

Before the Building Practitioners Board

	BPB Complaint Nos. CB26124 and CB26191
Licensed Building Practitioner:	River Delacroix-Barriball (the Respondent)
Licence Number:	BP135499
Licence(s) Held:	Carpentry and Site AoP 1

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	Board Inquiry
Hearing Type:	On the papers
Hearing and Decision Date:	20 March 2023
Final Decision Date:	23 May 2023

Board Members Present:

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

Disciplinary Finding:

The Respondent **has** committed disciplinary offences 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.

Contents

Summary	2
The Charges	3
Draft Decision Process	3
Evidence	4
Records of Work	4
Was the restricted building work complete?.....	4
Has the Respondent provided records of work?	4
Was there a good reason for the Respondent to withhold his records of work?	5
Has the Respondent committed a disciplinary offence?	5
Penalty, Costs and Publication	5
Penalty	6
Costs.....	7
Publication	7
Section 318 Orders	8
CB26124	8
CB26191	8
Submissions on Draft Decision	8
Request for In-Person Hearing	9
Right of Appeal	9
This decision and the order herein were made final on 23 May 2023 on the basis that no further submissions were received.	9

Summary

- [1] A building company contracted the Respondent to carry out building work on two new houses. The work started but was not finished by the Respondent. Other builders were engaged to complete the building work. The building company then sought records of work from the Respondent. The Respondent did not respond to any of the building company’s attempts to contact him. After the Respondent had received notification of a complaint in respect of one of the properties, he provided the records of work for both properties to the building company, who then sought to withdraw the complaint.
- [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 there were no good reasons to withhold the records of work. The Board decided that the Respondent would be fined \$1,500 and ordered to pay costs of \$500.

The Charges

- [4] In this matter, the disciplinary charges the Board resolved to further investigate¹ 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 33 and 34 Walton Street, Bulls.
- [5] The Board noted that the Complainant wanted to withdraw the complaint.² The Regulations³ state that if a Complainant does not wish to proceed with a complaint, then the Board may proceed with its investigations by way of a Board Inquiry.
- [6] The Board resolved to proceed by way of a Board Inquiry.

Draft Decision Process

- [7] 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 procedures⁴. 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 legislation⁵. 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.
- [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.
- [9] 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

¹ 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.

² Telephone call of 7 October 2022 and email of 13 October 2022 – both with the Investigator.

³ Regulation 17 (2) Complaints Regulations

⁴ Clause 27 of Schedule 3

⁵ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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

- [11] 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.
- [12] 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 work⁷ unless there is a good reason for it not to be provided.⁸

Was the restricted building work complete?

- [13] The Respondent carried out restricted building work on both properties between 28 July 2021 and 26 November 2021. This included structural framing, trusses and the wrap and cavity system. The branch manager of the building company stated that the Respondent abandoned the projects before their completion, and other builders finished the building work.
- [14] The Respondent did not dispute this evidence.
- [15] As such, the Board finds that completion occurred when the Respondent's engagement on the builds came to an end, and that was when a record of work was due. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work.

Has the Respondent provided records of work?

- [16] The branch manager of the building company advised that he had attempted to contact the Respondent numerous times over three or four months via various email addresses and telephone numbers. The Respondent did not reply.
- [17] The Respondent was advised of one of the complaints against him on 7 October 2022. On 13 October 2022, the branch manager advised that the Respondent had provided the records of work for both properties to him.
- [18] The Council files for both properties were obtained on 16 November 2022, and they did not contain records of work from the Respondent. The Council further advised

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ Section 317(1)(da)(ii) of the Act

on 10 February 2023 that records of work for the Respondent for both properties were on the Council file. The record of work for [Omitted] was provided to the Board, and it was dated 10 October 2022.

- [19] The provision of the records of work after the Respondent received the first complaint in October 2022 did not satisfy the Respondent’s statutory obligation to provide them on completion.

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

- [20] The Respondent promptly provided the records of work to the branch manager of the building company when he was notified of the first complaint. Despite emails from the Investigator on several dates, he did not provide any explanation to the Investigator for the failure to provide the records of work up to that point.
- [21] On notification on 2 December 2022 of the second complaint, which was after the records of work had been provided to the branch manager in October 2022, the Respondent stated, “*I have been in contact with [Omitted] directly to sort this matter*”.
- [22] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations. He should have acted in November 2021. He should not have waited until he was chased for a record of work.
- [23] Accordingly, the Board finds that no good reason was given for failing to provide the record of work on completion.

Has the Respondent committed a disciplinary offence?

- [24] The Respondent carried out and completed restricted building on two dwellings. He did not provide any records of work and did not have a good reason for failing to do so. He has committed two disciplinary offences of failing to provide records of work on completion of restricted building work.

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.⁹ 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.¹⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹¹
- (a) protection of the public and consideration of the purposes of the Act;¹²
 - (b) deterring other Licensed Building Practitioners from similar offending;¹³
 - (c) setting and enforcing a high standard of conduct for the industry;¹⁴
 - (d) penalising wrongdoing;¹⁵ and
 - (e) rehabilitation (where appropriate).¹⁶
- [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 cases¹⁷ and applying the least restrictive penalty available for the particular offending.¹⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁹ that is consistent with other penalties imposed by the Board for comparable offending.²⁰
- [29] 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.²¹
- [30] In this matter, the Board adopted a starting point of \$1500 for each offence because this is the usual tariff for record of work matters and is considered to be at a level to act as a deterrent to other Licensed Building Practitioners.
- [31] The aggravating factor was that there were two offences committed. However, it is a mitigating factor that they occurred at the same time and before the Respondent had an opportunity to be aware he had committed a disciplinary offence and thus modified his conduct.

⁹ See Section 318 of the Act reproduced in full at the end of this decision.

¹⁰ *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]

¹¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹² Section 3 Building Act

¹³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁶ *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

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

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

²¹ 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.

- [32] Taking the noted mitigating and aggravating factors into account, the Board decided that the penalty is to be equivalent to one offence having been committed and has decided that the Respondent is to pay a total fine of \$1,500 for the two offences (\$750 for CB26124 and \$750 for CB26191).

Costs

- [33] 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.²²
- [34] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁴.
- [35] 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 (\$250 for CB26124 and \$250 for CB26191). The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [36] 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 Act²⁵ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [37] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁶ 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.²⁷
- [38] Based on the above, the Board will not order further publication.

²² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁴ *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.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Orders

CB26124

[39] 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 \$750.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$250 (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.

CB26191

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$750.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$250 (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.

[40] 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

[41] 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.

[42] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **22 May 2023**.

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

- [44] 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.
- [45] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

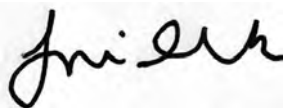
Request for In-Person Hearing

- [46] 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.
- [47] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **22 May 2023**.
- [48] 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

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

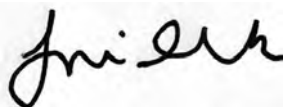
Signed and dated this 1st day of May 2023



Mrs J Clark
Presiding Member

This decision and the order herein were made final on 23 May 2023 on the basis that no further submissions were received.

Signed and dated this 30th 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.*