

Before the Building Practitioners Board

	BPB Complaint No. C2-01588
Licensed Building Practitioner:	Jason Brown (the Respondent)
Licence Number:	BP 114581
Licence(s) Held:	Roofing AOP Profiled Metal Rood and/or Wall Cladding

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:	Palmerston North
Hearing Type:	In Person – Consolidated with C2-01576 and C2-01577
Hearing Date:	19 March 2018
Decision Date:	4 April 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 section 317(1)(b) and 317(1)(da)(ii) of the Act

The Respondent **has not** committed disciplinary offences under section 317(1)(d) 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).

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

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:

“... 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.

Procedure

[5] The matter proceeded, with the consent of the various Respondent’s, as a consolidated hearing with two other related complaints.

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:

Jason Brown	Respondent
[Omitted]	Co-Respondent C2-01576, Licensed Building Practitioner – Site AOP 1
[Omitted]	Co Respondent C2-01577, Licensed Building Practitioner – Carpentry
[Omitted]	Witness for [Omitted]
[Omitted]	Expert for [Omitted]

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

[Omitted]	Witness, [Omitted]
Tony Kellerman	Building Consent Officer, Manawatu District Council
Chris Henry	Team Leader, Building Consenting, Manawatu District Council
Jon Astwood	Technical Assessor to the Board

- [8] The Complainant raised an allegation that the majority of the screws along the first row of purlins down from the ridge line had missed the purlin. Photographs were provided in support of the allegation. The Complainant noted the roof was installed in November 2016 and that when the issue was raised he was given assurances that it would be attended to and was provided with statements on 1 and 2 December 2016 that the roof had been completed in accordance with Building Code and the Roofing Code of Practice. Notwithstanding this on 16 January 2017, when the building work was brought to an end, it had still not been attended to.
- [9] The Board sought a report from the Technical Assessor as to the compliance of the building work. The Technical Assessor noted the screws had missed the purlins and that the purlins were at differing heights.
- [10] The Board was also provided with correspondence from the Council which noted that fixings had consistently missed the framing.
- [11] The Respondent did not, as part of the Registrar's Report, provide a response to the Complaint.
- [12] At the hearing the Respondent stated that he knew the screws had missed the purlin but that he did not immediately attend to the remediation as he wanted to ensure the roof was watertight. He also gave evidence that it was a ridge capping that had missed the purlins, that the roofing was not pre-drilled and that self-tapping screws had been used. He also noted that the builders had used the wrong sized purlins. His opinion was that had the correct ones been used then the issue may not have occurred. The Respondent did accept in questioning that the purlins were the correct size. The Respondent also noted that notwithstanding that the roof was in a high wind zone it had held during periods of bad weather and that it had been fixed about a month prior to the hearing. The remediation was confirmed by the [Omitted] witness.
- [13] The Technical Assessor gave evidence that it was not the ridge cap but roofing material down from the ridge that was at issue.
- [14] The Respondent was asked why a record of work had not been provided. He stated that the restricted building work was not complete and that in particular there was some vibration in the roofing material that still needed to be attended to.

Board's Conclusion and Reasoning

- [15] 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);
- (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);

and should be disciplined.

[16] The Board has decided that the Respondent **has not** 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).

[17] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[18] 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*⁶. 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.

[19] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ 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.

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

⁷ [2001] NZAR 74

- [20] The evidence showed that the Respondent had not correctly affixed roofing material to a single line of purlins. The Board accepted that the purlins had not been set out correctly. He also accepted that the dimensions of the purlins were as detailed on the plans. The Respondent was not, however, responsible for the install of the purlins.
- [21] The Respondent's negligence is in him not identifying the issues with the purlins and requiring that they be rectified prior to installing the roof and in then failing to take remedial action when the roof fixings missed the purlin. The Board does note that the issue has since been rectified. The rectification, however, only came about as a result of other persons bringing the issue to light and the Board does not believe it would have been dealt with had it not been raised by others. It has reached this conclusion on the basis that assertions were made that the roof was completed in a compliant manner when it was known that it had not been.
- [22] On this basis the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent displayed a lack of reasonably expected care in the completion of the roof and was therefore negligent.
- [23] The Board also notes that the roof was in a high wind zone and it has taken this into account in deciding that the matter was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [24] The Board has already made a finding as regards negligence and has noted that the underlying issue of purlin set out was not the work of the Respondent. As it was the purlins that were not as per the consent the Board finds that a disciplinary offence under section 317(1)(d) of the Act has not been committed.

Record of Work

- [25] 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 work⁸.
- [26] 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.
- [27] The Board discussed issues with regard to records of work in its decision C2-01170⁹ 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.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [28] 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.
- [29] 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 ...”.
- [30] 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. In this instance the Respondent has claimed that the roof was not complete and that it is still not complete. This is not accepted. Whilst remedial work was required actual completion occurred in December 2016 when statements were made to the effect that the roof was complete and compliant. A record of work has not been provided.
- [31] On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [32] 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.
- [33] No reasons other than the Respondent’s claim that the building work was not complete have been put forward. For the reasons noted above this was not a good reason.

Penalty, Costs and Publication

- [34] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [35] 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

- [36] 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.

- [37] 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.
- [38] The Respondent has been found to have committed two disciplinary offences. The negligence matter was at the lower end of the scale and as such a lesser penalty is warranted. The record of work matter is also at the lower end of the scale and Board's normal starting point for a record of work matter alone is a fine of \$1,500.
- [39] Taking into consideration all the circumstances of the case the Board considers a total fine for both matters of \$1,500 is the appropriate penalty.

Costs

- [40] 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."
- [41] 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 case¹².
- [42] In *Collie v Nursing Council of New Zealand*¹³ 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.*
- [43] A hearing was required as was a Technical Assessors report. The hearing was, however, consolidated and the allegations against the Respondent were not as extensive or as serious as those against the other two respondents. On this basis the

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 *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.

¹³ [2001] NZAR 74

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

[44] 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 Act¹⁴. 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.

[45] 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.

[46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. 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*¹⁸.

[47] 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 interest¹⁹. 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.

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

Section 318 Order

[49] 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 \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

¹⁴ Refer sections 298, 299 and 301 of the Act

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [50] 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

- [51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **27 April 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

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

Signed and dated this 4TH day of April 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:*

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- (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.*