

## Before the Building Practitioners Board

|                                 |                                 |
|---------------------------------|---------------------------------|
|                                 | BPB Complaint No. CB26215       |
| Licensed Building Practitioner: | Gavin Gardener (the Respondent) |
| Licence Number:                 | BP104463                        |
| 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 Type:                    | On the Papers    |
| Hearing and Draft Decision Date: | 30 June 2023     |
| Final Decision Date:             | 1 September 2023 |

#### Board Members Present:

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

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**Summary of the Board’s Final Decision**

[1] The Respondent failed to provide a record of work on completion of restricted building work. He 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.

**The Charges**

[2] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

### Regulation 10 Decision

- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>1</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 or she is to carry out or supervise, or 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

### Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had carried out or supervised building work in a negligent or incompetent manner (s.317(1)(b) of the Act).
- [5] With regard to the allegations made, the Board decided that regulation 9 (f)(ii) of the Complaints Regulations applied. It provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (f) the investigation of it is—*
- (ii) unnecessary*

- [6] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.<sup>2</sup>
- [7] The Respondent was engaged to structurally connect a relocated home onto piles at a property. This was restricted building work.<sup>3</sup> The work was carried out by a qualified builder and an apprentice. The Complainant alleged that the Respondent did not adequately supervise this work.
- [8] Restricted building work must be carried out or supervised by a Licensed Building Practitioner.<sup>4</sup> The Board has previously discussed<sup>5</sup> levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances.<sup>6</sup>

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<sup>1</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>2</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>3</sup> Section 5 (Definition of Restricted Building Work) Order 2011.

<sup>4</sup> Section 84 of the Act.

<sup>5</sup> C2-01143

<sup>6</sup> Type and complexity of work; experience of the person being supervised; the supervisor's experience; the number and geographic spread of the projects being supervised.

- [9] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [10] In this instance, the Board considers that the workmanship issue (some of the nail-on plates in the “nail free area” had been nailed) does not reach the seriousness threshold so as to consider the supervision of the work to have been negligent or incompetent.
- [11] It is on the basis of the above matters and the facts as presented in the complaint and response that the Board has decided that it will not proceed with the allegations of negligent or incompetent supervision.
- [12] The Complainant and Respondent should note that if new compellable evidence that was not available at the time the decision not to proceed was made, a further complaint may be made, or the Board may decide to initiate a Board Inquiry into the matter.

### **Draft Decision Process**

- [13] 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.
- [14] Ordinarily, the Board makes a decision having held a hearing.<sup>7</sup> The Board may, however, 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.<sup>8</sup>
- [15] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. The Board, did however, note that there might be further evidence in relation to the matter that the Board was not aware of. To that end, it issued a draft decision. The Respondent was 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 had requested an in-person hearing, or the Board had directed that one was required, then the Board advised that one would have been scheduled. The Respondent provided a submission dated 15 August 2023.

### **Evidence**

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>9</sup>. Under section 322 of the Act, the Board has

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<sup>7</sup> Regulation 10 of the Complaints Regulations

<sup>8</sup> 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

<sup>9</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

#### **Further Evidence and Submissions Received**

- [17] Following the Board issuing a Draft Decision, it received a submission from the Respondent. The submission summarised building work matters, which the Board is not further investigating. It also responded to the allegation that the Respondent had failed to provide a record of work on the completion of restricted building work. The response set out that the record of work was not provided because of a failure to pay an invoice. The Respondent also put forward evidence as to his good character.
- [18] The further submission has not changed the Board's decision. The provision of a record of work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed Building Practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.

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

- [19] 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>10</sup>
- [20] 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>11</sup> unless there is a good reason for it not to be provided.<sup>12</sup>

#### Did the Respondent carry out or supervise restricted building work?

- [21] The Respondent supervised the work of a qualified builder and an apprentice in structurally connecting a relocated house to the piles. This is restricted building work.<sup>13</sup>

#### Was the restricted building work complete?

- [22] The work was carried out and completed in September 2022.

#### Has the Respondent provided a record of work?

- [23] The Complainant requested a record of work from the Respondent on 9 and 14 November 2022 and did not receive a response.

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<sup>10</sup> Section 88(1) of the Act.

<sup>11</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>12</sup> Section 317(1)(da)(ii) of the Act

<sup>13</sup> Section 5 (Definition of Restricted Building Work) Order 2011

[24] The Council file was obtained on 17 February 2023, and it did not contain a record of work from the Respondent.

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

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

[26] The Respondent in his initial response did not give an explanation for not providing the record of work.

[27] It appeared from the correspondence provided that there was an ongoing payment dispute. The Respondent, in a subsequent submission, confirmed. This, as noted above, this is not a good reason.

[28] 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.

[29] The Board finds that no “good reason” for the failure to provide a record of work has been established.

Did the Respondent fail to provide a record of work?

[30] The Respondent supervised restricted building work, did not provide a record of work, and did not have a good reason for failing to do so. He has committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

**Board’s Decision**

[31] The Respondent **has** failed to provide a record of work on completion of restricted building work.

**Penalty, Costs and Publication**

[32] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[33] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs and publication.

Penalty

[34] 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>14</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>15</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>16</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>17</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>18</sup>
- (d) penalising wrongdoing;<sup>19</sup> and
- (e) rehabilitation (where appropriate).<sup>20</sup>

[35] 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>21</sup> and applying the least restrictive penalty available for the particular offending.<sup>22</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>23</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>24</sup>

[36] 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>25</sup>

[37] 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.

[38] The Respondent put forward his good character and history as a builder as mitigation. Whilst this is noted, it is not considered a mitigating factor as the offence is akin to an infringement offence, and the record of work was withheld as leverage. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

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<sup>14</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>15</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>16</sup> Section 3 Building Act

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

<sup>18</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>19</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</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>21</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>22</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>23</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>24</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>25</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.

### Costs

- [39] 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>26</sup>
- [40] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>27</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>28</sup>.
- [41] 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.
- [42] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

### Publication

- [43] 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>29</sup> and he will be named in 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.
- [44] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>30</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>31</sup>
- [45] Based on the above, the Board will not order further publication.

### **Section 318 Order**

- [46] 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 \$1,500.**

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<sup>26</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>27</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>28</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>29</sup> Refer sections 298, 299 and 301 of the Act

<sup>30</sup> Section 14 of the Act

<sup>31</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055



**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$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, except for the note in the Register, the Respondent being named in this decision and publication of the decision on the Licensed Building Practitioners' website.

[47] 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

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

Signed and dated this 20<sup>th</sup> day of September 2023



**Mrs F Pearson - Green**  
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.