

## Before the Building Practitioners Board

	BPB Complaint No. CB26048
Licensed Building Practitioner:	Benjamin Jones (the Respondent)
Licence Number:	BP129447
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	Wellington – Consolidated with CB26047
Hearing Type:	In Person
Hearing Date:	28 March 2023
Decision Date:	6 April 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (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)(i) of the Act.

The Respondent's license is cancelled. He may not apply to be relicensed for a period of six-months. He is ordered to pay costs of \$1,750. The Board's findings will be published, and 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 about a failure to obtain a Master Build Guarantee and other conduct that was alleged to have been disreputable. To make a finding of disrepute, the Board must determine that the conduct has lowered the esteem of the licensing regime in the eyes of the public and that the conduct was serious enough for the Board to make a disciplinary finding. The Board found that the Respondent’s failure to process a Master Build Guarantee for which he had completed the form and received payment was disreputable and that the Respondent’s licence should be cancelled as a result. He was also ordered to pay costs of \$1,750, and the Board decided that it would, in addition to recording the matter on the Public Register, publish its decision in Code Words.

## 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 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, in that, he may have:
- (a) taken funds for the purpose of obtaining a Master Builders Guarantee and not applied them to that purpose;
  - (b) falsely represented or implied that a Master Builders Guarantee and been applied for or obtained when it had not;
  - (c) allowed contracts works insurance to lapse whilst the build was still in progress;
  - (d) taken funds that were to be used as deposits on materials and/or appliances that were not applied to that purpose; and/or
  - (e) claimed payments for building work that had not been completed.

#### **Evidence**

- [4] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</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.

#### **Disrepute**

- [5] 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 convictions<sup>4</sup>;
  - honest mistakes without deliberate wrongdoing<sup>5</sup>;
  - provision of false undertakings<sup>6</sup>; and
  - conduct resulting in an unethical financial gain<sup>7</sup>.
- [6] The Courts have consistently applied an objective test when considering such conduct.<sup>8</sup> 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.<sup>9</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> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>4</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>5</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>6</sup> *Slack, Re* [2012] NZLCDT 40

<sup>7</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>8</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>9</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

- [7] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,<sup>10</sup> that the Respondent has brought the regime into disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.<sup>11</sup>

#### Master Build Guarantee

- [8] The complaint arose following the liquidation of Jonesy Construction Limited in May 2022. The liquidation resulted from a special shareholder resolution. The Respondent was the sole shareholder. The Complainant was a client whose home was under construction. He made a Master Build Guarantee claim but was informed that he was not insured. Media reports indicated that some 20 to 27 other clients of Jonesy Construction may have been in the same situation<sup>12</sup> and, at the hearing, Mr [OMITTED], the Complainant in CB26047, presented the Board with a list of 20 homeowners that he had contacted and whom he stated were in the same situation.
- [9] The Complainant was operating under the impression that he was covered by a Master Build Guarantee because he had completed an application form which had been taken from him for submission to Master Build Services by the Respondent. Also, the building agreement stipulated a Master Build Guarantee. The contracted price included the Guarantee premium, and the Respondent had invoiced the Complainant for the premium which had been paid.
- [10] The Respondent gave evidence that he was responsible for the processing of Master Build Guarantee Applications within his office. He was not able to offer any explanations as to why the applications were not submitted other than to state that it was an administrative oversight. The Respondent denied that the failure to submit the application was a result of financial issues within Jonesy Construction. He stated that the focus was on getting the related building work underway.
- [11] The Respondent noted that the Master Build Guarantee application process required that the owner confirm acceptance and cover. The Owner's Master Build Guarantee Information provided to the Owner as part of the Master Builders Residential Building Contract stipulated:

*A Master Build Guarantee is not provided automatically by engaging a RMB. A separate Guarantee application must be completed and be signed by the RMB and the Owner. It must then be accepted and signed by Master Build Services ("MBS") before it is valid.*

And

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<sup>10</sup> *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.

<sup>11</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>12</sup> Stuff articles dates 11 and 16 July 2022. The 11 July 2022 article reported Master Builders as stating that 27 Jonesy Construction clients had contacted Master Builders.

*NOTE: If the owner has not been contacted by MBS within 14 days after signing a Master Build Guarantee application they must immediately contact MBS on 0800 269 119.*

- [12] The Respondent placed a degree of responsibility on the Complainant for failing to follow up as per the above and ensure that a Master Build Guarantee was in place. The Respondent acknowledged that if the application had been made, his office would have been informed of the acceptance or rejection of the application. The Complainant acknowledged that he had not made any inquiries with Master Build Services.
- [13] The Board noted that there was a pattern of taking Master Build application forms and funds and then failing to apply for the guarantees. The Respondent submitted it was an administrative oversight. The Board does not accept that explanation. A single instance might be considered an oversight. However, there are potentially some 20 to 27 clients of Jonesy Construction that have been left without the protection of a Master Build Guarantee, which, according to the Master Builder's website is comprehensive:
- The Guarantee covers the homeowner for ten years and starts at the time they sign the contract. It covers them from Loss of Deposit and Non-Completion, Materials and Workmanship, and Structural Defects.*
- [14] The Complainant has been denied that cover and protection.
- [15] The Board finds that the Respondent did take the application form and funds and did not apply for the Master Build Guarantee. It makes that finding on the basis of the pattern of taking applications and funds but not submitting them. Further, the Board finds that the Respondent is principally responsible for the failures. Whilst there is a small degree of culpability to be apportioned to the Complainant for not checking that the Guarantee had been submitted and processed as per the application's directions, the Respondent must bear the majority of the blame and responsibility. The Complainant was entitled to assume that the Respondent in taking the original signed form, was going to submit it. He was a Master Builder, knew the required processes, had possession of the form and did not submit it and knew or ought to have known that the application had not been made. Given the importance of a Master Build Guarantee, the Board would expect a Master Builder, who is also a Licensed Building Practitioner, to know or check that an application has been accepted. The Complainant was not in as informed a position. The process was novel to him, and it is somewhat unreasonable to expect the person who has entrusted the Master Builder to follow up and check that they have completed their contracted duty.
- [16] Ultimately, from a disrepute perspective, he has put the Complainant in an unenviable position and has obtained an unethical financial gain as a result of his inaction. The losses that will be suffered by those impacted are significant. Also, the matter has attracted national media attention, and it will have lowered the licensing

