

Before the Building Practitioners Board

	BPB Complaint No. C2-01878
Licensed Building Practitioner:	Ivan Billings (the Respondent)
Licence Number:	BP 109804
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	Hamilton
Hearing Type:	In Person
Hearing Date:	21 November 2018
Decision Date:	19 December 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

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Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.
- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and [Omitted].
- [8] In essence the Complainant engaged the Respondent’s company Billings Builders Ltd to build a permitted internal fitout inside the shed which had been built by another company on the property. The Respondent maintains he did not know that the approved building consent for the main building included the internal construction of a toilet, shower, storage area and studio including a mezzanine floor with a balustrade protecting people from a significant potential fall.
- [9] The Complainant said in the written evidence that a copy of the consented plans were left at the property however the Respondent said they never found them.
- [10] When working off the non-consented plans they had been given, the Respondent found that the dimensions were 200 mm short to fit in the toilet, shower, storage

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

area and studio. He did not go back to the designer who produced the plans to seek changes. Rather he made things fit.

- [11] On the 2 June 2016 the council carried out an inspection and listed the following items in relation to the fitout that needed to be fixed as follows:
- (a) mid floor framing not as per the consented plans;
 - (b) bottom plate anchors not installed as per consented plans;
 - (c) mezzanine flooring not as specified in the consented plans;
 - (d) DPC not installed under bottom plate;
 - (e) lintel over slider not sized as per consented plans;
 - (f) stair trimmer joists not full length as per consented plans;
 - (g) joist hangers missing from floor joists;
 - (h) barrier to have adequately sized baluster posted with structural connections;
 - (i) top plate to be joined over studs; and
 - (j) timber framed area to be structurally connected to steel framed building to comply with the proposed bracing design intent.
- [12] Once these issues were brought to the Respondent's attention he attempted to get the designer to seek amendments and/or minor variations from council. In the end this did not happen and the Complainant brought in another builder to rectify the issues that were noted as not complying with the building consent.

Board's Conclusion and Reasoning

- [13] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)
- and should be disciplined.
- [14] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

- [15] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

- [16] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

- [17] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*⁹ it was stated as “*an inability to do the job*”.
- [18] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [19] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².
- [20] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

(b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[21] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[22] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[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.

[23] The primary issue before the Board was whether the Respondent should have checked to see if consented plans existed prior to undertaking the building work.

[24] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act. The onus is on the person carrying out the building work to show that one of the exemptions applies. What is required is careful and deliberate consideration of whether or not any of the exemptions apply prior to commencing the building work. If there is an element of doubt then at the least enquiries with the building consent authority should be made.

[25] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent for the building work was required to carry out the two storey internal fitout.

[26] The fit out did not come within any of the exceptions in Schedule 1 of the Act. It involved primary structure including wall framing supporting a first floor level, lintels supporting floor load above and lintel supports, floor joist framing and flooring to first floor level, wall framing to the first floor level including balustrade framing proving safety from falling and bracing to the two storey structure. Given this there was a clear requirement for a building consent to be obtained and the Respondent should have turned his mind to this. The Board would expect a licenced builder in

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

these circumstances to know a building consent was required regardless of whether he was given a copy of the consented plans.

- [27] It should also be noted that section 14E of the Act makes it very clear that it is the builder's responsibility and more so a licensed building practitioner's responsibility to ensure building work is carried out in accordance with a building consent. It states:

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.]*

- [28] Given the above and based on the evidence provided the Board finds that the Respondent should have ascertained if a building consent had been obtained for the internal fitout prior to commencing and that even if there was no building consent the Respondent should have asked the Complainant to obtain one given the nature of the work to be undertaken for the fitout. The Board, which includes persons with extensive experience and expertise in the building industry, therefore finds that the Respondent has been negligent in that he has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [29] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be

undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

- [30] In *Tan v Auckland Council*¹⁶ 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.

- [31] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of failure.
- [32] Given that the Respondent did not follow the consented plans as outlined in paragraph [11] above and these items relating to the Respondent's work was failed by the council hence requiring remedial action the Board finds that the disciplinary offence has been committed.

Penalty, Costs and Publication

- [33] 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.
- [34] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [35] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁷ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of

¹⁶ [2015] NZHC 3299 [18 December 2015]

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [36] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [37] The matters are serious. Building consents are at the heart of the system to ensure buildings are safe and that they perform. Failure to adhere to them puts that system at risk. Therefore, based on the above the Board's penalty decision is impose a fine of \$3,500.

Costs

- [38] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [39] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁹.
- [40] In *Collie v Nursing Council of New Zealand*²⁰ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [41] 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.

Publication

- [42] 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 Act²¹. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

¹⁹ *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.

²⁰ [2001] NZAR 74

²¹ Refer sections 298, 299 and 301 of the Act

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.

- [43] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [44] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁵.
- [45] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁶. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [46] Based on the above the Board will not order further publication.

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 penalty of \$3,500.

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(1)(iii) of the Act.

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

- [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.

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [49] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 January 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [50] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 19th day of December 2018



Richard Merrifield
Presiding Member

ⁱ **Section 318 of the Act**

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

-
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

ii **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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