

Before the Building Practitioners Board

	BPB Complaint No. C2-01508
Licensed Building Practitioner:	Kim Jerard (the Respondent)
Licence Number:	BP 123780
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	Christchurch
Hearing Type:	In Person
Hearing Date:	6 July 2017
Decision Date:	26 July 2017
Board Members Present	Chris Preston (Presiding) Richard Merrifield Mel Orange Bob Monteith

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 sections 317(1)(b) and (d) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Background to the Complaint	3
Evidence	3
Board's Conclusion and Reasoning	5
Negligence and/or Incompetence	6
Contrary to a consent	8
Penalty, Costs and Publication	8
Penalty	9
Costs.....	9
Publication	10
Section 318 Order	11
Submissions on Penalty, Costs and Publication	11
Right of Appeal	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 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 under 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 with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Background to the Complaint

- [5] The Complainant alleged the Respondent, when completing foundations for a new residential dwelling, initially constructed them smaller than the dimensions in the consented plans and then, when carrying out remedial work, constructed them larger. She obtained an engineering report which made various observations including that there may be a lack of reinforcing cover in the floor slab as a result of chairs not being inserted under steel mesh and a lack of cover on foundation walls as a result of remedial work.

Evidence

- [6] 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.

- [7] The Board heard evidence from:

Kim Jerard	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Respondent
[Omitted]	Witness for the Complainant
[Omitted]	Witness, Engineer
[Omitted]	Witness, Engineer
[Omitted]	Witness, Licensed Building Practitioner

⁴ [2016] HZHC 2276 at para 164

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

- [8] The Complaints Regulations require that the Registrar, when completing his report under regulations 7 and 8, provide the Respondent with the opportunity to respond to the complaint in writing. The Respondent did not avail himself of that opportunity and stated, at the hearing, that he did not do so as a result of personal issues at the time but on reflection he wished he had taken the opportunity.
- [9] At the hearing the Respondent stated he had a licensed building practitioner on site carrying out the work. He provided the name of [Omitted]. A search of the register shows that [Omitted] was granted a carpentry licence on 20 April 2012. His licence was suspended on 21 May 2014 as a result of him not relicensing and it was cancelled on 21 September 2015 due him not relicensing. He has therefore not held a licence since 21 May 2014. The restricted building work on the foundations took place after that date and as such he was not, at the time the restricted building work was completed, a licensed building practitioner by operation of section 297(1) of the Act⁶.
- [10] The Complainant set out that the foundations were initially constructed some 35-50mm too small in one area and that the Respondent, when carrying out remedial work then made the foundation in that area too large. Included in the documentation provided to the Board by the Complainant was correspondence from [Omitted], Chartered Engineer, setting out the repair methodology to be adopted to remediate the undersized foundation.
- [11] Council records also noted that in a site notice dated 18 February 2015:
- DIRECTIVE*
**** builder to ensure correct cover top and bottom of reinforcing is met at time of inspection some reo is hard down on poly insulation*
- [12] Photographs provided by the Complainant showed missing support chairs from under the reinforcing mesh prior to the floor slab being poured.
- [13] The Complainant provided a report compiled by [Omitted], Chartered Engineer on the concrete slab and foundations. His report was based on a review of documentation provided to him by the Complainant. The documentation included the consented drawing, producer statements, inspection records, site notes and photographs. [Omitted] commented:

5.1 Lack of cover to the underside of the slab reinforcing

... it is our opinion that it is likely that the slab reinforcing for this project has been cast with inadequate cover to the underside. Should this be the case the reinforcing will be prone to premature corrosion and will not comply with durability requirements ...

⁶ 297(1) A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.

5.2 Extension of the side of the foundation

We have observed ... some items of concern, being the apparent lack of side cover to the reinforcing and the saw cutting of areas of the slab that appear to have been constructed oversize.

- [14] At the hearing the Complainant set out that the Respondent was difficult to deal with and unresponsive to communications. The Respondent rejected this.
- [15] The Respondent provided an opening in which he accepted errors in the foundation size and the failure to install chairs prior to the floor slab being poured. He described those events as staff shortcomings and that he had instructed his staff to install the missing chairs. He stated he normally checks foundation dimensions prior to a pour but accepted that on this occasion it may not have occurred.
- [16] When questioned as to his own involvement in the building work he initially stated that he was not on site and that he relies on his staff. In response to further questioning he later stated that he had an active role in the job and that he carried out regular checks of it.
- [17] Evidence was heard as regards the remediation of the undersized foundation and whether there was sufficient cover for reinforcing steel following remediation of the oversized areas of the foundation. [Omitted] opinion on a lack of cover was based a documentary review. The evidence at the hearing was that it was more than likely that there was sufficient cover for the foundation wall and the remediated foundation was structurally acceptable but that adjustments had to be made to framing to accommodate for inaccuracies in foundation dimensions and that concrete splashing had to be removed from steel frames.
- [18] Evidence was also heard that the floor slab was designed without hydronic under floor heating which was installed. The finished floor level was increased by 25mm to accommodate for it and to improve the floors durability but a revised design was not developed and no consent amendments were obtained or minor variations processed. The Respondent did not give any consideration to the addition of the piping for the hydronic system other than increasing the amount of concrete cover. [Omitted] did not consider increasing the finished floor level would have any impact on the building.

