

Before the Building Practitioners Board

	BPB Complaint No. CB26173
Licensed Building Practitioner:	Nicholas Greer (the Respondent)
Licence Number:	BP126884
Licence(s) Held:	Carpentry

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 Draft Decision Date:	3 April 2023
Final Decision Date:	19 May 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Draft Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(i) 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.

Contents

Summary of the Board’s Decision	2
The Charges	3
Draft Decision Process	3
Evidence	4
The conduct under investigation	4
Criminal Convictions	5
Disrepute	6
Board’s Decision	6
Penalty, Costs and Publication	6
Penalty	7
Costs.....	8
Publication	8
Section 318 Order	9
Submissions on Draft Decision	9
Request for In-Person Hearing	9
Right of Appeal	10
This decision and the order herein were made final on 19 May 2023 on the basis that no further submissions were received.	10

Summary of the Board’s Decision

- [1] The Respondent was convicted of one representative charge of theft by a person in a special relationship. The Board initiated an inquiry into his conduct to consider whether the conduct that led to the conviction had breached section 317(1)(a) of the Act, which relates to being convicted of a crime that reflected on the Respondent’s fitness to be a Licensed Building Practitioner and whether his conduct had brought the regime into disrepute
- [2] The Board decided, given the seriousness of the offending, that the Respondent had committed both disciplinary offences. As the Respondent had been punished by the Courts and is paying reparation, the Board decided that it would censure the Respondent and record it on the Register for a period of three years so that the public is made aware of the conduct and findings.

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] In this matter, the disciplinary charge the Board resolved to further investigate² was whether:
- (a) been convicted, whether before or after he is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work contrary to section 317(1)(a) of the Act; and
 - (b) the Respondent may have conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.

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 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 Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was 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 a hearing will be scheduled.

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.

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

Evidence

- [8] 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.

The conduct under investigation

- [9] The Respondent came to the Board's attention as a result of media articles reporting that the Respondent had been convicted of theft. The Board obtained the sentencing notes from the District Court.⁶ Those notes recorded that the Respondent was convicted on one representative charge of theft by a person in a special relationship. In terms of the particulars, the Respondent was the treasurer of the victim, a registered charity. Between July 2019 and March 2020, the Respondent conducted 49 fraudulent transactions, stealing in total \$60,937.57. Repayments were made by the Respondent. The Respondent was sentenced to nine and a half months' home detention and ordered to pay reparation for the balance of the amount stolen. The Court took into consideration the Respondent's ability to continue to work and pay reparation. The sentencing Judge noted:

[11] In terms of the issue with your ability to work, that is a matter as I have said that is of utmost importance to me and I will return to that. The offending Mr Greer was not just simply impulsive, it was not concluded quickly, it was over a period of eight months and the victim found itself in overdue debt because of the funds that you had taken. I accept that there was a background behind your offending but still the starting point of two years and six months is appropriate. The fact that you were in financial difficulties because of being cheated does not excuse you going on to offend and cheat in respect of those who as I said considered you not simply a treasurer but a friend. I apply a discount for a relatively early guilty plea of 20 per cent that is appropriate and in terms of reparation I also accept that a 15 per cent discount is appropriate, leaving me with an end sentence of 19 and a half months' imprisonment.

[12] In terms of the purposes and principles of the Sentencing Act which I must consider I have particularly considered those that I have referred to earlier in my decision but as you have heard me say a number of times of particular interest to me is to ensure that you make repayment of all the funds to the victim. I have read your apology out in court so that the victims who are present know exactly what it is that you have said to me and that is in a public forum.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ *R v Nicholas James Greer* [2022] NZDC 20604

Criminal Convictions

- [10] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent has been convicted by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more. That element has been satisfied. The second is whether the commission of that offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work. The second element requires consideration by the Board of the interrelationship between the conviction and the Respondent's fitness to be a licensed person.
- [11] Unlike other licensing regimes, the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply for a licence⁷ or during the currency of their licence. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of section 317(1)(a) of the Act, and it does not matter that the criminal offending predated the person being licensed.
- [12] The Courts have stated that fitness is not to be equated with competence and that when considering fitness deterrence, public confidence and upholding standards are relevant.⁸ In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*,⁹ the High Court set out various factors that should be considered. They included the nature and gravity of the criminal charges, any previous history, any acceptance of responsibility, and the effect on public confidence. Applying those tests, the Board finds:
- (a) Nature and gravity of the charges: the offending was dishonesty related and was serious. The Respondent took advantage of persons who trusted him and caused harm to them.
 - (b) Acceptance of responsibility: the sentencing notes indicate that the Respondent accepted responsibility. Also, in response to the Board's inquiry, the Respondent expressed his regret and set out the impact on him and his family.
 - (c) Previous history: the Respondent has not previously offended, and he does not have a disciplinary history with the Board.
 - (d) The effect on public confidence: the Respondent's conduct will have negatively impacted on the public's confidence in Licensed Building Practitioners.
- [13] Given the above factors, the Board finds that the second element of section 317(1)(a) has been established in that the convictions reflect adversely on the

