

Before the Building Practitioners Board

	BPB Complaint No. CB26521
Licensed Building Practitioner:	Mark Johnston (the Respondent)
Licence Number:	BP104219
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	by audio-visual conference
Hearing Type:	In Person
Hearing and Decision Date:	3 December 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr T Tran, Barrister– Legal Member
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor
Ms S Chetwin CNZM, Barrister and Solicitor, Professional Director

Appearances:

J Hodgins for the Respondent

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)(g) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$1,500. 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] The Respondent was contracted to undertake building work for the Complainant. He did not, prior to building work being undertaken, provide prescribed disclosure information or a prescribed checklist, nor a written contract as per the requirements in Part 4A of the Building Act and the Building (Residential Consumer Rights and Remedies) Regulations 2014.
- [2] The Board found that the Respondent had breached clause 10 of the Code of Ethics for Licensed Building Practitioners (LBPs), which requires that LBPs comply with the Building Act and the Building (Residential Consumer Rights and Remedies) Regulations 2014. The Respondent was fined \$1,500 and ordered to pay costs of \$1,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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

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.

- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [Omitted], Christchurch, have breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act.
- [5] The Board gave notice, with respect to the allegation that the Respondent breached the Code of Ethics, that the specific provisions of the Code to be further investigated at a hearing would be:
- 10. You must comply with the law**
(1) *When you carry out or supervise building work, you must ensure that the building work complies with the following:*
(a) *the Building Act 2004*
- 14. Your duty to inform and educate client**
You must provide your client with sufficient information and advice to enable them to make an informed decision to enable you to continue with your building work.
- [6] The matters noted for investigation under Principle 10 were alleged failures to comply with sections 362D and 362F of the Building Act, being the absence of a signed, written building contract and the non-provision of the prescribed disclosure information and checklist, and the matters for further investigation under principle 14 would be the alleged failure to keep the homeowner advised of the progress and cost of the building work as against the budget and the information and cost estimates given to the homeowner, including with respect to the groundworks.
- [7] During the hearing, the Board ascertained that the Respondent had not carried out the groundworks referred to. As such, it did not further consider the alleged breach of clause 14 of the Code.

Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.³ 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.
- [9] The Respondent was engaged on a charge-up basis to carry out work for the Complainant. There were some discussions about estimated prices and a commercial dispute over the eventual amount that was charged.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Prescribed Disclosure Information and Checklist

- [10] Prior to the building work commencing, the Respondent did not comply with the provisions of section 362D of the Act or regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.
- [11] Section 362D requires a building contractor, which the Respondent was, to provide “prescribed disclosure information” and a “prescribed checklist” for building work that exceeds the prescribed minimum price. The prescribed minimum price is \$30,000. The building work exceeded that amount by a long margin.
- [12] Regulation 5 of the regulations sets out what the “prescribed disclosure information” and a “prescribed checklist” are.
- [13] Overall, the statutory provisions are designed so that a consumer can make an informed choice before entering into a building contract.

Contract

- [14] The Respondent also failed to provide a building contract prior to undertaking the building work. Section 362F of the Act mandates a contract if the price for residential building work exceeds the prescribed minimum price. It also states that the residential building contract must be in writing, dated and comply with the regulations.⁴ Regulation 6 of the Building (Residential Consumer Rights and Remedies) Regulations sets out the prescribed content for residential building contracts.
- [15] The Complainant’s and the Respondent’s evidence regarding the drafting and provision of a building contract differed. The Respondent maintained that the Complainant’s brother, a lawyer, was drafting a contract. The Complainant refuted that claim. Regardless of the disputed facts, the Respondent accepted that a written contract was not in place before the building work started. He did submit; however, there was an intention to provide one, but events overtook that intention.
- [16] The Respondent also gave evidence that since the introduction of the LBP scheme, he has been providing contracts. He does not use any common form of contract but tends to develop his own agreements after discussion with his client. The Respondent was unaware of the mandatory terms and conditions contained in regulation 6 of the Building (Residential Consumer Rights and Remedies) Regulations 2014, which he should familiarise himself with.

Code of Ethics

- [17] The Code of Ethics for LBPs was introduced by Order in Council.⁵ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar

⁴ Building (Residential Consumer Rights and Remedies) Regulations 2014

⁵ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes⁶ for some time, and the Board has taken guidance from decisions made in other regimes.

