

Before the Building Practitioners Board

	BPB Complaint No. C2-01783
Licensed Building Practitioner:	Malcolm Barratt (the Respondent)
Licence Number:	BP 116074
Licence(s) Held:	Carpentry and Site AOP 2

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	Hamilton
Hearing Type:	On the Papers
Hearing Date:	2 May 2018
Decision Date:	21 May 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
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 disciplinary offences under sections 317(1)(b) and 317(1)(h) 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);
- (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); and
- (c) breached section 314B of the Act (s 317(1)(h) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*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:

“... 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 matter was dealt with as hearing on the papers. The documentary evidence included the Complaint and the Respondent’s response to it.
- [7] The Complaint set out that a Building Consent Officer from the Whangarei District Council (The Complainant) had identified that building work was being undertaken on a new residential dwelling and that the building work did not have a building consent. At the time (6 October 2017) a 6m by 6m extension to an existing dwelling was underway. The slab had been poured, framing was almost completed including a large beam spanning the extension, the roofing iron was 95% complete and the rear wall was clad with vertical iron.
- [8] The Respondent stated in his response to the Complaint that he had knowingly carried out building work without a building consent but provided an assurance that it was always his intention to gain a retrospective building consent. He also noted that there were extenuating circumstances that required the work to be carried out under urgency so that a family member of the owner did not have to go into care. The Respondent noted:

I have mimicked the footings and pad design on the original structure. I also copied or overbuilt and overspec'ed every aspect of the build again using the original plans as a starting point. At every stage we took numerous photos

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

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

and closed in nothing that could not be inspected except for the pad which was well documented and photographed (photos have been submitted to council).

- [9] The Respondent further advised, prior to the hearing, that a building consent had now been issued. The Respondent submitted that this showed that the building work was completed to an acceptable standard.

Board's Conclusion and Reasoning

- [10] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) breached section 314B of the Act (s 317(1)(h) of the Act)
- and should be disciplined.
- [11] The Board has decided that the Respondent **has not** carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act).
- [12] The reasons for the Board's decision follows.

Carrying out Building Work without a Building Consent

- [13] The Board's considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent. It did not consider that the matters relating to the weatherboards were serious enough to warrant a disciplinary outcome.
- [14] 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.
- [15] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [16] The Board has found in previous decisions⁶ 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 C2-01068⁷.
- [17] More recently the High Court in *Tan v Auckland Council*⁸ the 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

⁶ Refer for example to Board Decision C1030 dated 21 July 2014

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ [2015] NZHC 3299 [18 December 2015]

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.

[18] 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.

[19] The Board also notes that section 362F of the Act imposes minimum requirements for contracts for residential building work over \$30,000 in value. It also imposes an obligation for the contract to be in writing and for the contract to comply with any regulations. The Building (Residential Consumer Rights and Remedies) Regulations 2014 were established and they deem certain contractual provisions to be part of an oral contract and Schedule 3 clause 1 includes:

1 Building consents

1.1 *The building contractor undertakes to obtain all necessary approvals, including building consents, before commencing the building work.*

[20] Given this provision it is clear that there was, in addition to the obligations outlined in the *Tan* decision, a contractual obligation on the Respondent to obtain any required consents or at least to ensure they were obtained before the building work was started.

[21] The questions for the Board to consider are firstly whether, at the time when 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. If he did know or should have known and has proceeded anyway then the second question is whether the Respondent has therefore been negligent or incompetent.

[22] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁹ 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.

[23] 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

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

- [24] 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*¹² it was stated as “*an inability to do the job*”.
- [25] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. 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.
- [26] 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 Act¹⁴. 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 practitioner¹⁵.
- [27] 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:*

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

¹⁵ *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.*

[28] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶ and be carried out in accordance with a building consent¹⁷. 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.

[29] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁸ 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.

[30] Turning to the facts the Respondent has accepted that he carried out building work without a building consent. It is clear from his response that he knew that one was required. There were extenuating circumstances. These, however, go to mitigation. The building work was not urgent work as defined in the Act and as such the provisions in the Building Act that relate to urgent work do not apply. Urgent building work relates to specified systems or situations where, for the purpose of saving or protecting life or health or preventing serious damage to property, a building consent cannot be obtained in advance¹⁹.

[31] It should also be noted that had the building work been completed prior to an application for a building consent being made, as was the stated intention, then one could not have been issued. Rather a certificate of acceptance would have been the only option open to the owner. A certificate of acceptance is not as beneficial as a building consent and associated code compliance certificate.

[32] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent in that he 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.

Not Licensed to Carry Out or Supervise Restricted Building Work

[33] The charge under section 317(1)(c) only relates to restricted building work. For building work to be restricted building work it has to of been carried out under a

¹⁶ Section 17 of the Building Act 2004

¹⁷ Section 40(1) of the Building Act 2004

¹⁸ [2001] NZAR 74

¹⁹ Refer section 41(1)(c) of the Act.

building consent. As there was no building consent in place the Respondent cannot be found to have committed this disciplinary offence.

Outside of Competence

[34] As regards working outside of one's competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

[35] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. If a licensed building practitioner undertakes work outside of their licence class²⁰ then they can be found to have worked outside of their competence. This is especially the case if the building work is noncompliant or is in some way deficient because the licensed building practitioner did not have the requisite skill set, knowledge base or experience.

[36] In this instance the Respondent has, in effect, been the designer for the build. The Respondent does not hold a design licence. It is to be noted that in respect of the design he followed a design that was developed for another project. Whilst this ultimately turned out to be acceptable there were no guarantees that it would have been. It should also be noted that a qualified designer may have developed a more effective or efficient design or one that better achieved the purposes of the Act.

[37] For these reasons the Board finds that the Respondent has committed a disciplinary offence under section 317(1)(h) in that he has carried out building work outside of his competency contrary to section 314B(b).

Penalty, Costs and Publication

[38] 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.

[39] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[40] 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

²⁰ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

*Patel v Complaints Assessment Committee*²¹ 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.

- [41] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²² 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.
- [42] Whilst the failure to obtain a building consent is a serious matter the fact that the building work did, according to the Respondent, meet building code requirements and was granted a building consent has reduced the seriousness of the matter. The overall circumstances surrounding the work being undertaken in an expeditious manner has also been taken into account as has the Respondent acceptance of responsibility.
- [43] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,000. The Board's starting point was \$4,000 but it has reduced this based on the factors noted above.

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 case²³.
- [46] In *Collie v Nursing Council of New Zealand*²⁴ 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.

²¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

²³ *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.

²⁴ [2001] NZAR 74

[47] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry. This is a reduced amount based on the fact that the matter was dealt with on the papers.

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 Act²⁵. 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.

[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 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.

[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 interest³⁰. 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.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (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.

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 **12 June 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 21st day of May 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*

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- 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.