

Before the Building Practitioners Board

	BPB Complaint No. C2-01801
Licensed Building Practitioner:	Michael Jonker (the Respondent)
Licence Number:	BP 126508
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:	17 May 2018
Decision Date:	28 May 2018

Board Members Present:

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

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.

The Respondent **has not** committed disciplinary offences under sections 317(1)(d) and 317(1)(da)(ii) 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 or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) 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

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

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:

“... 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 Complainants engaged the Respondent to undertake EQC repairs to their Lockwood property. Subsequently the Respondent was engaged to do alterations and renovations on their home.
- [6] Work commenced on or around 14 February 2017 and work was suspended (by the Respondent) on 27 September 2017. There is a dispute as to the status of the contract as the Complainant’s say the contract has been cancelled through their lawyer.
- [7] The main grounds for the complaint were:
- (a) That additional rafters were installed that did not form part of the original building consent for the EQC repair and that the Council was not made aware of this prior to the roof being closed in. Further, no amendment to the building consent was applied for and no council inspection was made which resulted in a stop work notice being issued.
 - (b) The length of time the roof was exposed to the weather during the renovations (approximately 8 to 12 weeks) and the resulting water damage to the interior of the home as a result of the tarpaulins not being tied down correctly.
 - (c) Battening nails that penetrated the wooden interior of the Lockwood walls.

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

- (d) General concern over the matching of the new construction materials and workmanship to the old and, in some cases, previously modified sections of the house.

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:
- | | |
|----------------|---|
| Michael Jonker | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Complainant |
| [Omitted] | LBP consultant for Complainants |
| Aaron Brown | Building Control Officer, Selwyn District Council |
- [10] In relation to the EQC repair the Respondent discovered there was a need for more rafters to be installed when the roof was exposed. He proceeded to install them after speaking to the Complainants about the requirement and the associated additional cost, estimated to be approximately \$16,000. The Complainants said they did not have this conversation with the Respondent, and the first they knew about the extra rafters was when they received the invoice for the work which had, by then, been closed in.
- [11] The Complainants approached the Council and the Building Control Officer visited the site. He put a stop work notice in place until an inspection of the roof could be undertaken by the Council and an amendment to the Building Consent had been approved. Both were done. The Council accepted that the building work undertaken by the Respondent met the Building Code.
- [12] In relation to the renovations, the Respondent explained that he had instructed his employees to remove the roof but was not present when this took place. He accepted that he had not intended to remove the entire roof all at once but having done so; he then made provision to protect the property by covering it with tarpaulins.
- [13] The Respondent did acknowledge that the roof was exposed to the weather for approximately 8 to 12 weeks.

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

- [14] During the time the roof was exposed to the elements it was claimed that the tarpaulins failed and allowed water to damage the inside of the home. It is disputed that this was as a result of the Respondent not securing the tarpaulins correctly.
- [15] Photos of the nails penetrating the inside wall formed part of the evidence, but no evidence was presented that could show exactly who was responsible for this.
- [16] [Omitted] stated in his report that there were a number of issues with the matching of the new construction materials to the existing parts of the home, some of which had been modified in the past. This included barge boards, colour mismatches and general aesthetics. When questioned he stated that he did not see any work that was not in accordance with the Building Code. He accepted his observations were not a full technical report but were as a result of a quick walk around the property and from discussion with the Complainants, whom he knew. He did not speak to the Respondent.
- [17] The Respondent accepted that there were areas where the old and the new did not match. He said that this was always going to be the case, given the change in material measurements, the colour difference between old and new materials and the need to match different building alterations.

Board's Conclusion and Reasoning

- [18] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [19] The Board has decided that the Respondent **has not**:
- (a) 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); or
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).
- [20] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [21] 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.

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

- [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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [23] 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*”.
- [24] 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.
- [25] 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 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.
- [26] 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*

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

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

- (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.*

[27] 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.

[28] 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.

[29] The Board's considerations in relation to negligence and/or incompetence in this case include a failure to obtain an amendment to the building consent prior to the related building work being carried out. In this respect section 40 of the Act states that building work must not be carried out except in accordance with a building consent.

