

## Before the Building Practitioners Board

	BPB Complaint No. CB26473
Licensed Building Practitioner:	Philip Wolland (the Respondent)
Licence Number:	BP106039
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Draft Decision Date:	1 July 2024
Final Decision Date:	17 September 2024
Board Members:	
	Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

#### 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 fine was reduced from a starting point of \$1,500 because the Respondent has, since the complaint was made, provided his Record of Work.

### 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 investigate<sup>1</sup> were that the Respondent may, in relation to building work at [OMITTED], have 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) breached the code of ethics prescribed under section 314A of the Act (s 317(1)(g) of the Act).
  - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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—*
  - (ii) 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.<sup>2</sup>

### Workmanship Allegations

- [7] The Complainant alleged that the Respondent's workmanship was negligent because of errors in pre-nailed frames, Gib cut too low, burn splatter marks on inside glass, the soffit linings thickness was changed, and external framing not built to the engineer's plans.

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<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

<sup>2</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [8] The Board considered that these matters did not reach the seriousness threshold. The issue of the spacing for the deck joists was a more serious matter, but on balance, the Board decided that the evidence suggested the Complainant may have changed his mind on the decking, necessitating the joist spacing change and the stamped building consent copy of the engineer's drawing S11 revision D relied on by the Complainant was not produced.
- [9] The Board decided that regulation 9(f)(ii) of the Complaints Regulations applies to these allegations and that their investigation is not necessary.

#### Code of Ethics and Disrepute

- [10] With regard to the allegations that the Respondent may have breached the Code of Ethics and/or brought the licensing regime into disrepute, the Complainant's allegations were the workmanship issues, disparaging comments to subcontractors about the Complainant, changing payment terms, and not coming back to site.
- [11] The Board considers that regulation 9(f)(ii) of the Complaints Regulations applies to these allegations and that their investigation is not necessary.
- [12] 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.<sup>3</sup>
- [13] When the disreputable conduct disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted it should only be exercised in the most serious cases of poor behaviour.
- [14] The Board has previously considered<sup>4</sup> the disrepute provision and discussed the legal principles that apply. In applying this provision, the Board views the conduct objectively<sup>5</sup> and is guided by findings in other occupational regimes.<sup>6</sup>
- [15] As such, the Board does not consider that these allegations reach the threshold necessary for them to be dealt with as disciplinary matters. The Board will not proceed with these allegations.
- [16] The Complainant and Respondent should note that if new compellable evidence that was not available at the time the decision not to proceed was made, a further complaint may be made, or the Board may decide to initiate a Board Inquiry into the matter.

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<sup>3</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>4</sup> Board decision C2-01111 2 July 2015

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

<sup>6</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519; *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401; *Slack, Re* [2012] NZLCDT 40; *Collie v Nursing Council of New Zealand* [2000] NZAR 7

### **Draft Decision Process**

- [17] 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.
- [18] Ordinarily, the Board makes a decision having held a hearing.<sup>7</sup> 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.<sup>8</sup>
- [19] 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 directed that one was required, this decision would have been set aside, and a hearing would have been scheduled.
- [20] The Respondent provided a written submission dated 30 July 2024 in response to the draft decision. That submission has been taken into consideration by the Board in making this decision.

### **Evidence**

- [21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>9</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

### **Failure to Provide a Record of Work**

- [22] 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.<sup>10</sup>
- [23] 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

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<sup>7</sup> Regulation 10 of the Complaints Regulations.

<sup>8</sup> 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

<sup>9</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>10</sup> Section 88(1) of the Act.

territorial authority on completion of restricted building work<sup>11</sup> unless there is a good reason for it not to be provided.<sup>12</sup>

Did the Respondent carry out or supervise restricted building work

- [24] The Respondent was engaged to construct a new two storey dwelling. He completed the timber wall and roof framing, closed in the structure, gib board lining and deck joists before his involvement in the project came to an end.
- [25] The work he carried out and/or supervised related to the primary structure of a house and was done pursuant to a building consent. As such, it meets the definitional requirements under the Regulations<sup>13</sup> and is therefore restricted building work.

Was the restricted building work complete

- [26] The relationship between the parties broke down and the Respondent's involvement in the project ended on 30 October 2024. In this instance, completion occurred on that date when the Respondent's engagement in the building work came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work.

Has the Respondent provided a record of work

- [27] The Respondent stated that he supplied a record of work to the Council on 26 March 2024. This is after the complaint was made on 15 February 2024. No evidence of the record of work being provided to the Council was initially provided by the Respondent. The Council file was obtained on 19 April 2024 and it did not contain a record of work from the Respondent.
- [28] In his submission on the draft decision, the Respondent provided a copy of his record of work and evidence that it had been provided to the Council on 26 March 2024.
- [29] Even though the Respondent provided the record of work to the Council on 26 March 2024, this is five months after his restricted building work was completed.

