

## Before the Building Practitioners Board

	BPB Complaint No. 26406
Licensed Building Practitioner:	Clayton Phillips (the Respondent)
Licence Number:	BP104957
Licence(s) Held:	Carpentry and Foundation – Concrete Foundation Walls and Concrete Slab-on-Ground; Concrete or Timber Pile Foundations

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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:	10 April 2024
Final Decision Date:	14 May 2024

#### Board Members:

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Mrs J Clark, Barrister and Solicitor, Legal Member

#### Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

#### Disciplinary Finding:

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

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. The Board’s starting point for penalty was a fine of \$1,500. The Respondent was given the opportunity to provide a record of work by the close of the submission period to both the owner and the Territorial Authority, as per the requirements of section 88(1) of the Act.
- [2] The Respondent provided the record of work to the homeowner, and on that basis, the Board reduced the fine. He is fined \$1,000 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.

## The Charges

- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

### Regulation 10 Decision

- [4] 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

- [5] The complaint to the Board also contained an allegation that by not providing the record of work, the Respondent had conducted himself 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).
- [6] With regard to that allegation, 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.*

- [7] 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>
- [8] 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.

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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

- [9] The Board has previously considered<sup>3</sup> the disrepute provision and discussed the legal principles that apply. In applying this provision, the Board views the conduct objectively<sup>4</sup> and is guided by findings in other occupational regimes.<sup>5</sup>
- [10] These allegations do not reach the threshold necessary for them to be dealt with as disciplinary matters under the ground of disreputable conduct. The Board considers that the Respondent's alleged failure to provide the record of work is adequately and more appropriately addressed as a disciplinary offence under section 317(1)(da)(ii) of the Act, and the Board has dealt with this below.

### Draft Decision Process

- [11] 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.
- [12] Ordinarily, the Board makes a decision having held a hearing.<sup>6</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>7</sup>
- [13] 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, this decision would have been set aside and a hearing scheduled.
- [14] The Respondent did not submit a response to the Draft Decision. He did submit evidence that he had provided a record of work after the Draft Decision was issued.

### Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>8</sup>. Under section 322 of the Act, the Board has

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<sup>3</sup> Board decision C2-01111 2 July 2015

<sup>4</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>5</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; *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>6</sup> Regulation 10 of the Complaints Regulations.

<sup>7</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>8</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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**

[16] 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>9</sup>

[17] 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 work<sup>10</sup> unless there is a good reason for it not to be provided.<sup>11</sup>

### **Did the Respondent carry out or supervise restricted building work.**

[18] The Respondent carried out and supervised excavation work and foundation installation.

[19] The foundation work he carried out and 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>12</sup> and is therefore restricted building work.

### **Was the restricted building work complete.**

[20] The Complainant advised that the work was carried out between April 2022 and March 2023. The Respondent's timeline confirmed an April 2022 start date, but he told the Investigator that he could not recall the exact dates he was on site.

[21] A Council foundation inspection is dated 26 October 2022. By the Respondent's timeline, the parties were discussing issues and outstanding payments by November 2022.

[22] On the basis of the above evidence, the Board considers the restricted building work was complete by November 2022.

### **Has the Respondent provided a record of work.**

[23] The Complainant provided emails between himself and the Respondent, which confirmed that as of January 2024, the Respondent had not provided a record of work. The Christchurch City Council confirmed on 13 March 2024 that it had not received a record of work from the Respondent.

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<sup>9</sup> Section 88(1) of the Act.

<sup>10</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>11</sup> Section 317(1)(da)(ii) of the Act

<sup>12</sup> Building (Definition of Restricted building Work) Order 2011ك

Was there a good reason.

- [24] The Respondent's response to the Investigator focussed on the production of the producer statement and set out various concerns about providing this. This, however, is not the document which is the subject of this complaint.
- [25] The Respondent gave no reason for failing to provide the record of work. He did comment - "*This complaint appears to be vexatious and retaliatory as [the Complainant] has withheld payment for over 12 months, despite numerous attempts to negotiate and mediate a settlement.*"
- [26] Further, the Complainant provided emails between himself and the Respondent's company Operations Manager requesting the record of work on 24 July and 26 September 2023. On 28 September 2023, the chain of emails back to the 24 July request was copied to the Respondent by the Complainant.
- [27] On 28 September 2023, the Operations Manager said - "*As we are currently in dispute for non-payment of overdue invoicing as per our terms of trade, I am unable to supply any further documentation directly, until the matter is resolved by the current Ministry of Justice mediation between all parties.*" This email was copied by the Operations Manager to the Respondent on that same date.
- [28] 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.
- [29] Accordingly, the Board finds that there was no good reason for failing to provide the record of work.

Did the Respondent fail to provide a record of work.

- [30] The Respondent's restricted building work was complete by the end of November 2022, and as of March 2024, he had not provided a record of work to the homeowner or the Territorial Authority. As such, he has failed to meet his statutory obligation to provide a record of work.

**Board's Decision**

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

**Penalty, Costs and Publication**

- [32] 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.

- [33] 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.
- [34] The Respondent did not make any submissions on the penalty, costs, or publication orders. He did provide evidence that he had since provided a record of work.

### Penalty

- [35] 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>13</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>14</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>15</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>16</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>17</sup>
  - (d) penalising wrongdoing;<sup>18</sup> and
  - (e) rehabilitation (where appropriate).<sup>19</sup>
- [36] 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>20</sup> and applying the least restrictive penalty available for the particular offending.<sup>21</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>22</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>23</sup>
- [37] 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>24</sup>

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<sup>13</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>14</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>15</sup> Section 3 Building Act

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

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

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

<sup>19</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>20</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>21</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

<sup>24</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.

- [38] 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.
- [39] The Board provided the Respondent with an opportunity to provide a record of work before it made a final decision on the appropriate penalty. A record of work dated 6 May 2024 was provided to the owner, and evidence of such was provided to the Board. Taking that into account as a mitigating factor, the penalty is reduced by \$500 to a fine of \$1,000.

### Costs

- [40] 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>25</sup>
- [41] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>26</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>27</sup>.
- [42] 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.
- [43] 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

- [44] 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>28</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.
- [45] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>29</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>30</sup>

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<sup>25</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

<sup>27</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.

<sup>28</sup> Refer sections 298, 299 and 301 of the Act

<sup>29</sup> Section 14 of the Act

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



[46] 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

[47] 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(I)(iii) of the Act.

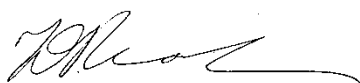
**In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.**

[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 Act<sup>iii</sup>.

Signed and dated this 17<sup>th</sup> day of June 2024



**Mrs F Pearson- Green**  
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."

#### 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.*