

## Before the Building Practitioners Board

	BPB Complaint No. C2-01875
Licensed Building Practitioner:	Christopher Gerbes (the Respondent)
Licence Number:	BP 126589
Licence(s) Held:	Roofing: Torch on Roof Membrane

---

### 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	Napier
Hearing Type:	In Person
Hearing Date:	11 October 2018
Decision Date:	1 November 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 disciplinary offences under sections 317(1)(b) and 317(1)(c) of the Act.

## Contents

<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	2
<b>Evidence</b> .....	3
<b>Board’s Conclusion and Reasoning</b> .....	5
Negligence and/or Incompetence .....	5
Not Licensed to Carry Out or Supervise Restricted Building Work.....	8
Misrepresentation or Outside of Competence.....	8
<b>Penalty, Costs and Publication</b> .....	8
Penalty .....	9
Costs.....	9
Publication .....	10
<b>Section 318 Order</b> .....	10
<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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(1)(c) of the Act); and
- (c) 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

---

<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.

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.

### **Evidence**

- [5] 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.
- [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.
- [8] The complaint related to roofing work carried out on a residential dwelling under a building consent. It included restricted building work. Multiple roofing contractors were involved. The roofing work that the Respondent and his business were involved in was the replacement of long run iron and associated flashings.
- [9] The Complainant commissioned a report from [Omitted] of [Omitted] who completed a site visit. With regard to the work the Respondent was involved in the report noted:
- (a) the barge flashing installed to the conservatory area is not fixed on the top surface and has come loose;

---

<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

- (b) the top termination of roof cladding at the upper most ridge did not appear to be turned up beneath the ridge flashing;
  - (c) the roof cladding appears to extend only 50mm past the ridge flashing. The cover provided to the top termination of the roof cladding should be 200mm;
  - (d) damaged roof cladding sheet either left in situ without being replaced or installed in a poor condition;
  - (e) the flashing installed to the change in plane between the upper level roofs incorporates an inadequate extension over the lower roof cladding. The flashing provides 150mm of cover (NZBC compliance document E2/AS1 requires that change in plane flashings installed in Very High wind zones provide 200mm cover to the roofing); and
  - (f) poor installation of the apron flashing has resulted in rippling of the flashing.
- [10] The Respondent provided a written response to the complaint in which he stated that his company is predominately a commercial membrane roofing company and that when approached for iron roofing projects they sub contract them. He noted issues with the person he subcontracted to with regard to drug abuse, non-payment of his staff and general poor workmanship which resulted in a cost to the company to put it right. The Respondent stated he no longer uses subcontractors and no longer did iron roofing.
- [11] At the hearing the Respondent gave evidence that he did order the materials and made one check of the work at or near completion.
- [12] The Respondent accepted liability for the sub-standard work and responsibility for rectification but noted that, due to the nature of the roof and weather issues rectification had not occurred.
- [13] The Board, post issue of the Registrar's Report, sought further details on who the subcontractor was that carried out the building work and in particular whether it was a licensed person. Information was provided to the Board to the effect that no licensed person had been identified as having carried out the building work.
- [14] The Board made further inquiries of the Respondent at the hearing as to who the subcontractor was. The Respondent was not able to assist but indicated he may have a phone number that he could provide. An opportunity was given to provide a phone number but one was not provided.
- [15] The Respondent was also questioned as to what, if any, due diligence he undertook to ensure the person he subcontracted to was licensed to carry out the restricted building work. He stated he thought he saw a BCITO card but made no other enquiries. He paid the subcontractor cash. No invoices were received.

[16] The Respondent accepted the workmanship issues noted in the [Omitted] report. He spoke of his business experience and his business operations. He stated he was, at the time, the only licensed person in the business.

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

[17] 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); and
- (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(1)(c) of the Act)

and should be disciplined.

[18] The Board has also decided that the Respondent **has not** breached section 314B(b) of the Act (s 317(1)(h) of the Act).

