

Before the Building Practitioners Board

	BPB Complaint No. CB26542
Licensed Building Practitioner:	Craig O'Brien (the Respondent)
Licence Number:	BP118522
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:	18 December 2024
Finalised Draft Decision Date:	13 March 2025

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, 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.

Draft Disciplinary Finding:

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

The Respondent is censured and ordered to pay costs of \$1,700. 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 Draft Decision

- [1] The Respondent entered into a fixed-price contract to build a new residential dwelling. The build took significantly longer than agreed, and he claimed cost fluctuations without substantiating the amounts sought or following the contractual process. The Complainants had to pay contractors and suppliers sums that had already been paid to the Respondent to complete the build. The Respondent agreed to repay those amounts but did not make any payments.
- [2] The Board was limited on what it could investigate because some of the conduct occurred before the Code of Ethics was in force. It did, however, decide that the Respondent had breached clause 20 of the Code of Ethics, which requires that a Licensed Building Practitioner (LBP) act in good faith during dispute resolution. The Board censured the Respondent and imposed costs of \$1,700. A censure was ordered on the basis that the Code is new and the Board is taking an educative approach towards its enforcement. A record of the disciplinary offending 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] The Complainants alleged multiple breaches of the Code of Ethics for Licensed Building Practitioners (LBPs) over the period 29 November 2021 to 30 April 2024. The Code of Ethics was introduced by Order in Council by way of the Building (Code of Ethics for Licensed Building Practitioners) Order 2021. The Order specified that it would come into force on 25 October 2022. As such, the disciplinary provision in section 317(1)(g) of the Act only applies to conduct that occurred after 25 October 2022. Because of that limitation, the Board could not investigate much of what was complained about. The Board could, however, further investigate how the Respondent engaged in dispute resolution as the alleged conduct for that allegation occurred after 25 October 2022. On that basis, the disciplinary charge the Board resolved to further investigate² was whether the Respondent may have breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act with respect to the following clause::

20 You must act in good faith during dispute resolution

If there is a dispute involving you and your client about building work (including, without limitation, the price, quality, or timing of the building work or your or the client's actions), you must—

- (a) attempt to resolve the dispute with your client; and*
- (b) ensure that you make yourself available to discuss the dispute with the client so that all parties (including you) have the opportunity to express their views and be heard; and*
- (c) ensure that at all times you act in a professional and respectful manner towards your client.*

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

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.

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 reasons are three-fold. First, the Respondent stated he would respond to the complaint. He was given additional time to respond and was advised that if he did not, the Board would then make an on-the-papers decision. Second, the Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. Third, the Board considers it would be contrary to the intention of the complaints process if the Board was not able to make a decision because the Respondent failed or refused to engage in that process.
- [8] The Board acknowledges, however, that there may be circumstances the Board is 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

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

Background

- [10] The Respondent was contracted to construct a new residential dwelling at [OMITTED], Auckland. The building contract, a New Zealand Certified Builders Association fixed price contract dated 24 March 2021, noted a completion date of 15 October 2021. The Complainants had entered into a house and land sale and purchase agreement for the completed project as the vendor. The Respondent did not complete the build until 30 April 2024, and the sale was lost due to a sunset clause that was activated when the build was not completed on time. The Complainants noted they had suffered a financial loss because of the delay, which the Respondent did inform them of, and that they had to pay contractors and suppliers to complete the build, notwithstanding that they had paid the Respondent for those services and products as part of progress payments.
- [11] The Complainants also alleged that the Respondent did not keep them informed about price increases and that he charged them an additional \$158,000. The complainants agreed to \$72,000 of the increases and requested invoices to

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

substantiate price increases claimed. The Complainant stated that the Respondent did not provide any invoices or evidence to support the additional amounts sought.

- [12] A commercial dispute arose. The Complainants entered into an agreement with the Respondent whereby he would repay \$131,000 in monthly instalments of \$10,000 to reimburse the Complainants for the amounts they had paid contractors and suppliers to complete the build. The Respondent has not adhered to that agreement. No payments have been made. The Respondent has stopped communicating with the Complainants. The Complainants alleged that during this period, the Respondent built a two-bedroom extension to his home without obtaining any funding. The Complainants note that they will have to initiate enforcement action in the courts to obtain payment.

