

Before the Building Practitioners Board

	BPB Complaint No. CB25702 and CB25858
Licensed Building Practitioner:	Harry Conroy (the Respondent)
Licence Number:	BP119958
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	16 December 2021
Substantive Decision Date:	23 December 2021
Penalty Decision Date:	16 March 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F 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.

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), 317(1)(d), and 317(1)(da)(ii) and 317(1)(h) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(c) of the Act.

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Summary of the Board's Penalty Decision

- [1] The Respondent carried out building work in a negligent manner and in a manner contrary to a building consent. The Respondent also carried out building work that was outside of his competence (design work) and failed to provide a record of work on completion of restricted building work. He is fined \$3,500 and ordered to pay costs of \$3,500. The disciplinary action will be recorded on the public register for a period of three years.

The Charges

- [2] This penalty decision arises out of the Board's substantive decision in which it made the following disciplinary findings:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) 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
 - (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act).
- [3] 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.
- [4] 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. The Board specifically noted:

[139] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an

opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

- [5] The Respondent was given until 23 February 2022 to make penalty, costs and publication submissions. An extension to 4 March 2022 was granted, and then a further extension to 10 March 2022. A submission was received on that date. The Respondent was assisted with his submission by legal counsel.
- [6] The submission included a critique of aspects of the Board's substantive decision. It also included a PS1 dated 23 July 2020, structural calculations also dated July 2020, and drawings dated 23 July 2020 from [Omitted], an engineer.
- [7] As noted above, the Board was not, in calling for submissions on penalty costs and publication, offering the Respondent the opportunity to relitigate the matter. Notwithstanding, the Board has considered the full submissions. In this respect, the Board notes that whilst the Respondent has provided evidence of the engineer's instructions for the change to the roof structure, they are dated July 2020, whereas the work took place over a year prior. Moreover, as noted in the substantive decision, an amendment to the building consent was required for the deletion of the roof trusses and redesign of the roof structure but was not obtained. No building work on the roof should have taken place until such time as the amendment was granted, and the Respondent, who stated he was very experienced with that type of work, should have known that. In essence, the engineer's instructions came after the fact. They should have been obtained before the work was undertaken and as part of a building consent amendment process. The Board's decision stands.

Penalty

- [8] The Board's initial view was as follows:

[123] The Board, on the basis of the above commentary, initially considered suspending the Respondent's licence. However, given the mitigating circumstances present, the Board decided that suspension was not required. Those mitigating circumstances were the involvement of the engineer and designer and their failures to advise that a building consent amendment was required prior to any building work being undertaken. They ought to have known better and, in essence, contributed to the overall situation.

[124] Taking all of the factors into account, the Board decided that a mid-level fine would be appropriate. It has set the amount at \$3,500, an amount which it hopes will deter the Respondent and others from similar conduct.

- [9] In the submissions, the Respondent points to external contributing factors, including the adequacy of the plans, the actions taken by the truss manufacturer, cost-cutting measures taken, the non-compliance of the original building work under the original

consent, and the involvement of other contractors, which he considered were mitigating factors. The Respondent stated:

Having regard to the above, whilst I still have difficulty accepting the findings, it has its functions and will have to levy some penalty. As a starting point, the failure to hand over a record of work levies a \$1,500 fine and some costs (\$500). A fair and equitable outcome would be some form of reduction. But that will still hurt.

In mitigation as well, this is the first complaint I have ever received in 48 years of building. I confirm that I have never been asked or required to come back and fix any work that I have completed.

This project has been a financial ruin for me. The Owners have not paid their outstanding invoices, which total over \$100,000. They have left my company to pay subcontractors and materials invoices, all of which have been paid in full.

- [10] The level of fine and the costs the Respondent submits as appropriate are those that are imposed by the Board for failure to provide records of work where the matter is dealt with on the papers. The findings in this matter are more serious, and multiple disciplinary offences have been upheld following an-in person hearing. The suggested fine and costs are not appropriate in such circumstances.
- [11] The Board must, however, turn its mind to whether there are any mitigating factors present that it was not aware of at the time it proposed an indicative penalty. The contributing factors were known as was the extent of the commercial dispute, and whilst the Respondent can point to losses, the Complainant has also suffered as a result of the Respondent's actions. The Respondent's long-standing in the industry was also known to the Board. It was for those reasons that the Board did not impose a more significant or severe penalty and they are why a suspension was not imposed.
- [12] The Respondent also raised his current circumstances. His medical conditions were known, but it is accepted that he may be suffering financial stresses as a result of Covid. To that end, the Respondent can seek time to pay the fine and the costs imposed from the Registrar.
- [13] Having considered the submissions received, the Board has decided to uphold its initial view. The fine is confirmed.

Costs

- [14] The Board's initial view was that \$3,500 in costs was appropriate. The Respondent submitted:

Whilst the costs are only a small proportion, it is still a cost borne by me. The financial impact of having to bear that along with a financial penalty will put stress on me at this time. I seek a reduction in the costs award as well.

- [15] The commentary about applies, as does the comment that the Respondent can, if he will have difficulty paying, seek to make the payment over time. The costs order is confirmed.

Publication of Name

- [16] The Board's initial view was there were good reasons to further publish the matter. The Respondent submitted:

Whilst I accept publication on the Register and in the decision, wider publication in 'The Wrap Up' is disproportionate to the penalty awarded by the Board. I have always conducted my business honestly and astutely with clients in mind. I have already been subject to false accusations with the complaint and other matters and wider publication will have a huge impact on my future work, and my ability to fight for the money I am owed.

The predicament for me as a builder accused is one of two things, to accept some of the Boards findings is to relinquish my right to disapprove of matters that brand me not for 3 years, not for \$7,000 but forever.

- [17] The Respondent, in the second paragraph above, appears to have noted his disagreement with the Board's decision. He is reminded of his right of appeal.
- [18] In respect of the submission in the first paragraph above, the Board has decided, having taken it into account with the balance of the submissions made, that it will not further publish the matter. The Board accepts that publication may have a disproportionate impact on the Respondent.

Section 318 Order

- [19] 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 \$3,500 (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(I)(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, in addition to the note in the Register and the Respondent being named in this decision.

- [20] 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

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

Signed and dated this 29th day of March 2022.



Mr M Orange
Presiding

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.*