[30] In this case the Board was of the view that the Respondent should have made an effort to confirm that an amendment to the building consent for the additional rafters was being sought and waited for it to be issued, notwithstanding the Respondent's belief that it was the responsibility of the home owner or the architect to seek such an amendment.

[31] Further, the Respondent should have known that a building inspection would have been required for such a change, yet he had the roof closed in without an inspection taking place. Even if the inspection should have been arranged by somebody else, he should have made an effort to obtain the results of the inspection (had it been made). By not doing this, he has undermined the purpose of the inspection process. In this case, his actions resulted in additional time and costs because a stop work notice was issued and parts of the roof had to be removed to check what had been done.

[32] The Respondent claims that he was a labour only contractor. However, he has used a Master Builders full additions and alterations contract, which implies more than just

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

the provision of labour. In addition, the Respondent was providing material and also contracted others to undertake some of the work on the roof.

- [33] There was also an obligation in the contract to provide written and signed variations to the contract, as should have been the case for the additional rafters.
- [34] When considering the length of time the roof was exposed to the elements, the Board is of the view that the whole roof did not need to be removed to undertake the work. In his evidence the Respondent admitted he was not present when the roof was removed by his employees and was surprised to see it had been completely removed when he went to site.
- [35] The Board was not able to conclusively determine the reason for the failure of the tarpaulins. However, it is the Board's view that having to protect the roof for an extended period of time adds to the risk of failure. It was not clear to the Board why the reroofing should have taken from 8 – 12 weeks other than the Respondent being busy on other work.
- [36] In respect to the nails penetrating the inside of the Lockwood walls, the Board was not able to come to any conclusion as to who was responsible. The Board notes that this did not form part of the report undertaken by [Omitted], nor was this observed by him.
- [37] Regarding the issues of matching of old and new materials the Board accepts that there is going to be issues obtaining a perfect match of old and new unless significant expense is incurred – particularly as the original house was constructed approximately 50 years ago and had had other alterations done over that period. The Board does comment that the level to which an aesthetic match can be achieved should be discussed and agreed with the consumer. This should happen at the time the scope of work is done and a contract entered into, so as to manage the consumer's expectations and budget.
- [38] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered that the Respondent departed from what the Board considers to be an accepted standard of conduct in relation to the failure to obtain an amendment to the building consent and associated inspections and in respect of removal of the roof. The Respondent's conduct was sufficiently serious to warrant a disciplinary outcome.

Not Building to the Building consent

- [39] The Board notes that a building consent was issued. With the exception of adding additional rafters and not making sure an amendment to the building consent was issued (dealt with above), there were no other significant issues relating to non-compliance.
- [40] The Board therefore does not up hold this ground for discipline.

Record of Work

- [41] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁶.
- [42] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [43] The Board discussed issues with regard to records of work in its decision C2-01170¹⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [44] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [45] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [46] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.
- [47] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [48] In this instance there was a dispute over the status of the contract. The Respondent claims it was suspended and the Complainants say it was cancelled. The Board is of the view that, given what has transpired and the apparent breakdown in trust on both sides, it is most likely that the Respondent will not complete the work. He should therefore issue a record of work for the restricted building work he has

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

undertaken and take the opportunity to be clear what work he did do and what he did not.

- [49] Because of the inconclusive evidence about the termination of the contract the Board has decided not to uphold this ground for discipline.

Penalty, Costs and Publication

- [50] 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.

- [51] 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

- [52] 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*¹⁸ 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.

- [53] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁹ 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.

- [54] Based on the above the Board considered imposing a fine of \$3,000 but has reduced this to \$1,500, given the quality of work undertaken by the Respondent was not questioned, rather the processes he followed did not reflect good practice and appropriate level of care.

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [55] 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.”
- [56] 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 case²⁰.
- [57] In *Collie v Nursing Council of New Zealand*²¹ 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.*
- [58] 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.

Publication

- [59] 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 Act²². 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.*
- [60] 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.
- [61] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided

²⁰ *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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

[62] 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 interest²⁷. 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.

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

Section 318 Order

[64] 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 \$1,500.

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.

[65] 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

[66] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **19 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

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

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 28th 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 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.*