regime's reputation in the eye of the public. It is a case where the Respondent's conduct has brought the regime into disrepute.

### Works Insurance

- [17] The building agreement also included contract works insurance. The costs were included in the overall costs of the build. The Complainant presented evidence that the policy for his specific address expired on 29 April 2022. An extension had been arranged, but it had not been paid for. As a result, the policy lapsed. There was a period between 30 April 2022 and 11 May 2022, when Jonesy Construction was placed into liquidation, when there was no insurance cover. No claimable events occurred during that period. The Complainant paid for cover once the issue became known to him.
- [18] The Respondent submitted that insurance cover was in place because his payment terms were 20<sup>th</sup> of the month following. He stated he would provide evidence to support this. He submitted a copy of a Policy schedule. It did not contain payment terms or any statements to the effect that cover would remain in place even if the invoice was not paid.
- [19] The Board noted the time frame was limited and that whilst the consequences could have been dire had an insurance event occurred, it was possible that, if the company had continued to trade, the premium would have been paid and the cover extended. In the circumstances, the Board decided that the conduct of itself was not sufficiently serious enough to make a finding of disrepute.

### Payments

- [20] The Complainant noted various aspects of the building work that had been invoiced but which had not been completed. These included payments in relation to retaining walls, doors and various internal fittings and fixtures. The Complainant noted that whilst he had made payments in full to the Respondent for various items, payment in full had not been made to the various suppliers.
- [21] The Respondent put forward that the payments were dealt with as per the ordinary course of business, with deposits being paid to secure products or services. He noted that the liquidation of Jonesy Construction interceded in the payment and provision process. He was examined as regards the causes of the liquidation, his role in it, and issues noted in the Second Liquidator's Report. The Respondent submitted that allegations in the Report had not been substantiated.
- [22] As with the finding in relation to insurance, the conduct, when viewed in the ordinary course of business, was not out of the ordinary. The Respondent's company was in financial difficulty and whilst it could be said the client's money should have been better protected, the Respondent was operating within the law. The conduct did not reach the threshold to be considered as disreputable.

## Board's Decision

[23] The Respondent has brought the regime into disrepute by taking Master Build Guarantee application forms and funds and not processing the same.

## Penalty, Costs and Publication

[24] 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.

[25] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

## Penalty

[26] 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>13</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>14</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>15</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>16</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>17</sup>
- (d) penalising wrongdoing;<sup>18</sup> and
- (e) rehabilitation (where appropriate).<sup>19</sup>

[27] 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>20</sup> and applying the least restrictive penalty available for the particular offending.<sup>21</sup> In all, the Board should be looking to impose a fair, reasonable, and

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<sup>13</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>14</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>15</sup> Section 3 Building Act

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

<sup>17</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>18</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>19</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>20</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>21</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty<sup>22</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>23</sup>

- [28] 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>24</sup>
- [29] The offending is serious, and it is aggravated by there being two findings of disreputable conduct under consideration. The Board considers the Respondent poses a risk to the public, and whilst his competence as a Licensed Building Practitioner has not been called into question, his ethics have. Given those circumstances, the Board considered a penalty that protects the public and deters others to be appropriate. To that end, it decided that the starting point would be the cancellation of the Respondent's licence. The Board considered whether a suspension rather than cancellation would suffice but decided that cancellation is required to ensure that high standards are set and maintained. In reviewing other disrepute matters that have come before it, the Board decided a six-month cancellation would be appropriate and consistent with other penalties imposed by the Board.

### Costs

- [30] 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>25</sup>
- [31] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>26</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>27</sup>.
- [32] 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 moderately complex. Adjustments are then made.
- [33] The Board's scale for a half-day hearing is \$3,500. This matter was consolidated with another complaint. It is appropriate that the costs be split across the two matters. As such, and based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,750 toward the costs of and incidental to the Board's inquiry.

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<sup>22</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

<sup>24</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.

<sup>25</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>26</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>27</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.

## Publication

- [34] 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>28</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.
- [35] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>29</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>30</sup>
- [36] Based on the above, the Board will order further publication. The Board considers that publication is required given the cancellation of the Respondent's licence and so that others can learn from the matter. The Board also notes that there is a high degree of public interest in the matter and that in such circumstances, the publication is appropriate. The publication will be by way of an article in Code Words.

## **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,750 (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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

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

<sup>29</sup> Section 14 of the Act

<sup>30</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [38] 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 Penalty, Costs and Publication**

- [39] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **10 May 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### **Right of Appeal**

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

Signed and dated this 18<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:*
  - (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.*

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- (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.*