

[28] The Respondent carried out and completed restricted building work. He did not provide a record of work and did not have a good reason for failing to do so. He has committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

[29] 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.

Penalty

[30] The Board has the discretion to impose a range of penalties.¹⁴ 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.¹⁵ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁶

- (a) protection of the public and consideration of the purposes of the Act;¹⁷
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁸
- (c) setting and enforcing a high standard of conduct for the industry;¹⁹
- (d) penalising wrongdoing;²⁰ and

¹³ 7 October 2022

¹⁴ See section 318 of the Act reproduced in full at the end of this decision.

¹⁵ *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]

¹⁶ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁷ Section 3 Building Act

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

(e) rehabilitation (where appropriate).²¹

- [31] 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 cases²² and applying the least restrictive penalty available for the particular offending.²³ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁴ that is consistent with other penalties imposed by the Board for comparable offending.²⁵
- [32] 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.²⁶
- [33] The Board's 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 and is consistent with previous Board decisions on this disciplinary offence. There were no mitigating or aggravating factors. The Board decided that the Respondent is to pay a fine of \$1,500.

Costs

- [34] 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.²⁷
- [35] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁸. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁹.
- [36] 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

²¹ *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

²² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August

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

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ 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.

²⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁸ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁹ *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.

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

Publication

- [37] 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 Act³⁰ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [38] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³¹ 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.³²
- [39] Based on the above, the Board will not order further publication

Section 318 Order

- [40] 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.

- [41] 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

- [42] The Board invites the Respondent to:

(a) provide further evidence for the Board to consider; and/or

³⁰ Refer sections 298, 299 and 301 of the Act

³¹ Section 14 of the Act

³² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

(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.

- [43] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **10 May 2023**. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new compellable evidence that was not available at the time the regulation 9 decision not to proceed was made, then a further complaint in respect of the matter may be made.
- [44] If submissions on the Board's Conclusion and Reasoning or on matters relating to penalty costs and publication are received, then the Board will meet and consider those submissions.
- [45] 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.
- [46] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

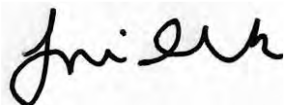
Request for In-Person Hearing

- [47] 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.
- [48] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **10 May 2023**.

Right of Appeal

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

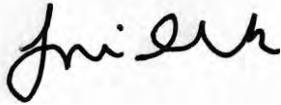
Signed and dated this 18th day of April 2023



Mrs J Clark
Presiding Member

This decision and the order herein were made final on 11 May 2023 on the basis that no further submissions were received

Signed and dated this 15th day of May 2023



Mrs J Clark
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.*