

## Before the Building Practitioners Board

	BPB Complaint No. CB25986
Licensed Building Practitioner:	Kim Dobney (the Respondent)
Licence Number:	BP 129388
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	22 March 2023
Board Members Present:	
	Mr M Orange, Deputy Chair, Barrister (Presiding)
	Mrs F Pearson-Green, LBP, Design AoP 2
	Ms 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 a disciplinary offence under section 317(1)(da)(ii) of the Act. The Respondent is censured. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary

[1] A complaint was made that the Respondent had failed to provide a record of work on completion of restricted building work following a failed joint venture build. The Respondent argued that his restricted building work had not been completed. The Board found that it was complete, as the Respondent knew others had finished the work and that he would not be able to return and carry out any further restricted building work. The Board imposed a censure for the failure to provide a record of work on the basis that there were extenuating mitigating factors. No costs order was made on the same basis, and because the Respondent has been adjudicated as bankrupt.

## The Charges

[2] 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.<sup>1</sup>

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<sup>1</sup> 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.

- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], have failed, without good reason, in respect of a building consent that relates to restricted building work that he has carried out 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) contrary to section 317(1)(da)(ii) of the Act.
- [4] The Board<sup>3</sup> initially dealt with the complaint by way of a Draft Decision noting that the Respondent had not engaged in the investigation process. The Respondent disputed the findings and claimed he had not received notice of the complaint. The Draft Decision was set aside, and a hearing was scheduled.

### **Evidence**

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. 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.
- [6] The Respondent's understanding was that he was involved in a joint venture build with the Complainant, who held the title to the land on which the build was carried out. The Respondent stated that his understanding of the contractual relationship, which was not reduced to writing, was that he would contribute capital toward the build and would share in any profit once the capital contributions were repaid.

### **Failure to Provide a Record of Work**

- [7] 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.<sup>5</sup>
- [8] 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 work<sup>6</sup> unless there is a good reason for it not to be provided.<sup>7</sup>

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<sup>2</sup> 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.

<sup>3</sup> The Board is a statutory body established under section 341 of the Act.<sup>3</sup> Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>5</sup> Section 88(1) of the Act.

<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>7</sup> Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise restricted building work

- [9] The Respondent both carried out and supervised restricted building work on a new residential build.

Was the restricted building work complete

- [10] The build did not progress as the Respondent expected, and his involvement came to an end as a result of funding issues. There were some outstanding items that were yet to be completed. The build was completed by others, and a Code Compliance Certificate was issued on 1 June 2022. The Respondent was aware that it had been completed by others and that he would not be able to return and complete any further restricted building work. In those circumstances, the Respondent's restricted building work was complete.

Has the Respondent provided a record of work

- [11] The Respondent has not provided a record of work.

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

- [12] At the hearing, the Respondent maintained that the only reason he did not provide a record of work was because his building work was not complete. That has already been dealt with.
- [13] In his original response to the complaint, the Respondent also expressed a concern that non-licensed persons may have completed the work. Providing a record of work is not "signing off". It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work.
- [14] The Board finds that there were no good reasons for not providing a record of work.

Did the Respondent fail to provide a record of work

- [15] The Respondent has failed, without good reason, to provide a record of work on completion of restricted building work.

**Penalty, Costs and Publication**

- [16] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [17] The Respondent made submissions at the hearing as regards penalty, costs and publication.

## Penalty

- [18] The Board has the discretion to impose a range of penalties.<sup>ii</sup> 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.<sup>8</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>9</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>10</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>11</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>12</sup>
  - (d) penalising wrongdoing;<sup>13</sup> and
  - (e) rehabilitation (where appropriate).<sup>14</sup>
- [19] 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 cases<sup>15</sup> and applying the least restrictive penalty available for the particular offending.<sup>16</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>17</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>18</sup>
- [20] 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.<sup>19</sup>
- [21] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [22] The Respondent outlined the losses that he had incurred and noted that his company had been liquidated and he had been personally bankrupted as a result of the build. The Board accepted that there were significant mitigating factors. In those

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<sup>8</sup> *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]

<sup>9</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>10</sup> Section 3 Building Act

<sup>11</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>12</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>13</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>14</sup> *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

<sup>15</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>16</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

<sup>19</sup> 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.

circumstances, the Board decided that it would reduce the fine to a censure. A censure is an expression of disapproval of the Respondent's conduct.

### Costs

- [23] 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.<sup>20</sup>
- [24] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>21</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>22</sup>.
- [25] 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 simple. Adjustments are then made.
- [26] Ordinarily, the Board's costs order for a hearing of this type would be in the order of \$1,000. However, as the Respondent has been bankrupted, and given the mitigating circumstances present, the Board sees no point in making a costs order.

### Publication

- [27] 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<sup>23</sup> and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [28] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>24</sup> 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.<sup>25</sup>
- [29] Based on the above, the Board will not order further publication.

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<sup>20</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>21</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>22</sup> *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.

<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

<sup>25</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

[30] 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.

**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, except for the note in the Register and the Respondent being named in this decision.**

[31] 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

[32] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iii</sup>.

Signed and dated this 4<sup>th</sup> day of April 2023



**M Orange**  
Presiding Member

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### <sup>i</sup> 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.