

Before the Building Practitioners Board

	BPB Complaint No. CB24843
Licensed Building Practitioner:	Guoxiang Ye (the Respondent)
Licence Number:	BP 118446
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:	18 April 2019
Decision Date:	1 May 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent has committed a disciplinary offence under section 317(1)(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) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*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 at the hearing from:

Guoxiang Ye	Respondent
[Omitted]	Witness
[Omitted]	Witness (by telephone)

- [8] The Complainants’, in their complaint, stated that the builder and project manager was [Omitted]. He was not a licensed building practitioner. They had not seen the Respondent on site. He was not noted in the contract they had with [Omitted]. He was not listed in the Council file as the licensed building practitioner.

- [9] The Respondent gave evidence that he was contracted to [Omitted] on a labour only basis to carry out building work on an extension and alterations to the property at [Omitted] under a building consent. The Respondent provided a record of work stating he supervised the restricted building work.

- [10] The work started on the 16 January 2018 and finished with the termination of the contract on 3 July 2018 when the Project Manager, [Omitted], and the Respondent were banned from the site and the contract was cancelled. The banning came about

⁴ [2016] HZHC 2276 at para 164

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

as a result of two consecutive failed Council inspections. The complaint was supported with photographs and council inspection records.

- [11] The Complainants engaged [Omitted] of [Omitted] to prepare a report about the building work completed. [Omitted] completed a site visit. He noted:

The new addition, at the time of our 12th July visit was at a stage where the roof was on and the exterior wrapped in building wrap, the joinery was yet to be installed. This area of the work was waterproof but not weathertight.

The new addition did not appear to have been constructed in accordance with the building code to this stage. The framing of this had been poorly undertaken, particularly where the new meets with the old. The door openings had been incorrectly framed and the brace panels incorrectly constructed.

There have been failed building inspections relating to his work. The points of failure are fundamentally basic and should not have occurred if the works were undertaken by competent builders.

The renovation of the existing dwelling has been poorly done most of which will require demolishing and reconstructing to meet with the requirements of the NZ Building Code and good trade practice.

- [12] The findings in his report dated 5 September 2018 were reviewed by the Board and questions were asked about the Respondent's supervision of the building work. The findings included:

- (a) floor levels;
- (b) cutting of roof trusses;
- (c) window openings;
- (d) failure to install a structural beam;
- (e) poor framing; and
- (f) the non-removal of borer infested timber

- [13] In respect to the level of the floor between the existing and new addition being up to 30mm different, evidence was provided which indicated that the new floor was based on the level at the old back door. While this area was level it was found that once the existing wall was removed the existing floor was up to 30mm out along the length of the wall. It appeared that the Respondent did not go back to the Project Manager, designer and owner to discuss what should be done about the height difference instead he allowed construction to proceed.

- [14] In respect to the roof trusses being cut the Respondent produced photos of the trusses arriving on site already cut. In respect to the windows evidence was produced that the Respondent did not replace any windows. The Respondent said he was supervising the construction of the extension and new framing of the existing house.

- [15] The Respondent was asked why he left a considerable amount of borer infested timber in the building. The Respondent said he asked the Project Manager to discuss with the owner the need to remove this borer infested timber but was told they could not afford to replace all infested timber. However, some of the retained infested timber would have very limited structural strength. Also the new framing timber was 90 by 45mm whereas the existing framing was 100 by 50 mm hence there was a 10mm difference. The Respondent said he intended to pack out the new timber.
- [16] In respect to the ceiling beam in the lounge area the Respondent conceded he should not have used 90 by 45 mm timber but should have sought specific design for the ceiling beam.
- [17] With regard to the issue of framing placed hard up against a wall of bricks leaving the bricks protruding into the room evidence was given by [Omitted] that the bricks should have been cut back before framing was erected next to the brick wall and that a special flashing should have been made to ensure this joint would be water proof. Other framing issues including the adequacy of some lintels over doorways were also of concern.
- [18] The Respondent admitted and accepted that he should have done some of the work differently.

Board's Conclusion and Reasoning

- [19] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and has not
 - (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 should be disciplined.
- [20] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [21] The finding of negligence relates to the Respondent's supervision of non-licensed persons.
- [22] 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [23] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [24] 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 Act⁹. 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 practitioner¹⁰.
- [25] 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.*

- [26] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹ and be carried out in accordance with a building consent¹². 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.

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

[27] There was clear evidence of non-compliance with acceptable standards. As the finding relates to supervision the Board needs to also consider whether the conduct has fallen below the acceptable standards as regards supervision.

[28] Supervise is defined in section 7¹³ 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.

[29] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligation noting that the level of supervision required will depend on a number of circumstances and ultimately whether the work meets the requirements of the building code and if not the level of non-compliance. The report from [Omitted] contained serious issues of noncompliance. The Respondent accepted he should have done some of the work differently. The Board, on its review of the evidence, finds that aspects of the building work was not carried out in accordance with acceptable standards.

[30] 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 1992¹⁴. 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 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."

[31] The Board was not convinced that the Respondent had adequately supervised the work on this site given some of the failings evident in the evidence. In particular the

¹³ 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.

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

use of different sized framing timber for the alterations; the retention of very badly infested existing timber; the lack of an adequate beam in the lounge; and in not cutting back the bricks and providing a flashing at this junction. Moreover, there was inadequate discussion with the Project Manager/designer/owner in respect to the difference in floor levels between the addition and the existing building.

- [32] 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.

- [33] As noted in [Omitted] report the matters and the consequences are serious. Therefore, given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considers 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.

Contrary to a Building Consent

- [34] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.

- [35] In *Tan v Auckland Council*¹⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [36] There was clear evidence before the Board of failures to build in accordance with the building consent issued. The Board notes that there is a degree of double up with the finds as regards negligence. This will be taken into consideration in determining the appropriate penalty.

¹⁵ [2001] NZAR 74

¹⁶ [2015] NZHC 3299 [18 December 2015]

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 Actⁱ, 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*¹⁷ 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*¹⁸ 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 level of negligence and noncompliance of the building work was serious. Based on this and the above principles the Board's initial penalty decision was that a fine of \$5,000 was appropriate. It has, however, reduced this to \$3,500 based on the fact the Respondent did admit that he did not supervise some of the work correctly.

Costs

- [42] 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."
- [43] 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

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁹.

- [44] In *Collie v Nursing Council of New Zealand*²⁰ 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.

- [45] 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

- [46] 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 Act²¹. 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.

- [47] 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.
- [48] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.
- [49] 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 interest²⁶. It is,

¹⁹ *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.

²⁰ [2001] NZAR 74

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

[51] 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 penalty of \$3,500.

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.

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.

[52] 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

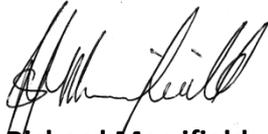
[53] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **23 May 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions 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.

[54] 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

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

Signed and dated this 1st day of May 2019



Richard Merrifield
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.*