

Before the Building Practitioners Board

	BPB Complaint No. C2-01779
Licensed Building Practitioner:	Bernard Caddick (the Respondent)
Licence Number:	BP 103871
Licence(s) Held:	Bricklaying and Blocklaying AOP Structural Masonry Veneer

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:	9 May 2018
Decision Date:	8 June 2018

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

Appearances:

[Omitted], Industry Representative for the Respondent

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

Introduction	2
Function of Disciplinary Action	2
Background to the Complaint	3
Evidence	3
Board’s Conclusion and Reasoning	5
Penalty, Costs and Publication	7
Penalty.....	7
Costs	8
Publication.....	8
Section 318 Order	9
Submissions on Penalty, Costs and Publication	10
Right of Appeal	10

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 offence the Board resolved to investigate was 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [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:

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

⁴ [2016] HZHC 2276 at para 164

“... 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.

Background to the Complaint

- [5] The Complainant’s property, a two-storey dwelling with a brick veneer cladding, had been damaged by the Christchurch earthquakes. The property had been re-clad once after the earthquake but did not meet the standard required by the insurers.
- [6] The Respondent, a labour-only sub-contractor, was engaged to undertake the second re-clad.
- [7] This second re-clad was also not up to standard and the property then had to be re-clad for a third time to the ultimate satisfaction of the Complainant and insurers.

Evidence

- [8] 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.
- [9] In addition to the documentary evidence provided to the Board, the Board heard evidence at the hearing from:

Bernard Caddick	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Respondent
[Omitted]	Witness – [Omitted]
[Omitted]	Witness – Licensed Building Practitioner [Omitted]

- [10] The Respondent was engaged as a sub-contractor by the main contractor who had completed the first re-clad.
- [11] The re-clad was undertaken under a building consent authority exemption granted under clause 2 of Schedule 1 of the Building Act. A specification had been provided to the contractor that noted:

It is the responsibility of the contractor to verify on site that the reclading of the house will comply with the New Zealand Building Code E2/AS1 and New Zealand Standard 4210 before commencing work.

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

Any discrepancies in regard to the state of the existing buildings is to be resolved before any work is to commence.

- [12] The Respondent was not provided with a copy of these specifications, nor did he ask the main contractor for a copy.
- [13] After a quick walk around the property the Respondent commenced work with bricks provided by the main contractor.
- [14] These bricks were not the ones that had been specified, but identical to the ones that had been used in the first re-clad. There was an 8mm difference in the height of each brick, a matter that affected the set-out and aesthetics. As already noted the Respondent did not check the specifications prior to commencing work with the provided bricks.
- [15] Given the movement of the property as a result of the earthquakes, the re-clad was difficult. Walls were not plumb making it more difficult to ensure a 40mm cavity on all walls and evidence was presented that the deck was on a lean making it difficult to *catch the foundation to make it level*.
- [16] Evidence was presented that the second re-clad was not only aesthetically poor but efflorescence was occurring in some areas. This indicated the presence of moisture behind the bricks because of the lack of an appropriately sized cavity with the cladding not ventilated to code. In some places building paper could be seen flapping especially around the windows. As well, questions were also raised about the number of weep holes.
- [17] The insurers requested a report from [Omitted] a qualified brick and blocklayer who had additional qualifications. He recommended that the property should be re-clad for a third time given the cost of remediation of the second re-clad *would be as close to same cost as rebricking the entire veneer*.
- [18] Provided to the Board was his report to the insurer after the cladding had been removed. Given his qualifications, he identified other matters that required repair before the re-cladding could commence including a continuous crack all the way around the top level slab which meant the slab was completely disconnected from the lower level.
- [19] [Omitted] also noted that given the deck was on a lean, water was entering behind the cavity where the bearers penetrated.
- [20] He noted that the cavity was not 40mm in many places and when he re-clad in some places he had to cut the back of the bricks to ensure he could comply with the code and in other areas the bricks over-hung the foundations by up to 20mm. This was a difficult re-clad.
- [21] There was also a lack of weather-proofing behind the veneer with sill tape present in some areas but not others.

- [22] A lack of ventilation where the lower level had been blocked off from the upper level by the steel lintel should have had ventilation above and below the lintel. This was not done.
- [23] In one area by the garage, bricks had been placed hard against a concrete block pillar – a matter that the Respondent, when questioned, considered to be an acceptable practice.

Board's Conclusion and Reasoning

- [24] 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.
- [25] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.
- [26] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [27] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*⁹ it was stated as "*an inability to do the job*".
- [28] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [29] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

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

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².

[30] 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.*

[31] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[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] The Board noted that the re-clad of the property was very difficult given the way in which the property had moved during the earthquakes. The Board did not consider that a licensed building practitioner with a brick and blocklaying licence would necessarily have picked up the crack in the top level slab.

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

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

- [34] The Board did consider that the failure to check the specifications prior to commencing work would have identified that the wrong bricks had been ordered and would have provided guidance to the licensed building practitioner as to the standard expected to be achieved.
- [35] When questioned, the Respondent stated that he relied on building inspectors to identify errors and the fact that inspections were not undertaken was a contributing factor. The Respondent will now only work to consented plans and specifications.
- [36] The Board takes the view that a licensed building practitioner should always build to the standards and reliance on building inspectors to check work and identify mistakes is not a practice that the Board condones. The licensed building practitioner should build 'right' in the first instance.
- [37] The Board considered the issues with water ingress and the lack of an appropriately sized cavity were serious matters. The Respondent did not understand that there was a requirement to ensure a cavity between block work and the brick veneer was also serious.
- [38] 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

- [39] 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.
- [40] 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. In particular the Board noted the challenges of re-cladding the property and the circumstances relating to his labour-only contract.

Penalty

- [41] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁶ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[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.

[42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[43] Based on the above the Board's penalty decision is to impose a fine of \$2,000.

Costs

[44] 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."

[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 case¹⁸.

[46] In *Collie v Nursing Council of New Zealand*¹⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

[47] 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

[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 Act²⁰. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

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

¹⁸ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

¹⁹ [2001] NZAR 74

²⁰ Refer sections 298, 299 and 301 of the Act

- [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 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁴.
- [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 interest²⁵. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [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 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 \$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.
- [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.

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

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

²⁴ *ibid*

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

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 **2 July 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.

Right of Appeal

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

Signed and dated this 8th day of June 2018



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*

-
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
(b) *within any further time that the appeal authority allows on application made before or after the period expires.*