

Before the Building Practitioners Board

	BPB Complaint No. CB26429
Licensed Building Practitioner:	Nigel John O’Leary (the Respondent)
Licence Number:	BP113947
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 Type:	On the Papers
Draft Decision Date:	11 April 2024
Final Decision Date :	24 June 2024
Board Members Present:	

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
Mrs J Clark, Barrister and Solicitor, Legal Member
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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,000 and ordered to pay costs of \$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 of the Board's Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500.

The Charges

- [2] 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. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

Regulation 10 Decision

- [3] In this matter, the disciplinary charges the Board resolved to further investigate¹ were that the Respondent may, in relation to building work at [OMITTED], have

¹ 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.

failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) breached the code of ethics prescribed under section 314A of the Act (s 317(1)(g) of the Act).
- [5] With regard to the allegations made, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:
- Complaint not warranting further investigation***
A complaint does not warrant further investigation if—
- (f) *the investigation of it is—*
 - (i) *unnecessary.*
- [6] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.²
- [7] The conduct complained about occurred in or about 2021, and the Board noted that Final Inspections occurred in August and September 2021. Whilst those inspections were recorded as “failed”, it was noted that the reasons included failures to provide documentation, some of which were resolved between inspections, such as the provision of a surveyor’s certificate. The items that did relate to the quality and compliance of the building work were minor in nature, incomplete work, or did not relate to the Respondent’s work (such as landscaping). As such, those matters did not reach the threshold for further investigation.
- [8] One matter that came close to being serious enough to warrant further investigation was a possible failure to ensure a building consent amendment was in place prior to the associated building work being undertaken. In his response to the complaint, the Respondent noted that he had not provided a record of work because he was waiting for an amendment relating to the cladding.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

[9] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with: a minor variation under section 45A of the Act or an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is required.

[10] In *Tan v Auckland Council*³ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[11] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[12] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[13] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[14] Given the above, the Respondent is cautioned regarding his future conduct. If changes are going to be made to what has been consented, the Respondent needs to ensure that the appropriate approvals are in place before they occur.

Draft Decision Process

[15] 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 necessary prior to it making a decision.

³ [2015] NZHC 3299 [18 December 2015]

- [16] Ordinarily, the Board makes a decision having held a hearing.⁴ The Board may, however, depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.⁵
- [17] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. There may, however, have been further evidence in relation to the matter that the Board was not aware of. To that end, the decision was a draft Board decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent had requested an in-person hearing, or the Board had directed that one was required, the draft decision would have been set aside, and a hearing scheduled.
- [18] The Respondent did not submit a response to the Draft Decision. The Complainant made a submission on the adequacy of the penalty and advised the Board that he still had not received the record of work.

Evidence

- [19] 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 which allow it to receive evidence that may not be admissible in a court of law.

Failure to Provide a Record of Work

- [20] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.⁷
- [21] 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 unless there is a good reason for it not to be provided.⁹

Did the Respondent carry out or supervise restricted building work?

- [22] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary

⁴ Regulation 10 of the Complaints Regulations.

⁵ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

⁷ Section 88(1) of the Act.

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

⁹ Section 317(1)(da)(ii) of the Act

structure and external moisture management system of a residential dwelling, both of which are restricted building work.¹⁰ It follows that a record of work was required on completion of that work.

Was the restricted building work complete?

[23] The Respondent's involvement in the project came to an end in or about August 2021. Final Inspections took place in September 2021, indicating that all of the restricted building work had been completed. Additionally, the Respondent provided a record of work as part of the investigation process. It was dated 2 August 2021, which is, in itself, a statement by the Respondent that his restricted building work was complete as at that date.

Has the Respondent provided a record of work?

[24] The Respondent did not provide a record of work until a complaint was made and the Board investigated his conduct. The provision was to the Board's investigator, and it occurred on 9 February 2024.

[25] Completion occurred in August 2021. As such, that was when a record of work was due. Because it was not provided within a short time thereafter, the Board finds that it was not provided on completion as per the requirements of section 88 of the Act.

Was there a good reason?

[26] The only reason put forward by the Respondent was that he was waiting for an amendment to the building consent. He stated:

ROW was completed but was not submitted due to the need to amend building consent for cladding and driveway changes.

[27] As noted above, the requirement is to provide the record of work on completion. It may be common to retain it until a Code Compliance Certificate is sought or to wait until it is requested. However, the wording of section 88 of the Act is clear. The only prerequisite is that the restricted building work is complete. This was confirmed by the High Court in *Ministry of Business Innovation and Employment v Jeffrey Bell*,¹¹ where the High Court stated:

*In my view the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work.*¹²

[28] On that basis, the Board finds that waiting for an amendment was not a good reason.

¹⁰ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

¹¹ [2018] NZHC 1662

¹² Ibid at paragraph [50]

Board's Decision

[29] The Respondent **has** failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

[30] 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.

[31] The matter was dealt with on the papers. The Board made an indicative order in its draft Decision and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

[32] The Respondent did not make any submission on the penalty, costs or publication orders.

Penalty

[33] The Board has the discretion to impose a range of penalties.ⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹³ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁴

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

[34] 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 cases²⁰ and applying the least restrictive penalty available for the particular offending.²¹ In all, the Board should be looking to impose a fair, reasonable, and

¹³ *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]

¹⁴ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁵ Section 3 Building Act

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

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

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

¹⁹ *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

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

²¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty²² that is consistent with other penalties imposed by the Board for comparable offending.²³

- [35] 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.²⁴
- [36] 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 factors present. The Respondent has provided a late record of work as part of the investigation. That has been taken into account as a mitigating factor. The penalty is reduced by \$500 to a fine of \$1,000.
- [37] The Board acknowledges the Complainant's submission on penalty and his view that the fine is "small" and "a token". However, it is important that the penalties are consistent across this ground of discipline and as such the Board has not departed from its standard approach.
- [38] The Board notes however, that the record of work has not been given to the Complainant. The Board, therefore, directs the Board Officer to send the record of work which is on the Board's file to the Complainant and to the Dunedin City Council.

Costs

- [39] 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.²⁵
- [40] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁷.
- [41] 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. Adjustments are then made.

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

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

²⁴ 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.

²⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

²⁷ *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.

[42] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

[43] 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,²⁸ 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.

[44] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁹ 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.³⁰

[45] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

[46] 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 \$1,000.

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, the Respondent will be named in this decision, which will be published on the Board's website.

[47] The Board directs the Board Officer to provide a copy of the record of work to the Complainant and to the Dunedin City Council.

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

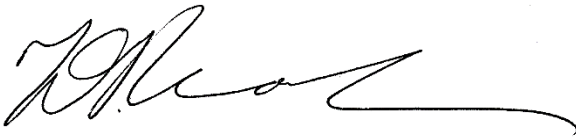
³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [48] 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

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

Signed and dated this 11th day of July 2024.



Mrs F Pearson-Green
Presiding Member

ⁱ Section 318 of the Act

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

ⁱⁱ Section 318 Disciplinary Penalties

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

ⁱⁱⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*