- [18] The Code also differentiates between LBP who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [19] The disciplinary provision in the Act simply states, “has breached the code of ethics”. Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,⁷ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [20] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. In *Collie v Nursing Council of New Zealand*,⁸ the test was stated as:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

The conduct under investigation

- [21] Two Code of Ethics provisions were under investigation. Both are related to the provision of statutorily required documentation. In total, three statutorily required documents were not provided. They were the prescribed disclosure information, prescribed checklist and a contract. With respect to the first two, the Respondent was not aware of the obligation to provide those documents. Regarding the contract, the Respondent knew of the obligation but proceeded with the building work without one.
- [22] Clause 10 of the Code of Ethics requires compliance with the Building Act and the Building (Residential Consumer Rights and Remedies) Regulations 2014. It is clear that the Respondent has not, insofar as he has not provided mandatory

⁶ Lawyers, Engineers, Architects and Accountants, for example

⁷ [1992] 1 NZLR 720 at 724

⁸ [2001] NZAR 74

documentation, complied with those legislative provisions. It follows that he has breached the Code of Ethics. The question then becomes one of whether the conduct was serious enough to warrant a disciplinary outcome.

Was the conduct serious enough?

- [23] The Board has decided that the conduct was serious enough.
- [24] Regarding the prescribed disclosure information and checklist, the Respondent was not aware of his obligations, and his failure to comply resulted in the consumer not being as informed as she should have been, which, in turn, may have impacted her decision-making.
- [25] Turning to the failure to provide a contract, contracts provide certainty and ensure that the parties know what their contractual rights and obligations are. They also make enforcement of those contractual rights and obligations easier. In this respect, the Board also notes that a dispute has since arisen, and its management and resolution will have been made more difficult by the absence of a contract. The legislative provisions were put in place to protect consumers because building contracts are prone to disputes and are of high value and importance to them.
- [26] It should be noted, as regards seriousness, that under subsections 362D(4) and 362F(3) of the Act, a person who contravenes either section commits an infringement offence and is liable to a fine not exceeding \$2,000. The current prescribed infringement fine is \$500 for each contravention.⁹ On that basis, the Respondent would have been liable to \$1,500 in infringement fines.

Board Decision

- [27] The Respondent has breached clause 10 of the Code of Ethics.

Penalty, Costs and Publication

- [28] 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.
- [29] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [30] 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

⁹ Schedule 1 of the Building (Infringement Offences, Fees, and Forms) Regulations 2007

aggravating factors present.¹⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹¹

- (a) protection of the public and consideration of the purposes of the Act;¹²
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;¹³
- (c) setting and enforcing a high standard of conduct for the industry;¹⁴
- (d) penalising wrongdoing;¹⁵ and
- (e) rehabilitation (where appropriate).¹⁶

[31] 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 cases¹⁷ and applying the least restrictive penalty available for the particular offending.¹⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁹ that is consistent with other penalties imposed by the Board for comparable offending.²⁰

[32] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.²¹

[33] In this matter, the Board adopted a starting point of a fine of \$2,500. In setting the starting point, the Board took into account that whilst the Code of Ethics is new, the Board has been taking an educative approach towards its enforcement in disciplinary matters, the requirements to provide prescribed disclosure information, checklists, and contracts have been in place since 2014, so practitioners should be well aware of them and be complying with those requirements. On that basis, and having taken into consideration other penalty decisions made, the Board arrived at the starting point.

[34] There are some mitigating factors. Firstly, the Board accepts that there may have been some confusion over who was to provide a contract. Whilst it is not a defence,

¹⁰ *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]

¹¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹² Section 3 Building Act

¹³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁶ *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

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

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ 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.

the Board does consider it to be a mitigating factor. Secondly, the Respondent accepted the allegations and is entitled to a penalty reduction to recognise that acceptance. Considering those factors, the Board decided to reduce the fine to \$1,500.

Costs

- [35] 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.²²
- [36] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²³. The starting point can then be adjusted up or down with regard to the particular circumstances of each case.²⁴
- [37] 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 simple, and it was heard using an audio-visual link. Adjustments are then made.
- [38] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a simple matter that has been dealt with using an audio-visual link. It is significantly less than 50% of actual costs.

Publication

- [39] 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,²⁵ 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.
- [40] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁶ 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.²⁷

²² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁴ *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.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [41] Based on the above, a summary of the decision will be published. The Respondent will not be named in that publication. The publication will focus on an LBP's obligations under the Building (Residential Consumer Rights and Remedies) Regulations 2014 and the Board's ability to enforce those through the Code of Ethics, serving as guidance for others.
- [42] The Respondent should also note that whilst the Respondent will not be named, the Board has not made any form of suppression order.

Section 318 Order

- [43] 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 \$1,500 (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, the Respondent will be named in this decision, which will be published on the Board's website.

The Registrar is also directed to publish the matter in accordance with the Board's directions noted in this decision.

- [44] 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

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

Signed and dated this 30th day of January 2025.



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

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- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

ii Section 318 Disciplinary Penalties

- (1) *In any case to which section 317 applies, the Board may—*
 - (a) *do both of the following things:*
 - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*

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- (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.*