

Before the Building Practitioners Board

	BPB Complaint No. 26712
Licensed Building Practitioner:	Colby Kelly-Nash (the Respondent)
Licence Number:	BP 140648
Licence(s) Held:	Carpentry

Draft 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:	10 April 2025
Finalised Draft Decision Date:	26 May 2025

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor
Ms S Chetwin CNZM, Barrister and Solicitor, Professional Director

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's licence is suspended for six (6) months and he is 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.

Contents

Summary of the Board’s Draft Decision	2
The Charges	3
Draft Decision Process.....	3
Evidence.....	4
Background.....	4
Disrepute	4
The conduct complained about	5
Was the conduct serious enough	5
Board’s Decision	5
Penalty, Costs and Publication.....	5
Penalty	5
Costs.....	6
Publication	7
Section 318 Order.....	8
Submissions on Draft Decision	8
Request for In-Person Hearing.....	8
Right of Appeal	9
This decision and the order herein were made final on 26 May 2025 on the basis that no further submissions were received'.....	9

Summary of the Board’s Draft Decision

- [1] The Respondent quoted for building work and took funds from the Complainant for that work but did not carry it out or repay the funds. The Board found that the Respondent had conducted himself in a disreputable manner contrary to section 317(1)(i) of the Act. The Board decided it would suspend the Respondent’s licence for a period of six (6) months and ordered that he pay costs of \$700. A record of the distant offending will be recorded on the Public Register for a period of three years.
- [2] The Board decided that the Respondent’s licence would be suspended because it had identified a pattern of taking funds and not completing the building work, and the Board considered there was a need to protect other consumers from similar conduct.

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 whether the Respondent may 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.
- [5] The Complainant had also alleged a breach of section 317(1)(b) of the Act, (negligence or incompetence) and of the Code of Ethics for Licensed Building Practitioners (section 317(1)(g) of the Act). The Board considered, given the nature of the conduct, that the appropriate disciplinary provision to proceed under was that for disrepute.

Draft Decision Process

- [6] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [7] Ordinarily, the Board makes a decision having held a hearing.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
- [8] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside, and a hearing will be scheduled.

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

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁵ 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.

Background

- [10] The Complainant stated that he had engaged the Respondent in good faith and on the basis that he was a licensed person. The Respondent had provided him with a quote to re-clad portions of the property. A copy of the quote was provided to the Board. It was dated 27 August 2024. It quoted the amount of \$15,019 for the building work. A deposit of \$7,510 was paid on 10 September 2024.
- [11] The Respondent has not carried out the agreed work. The Complainant asked for the deposit to be repaid and offered a payment plan. The Respondent made promises to repay that have not been kept.
- [12] The Respondent was sent a copy of the complaint and asked to provide a response. He has not done so.
- [13] The Complainant's evidence did contain text messages wherein the Respondent stated he had purchased the weatherboards for the project. No evidence to support the statement was provided.

Disrepute

- [14] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:
- criminal convictions;⁶
 - honest mistakes without deliberate wrongdoing;⁷
 - provision of false undertakings;⁸ and
 - conduct resulting in an unethical financial gain.⁹
- [15] 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

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

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 *ColliervNursing 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

- [16] 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 conduct was sufficiently serious enough for the Board to make a disciplinary finding.¹³

The conduct complained about

- [17] The conduct in this matter is that of obtaining an unethical financial gain. The Respondent has taken the Complainant's money but has not carried out the promised work or returned the funds. He has stopped communicating.
- [18] On the basis of the evidence before the Board, which has not been contradicted by the Respondent, the Board finds that the Respondent has conducted himself in a disreputable manner in that he has obtained an unethical financial gain.

Was the conduct serious enough

- [19] Taking money and retaining it without providing the agreed services is serious. It undermines public faith in the licensing regime, and it should result in a disciplinary outcome.

Board's Decision

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

Penalty, Costs and Publication

- [21] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act,ⁱ consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [22] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and 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

- [23] 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

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

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]

- (a) protection of the public and consideration of the purposes of the Act;¹⁶
 - (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;¹⁷
 - (c) setting and enforcing a high standard of conduct for the industry;¹⁸
 - (d) penalising wrongdoing;¹⁹ and
 - (e) rehabilitation (where appropriate).²⁰
- [24] 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
- [25] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.²⁵
- [26] The Board adopted a starting point of a suspension of the Respondent's licence. The reason a suspension was considered to be warranted was that the Respondent was recently disciplined for similar conduct,²⁶ which causes concern for other consumers who may also be relying on his licence status as an indication that he is a reputable person.
- [27] The Board considers a suspension period of six (6) months to be appropriate. A period of six months will deter the Respondent from future conduct should he be re-licensed. It will also deter other Licensed Building Practitioners from similar conduct.
- [28] If the Respondent provides evidence that he has paid the Complainant the amount owed within the period allowed for submissions on penalty, and the Complainant confirms the same, then the Board may consider reducing the penalty.

Costs

- [29] 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

¹⁶ Section 3 Building Act

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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.

²⁶ Colby Kelly-Nash [2025] BPB 26626

that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.²⁷

- [30] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings.²⁸ The starting point can then be adjusted up or down, depending on the particular circumstances of each case.²⁹
- [31] 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.
- [32] 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

- [33] 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,³⁰ 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.
- [34] 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
- [35] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

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.

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Building Act 2004, the Respondent's licence is suspended for a period of six (6) months.

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.

[37] 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

[38] 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.

[39] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **Friday 23 May 2025**.

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

[41] 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.

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

Request for In-Person Hearing

[43] 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.

[44] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **Friday 23 May 2025**

- [45] 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

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

Signed and dated this 2nd day of May 2025



Mr M Orange
Presiding Member

This decision and the order herein were made final on 26 May 2025 on the basis that no further submissions were received'.

Signed and dated this 27th 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:*
 - (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:*

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- (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.