

Before the Building Practitioners Board

	BPB Complaint No. CB25040
Licensed Building Practitioner:	Benjamin Graham (the Respondent)
Licence Number:	BP 108663
Licence(s) Held:	Carpentry

Penalty Decision of the Board under section 318 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing Date:	31 July 2019
Substantive Decision Date:	10 September 2019
Penalty Decision Date:	4 November 2019
Board Members Present	
Board Members Present:	
	Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
	Mel Orange, Legal Member
	Bob Monteith, LBP Carpentry and Site AOP 2
	Faye Pearson-Green, LBP Design AOP 2

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.

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Introduction

- [1] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [2] 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.
- [3] In its substantive decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.
- [4] On 16 October 2019, the Board received submissions from the Respondent’s lawyer. It has considered them and made the following decisions.
- [5] The Board did not call for submissions from other persons with an interest in the matter.

Penalty

- [6] The Board’s initial view was that a fine of \$6,000 was the appropriate penalty for the disciplinary offence.
- [7] Counsel for the Respondent has submitted that there is a discretion for the Board to take no action under section 318. He has submitted the discretion is apparent from the two phrases in subsection (1) of sections 317 and 318 and subsections (4) and (5) of section 318. This is on the basis that section 318 states the Board “may...take any of the actions referred to in section 318...” and (as a correlate) that “in any case to which section 317 applies, the Board may...” impose the relevant penalty. Counsel submits that those sections can be contrasted with section 316, which says that the Board “must” investigate a complaint and notes the use of explicit versus discretionary language.
- [8] The Board does not agree that it has a discretion. Whilst section 318(1) uses the phrase “may”, which suggests the possibility of discretion, the Board notes that the disciplinary provisions of other schemes expressly enable the decider to take no action whereas the Building Act does not. Section 147M(h) of the Electricity Act

1992, for example, stipulates that the Electrical Workers Registration Board may “make no order”. Section 106(1)(h) of the Plumbers, Gasfitters, and Drainlayers Act 2006 contains the same provision. Section 318 of the Building Act 2004 does not have contain a similar provision. On this basis the Board has taken the approach that Parliament did not intend that the Board have a similar discretion under the Building Act.

- [9] Rather the Board considers that the wording in 318(1) of the Act, and reference to “may”, is in respect of a discretion to choose amongst the various penalty options in section 318(1)(a) to (f).
- [10] The Board also notes that one of the intentions of the licensing regime was to ensure the public were informed when selecting a licensed building practitioner. Disciplinary action taken under section 318 must, under section 301(1)(l)(iii) of the Act, be recorded in the Register for a period of three years. The Register is established by section 298 of the Act. Section 299 sets out its purposes which are:

The purpose of the register is—

- (a) to enable members of the public to—*
 - (i) determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person's [licensing]; and*
 - (ii) choose a suitable building practitioner from a list of licensed building practitioners; and*
 - (iii) know how to contact the building practitioner; and*
 - (iv) know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

- [11] Taking the above provisions into consideration it is clear that one of the purposes of the Register is to allow informed consumer and providing information as regards disciplinary action helps to facilitate this. Not taking any action under section 318 would defeat this purpose.
- [12] Given the above the Board has decided that it does not have a discretion as submitted by Counsel. Moreover, the Board does not consider that this is a case where, if there was such a discretion, it should be exercised.
- [13] Counsel has also submitted, as regards the proposed penalty of a fine and its potential for deterrence and/or protection of the public, that:
- (a) the company of which the Respondent is a director, Venture Developments Ltd, has been prosecuted and received a criminal conviction. A criminal conviction has a very strong deterrent effect and as director of the company this has flowed directly to the Respondent;*
 - (b) the fine in that case was over \$50,000;*
 - (c) there is no pattern of past behaviour to indicate a need for deterrence;*

- (d) *the Respondent Mr Graham and Venture Developments Ltd have responded to any potential harm to the public by spending a significant sum of money to correct an innocent mistake. Mr Graham has no track record of having posed any form of risk to the public and where his actions have created that possibility he has incurred massive expenditure to take all practicable steps to remediate the issue.*
- (e) *the fact that the Council appears to have taken no steps in relation to identical properties which also have been built without consents suggests that the regulator itself does not perceive a threat to public safety; and*
- (f) *the Respondent has cooperated fully throughout the Board's lengthy inquiry. He provided all potentially relevant information proactively and as requested by the Board. It is usual in the criminal jurisdiction to give credit where a defendant has been cooperative with an investigation and that principle should apply here.*

[14] The above matters are all relevant mitigating factors. They were, however, factors that were taken into consideration by the Board in reaching its final penalty decision of a fine of \$6,000. No new mitigation has been presented. On this basis the Board has decided to uphold its initial view.

Costs

[15] The Board's initial view was that \$2,000 in costs was appropriate. Counsel has not taken issue with the level of costs. The amount is affirmed.

Publication of Name

[16] The Board's initial view was there were good reasons to further publish the matter. Counsel has submitted further publication is not required as the public is already aware and the profession has ready access to the facts, the media reports and, once published, the Board's decision. The personal impact on the Respondent of the various proceedings has also been noted.

[17] In its substantive decision the Board noted that publication, if undertaken, would focus on the lessons other practitioners can learn from the matter. The Board still considers that this is important. At the same time, it acknowledges the submissions made and accepts that the matter is already sufficiently in the public domain and that, as such, further publication may not be required.

[18] Given the above the Board has decided that there will be an article in Code Words that will focus on the need to ensure that building consents are in place prior to building work being undertaken but that the Respondent will not be named in it.

[19] The Respondent should note that the Board is not ordering that any of the details relating to the matter be suppressed. Only that the article will not identify him. He will be named in the Board's published decision.

Section 318 Order

[20] 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 \$6,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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(1)(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.

[21] 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

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

Signed and dated this 4th day of November 2019



Richard Merrifield
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:

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- (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.*