

## Before the Building Practitioners Board

	BPB Complaint No. C2-01899
Licensed Building Practitioner:	Tony Songhurst (the Respondent)
Licence Number:	BP 129264
Licence(s) Held:	Carpentry and 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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	6 November 2018
Decision Date:	3 December 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	David Fabish, LBP, Carpentry Site AOP 2
	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 a disciplinary offence under section 317(1)(b) 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
<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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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.

#### **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:
- |                |  |
|----------------|--|
| Tony Songhurst | Respondent                                       |
| [Omitted]      | Complainant                                      |
| [Omitted]      | Complainant                                      |
| [Omitted]      | Licensed Building Practitioner, Remedial Builder |
- [8] The Respondent was engaged to carry out building work to address a weathertightness issue. The scope of work included:
- (a) replacing weatherboards on the back of the house;
  - (b) replacing an aluminium French door with a wooden one;
  - (c) replacing fascia on a bathroom window;
  - (d) replacing fascia around the French door;
  - (e) filling the cavity with bats (or similar) while the weatherboards were off;
  - (f) replacing the flashing on the deck side of the bathroom roof; and
  - (g) repairing a bathroom window.
- [9] The building work started on or about 7 February 2018. In mid-February the Complainants raised concerns directly with the Respondent about the work. On 19 February 2018 the Complainants emailed the Respondent with a full list of their concerns around finishing and workmanship.

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

- [10] On the same date the Complainants received an invoice which they were not prepared to pay. Their reason was that the issues they had raised had not been addressed and that the job had not been completed.
- [11] On 20 February 2018 the Respondent removed his team from the property and advised he would not return until the invoice was paid.
- [12] On 11 March 2018 the Complainants engaged [Omitted] to carry out remediation work and to complete the scope of works. [Omitted] reported that:
- (a) The installed timber French doors were too thick for the existing wall and would need to be removed and cut down.
  - (b) The weatherboards used were the wrong type and not fit for purpose as they did not have weather groove. These would have to be removed and replaced.
  - (c) The existing ridge cap flashing is short and the weatherboards go behind it so it will be letting water in between them both. This will require the two flashings to be replaced as they have been cut short.
  - (d) The existing bathroom window has been poorly fixed and timber ends have been left exposed and unpainted. This will need to be redone.
  - (e) A rough piece of timber has been stuffed between the area where the old weatherboards met the new boards. This area of old weatherboards would need to be replaced.
  - (f) Short of supplying new timber doors, all work completed will need to be redone. A few extras would also be needed to modify the new timber doors and fix the work that had been done to the bathroom window.
- [13] [Omitted] provided a further report on the building work that had been completed prior to his engagement on the project. He noted various issues including those listed above and provided more detail.
- [14] The Respondent provided a response to the complaint in which he referred to the commercial dispute. He did not provide any response or detail as regards the matters complained about.
- [15] At the hearing the Respondent provided an opening in which he stated that the building work was carried out by two licensed building practitioners who were contracted to him to do the work. They were identified as:
- [Omitted]; and
  - [Omitted].
- [16] The Respondent stated the he did not carry out any building work. Nor did he provide any quality control. He stated he simply deferred to the two licensed building practitioners on site whom he stated were more experienced than he was. The Respondent did source and supply materials and provide project management.

- [17] The Respondent was questioned as to whether he supplied thermal insulation for the project. He stated that he did and that it was installed in external walls. He was also asked whether, as the head contractor, he had given consideration as to whether a building consent was required for in the installation of thermal insulation. He stated that he believed it was exempt work. He stated he had not checked but went off his recollections of the exemptions.

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

- [18] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [19] The Board noted that there were two licensed building practitioners who carried out the building work. Under the licensing regime each licensed person is responsible for his or her building work. As such the Board will be imitating an inquiry into the conduct of the two licensed building practitioners identified.
- [20] The Board can, however, further investigate matters relating to the requirement for a building consent for the building work and it is with respect to this that the Board has decided that the Respondent has been negligent.
- [21] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
- [22] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [23] Schedule 1 provides a general exemption for the repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used. The majority of the building work carried out came within this provision.
- [24] Clause 13 of Schedule 1 also provides an exemption for thermal insulation. It states:

#### **13 Thermal insulation**

*Building work in connection with the installation of thermal insulation in an existing building other than in—*

- (a) an external wall of the building; or*
- (b) an internal wall of the building that is a fire separation wall (also known as a firewall).*

- [25] Thermal insulation was installed in external walls. A building consent was not obtained for this.

- [26] It should be noted that installing insulation can impact on the performance of other components of a building including the retention of moisture and the performance of electrical conductors. As such it is important that its installation into an existing building is reviewed objectively as it is when a building consent is applied for.
- [27] The Board has found in previous decisions<sup>6</sup> that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068<sup>7</sup>.
- [28] More recently the High Court in *Tan v Auckland Council*<sup>8</sup> Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

*[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.*

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

- [29] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [30] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing being negligent or incompetent.
- [31] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>9</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.*

- [32] 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

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<sup>6</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>7</sup> Board Decision C2-01068 dated 31 August 2015

<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

<sup>9</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*<sup>10</sup> test of negligence which has been adopted by the New Zealand Courts<sup>11</sup>.

- [33] 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>12</sup> it was stated as “an inability to do the job”.
- [34] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>13</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.
- [35] 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>14</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>15</sup>.
- [36] 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:*

<sup>10</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>12</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>13</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>14</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>15</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

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

[37] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>16</sup> and be carried out in accordance with a building consent<sup>17</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.

[38] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>18</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.*

[39] The Respondent was the main contractor. He holds Carpentry and Site Area of Practice 1 licences. A site licence covers the coordination and oversight of building work. The competencies of both a Carpentry and Site AOP 1 licence includes understanding and applying knowledge of the building and construction industry and in particular of building consent requirements.

[40] The complainants are not experts and not knowledgeable in the building and construction process or the regulatory environment. As noted in *Tan* the Respondent was in the best position to make sure that unconsented work did not occur. He was the person with oversight of the building work.

[41] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

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

[42] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[43] 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.

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<sup>16</sup> Section 17 of the Building Act 2004

<sup>17</sup> Section 40(1) of the Building Act 2004

<sup>18</sup> [2001] NZAR 74

Penalty

[44] 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>19</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.*

[45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>20</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.

[46] The negligence was at the lower end of the scale. At the same time the implications for the Complainants are significant. As building work has been carried out without a building consent when one was required, the Complainants will have to apply for a Certificate of Acceptance which may or may not be granted. Either way cost will be incurred.

[47] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,000.

Costs

[48] 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."

[49] 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>21</sup>.

[50] In *Collie v Nursing Council of New Zealand*<sup>22</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

<sup>19</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>21</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>22</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.*

[51] 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.

#### Publication

[52] 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>23</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.*

[53] 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.

[54] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</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>26</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>27</sup>.

[55] 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>28</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.

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

#### **Section 318 Order**

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

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<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</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 \$2,000.

**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 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.

[58] 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**

[59] 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 January 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[60] 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**

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

Signed and dated this 3<sup>rd</sup> day of December 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.*