Code of Ethics

- [13] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁶ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes⁷ for some time, and the Board has taken guidance from decisions made in other regimes.
- [14] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [15] The disciplinary provision in the Act simply states, "has breached the code of ethics". Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,⁸ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [16] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. In *Collie v Nursing Council of New Zealand*,⁹ the test was stated as:

⁶ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁷ Lawyers, Engineers, Architects and Accountants, for example

⁸ [1992] 1 NZLR 720 at 724

⁹ [2001] NZAR 74

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

The conduct under investigation

- [17] The allegation made in the complaint was that the Respondent had breached clause 20 of the Code, which requires that an LBP act in good faith during dispute resolution. Acting in good faith includes dealing fairly and honestly with a client and keeping promises made.
- [18] Looking at the Respondent's conduct, he entered into a fixed-price contract, which included a clause for cost fluctuations (price increases). The clause required that a specific process be used when cost fluctuations were claimed. There was no evidence that the specified process had been used, and notwithstanding, the Respondent sought payment for cost fluctuations. When challenged about those fluctuations, he failed to provide any evidence to substantiate them.
- [19] The Respondent then entered into an agreement to repay \$131,000 that he had been paid but which he had not expended on the build as per the contract. He has not complied with that agreement, and the Complainants now have to take enforcement action. It does not appear that there was any intention to make the payments, and it may be that funds that could have been used to pay the Complainants were used to fund the Respondent's own build.

Did the conduct breach the Code

- [20] When considering conduct of this type, the courts have stated that it has to be viewed objectively. The subjective views of the practitioner or other parties involved are irrelevant.¹⁰
- [21] Looking at the Respondent's conduct objectively, the Board finds that the Respondent has not acted in good faith.

Was the conduct serious

- [22] As noted, the Code was introduced to raise standards. When it was introduced, the Ministry of Business Innovation and Employment undertook an awareness and education campaign to ensure Licensed Building Practitioners were aware of the Code and the need to act in accordance with it. The old days are gone. More is now expected of Licensed Building Practitioners.
- [23] The Board found that the conduct was serious. There was a pattern during of disingenuous conduct in relation to financial matters. The Respondent claimed cost fluctuations without substantiating them and potentially used funds he was not

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

entitled to for his own benefit. He also agreed to repay funds he was not entitled to but did not make any payments. Cumulatively, the conduct was serious.

Board's Decision

[24] The Respondent **has** breached the Code of Ethics.

Penalty, Costs and Publication

[25] 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.

[26] 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

[27] 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.¹¹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹²

- (a) protection of the public and consideration of the purposes of the Act;¹³
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;¹⁴
- (c) setting and enforcing a high standard of conduct for the industry;¹⁵
- (d) penalising wrongdoing;¹⁶ and
- (e) rehabilitation (where appropriate).¹⁷

[28] 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 cases¹⁸ and applying the least restrictive penalty available for the particular

¹¹ *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]

¹² Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹³ Section 3 Building Act

¹⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ *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

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

offending.¹⁹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁰ that is consistent with other penalties imposed by the Board for comparable offending.²¹

- [29] 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.²²
- [30] The Code of Ethics is new, and the Board has been taking an educative approach to its enforcement. On that basis, whilst the conduct was serious, the Board has decided that it would impose a censure. The Respondent should note, however, that any future contraventions will not be treated so lightly.

Costs

- [31] 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.²³
- [32] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁴. The starting point can then be adjusted up or down, depending on the particular circumstances of each case²⁵.
- [33] 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, because of the Respondent's failure to engage in the complaints process, complex. Adjustments are then made.
- [34] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,700 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a complex matter that has been dealt with by way of a Draft Decision. It is significantly less than 50% of actual costs.

Publication

- [35] 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,²⁶ and he will be named in

¹⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

²² 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.

²³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁴ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁵ *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.

²⁶ Refer sections 298, 299 and 301 of the Act

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.

- [36] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁷ 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.²⁸
- [37] 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.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,700 (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.

- [39] 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

- [40] 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.

²⁷ Section 14 of the Act

²⁸ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [41] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **12 March 2025**.
- [42] If submissions are received, then the Board will meet and consider those submissions.
- [43] 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.
- [44] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [45] 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.
- [46] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **12 March 2025**.
- [47] 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

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

Signed and dated this 19th day of February 2025.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 13 March 2025 on the basis that no further submissions were received



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:*
 - (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.*