### Negligence and/or Incompetence

[19] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>6</sup> 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*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[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*<sup>9</sup> 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 test<sup>10</sup>. 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.

<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

[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 Act<sup>11</sup>. 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 practitioner<sup>12</sup>.

[24] 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:*
- (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 Code<sup>13</sup> and be carried out in accordance with a building consent<sup>14</sup>. 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*<sup>15</sup> 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.*

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

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

<sup>13</sup> Section 17 of the Building Act 2004

<sup>14</sup> Section 40(1) of the Building Act 2004

<sup>15</sup> [2001] NZAR 74

- [27] The building work was not carried out by the Respondent. It included restricted building work that had to be carried out or supervised by a licensed building practitioner. The subcontractor was not licensed. Responsibility falls to the Respondent as the supervisor.
- [28] The [Omitted] report highlighted serious non-compliance issues. The work was not completed to an acceptable standard. As the Respondent supervised the work the question for the Board is whether his supervision was negligent or incompetent.
- [29] Supervise is defined in section 7<sup>16</sup> of the Act. The definition states:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

*(b) complies with the building consent under which it is carried out.*

- [30] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:
- (a) the type and complexity of the building work to be supervised;
  - (b) the experience of the person being supervised;
  - (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
  - (d) the number of persons or projects being supervised; and
  - (e) the geographic spread of the work being supervised.

- [31] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

- [32] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992<sup>17</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

*"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the*

---

<sup>16</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

*(b) complies with the building consent under which it is carried out.*

<sup>17</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

*electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

- [33] Looking at the building work in question and the considerations outlined in paragraphs [29] and [30] the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent in his supervision of the building work. In particular the Board notes that the Respondent placed his trust in an unlicensed subcontractor and that he did little or no checks of the work.

#### Not Licensed to Carry Out or Supervise Restricted Building Work

- [34] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

*All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

- [35] The Respondent is a licensed building practitioner with a Roofing Licence. Within roofing there are various Areas of Practice that have been established to distinguish between the various types of roofing. The Respondent is licensed in Torch on Roof Membrane. He is not licensed in Profiled Metal Roof and Wall Cladding. The restricted building work involved long run iron which required an Area of Practice of Profiled Metal Roof and Wall Cladding. As the Respondent did not have that Area of Practice and was the only licensed person the Board finds that he has committed the disciplinary offence.

#### Misrepresentation or Outside of Competence

- [36] The Respondent was also charged with an offence under section 314B(b) of the Act. The section relates to carrying out or supervising building work outside of a licensed person's competence. As the Board has made a finding that he has committed a disciplinary offence under section 317(1)(c) of the Act it does not consider that a finding is also necessary under section 317(1)(h) of the Act.

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

- [37] 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.
- [38] 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

- [39] 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>18</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.*

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>19</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.
- [41] The Board noted that the Respondent has accepted responsibility and has stated an intention to rectify the workmanship and compliance issues. It has taken this into account as mitigation.
- [42] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$1,500. This has been reduced from a starting point of \$2,000.

### Costs

- [43] 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."
- [44] 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>20</sup>.
- [45] In *Collie v Nursing Council of New Zealand*<sup>21</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

<sup>18</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>19</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>20</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>21</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.*

- [46] 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.

#### Publication

- [47] 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>22</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.*

- [48] 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.
- [49] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>23</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>24</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>25</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>26</sup>.
- [50] 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>27</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.
- [51] Based on the above the Board will not order further publication.

#### **Section 318 Order**

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

<sup>22</sup> Refer sections 298, 299 and 301 of the Act

<sup>23</sup> Section 14 of the Act

<sup>24</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>25</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>26</sup> *ibid*

<sup>27</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

**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.

- [53] 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**

- [54] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **23 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.

- [55] 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**

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

Signed and dated this 1<sup>st</sup> day of November 2018



**Chris Preston**  
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.*