

Before the Building Practitioners Board

	BPB Complaint No. CB25758
Licensed Building Practitioner:	Derek Nagel (the Respondent)
Licence Number:	BP 113848
Licence(s) Held:	Carpentry, Bricklaying and Blocklaying, Structural Masonry, Site AoP 2

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
Draft Decision Date:	24 August 2021
Final Decision Date:	28 October 2021

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

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.

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Summary of the Board’s 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.

The Charges

- [2] On 24 August 2021, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [3] 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.
- [4] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [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 is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

- [6] 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.
- [7] The Board did, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, it issued a draft Board decision. The Respondent and/or Complainant were provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board had directed, or the Respondent had requested an in-person hearing, then the Board advised that one would have been scheduled.

Disciplinary Offences Under Consideration

- [8] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act)

Function of Disciplinary Action

- [9] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [10] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁵ Collins J. noted that:

"... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

Evidence

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[12] The Respondent was engaged to carry out building work on a new residential dwelling at [Omitted], under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in or about January 2019 and came to an end in or about December 2019. Following completion, the complaint set out that requests for a record of work were made. The Complainant stated:

attached I send you a complaint, because our former builder Derek Nagel is not willing to provide us with all the necessary documents "the row". We need those papers urgently to apply for the CCC. Our new builder [Omitted] finished the house under all regulations. Since months many times we are asking Mr. Nagel to support us with the papers, but without success.

[13] The Complainant further noted that requests were made by phone and email and that lawyers were engaged to obtain possession of the building consent pack from the Respondent in January 2020 and that it was provided in May 2020. The Complainant also noted that their new builder, who had completed the build, also made several attempts to contact the Respondent to obtain his record of work.

[14] The Respondent provided a response to the complaint. He stated that requests for a record of work were first made in January 2021, not January 2020, and that he provided a record of work to the owner and the Territorial Authority on 24 May 2021. He stated:

4. a) There have not been several requests to provide the record of work (ROW). In fact, Nagel Builders did not know another builder had been engaged until [Omitted] made contact and requested the ROW in late January 2021. The ROW was only requested once.

[15] The Respondent referred to a commercial dispute. He stated that when the building consent pack was returned, the record of work was not included as the work was not complete and that there was an issue with work that had been carried out by the owner. Those issues caused a delay in the provision of a record of work. He stated:

4. e) The ROW was not in the consent pack as the job was incomplete. Also, because it referred to work that had been incorrectly completed by the owner without permission of the builder in charge, Derek was discussing with the council how to deal with work completed or engaged directly by [Omitted]. This caused the delay in returning the row.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

4. f) [Omitted] *refused to sign a statement clearly stating the work conducted outside of the builder's supervision and this also caused delay in submitting the ROW.*

[16] The Respondent provided a timeline. It included the following:

13 Dec Last day on site brought Consent Pack home to tidy up. All Building Inspections were completed to date.

Outstanding work - Verandah roof trim and concrete verandah front trim we were still sorting options (see Other Issues 4.f.)

[17] In a comments section of the response, the Respondent stated:

On the 13 Dec 2019, to make the site good for the owners arrival, we totally cleaned the inside and the outside of the house. We brought the Consent Pack home to consolidate producer statements and certificates. This took us into the Christmas period and by mid-January we had received a letter from K3 Lawyers about the concrete, tasks [Omitted] thought needed to be done on the house, and a request for the Consent Pack. This took us by surprise as we had been trying to work through the problems and complete the job. We engaged a Lawyer to represent us and in the reply; stated we would return the Consent Pack as soon as we had finished working on it.

Since January 2020 we have not heard from [Omitted] personally by phone or email apart from her replying by text on Feb 8 confirming we could give her email to Allied concrete. As [Omitted] had started the legal process, we had to engage a lawyer and all correspondence since have been through lawyer's letters. The request was for the Consent Pack and there was never a mention specifically of the ROW. Her statement that she has been asking for the ROW since Jan 2020 is incorrect.

[18] The Territorial Authority's file was obtained in July 2021. It did not contain a record of work from the Respondent.

Further Evidence and Submissions Received

[19] Following the Board issuing a Draft Decision, it received submissions from both the Complainant and the Respondent.

[20] The Complainant provided further evidence of repeated requests for records of work from the Respondent and that when they asked for "all papers", the request included the provision of a record of work. The Complainant also stated that the Respondent was aware that another builder had been appointed to complete the work in April 2020.

[21] The Respondent submitted that he did not provide a record of work as he had not completed all of the restricted building work and that the verandah roof trim, which was to be completed, was restricted building work. The Respondent maintained that

the first he knew about a new builder being appointed was in January 2021. He stated:

We feel there is some misinterpretation in the Board's findings and wish to add further explanation and evidence to clarify. We obviously did not clearly define the remaining work to be done on the house in Dec 2019, as it was restricted building work. Also, we did provide our ROW as soon as we were able after we knew that someone else had completed the remaining restricted building work.

