

Before the Building Practitioners Board

	BPB Complaint No. CB26602
Licensed Building Practitioner:	John Joseph McCullagh (the Respondent)
Licence Number:	BP141335
Licence(s) Held:	Bricklaying and Blocklaying (AoP: Veneer and Structural Masonry)

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

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	7 February 2025
Finalised Draft Decision Date:	24 March 2025
Board Members Present:	

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
Mr T Tran, Barrister, Legal Member
Mr C Lang, Building Surveyor and Quantity Surveyor

Procedure:

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

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$2,000 and ordered to pay costs of \$700. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary of the Board's Draft Decision

- [1] The Respondent failed to provide a Record of Work (ROW) for each of the two properties after completing restricted building work. He is fined \$2,000 and ordered to pay costs of \$700. The disciplinary findings will be recorded on the Public Register for a period of three years.
- [2] If the Respondent provides a ROW for each property by the close of the submission period to both the owners and the Territorial Authority, as per the requirements of section 88(1) of the Act, and evidence to such is provided to the Board, the fine will be reduced to \$1,500.

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 Board resolved to investigate disciplinary charges relating to two properties: [OMITTED] Tauranga (Property 1) and [OMITTED], Tauranga (Property 2). The allegation is that the Respondent failed, without good reason, to provide ROWs for restricted building work he carried out at these properties, as required under section 88(1) of the Act, contrary to section 317(1)(da)(ii) of the Act.

Preliminary Issue

- [5] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent.
- [6] The Register of Licensed Building Practitioners (LBP or LBPs) must contain certain information, including under section 301(1)(d) an "address for communications under this Act". Under section 302, the LBP must keep their details up to date:

302 Obligation to notify Registrar of change in circumstances

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
- (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
- (b) *includes any change that may be prescribed (if any).*

- [7] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
- (a) *delivered personally to the person; or*
- (b) *delivered to the person at the person's usual or last known place of residence or business; or*
- (c) *sent by fax or email to the person's fax number or email address; or*

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.

(d) posted in a letter addressed to the person at the person's usual or last known place of residence or business.

(5) A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.

- [8] Using the email address recorded in the Register, the complaint was sent to the Respondent on 9 September 2024. When no response was received, the Investigator made multiple attempts to contact the Respondent, including a series of phone calls on 11 December 2024 where the phone appeared to be disconnected, and a follow-up email on the same day providing another opportunity to respond by 18 December 2024. To date, there has been no response.
- [9] The Board notes that on 20 August 2024, the Respondent actively engaged in email correspondence, responding to the Complainant's request for a ROW by sending an invoice for Property 2.
- [10] The Respondent has not provided any updated contact details, and the email address used for service was that contained in the Register. Section 394(1)(c) specifically allows for service by email to the person's email address. The Board finds that the complaint was properly served on the Respondent via the email address recorded in the Register.
- [11] Based on the above, the Board finds that it is appropriate to proceed with considering the complaint. The Respondent was properly served and had adequate opportunity to respond before departing New Zealand.
- [12] Having addressed these service and jurisdictional matters, the Board now turns to its process for reaching a decision.

Draft Decision Process

- [13] The Board's jurisdiction is that of an inquiry. Matters 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.² 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.³
- [15] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers 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

² Regulation 22 of the Complaints Regulations.

³ 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.

Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside, and a hearing will be scheduled.

Evidence

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁴ 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.

Failure to Provide a Record of Work

- [17] Section 88(1) of the Act requires that each LBP who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of that restricted building work,⁵ provide a ROW in the prescribed form to:
- a. The owner; and
 - b. The territorial authority for the district in which the restricted building work is situated.

- [18] This obligation exists unless there is a good reason for it not to be provided.⁶

Did the Respondent carry out or supervise restricted building work

- [19] The Board notes that the Respondent held a current LBP licence at all relevant times when the restricted building work was carried out (from 8 August 2022 until completion in February 2024). His subsequent licence suspension on 16 September 2024 does not affect his obligations regarding work completed while licensed.
- [20] The Respondent was engaged as a subcontractor by Bay Carpentry Limited to carry out and/or supervise building work on two new residential dwellings under building consent. The Respondent's work included brick veneer cladding at Property 1 and 2.
- [21] This was restricted building work as it involved the external moisture management system of residential dwellings.
- [22] Evidence establishes that the Respondent was the LBP who carried out and/or supervised the restricted building work. The Respondent held a licence (BP141335), issued on 8 August 2022, throughout the period when the restricted building work was carried out. Council inspection reports document the Respondent's involvement at both properties. For Property 1, on 4 December 2023, while it is unclear whether the Respondent was physically present, the inspector spoke with him by phone and

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011.

⁶ Section 317(1)(da)(ii) of the Act.

his LBP licence card was presented during the inspection. Although the licence card appeared to have lapsed, verification of the online register confirmed his licence was valid. For Property 2, the inspection report dated 19 February 2024 clearly confirms the Respondent was personally present onsite for the inspection, identified as 'LBP John BP141335'.

Was the restricted building work complete

- [23] The Council inspection reports show that the half high brick inspection at Property 1 was passed on 4 December 2023. For Property 2, the half high brick inspection was passed on 19 February 2024, and the Respondent subsequently issued an invoice for this work dated 26 February 2024.
- [24] Based on the inspection reports and invoice dates, the Board finds that the restricted building work was completed at both properties by February 2024 at the latest.

