

Before the Building Practitioners Board

	BPB Complaint Nos. CB26109 and CB26110
Licensed Building Practitioner:	Joseph Taupo (the Respondent)
Licence Number:	BP120568
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry, Veneer

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	Complaints
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	2 February 2023
Final Decision Date:	20 March 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	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.

Disciplinary Finding:

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

Contents

Summary of the Board’s Decision	2
The Board	2
The Charges	3
Disciplinary Offences Under Consideration	3
Function of Disciplinary Action	4
Evidence	4
CB26109	4
CB26110	5
Submissions.....	5
Further Evidence and Submissions Received	6
Board’s Conclusion and Reasoning	6
Penalty, Costs and Publication	7
Penalty	8
Costs.....	8
Publication	10
Section 318 Orders	11
CB26109	11
CB26110	11
Right of Appeal	11

Summary of the Board’s Decision

[1] The Respondent failed to provide two records of work on the completion of restricted building work. He is fined \$500 in respect of each (total fines of \$1,000) and ordered to pay costs of \$250 in respect of each (total costs of \$500). The disciplinary finding will be recorded on the public Register for a period of three years.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

¹ Section 341 of the Act.

The Charges

- [3] On 2 February 2023, the Board received two Registrar's Reports in respect of two complaints about the conduct of the Respondent.
- [4] 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.
- [5] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10, the Board is required to hold a hearing.
- [6] 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 procedures². 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 legislation³. As such, it may 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.
- [7] In this instance, the Board has decided that formal hearings are not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [8] The Board further decided that the two complaints, which were made by the same Complainant and which both allege a failure to provide a record of work on completion of restricted building work, would be dealt with in a single consolidated decision.
- [9] The Board does, however, note that there may be further evidence in the possession of persons involved in the matters or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Respondent will be 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 directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [10] 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

² Clause 27 of Schedule 3

³ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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) at:

- (a) [OMITTED], Queenstown, in respect of matter CB26109; and
- (b) [OMITTED], Queenstown, in respect of matter CB26110.

Function of Disciplinary Action

[11] 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*⁴ and in New Zealand in *Dentice v Valuers Registration Board*⁵.

[12] 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*,⁶ 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.”

Evidence

[13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.

CB26109

[14] The Respondent was engaged to carry out building work on a new residential dwelling under a building consent at [OMITTED], Queenstown. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on or about September 2020. In August 2021, the Respondent invoiced for his work and did not carry out any further restricted building work after that date. The Respondent sought a record of work noting that there had been “many phone calls and texts and promises from the blocklayer (the Respondent) to supply record of works”. One was not provided.

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ [2016] HZHC 2276 at para 164

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [15] On 28 September 2022, the Board obtained the Territorial Authority file. It did not contain a record of work.

CB26110

- [16] The Respondent was engaged to carry out building work on a new residential dwelling under a building consent at [OMITTED], Queenstown. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on or about May 2021. In August 2021, the Respondent invoiced for his work and did not carry out any further restricted building work after that date. The Respondent sought a record of work noting that there had been "many phone calls and texts and promises from the blocklayer (the Respondent) to supply record of works". Again, one was not provided.
- [17] On 28 September 2022, the Board obtained the Territorial Authority file. It did not contain a record of work.

Submissions

- [18] The Respondent provided the same response for both matters.
- [19] The Respondent had been engaged by [OMITTED]. That company went into liquidation in March 2022. The Respondent maintained that the Complainant had undertaken to pay directly.
- [20] In correspondence to the Complainant dated 22 September 2022, the Respondent stated:

I withheld issuing the 'Completion of Works' certificate pending payment of the outstanding invoice believing you were paying me directly.

And

The Building Practitioners Board [BPB] have contacted me alleging misconduct under section 317 of the Building Act 2004 which could result in a public hearing and adverse publicity for us both.

- [21] In response to the complaint dated 7 October 2022, the Respondent noted payment issues and stated:

Record of Work was completed but withheld pending payment of invoice

- [22] A further response stated reiterated the above and further stated:

"Without Prejudice" issue Record of Works on condition Mr. [OMITTED] withdraws all complaints regarding both properties and no further action is taken by Building Practitioner Board against me.

Further Evidence and Submissions Received

[23] Following the Board issuing a Draft Decision, it received a submission from the Respondent. The submission accepted the decision and put forward mitigating factors. The Board took the submissions into account when making this Final Decision.

Board's 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 two records 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 work⁸.

[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.

[27] The Board discussed issues with regard to records of work in its decision C2-01170⁹ 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*¹⁰ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁰ [2018] NZHC 1662 at para 50

- [30] As to when completion will have occurred is a question of fact in each case.
- [31] 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.
- [32] With respect to both properties, whilst the date when the Respondent finished his work is not known, the Respondent invoiced for his work in August 2021 and did not carry out any further work after that date. As such, completion occurred in August 2021. Records of work have not been provided. 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.
- [33] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [34] 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.
- [35] In this instance, the Respondent was demanding payment of invoices by the Complainant following the failure of the contractor that engaged him. Irrespective of the validity of those claims, a record of work is a statutory document. It cannot be withheld for contractual or commercial reasons, including as leverage for outstanding invoices. Further, a Licensed Building Practitioner cannot contract out of the provision of a record of work. Given those factors, the payment issues were not a good reason.
- [36] Finally, the Respondent’s approach of seeking to have the complaint withdrawn in return for a record of work is disappointing. Again the Respondent was trying to use it as leverage. The Respondent should note that the Board can continue with matters as a Board Inquiry where complaints are withdrawn. As such, even if the complaint was withdrawn, the Board had the statutory authority to continue with its investigations.

Penalty, Costs and Publication

- [37] 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.

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

Penalty

- [39] 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*¹¹ 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.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹² 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.
- [41] 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.
- [42] The Board has dealt with two separate complaints. Whilst that would allow for a higher penalty there are mitigating factors (financial losses). Further, had the Complainant made a single complaint the fact that two records of work had not been provided would have been seen as an aggravating factor for which an increase in penalty would have been warranted.
- [43] The Board’s initial view was that a total fine of \$1,500 (\$750 per disciplinary offence) was the appropriate penalty for the disciplinary offence. The Respondent submitted that he had learnt from the matter and that he was experiencing financial hardship. Having considered the submissions, the Board has decided to reduce the penalty to a total fine of \$1,000 (\$500 per disciplinary offence).

Costs

- [44] 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.”

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [45] 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 case¹³.
- [46] In *Collie v Nursing Council of New Zealand*,¹⁴ 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.*
- [47] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁵ 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.*
- [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.*
- [48] 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 matters were simple. Adjustments based on the High Court decisions above are then made.
- [49] The Board notes the matters were 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 \$250 be paid by the Respondent for each matter. 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.

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ CIV-2011-485-000227 8 August 2011

Publication

[50] 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 Act¹⁶. 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.

[51] 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.

[52] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. 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*²⁰.

[53] 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 interest²¹. 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.

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

¹⁶ Refer sections 298, 299 and 301 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Orders

CB26109

[55] For the reasons set out above, the Board directs, in respect of matter CB26109, that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

CB26110

[56] For the reasons set out above, in respect of matter CB26110, 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 \$500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[57] 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

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

Signed and dated this 27th day of March 2023



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 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.*