[22] The Respondent further submitted:

Difficulty with ROW:

Over the next weeks we were trying to resolve how to deal with issues covered in the ROW. We were trying to work out how to do this as another builder had finished this restricted building work. Our dilemma was in relation to our ten year liability for this dwelling. The owners had also refused to sign a "variation to contract" in January 2020 to address the difference in the contract document, covering aspects that they had taken responsibility for during the construction and the changes they had made to the original plan. Some of these were not acceptable to good practise and were and are still worrying.

In the end we did try to address them in the ROW.

[23] The Board took the further evidence and submissions into account when making this Final Decision.

Conclusion and Reasoning

[24] The Board has decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act) and **should** be disciplined

[25] 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 work⁷.

[26] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [27] The Board discussed issues with regard to records of work in its decision C2-01170⁸ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [28] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [29] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [30] As to when completion will have occurred is a question of fact in each case.
- [31] The Complainant put forward that completion occurred in December 2019. The original response referred to making the site ready for the owners’ arrival on 13 December 2019, including cleaning inside and out and consolidating producer statements and certificates. At the same time, the Respondent also stated that the job was not complete. The incomplete work was stated as being a veranda roof trim and concrete veranda front trim.
- [32] The Respondent’s response to the Board’s Draft Decision took issue with the timeline, and the Respondent submitted that he had not completed the restricted building work and that, as such, a record of work was not due. He outlined what the unfinished restricted building work was. The work outlined may have been restricted building work. The Respondent stated that he did not know that another builder had taken over until January 2021. The Complainant also provided further evidence and submissions, which put the date at which the Respondent knew another builder had started as April 2020.
- [33] In the Draft Decision, the Board took the position that all of the restricted building work had been completed. With the benefit of the additional submissions, the Board’s decision is still that the Respondent failed to provide a record of work on completion of restricted building work but on the basis that deemed completion occurred when a new builder was appointed.
- [34] In most situations, issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Contractual

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁹ [2018] NZHC 1662 at para 50

disputes or intervening events can, however, lead to situations where the licensed practitioner, owner, or territorial authority's perceptions as to when the record of work must be provided may differ.

- [35] One such situation is where it is clear the licensed building practitioner will not be able to carry out any further restricted building work on a site. This is what occurred in the present case when the Respondent was replaced with another builder. In effect, even though the intended scope of work had not been completed, the Respondent's restricted building work under, been completed as he was not able to carry out or finish off any further restricted building work. On the Respondent's dates, this occurred in January 2021. A record of work was not provided soon thereafter. The earliest possible date is 24 May 2021 when the Respondent says he provided it to the Council. It is noted, however, that the Council file received by the Board on 21 July 2021 did not contain a record of work from the Respondent. Notwithstanding, even if he had provided it to the Council on 24 May 2021, it was still not provided "on completion" or soon thereafter.
- [36] The Respondent should also bear in mind that a record of work can capture not only what has been done but also what has not been done. By providing adequate detail within his record of work, he could have afforded himself a degree of protection against future liability by limiting the record to only that which he had to that point in time completed.
- [37] The above also goes some way to answering the Respondent's submission that he was concerned about liability in providing a record of work. The Respondent should note that providing a record of work is not "signing off". It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:
- (4) A record of work given under subsection (1) does not, of itself,—
create any liability in relation to any matter to which the record of work
relates; or give rise to any civil liability to the owner that would not otherwise
exist if the licensed building practitioner were not required to provide the
record of work.*
- [38] Given the above factors, the Board finds that completion occurred, at the latest, in January 2021, but that a record of work was not provided until May 2021. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [39] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is

open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.

- [40] The Respondent stated that requests for a record of work were not made. The Complainant refutes that. Whether requests were made is not relevant as the statutory requirement is for the licensed building practitioner to provide a record of work. The provisions do not require that the owner or territorial authority demand one. The Respondent had an obligation to act of his own accord and not wait for others to remind him of his obligations. As such, even if a request for a record of work was not made, it is not a good excuse.
- [41] It was also noted that there was an ongoing commercial dispute. Whilst the dispute was not advanced as a reason for non-provision, the Respondent should note that the Board has repeatedly stated that 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.

Penalty, Costs and Publication

- [42] 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, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [43] The matter was initially 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. The Board reviewed submissions received and made this Final Decision.

Penalty

- [44] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁰ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹¹ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [46] 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. There are no aggravating nor mitigating factors present. The Board saw no reasons to depart from the starting point in its Draft Decision, and that remains the case. The fine is set at \$1,500.

Costs

- [47] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [48] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹².
- [49] In *Collie v Nursing Council of New Zealand*,¹³ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [50] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁴ the High Court noted:

[46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*

¹¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

¹² *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.

¹³ [2001] NZAR 74

¹⁴ CIV-2011-485-000227 8 August 2011

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [51] 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 investigation. Adjustments based on the High Court decisions above are then made.
- [52] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [53] 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 Act¹⁵. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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.

- [54] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.
- [55] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁹.

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

[56] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁰. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[57] Based on the above, the Board will not order further publication.

Section 318 Order

[58] 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.

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(l)(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.

[59] 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

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

Signed and dated this 1st day of December 2021.



Mr M Orange
Presiding Member

²⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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 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.*