

## Before the Building Practitioners Board

	BPB Complaint No. C2-01677
Licensed Building Practitioner:	Satish Chand (the Respondent)
Licence Number:	BP 113469
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	Auckland
Hearing Type:	In Person
Hearing Date:	20 December 2017
Decision Date:	15 January 2018

#### Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)  
Mel Orange, Legal Member  
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 section 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

## Contents

<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Background to the Complaint</b> .....	3
<b>Evidence</b> .....	3
<b>Board’s Conclusion and Reasoning</b> .....	5
Jurisdiction.....	5
Negligence and/or Incompetence.....	5
Contrary to a Building Consent.....	6
Record of Work.....	6
<b>Penalty, Costs and Publication</b> .....	7
Penalty.....	8
Costs.....	9
Publication.....	10
<b>Section 318 Order</b> .....	11
<b>Submissions on Penalty, Costs and Publication</b> .....	11
<b>Right of Appeal</b> .....	11

## 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 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).

---

<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.

### 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 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.

### Background to the Complaint

[5] The Complainant set out that the Respondent carried out building work in relation to an extension to an existing dwelling under a building consent between 1 December 2015 and 24 March 2016. The Complainant alleged the building work was carried out to an unacceptable standard.

[6] The Complainant also stated that a record of work had been requested on multiple occasions but had not been provided.

### Evidence

[7] 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.

[8] The complaint included copies of Building Consent Authority (BCA) inspections and photographs of the building work complained of. The inspections records included a Site Notice dated 18 April 2016 from Manukau Building Consultants, the BCA. It noted the following noncompliant items and poor workmanship:

1. *The site requires clean up [Site Hazard].*
2. *12mm gap between the deck and the dwelling is required.*

<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

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

3. *Porch post that supports the roof beams requires uplift brackets.*
4. *The timber floor falls away – approximately 20mm-30mm. With reference to NZS3604:2011 – Section 2 Table 2.1 the tolerances are outside the scope of NZS3604:2011. This needs to be rectified.*
5. *Corner soakers have not been install as per plan.*
6. *The gap above the head flashing to James Hardie weather boards is greater than 5mm and install poorly [80% of the windows].*
7. *The timber wall – Northern Elevation appears to be out of level by approximately 20mm. with reference to NZS3604:2011 – Section 2 Table 2.1 the tolerances are outside the scope of NZS3604:2011.*
8. *Windows to be fix in accordance with the Gib Board Manufacturers Spec.*
9. *All Gib braces to be fix in accordance with NZBC – E2/AS1.*
10. *Ceiling Gib board sheets need to be install in accordance with the Gib Board Manufacturers Spec.*
11. *The right product screws required for fixing Gib board.*
12. *The water proof membrane in the bathroom appears to be lift around the shower, furthermore the shower requires flood testing once the underfloor waster has been installed.*

*Please Note: there maybe additional items that require rectifying*

*Before any building work can proceed, all of the above noted items are to be rectified.*

- [9] Other BCA inspection records noted “standard of Gib board put up very poor workmanship”. Photographs of the plasterboard install were included.
- [10] The Complainant also set out in the complaint that the Respondent had been advised by him that the building work was not in accordance with manufacturer’s specifications and needed to be rectified. The Complainant stated that the Respondent refused and complained to the main contractor who told the Complainant to stop interfering with his workers. The Complainant noted that there were health and safety breaches on site including a failure to display a hazard board.
- [11] The Respondent did not provide a written response to the complaint. He did provide a submission prior to the hearing. In it he noted that he had been liaising with the Complainant with regard to the record of work. He did not address the other issues.
- [12] The Board heard evidence at the hearing from the Respondent. The Board advised the Respondent that it had compelling evidence of noncompliant and poor standard building work before it and it was seeking his response to the allegations.
- [13] The Respondent stated that he was engaged by the main contractor, a non-licensed person, that there were problems with finance and as a result the work stopped. The main contractor provided labourers to assist with the building work. He both carried out and supervised the building work. He noted that the BCA passed the work.

[14] With regard to the record of work the Respondent produced one dated 20 July 2017 which was provided to the main contractor on or about that date. He stated he also provided it to the owner on that date. He did not provide it to the Territorial Authority. He believed the owner would provide it to the Territorial Authority.

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

[15] The Board has decided that the Respondent **has**:

- (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);

and should be disciplined.

[16] The reasons for the Board's decision follows.