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
 - (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 Board's reasoning follows.

Negligence and/or Incompetence

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

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

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

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

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

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[23] The Respondent has accepted the errors in the foundation dimensions and a failure to ensure chairs were installed under reinforcing mesh prior to the floor slab being poured. The Board finds that a reasonable practitioner taking due care would not have made such errors and accordingly that the Respondent has been negligent.

[24] The Board also finds that the Respondent was negligent in failing to deal with the changes to the foundation by way of inclusion of a hydronic under floor heating system. The addition of the system was known to him and whilst he was not responsible for its installation he should have taken steps to ensure its inclusion would not affect the design and the performance of the floor slab prior to it being poured. At the least he should have discussed it with the designer and the council and ascertained whether it could be dealt with as a minor variation under section 45A of the Act or whether an amendment to the building consent was required.

[25] Whilst the Respondent's engineer considered it was a minor matter and that the only effect of changing the finished floor level would be to increase the concrete

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁸ [2001] NZAR 74

cover the Board is of the view that further investigation was warranted. A change to finished floor level can, for example, affect recession planes and whilst there was no evidence of this it is illustrative of the effect such a change can have on a design.

- [26] The Board notes that the Respondent's role was one of supervision and not withstanding him stating he had an active role it preferred his earlier evidence that he relies on his staff.
- [27] The fundamental requirements of supervision, as per the definition in section 7 of the Act, are that the supervision is *"sufficient to ensure it is performed competently and that it complies with the building consent"*.
- [28] In C2-01143 the Board discussed the levels of supervision it considers are 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.
- [29] The Board also needs to consider whether the work met the requirements of the building consent and building code and if not the level of non-compliance.
- [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 1992⁹. 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."

⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- [31] Looking at the above it is clear to the Board that the Respondent has not provided adequate supervision. If he had then it is more than likely that the errors would not have occurred.
- [32] The final consideration for the Board is the seriousness of the matter. Foundations are fundamental to the structural integrity of a building and the evidence before the Board is that the durability of the steel mesh may have been compromised because of a lack of cover under it. The repeated errors in foundation dimensions were also of a serious nature and had knock on effects.
- [33] The Board therefore finds that the Respondent has been negligent and that the negligence has been sufficiently serious enough to warrant a disciplinary outcome under section 317(1)(b) of the Act.

Contrary to a consent

- [34] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [35] In the case before the Board there was evidence that the foundation was built too small and then too large, that the finished floor level was 25mm higher than consented and that the required cover on steel mesh was not maintained. These are all matters that varied from the building consent that was issued and as such the Board finds that the Respondent has committed a disciplinary offence under section 317(1)(d) of the Act.
- [36] The Board notes that the above matters the same ones that have led to a finding of negligence. This is often the case. Issues that lead to a negligence finding will often also be instances of non-compliance with a building consent. The Board considers, however, that potential duplication can be dealt with in terms of the Board considering the appropriate penalty.

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. Included in the mitigation was that the Respondent had rectified dimensional issues at his cost.

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*¹⁰ 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*¹¹ 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 matters before the Board were serious but not at the higher end of the scale and whilst two disciplinary offences have been committed for the purposes of penalty the Board will treat them as a single event. There is some mitigation present but also aggravating features including the Respondent not engaging in the disciplinary process to the hearing.
- [42] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*¹² the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent the Respondent has been reluctant.
- [43] Based on the above factors the Board's penalty decision is that the Respondent pay a fine of \$3,000.

Costs

- [44] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹² [2011] 3 NZLR 850.

[45] 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 case¹³.

[46] In *Collie v Nursing Council of New Zealand*¹⁴ 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.

[47] Based on the above the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. In coming to its decision the Board has taken into account that the Respondent sought and was granted an adjournment following the matter being set down to be heard on 13 April 2017.

Publication

[48] 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 Act¹⁵. The Board is also able, under s 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.

[49] 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.

[50] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. 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*¹⁹.

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

- [51] 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 interest²⁰. 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.
- [52] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty:	Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,000.
Costs:	Pursuant to s 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 s 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.

- [54] 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

- [55] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **17 August 2017**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

²⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Signed and dated this 26TH day of August 2017.



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.*