

Before the Building Practitioners Board

	BPB Complaint No. C2-01859
Licensed Building Practitioner:	Raymond Toland (the Respondent)
Licence Number:	BP 132177
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	Wellington
Hearing Type:	In Person
Hearing Date:	10 October 2018
Decision Date:	24 October 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

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)(b) 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); and
- (b) breached section 314B(b) of the Act (s 317(1)(h) 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.

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

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

- [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 from the Respondent at the hearing. The Board also heard evidence from Tim Watson, a Technical Advisor to the Board who had completed a report in respect of the building work to which the complaint related.
- [8] The Respondent was engaged to carry out renovations to a bathroom and kitchen of a flat and to install a new deck. The building work did not require a building consent. The Complainant, the owner of the flat, complained that the building work was carried out in a negligent manner.
- [9] A report completed by the Technical Assessor noted the issues set out in the following table:

⁴ [2016] HZHC 2276 at para 164

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

Description of defective work	Contravention or non-compliance with the Building Act or Building Code	LBP's response summation	Technical Advisor comment/observation & photo references	Implication of the non-compliance
Kitchen with warping benchtop, splashback, multiple leaks, plumbing poor.	Section 17 of the Building Act Building code clauses B2 (durability), E3 (internal moisture), G3 (Food prep & prevention of contamination).	Questions if some delamination due to use of benchtop by occupants. Advised owner that it would be replaced.	Defective benchtop material used. Unlikely due to use of benchtop as is delaminating in multiple places, including areas where little to no use would occur.	Unightly appearance, growth of mould and unsanitary conditions in a food preparation area.
Bathroom with wall, skirting warping. Wet behind vanity, shower not fixed properly and leaking, nail through pipe, water pipe through ventilation duct.	Section 17 of the Building Act Building code clauses B2 (durability), E3 (internal moisture).	Advises that plumber is to blame for leaks and that plumber refuses to comment. Admits fault with nail in pipe and states it was fixed and contends that it was not poor workmanship.	Problems are related to nail through pipe & defective plumbing work. MDF skirting is in very poor condition and is a poor choice of material for bathroom applications. Vent duct (1 of 2) appears to be an existing installation with no ducting pipework. A water supply pipe runs through this area, but there was no indication whether this work was new or not. Plastic shower lining not well adhered to wall and corner of shower leaking onto floor.	Unightly appearance, growth of mould and unsanitary conditions in bathroom.
Lino - Bubbling surface, joins in multiple areas.	Section 17 of the Building Act Building Code clause E3 (internal moisture).	States that the Lino work was not charged to the client and advised owner at the time that he was not a floorlayer.	Workmanship was poor with bubbling of lino and rough edges sealed with silicone to walls. Suspect poor substrate preparation is largely to blame for lifting of lino.	Unightly appearance, increased wear due to high points could create potential trip hazard in the future. Potential for water spills or washing to affect walls at junctions.

Description of defective work	Contravention or non-compliance with the Building Act or Building Code	LBP's response summation	Technical Advisor comment/observation & photo references	Implication of the non-compliance
Deck - Unstable, attached to house, nails proud of deck surface, gate with no stability,	Section 17 of the Building Act, Building Code clause B1 (structure), B2 (durability), D1 (Access), E2 (external moisture). F4 (Safety from falling)	Replies that deck was never finished due to dispute over changes and payment so work was incomplete. Nail status could be result of wood shrinkage	Deck joists ends nailed directly to weatherboards of dwelling. Decking abutted to weatherboards without required 12mm separation. Deck bearers/stringers not adequately fixed or supported in various areas. (deck step) Question whether structural nailing & deck piles meet B2 requirements. Deck barrier does not meet NZS3604. Timber strength grading at question. Materials stated on builders plan to owner not used. Deck barrier/steps/handrail dimensions do not comply with D1 'Main Private Stair' requirements or F4. Various proud nail heads and deck gate requires a diagonal brace.	Deck slumping over time, potential for joists to break under load. Potential for loaded deck to damage house cladding at connection over time. Risk of falling from new deck surface.
Plumbing - no glue / sealant used, poor quality workmanship	Section 17 of the Building Act	Has tried to engage with plumber regarding issues but has had no success.	Not restricted building work and is a civil matter.	Long term leaks could damage durability of internal building components, including in-wall structure.