⁷ Compare with the licensing provisions in section 91(d) of the Electricity Act 1992 and section 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

⁸ *Professional Conduct Committee v Martin* High Court WN 2007

⁹ [2013] 3 NZLR 103

Respondent's fitness to carry out or supervise building work or building inspection work. The disciplinary offence has been committed.

Disrepute

- [14] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:
- criminal convictions¹⁰;
 - honest mistakes without deliberate wrongdoing¹¹;
 - provision of false undertakings¹²; and
 - conduct resulting in an unethical financial gain¹³.
- [15] The Courts have consistently applied an objective test when considering such conduct.¹⁴ The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.¹⁵
- [16] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,¹⁶ that the Respondent has brought the regime into disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.¹⁷
- [17] As noted above, the conduct involved serious criminal offending. It was premeditated and sustained, and the victims were persons who knew and trusted the Respondent. The offending has been the subject of media attention. In those circumstances, the Board finds that the Respondent's conduct has lowered the reputation of the Licensed Building Practitioner regime in the eyes of the public.

Board's Decision

- [18] The Respondent **has** breached sections 317(1)(a) and 317(1)i) of the Act. The Board does note the commonality between the findings. For the purposes of considering the appropriate penalty, it will treat the two offences as a single matter.

Penalty, Costs and Publication

- [19] 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,

¹⁰ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹² *Slack, Re* [2012] NZLCDT 40

¹³ *Collie v Nursing Council of New Zealand* [2000] NZAR 7

¹⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 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.

¹⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [20] 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

- [21] 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.¹⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁹
- (a) protection of the public and consideration of the purposes of the Act;²⁰
 - (b) deterring other Licensed Building Practitioners from similar offending;²¹
 - (c) setting and enforcing a high standard of conduct for the industry;²²
 - (d) penalising wrongdoing;²³ and
 - (e) rehabilitation (where appropriate).²⁴
- [22] 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 cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸
- [23] 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.²⁹

¹⁸ *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]

¹⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁰ Section 3 Building Act

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

²² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁴ *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

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁹ 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.

- [24] The Respondent has been punished by the Courts. He has accepted responsibility for his offending and is held in high regard by his employer.³⁰ The Courts have noted the importance of the Respondent being able to continue to work. The Board agrees. It is important that the Respondent be able to continue in his trade and to pay Court ordered reparation. For those reasons, the Board decided that it would not impose a restrictive penalty.
- [25] What is important is that those who seek to engage the Respondent to carry out building work as a Licensed Building Practitioner are made aware of his history and are able to make an informed decision. The imposition of a censure will achieve that. As such, and on the basis that the Respondent has been punished by the Courts, the Board will impose a censure which is a public expression of disapproval of his conduct.

Costs

- [26] 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.³¹
- [27] Ordinarily, the Board would seek costs in the range of \$500. However, as the Respondent is bankrupt and is paying reparation to his victims, the Board has decided that it will not make a costs order.

Publication

- [28] 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,³² and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [29] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³³ 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.³⁴
- [30] Based on the above, the Board will not order further publication. In coming to that decision, the Board noted that there has already been media attention, and the Board does not consider that further publication is required.

³⁰ The Board was provided with a reference from the Respondent's employer.

³¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³² Refer sections 298, 299 and 301 of the Act

³³ Section 14 of the Act

³⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1) 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.

Submissions on Draft Decision

[32] 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.

[33] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **17 May 2023**.

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

[35] 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.

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

Request for In-Person Hearing

[37] 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.

[38] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **17 May 2023**.

[39] 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

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

Signed and dated this 26th day of April 2023.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 19 May 2023 on the basis that no further submissions were received.

Signed and dated this 26th day of May 2023



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.*