Was there a good reason

- [30] The Respondent stated in an email to the Complainant on 28 November 2023 that *"Our complete record of work will be submitted to council, when we have been paid in full for October's work"* and in his submission to the Disputes Tribunal he said – *"[We] have refrained from providing the PNCC with a complete record of work documents due to the outstanding final claim payment."*

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<sup>11</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>12</sup> Section 317(1)(da)(ii) of the Act

<sup>13</sup> Building (Definition of Restricted building Work) Order 2011

- [31] 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.
- [32] In his further submission, the Respondent explained that while reference to outstanding payment was made in the Disputes Tribunal documentation, this was not the primary factor in the delay in the provision of the record of work. The Respondent said the project's stress and the time and effort spent on preparation for the Disputes Tribunal hearing shifted his focus away from providing the paperwork. He stated that *"this led to the submission of the record of work being deprioritised, which I now regret."*
- [33] The Board acknowledges that this may have been a stressful period for the Respondent, but that does not take away from his statutory obligation as a Licensed Building Practitioner. Five months passed from the completion of his restricted building work before the record of work was provided – this is not a reasonable period of time. Further, the record of work was only produced after the complaint had been made.
- [34] Accordingly, the Board finds that the Respondent has not established a "good reason" for failing to provide the record of work on completion.

Did the Respondent fail to provide a record of work

- [35] The Respondent failed to provide a record of work on completion of his restricted building work in accordance with his statutory obligations.

**Board's Decision**

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

**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 Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [38] 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.
- [39] The Respondent made submissions on penalty and publication, but not on costs.

## Penalty

- [40] The Board has the discretion to impose a range of penalties.<sup>ii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>14</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>15</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>16</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>17</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>18</sup>
  - (d) penalising wrongdoing;<sup>19</sup> and
  - (e) rehabilitation (where appropriate).<sup>20</sup>
- [41] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>21</sup> and applying the least restrictive penalty available for the particular offending.<sup>22</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>23</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>24</sup>
- [42] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>25</sup>
- [43] 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.
- [44] In its draft decision, the Board provided the Respondent with an opportunity to provide a copy of his record of work together with evidence that it had been

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<sup>14</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>15</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>16</sup> Section 3 Building Act

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

<sup>18</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>19</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

<sup>21</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>22</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

<sup>24</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>25</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.



provided to the Council and to the Complainant homeowner before it made a final decision on the appropriate penalty.

- [45] The Respondent has provided a copy of the record of work to the Board and evidence that it was provided to the Council. He has not demonstrated that it has been given to the homeowner. However, the Board has previously held that provision to the Territorial Authority is sufficient as the record of work is then publicly available to the homeowner.<sup>26</sup>
- [46] Accordingly, as signalled in the draft decision, the Board considers the provision of the record of work to be a mitigating factor, and the penalty is reduced from the starting point of \$1,500 to a fine of \$1,000.
- [47] The Respondent further submitted in response to the draft decision that *“the Board...reconsider the fine...the situation was complex and involved multiple stress factors that impacted the timely submission of the record of work.”*
- [48] The Board considered the Respondent’s further submission on penalty but has decided that to amend the penalty would not be consistent with other penalties imposed by the Board for comparable offending.

### Costs

- [49] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>27</sup>
- [50] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>28</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>29</sup>.
- [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 simple. Adjustments are then made.
- [52] The Respondent accepted the costs order in his submission – *“agreeing that other Licensed Building Practitioners should not bear the financial burden of an investigation and hearing.”*
- [53] 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.

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<sup>26</sup> Hanif [2019] BPB 25132

<sup>27</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>28</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>29</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

## Publication

- [54] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>30</sup> 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.
- [55] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>31</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>32</sup>
- [56] The Respondent asked the Board to reconsider the publication order. The Board has not ordered any publication beyond that required by statute.
- [57] 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**

- [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 \$1,000.
- 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.**
- [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.

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<sup>30</sup> Refer sections 298, 299 and 301 of the Act

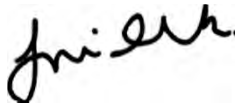
<sup>31</sup> Section 14 of the Act

<sup>32</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

## Right of Appeal

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

Signed and dated this 16<sup>th</sup> day of October 2024.



**Mrs J Clark**  
Presiding Member

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### <sup>i</sup> **Section 318 of the Act**

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

### <sup>ii</sup> **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.*