### Jurisdiction

[17] The Board only has jurisdiction over licensed persons<sup>6</sup>. The Respondent is presently not licensed. At the time of the alleged conduct he was, however, licensed and as such the Board has jurisdiction pursuant to section 315(2) which states:

*A complaint or inquiry, and any decision on the complaint or inquiry, may relate to a person who is no longer a licensed building practitioner but who was a licensed building practitioner at the time of the relevant conduct.*

### Negligence and/or Incompetence

[18] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>7</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[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.*

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

<sup>6</sup> Pursuant to section 315 of the Act.

<sup>7</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [19] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>8</sup> as regards the threshold for disciplinary matters:

*[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.*

- [20] The failings noted in the Site Notice from the BCA were both numerous and serious. The building work shown in the photographs was very poorly carried out. Both demonstrated a lack of reasonably expected care and a lack of the reasonably expected ability and skill in respect to both the carrying out of building work and the supervision of others. As such the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent was both negligent and incompetent.

#### Contrary to a Building Consent

- [21] 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 a variation 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.
- [22] The BCA Site Notice listed numerous items of noncompliance with the building consent and is, in itself, sufficient evidence of building work not having been carried out in accordance with the building consent. The Respondent is therefore found to have committed the disciplinary offence.

#### Record of Work

- [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 territorial authority on completion of restricted building work<sup>9</sup>.
- [24] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board

<sup>8</sup> [2001] NZAR 74

<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

- [25] The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup> and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [26] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [27] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion.
- [28] In the present case building work ceased on 24 March 2016 and a record of work was not completed until 20 July 2017, over a year later. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [29] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [30] In this instance there was a payment dispute with the main contractor. 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.

### **Penalty, Costs and Publication**

- [31] 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.

---

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [32] 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

- [33] 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>11</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.*

- [34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>12</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.
- [35] The Respondent has previously appeared before the Board and has been found guilty of disciplinary offences and has been penalised as follows:

<b>Complaint Number</b>	<b>Disciplinary Offences</b>	<b>Penalty</b>
C2-01445	317(1)(da)(ii)	Fine of \$1,500
C2-01468	317(1)(b) and (da)(ii)	Fine of \$1,500
C2-01565	317(1)(b) and (d)	Licence cancelled for 6 months

- [36] In C2-01565 the Board noted:

*[42] The Board needs, in coming to its penalty decision, to consider the purposes of the regime for licensed building practitioners and the need for the public to have confidence in those that are licensed to carry out or supervise restricted building work.*

<sup>11</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>12</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[43] *In this instance the Board considers the Respondent's conduct to have been sufficiently serious enough to warrant either a suspension or a cancellation of his licence. As the Respondent has been found to have been incompetent it is minded toward cancellation as this means that the Respondent will, if he reapplies for a licence, be reassessed as to his competency. This in turn creates an element of public protection.*

[44] *Additionally the Respondent's licence is already suspended. As such the Board considers that cancellation is appropriate. The Board will also order that he may not reapply to be licenced for a period of six months.*

[37] The Respondent has again committed multiple disciplinary offences. The negligence and incompetence and contrary to consent matters are very serious. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. Moreover the scheme is designed to ensure a base level of competence so that restricted building work or is carried out or supervised competently and in accordance with the building code and any building consent issued. The Respondent has been found to have been lacking with regard to those competencies on more than one occasion.

[38] Taking all of the above factors into account the Board considers that a further cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct and to ensure the Respondent's competency is reassessed if he decides to reapply for a licence at a future date.

[39] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of 2 years from the end of his current period of cancellation.

### 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>13</sup>.

[42] In *Collie v Nursing Council of New Zealand*<sup>14</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

---

<sup>13</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>14</sup> [2001] NZAR 74

*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] A hearing was required and based on the above factors the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. This is still significantly less than 50% of actual costs.

#### 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>15</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>16</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>17</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>18</sup>. 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*<sup>19</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>20</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 order further publication. The Board considers publication of the Respondent's name is necessary to give effect to its order and to ensure the deterrence element of the penalty. Such publication will be made in the Code Words publication and on the Board's website and by way of such other means as is considered necessary to effectively inform the public.

<sup>15</sup> Refer sections 298, 299 and 301 of the Act

<sup>16</sup> Section 14 of the Act

<sup>17</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>18</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>19</sup> *ibid*

<sup>20</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

[49] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 2 years from the date his current cancellation ends.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 be action taken to publicly notify the Board's action, in addition to 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 **7 February 2018**. 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.

### Right of Appeal

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

Signed and dated this 15<sup>th</sup> day of January 2018



**Richard Merrifield**  
Presiding Member

---

<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.*