

## Before the Building Practitioners Board

	BPB Complaint No. C2-01920
Licensed Building Practitioner:	Arthur May (the Respondent)
Licence Number:	BP 103806
Licence(s) Held:	Site AOP 1

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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	Complainant
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	27 November 2018
Decision Date:	17 January 2019

Board Members Present:

- Chris Preston (Presiding)
- Richard Merrifield, LBP, Carpentry Site AOP 2
- Mel Orange, Legal Member
- David Fabish, LBP, Carpentry 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.

#### Board Decision:

The Respondent **has** committed a disciplinary offence under section 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 Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent 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).

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

[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*<sup>4</sup> 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*

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

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

*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.

#### **Procedure**

- [5] The matter was set down for a hearing. Both the Respondent and the Complainant gave notice that they would not appear at the hearing. The matter proceeded in their absence.

#### **Evidence**

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.
- [7] 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.
- [8] In addition to the documentary evidence before the Board heard evidence at the hearing from [Omitted], a licensed building practitioner with a Carpentry Licence.
- [9] The Respondent, by way of his business Home Build Project Management Limited, was engaged to build a new residential dwelling for the Complainants. He subcontracted the carpentry work to [Omitted].
- [10] The Building Agreement specified “Shadowclad 12mm Ply on 20mm Cavity & 4.5mm Hardiflex”. The specification that formed part of the building consent noted in clause 6.0 Exterior Cladding “Shadowclad Ply – As attached BRANZ appraisal No 764”. The consented plans stipulated “12mm Ply with weathergroove battens @ 300 crs on 20mm cavity”.
- [11] The Complainants, following completion, experienced bubbling of the cladding material installed. Subsequent investigations revealed that the cladding was ECO Ply BO which was not the specified product. The cladding has since been replaced with the correct Shadowclad product at the Respondent’s expense.
- [12] [Omitted] stated that he installed the cladding. He did not order it. It was supplied to him by Home Build Project Management Limited who ordered and supplied all materials. Prior to the cladding being installed [Omitted] stated that he queried the suitability of the product as he noted it was to be painted black.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [13] Photographs of the installed cladding admitted into evidence at the hearing showed that it was clearly stamped with ECO Ply BO.
- [14] [Omitted] gave evidence that when he raised the issue with the Respondent, the Respondent advised him that he had spoken to [Omitted] and that they had advised that it would be okay to proceed and use the supplied product.
- [15] [Omitted] also stated that he was not dealing with consenting issues or with minor variations. He stated he was simply a contracted carpenter and that all other matters were dealt with by the Respondent.
- [16] The Respondent provided a written response. He stated that the install of the wrong cladding was an error and that it was rectified at no cost to the Complainant. In a further written response he stated that he had received and relied on advice from [Omitted] that proved to be incorrect and that the decision and responsibility was his. He did not elaborate further or provide any supporting evidence.
- [17] The Respondent has since voluntarily cancelled his licence.

#### **Board's Conclusion and Reasoning**

- [18] The Board has decided that the Respondent **has** 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.
- [19] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40 of the Act.
- [20] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and the works will meet any required performance criteria.
- [21] 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.
- [22] In *Tan v Auckland Council*<sup>6</sup> 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.*

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<sup>6</sup> [2015] NZHC 3299 [18 December 2015]

- [23] 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 harm.
- [24] In the present case the specified exterior cladding was changed. The evidence before the Board was that the specified product was not installed. A different product was. There was, in essence, a product substitution.
- [25] The product substitution was not dealt with as either a minor variation or as an amendment. On this basis the Board finds that the building consent has not been adhered to.
- [26] The Board also finds the Respondent was the person who was responsible for the product substitution. He ordered the materials and did not check that the correct product was supplied. He then failed to take action as regards changes to the building consent when he made the decision to proceed with the install of the ECO Ply BO.
- [27] The question for the Board is whether the Respondent, in ordering the incorrect product, has carried out building work given his involvement was in ordering the wrong product and then failing to deal with the product substitution.
- [28] The term “building work” is defined term in section 7 of the Act as follows:
- building work —*  
*(a) means work—*  
*(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*
- [29] The phrase “for, or in connection with” used in the definition connotes in the Board’s view a wide range of matters that could be brought into play including the processes and systems used to manage the construction, alteration, demolition or removal of a building.
- [30] The Board is required to interpret terms in the Act from the text and in accordance with its purpose but ultimately it should be done to ensure that it gives effect to the purpose of Parliament<sup>7</sup>. The Board may, if necessary, in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 Purposes of the Act, section 14E Responsibilities of the Builder and section 282A Purposes of Licensing Building Practitioners have been taken into consideration.
- [31] All of these provisions use similar references to the process to achieve the resulting object of building work and of its compliance with a building consent and the building code. On this basis the Board has decided that the conduct of the Respondent comes within the definition of building work and that the Respondent has committed the disciplinary offence.

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<sup>7</sup> Refer s 5 of the Interpretation Act 1999

### **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, as a result of the Respondent not appearing, largely dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

- [34] 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*<sup>8</sup> 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 punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*
- [35] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>9</sup> 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.
- [36] The Board notes that the Respondent has previously been disciplined by it. The related conduct, however, occurred at a similar time to the present complaint and prior to the Board making its decision on the other matter and as such it does not view it as an aggravating factor.
- [37] The Board also notes that the Respondent has taken responsibility and that the cladding has now been replaced.
- [38] The Respondent has cancelled his licence. His voluntary action has no bearing on the Board's penalty considerations as the Board notes he can, at any time, reactivate it.
- [39] Taking all of the above factors into consideration the Board has decided that the appropriate penalty is that the Respondent be fined the sum of \$1,000.

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<sup>8</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>9</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

## Costs

- [40] 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.”
- [41] 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 case<sup>10</sup>.
- [42] In *Collie v Nursing Council of New Zealand*<sup>11</sup> 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.*
- [43] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board’s inquiry. This is significantly less than 50% of actual costs incurred.

## 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>12</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- 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.*
- [45] 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.
- [46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>13</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>14</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>15</sup>. The High Court provided

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<sup>10</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>11</sup> [2001] NZAR 74

<sup>12</sup> Refer sections 298, 299 and 301 of the Act

<sup>13</sup> Section 14 of the Act

<sup>14</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>15</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>16</sup>.

- [47] 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 interest<sup>17</sup>. 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.
- [48] Based on the above the Board will not order further publication.

### Section 318 Order

- [49] 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 \$1,000 (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.**

- [50] 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.

### Submissions on Penalty, Costs and Publication

- [51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **8 February 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.
- [52] 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.

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<sup>16</sup> *ibid*

<sup>17</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Right of Appeal

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

Signed and dated this 17<sup>th</sup> day of January 2019



**Chris Preston**  
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 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.*