Has the Respondent provided a record of work

- [25] The Complainant filed the complaint on 30 August 2024, stating that a ROW had not been provided for either property despite requests.
- [26] The Council files obtained did not contain a ROW from the Respondent for either property.

Was there a good reason

- [27] The Respondent has not provided a response to the complaint. However, evidence shows that after completing work at Property 2, he issued an invoice dated 26 February 2024 to Bay Carpentry Limited (the head contractor). After Bay Carpentry went into liquidation, the Complainant contacted the Respondent on 15 August 2024 requesting a ROW for Property 1. The Respondent replied on 20 August 2024 by sending his outstanding invoice for Property 2, suggesting that the payment dispute with the now-liquidated head contractor was his reason for not providing ROWs for either property. The complaint was formally served on the Respondent on 9 September 2024, with a response request by 7 October 2024, while he was still in New Zealand. The Respondent remained in the country until 15 November 2024, providing ample opportunity to respond to the complaint or provide the required ROWs before his departure.
- [28] The Board notes that the Respondent had been paid in full for Property 1, yet still did not provide a ROW for that property.
- [29] The Board has consistently stated that a ROW must be provided on completion of restricted building work regardless of whether there is a payment dispute. The requirement is a statutory obligation that is not dependent on payment.
- [30] The Board, therefore, finds that no "good reason" has been established for the failure to provide ROWs for either property.

Did the Respondent fail to provide a record of work

- [31] For the reasons set out above, the Respondent failed to provide a ROW for each property on completion of the restricted building work in breach of section 88 (1) of the Act.

Board's Decision

- [32] The Board finds that the Respondent **has** committed **two** disciplinary offences in failing to provide a ROW for both Property 1 and Property 2 respectively. The Respondent was required to provide a ROW upon completion of the restricted building work at each property. He has failed to do so.
- [33] The requirement to provide a ROW is a statutory obligation under section 88(1) of the Act. There is no discretion as to whether it must be done.

Penalty, Costs and Publication

- [34] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act,ⁱ consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [35] 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

- [36] 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.⁷ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:⁸
- (a) protection of the public and consideration of the purposes of the Act;⁹
 - (b) deterring other Licensed Building Practitioners from similar offending;¹⁰
 - (c) setting and enforcing a high standard of conduct for the industry;¹¹
 - (d) penalising wrongdoing;¹² and

⁷ *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].

⁸ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29].

⁹ Section 3 Building Act.

¹⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹¹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724.

¹² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27.

(e) rehabilitation (where appropriate).¹³

- [37] 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 cases¹⁴ and applying the least restrictive penalty available for the particular offending.¹⁵ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁶ that is consistent with other penalties imposed by the Board for comparable offending.¹⁷
- [38] 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.¹⁸
- [39] 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 ROW is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [40] In this case, there are two separate failures to provide ROWs. Having regard to the totality of the offending, the Board considers it appropriate to impose a fine of \$1,000 for each failure, resulting in a total fine of \$2,000.
- [41] The Board will provide the Respondent with an opportunity to provide a ROW for each property before it makes a final decision on the appropriate penalty. If ROWs are provided to both the owner and the Territorial Authority in accordance with section 88(1) of the Act, and evidence of this is provided to the Board, this will be considered a mitigating factor. In such case, the penalty will be reduced by \$500 to \$1,500.

Costs

- [42] 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.¹⁹
- [43] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings.²⁰ The starting point can then be adjusted up or down, having regard to the particular circumstances of each case.²¹

¹³ *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.

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

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818.

¹⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

¹⁸ 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.

¹⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

²⁰ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011.

²¹ *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.

- [44] 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 a simple case. Adjustments are then made.
- [45] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$700 toward the costs of and incidental to the Board's inquiry.

Publication

- [46] 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,²² 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.
- [47] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²³ 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.²⁴
- [48] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website.
- [49] The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

²² Refer sections 298, 299 and 301 of the Act.

²³ Section 14 of the Act.

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055.

Section 318 Order

[50] 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 \$2,000 (but reduced to \$1,500 if ROWs for both properties are provided)

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$700 (GST included) towards the costs of, and incidental to the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(l)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

[51] 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

[52] 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.

[53] Submissions and/or further evidence must be filed with the Board **15 working days** from the date of this Draft Decision.

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

[55] 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.

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

Request for In-Person Hearing

[57] 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.

[58] A request for an in-person hearing must be made in writing to the Board Officer **15 working days** from the date of this Draft Decision.

[59] 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

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

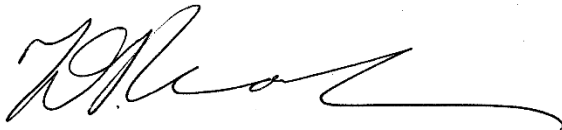
Signed and dated this 28th day of February 2025.



Mrs F Pearson-Green
Presiding Member

This decision and the order herein were made final on 24th Day of March 2025 on the basis that no further submissions were received

Signed and dated this 24th day of March 2025.



Mrs F Pearson-Green
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,*

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- 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.*