- [10] The Board questioned the Respondent as regards the plumber and what due diligence he carried out prior to engaging him to ensure he was a registered and licensed person. The Respondent gave evidence that his usual plumber was not available, that a person by the name of [Omitted] had been recommended, and that he did not carry out any other checks on him. He paid [Omitted] cash, did not receive an invoice, and has not been able to contact him since. He was not able to supply any other details. There was no person matching the description on the Plumbers Gasfitters and Drainlayers Register.
- [11] With regard to the kitchen benchtop the Respondent stated it was purchased new but was a cheap top. The Respondent also stated that the bathroom fittings were installed by the plumber except that he installed the screen. His workers installed the skirting boards and he accepted they should have been pine and that he did not check their work. He also accepted that one of his workers pieced a pipe with a nail but submitted that this was an accident.
- [12] The Respondent carried out the lino install. He accepted that he was not experienced in lino installation and stated that he had not charged for his services.
- [13] The Board's main area of investigation was the deck. The Respondent accepted that the work was not completed to an acceptable standard but submitted that when the deck was being completed a dispute had arisen and that budget issues were arising which impacted on what was done and how it was done. The Respondent also submitted that the deck was not complete and that the bolts securing the stringer were not installed as the workers were not sure which type of bolts to use and that it could be done as part of completion. He also submitted that a landing at the bottom of the stairs was to be constructed. The Respondent issued no warnings as regards the safety and compliance of the deck.
- [14] The Respondent also made submissions about personal issues that were impacting him at the time the building work was carried out. He stated that he takes being a licensed building practitioner seriously and was disappointed by the building work that was carried out.

Board's Conclusion and Reasoning

- [15] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [16] The Board has also decided that the Respondent **has not** breached section 314B of the Act (s 317(1)(h) of the Act).
- [17] The reasons for the Board's decision follows.

Negligence and/or Incompetence

- [18] There were two matters that the Board was investigating with regard to negligence and/or incompetence. The first was the manner in which the building work was carried out. The second was with regard to the processes used to engage a plumber.
- [19] 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.*
- [20] 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 into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [21] 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*".
- [22] 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.
- [23] 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.
- [24] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

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

- (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:*
- (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.*

[25] 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.

[26] 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.

[27] Looking at the first matter identified, the quality and compliance of the building work, the Board considered that the contraventions with regard to the deck were serious and that they warranted a disciplinary outcome. The deck was left in an unsafe manner and no warnings were issued or instructions given as to matters that required completion. Items such as the installation of securing bolts should have been done in sequence and the installation will now be difficult given the available access. Other items, such as the lack of a gap between the decking and the stringer and the weatherboards is a serious non-compliance issue which can result in long term weathertightness issues for the dwelling. Other matters posed a risk to safety such as the balustrade and the uneven first step.

[28] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

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.

- [29] Turning to the Respondent's engagement of a plumber it was noted by the Board that no due diligence was carried out. The register of plumbers, gasfitters and drainlayers is a free publicly accessible register and the Board considers that a responsible licensed building practitioner would at the least take steps to ensure a plumber that he was not familiar with was registered and licensed. In this instance, however, the Board has decided that the conduct was not serious enough to warrant a disciplinary outcome. Had the work been carried out under a building consent then the outcome may well have been different.

Misrepresentation or Outside of Competence

- [30] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).

- [31] As regards working outside of one's competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [32] The matter for investigation was whether the Respondent had carried out plumbing work which was outside of his competence or had knowingly engaged an unauthorised person to carry out the work. The Board was satisfied that the Respondent did engage another person and that he thought that person was authorised and was thus the supervisor of that person. It has already made a finding in this regard within the context of negligence and as such a further finding is not necessary.

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 Act¹, 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*¹⁶ 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.

- [36] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ 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 Board noted that the Respondent accepted a level of responsibility and has taken some steps to rectify issues. Notwithstanding the matters pertaining to the deck involved serious safety risks and the Respondent did not take steps to warn or rectify them.
- [38] Based on the above the Board had a starting point of a fine of \$3,000 but it has reduced this to \$2,500 having taken into account the mitigation present.

Costs

- [39] 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."
- [40] 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 case¹⁸.
- [41] In *Collie v Nursing Council of New Zealand*¹⁹ 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.*
- [42] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁸ *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.

¹⁹ [2001] NZAR 74

Publication

[43] 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 Act²⁰. 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.

[44] 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.

[45] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.

[46] 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 interest²⁵. 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.

[47] Based on the above the Board will not order further publication.

Section 318 Order

[48] 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 \$2,500.

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.

²⁰ Refer sections 298, 299 and 301 of the Act

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [49] 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

- [50] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **15 November 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.
- [51] 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

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

Signed and dated this 24th day of October 2018



Chris Preston
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.*