

Before the Building Practitioners Board

	BPB Complaint No. C2-01686
Licensed Building Practitioner:	William Parlane (the Respondent)
Licence Number:	BP 125793
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:	22 November 2017
Decision Date:	30 November 2017

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (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 a disciplinary offence under section 317(1)(b) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	5
Penalty, Costs and Publication	6
Penalty	6
Costs.....	7
Publication	8
Section 318 Order	8
Submissions on Penalty, Costs and Publication	9
Right of Appeal	9

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 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:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are

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

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 Board heard evidence from:

William Parlane	Respondent
[Omitted]	Complainant
[Omitted]	Retired Builder
[Omitted]	Licensed Building Practitioner

- [7] The Complainant contracted Skyline Buildings Christchurch Limited to construct a new four bedroom dwelling. The Respondent was engaged by Skyline to carry out carpentry work on the build. At the time the Respondent was engaged the foundations were complete. He took the build through to a closed in shell. Skyline provided a project manager [Omitted] and a person who interacted with the client [Omitted].
- [8] Following completion the Complainant obtained a report from [Omitted]. His report entitled Residential Property Inspection set out various defective matters (the Report). The Complainants took legal action against Skyline on the basis of the Report and obtained judgment in the District Court.
- [9] The Complainants also made a complaint about the Respondent based on the Report. The following table sets out the allegations, responses and evidence heard at the hearing in respect of them:

Allegation	Detail
Interior walls not square and/or out of plumb	The Respondent carried out the building work with the assistance of other licensed building practitioners. He stated he plumbed the walls using a 2 metre long level. The Complainant stated that he had raised the issue with Skyline and that it was not addressed by them. He noted that the comment made at the time was that the plasterers would

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

Allegation	Detail
	attend to it but they, in turn, stated it was the responsibility of the builder. [Omitted] stated that 12 doors walls were not plumb or were out of square.
Door frames not square	The Respondent carried out the building work with the assistance of other licensed building practitioners. He could not explain why the door frames were not square but did accept that one wardrobe door was out by 20mm. All doors and windows were pre-ordered by Skyline.
Gib board did not extend into window or door reveals	The Respondent did not install the gib board but did install the windows and doors with the assistance of other licensed building practitioners. All doors and windows were pre-ordered by Skyline.
Door and window reveals are 5mm too long	The Respondent carried out the building work with the assistance of other licensed building practitioners. His evidence was that he installed them flush and he could not explain why excessive fill was required. All doors and windows were pre-ordered by Skyline. Framing was 90mm, not 95mm.
Inspection from the outside of the building did not find any weather tightness seals around the windows and doors	The Respondent carried out the building work with the assistance of other licensed building practitioners. His evidence was that the windows were installed in accordance with the consented documentation. All doors and windows were pre-ordered by Skyline. [Omitted] stated that he considered the WANZ guidelines had not been followed. It was noted that this was only one means of achieving compliance.
Some flashing details are not consistent with the council approved plans	The Respondent carried out the building work with the assistance of other licensed building practitioners. Flashings were provided by Skyline.
There is a hump in the living room concrete floor	The foundations and concrete floor were complete when the Respondent took over the build.
Blemishes in the paint and plaster finishes	The work was completed by other practitioners.
Damage to the shower door	The work was completed by other practitioners.
The exterior spouting is	The Respondent carried out the building work with

Allegation	Detail
hung improperly, it falls the wrong way	the assistance of other licensed building practitioners.
The cladding under the spouting is wavy and needs re-fixing	The Respondent carried out the building work with the assistance of other licensed building practitioners.

- [10] The Respondent gave evidence that towards the end of the build his brother passed away and as a result he had to spend time in Australia and as such was not on site at all times. The Respondent provided an email dated 6 May 2016 in which he advised Skyline to cease using his licensed building practitioner number as he was no longer involved in the building work.
- [11] The Respondent noted in his written response to the complaint that the work was passed by the Council. [Omitted] noted that the Council is not responsible for quality control, only for compliance.
- [12] The Board questioned the Respondent as to why the record of work that he signed stated he had supervised the foundations when his evidence was that the foundations were complete when he started. He stated that the Skyline practice was to complete the record of work and he would simply sign it. Evidence was also heard that the Respondent's was the only record of work provided even though at least three other licensed building practitioners appeared to have carried out restricted building work.

Board's Conclusion and Reasoning

- [13] 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.
- [14] In considering whether the Respondent 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

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

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.

- [15] 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.

- [16] The matters which the Board considers were serious enough to warrant a disciplinary outcome were those related to the out of square and/or plumb walls and doors and the failure to ensure door and window reveals were flush. With regard to the plumbing of walls the Board noted that the practice used by the Respondent would not have been sufficient to ensure a 2.4 metre stud would be plumb. A two metre level could have been used but only if it was in conjunction with a longer straight edge. As regards to the other matters no plausible explanations or reasons were put forward as to why the defects had occurred and the Board finds that had accepted trade practices been used the defects would not have occurred.
- [17] Given the above the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent displayed a lack of reasonably expected care and as such was negligent.

Penalty, Costs and Publication

- [18] 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.
- [19] 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

- [20] 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*⁸ 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:

⁷ [2001] NZAR 74

⁸ 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.

- [21] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁹ 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.
- [22] Whilst the matters under consideration were not, of themselves, overly serious the consequences for the Complainant in terms of the costs to remediate were significant. The Board has taken this into consideration in determining penalty. In terms of mitigation the Board notes that the Respondent was not the only contractor involved but the burden of the defects, from a disciplinary perspective, have fallen on him.
- [23] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,000.
- [24] The Board also cautions the Respondent as regards his record of work practices. The record of work is an important document. It is the responsibility of the licensed building practitioner to correctly complete it and to provide it to the owner and the territorial authority, not the main contractors. The Respondent is also reminded that each and every licensed building practitioner who carried out or supervises restricted building work must complete their own record of work.

Costs

- [25] 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."
- [26] 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 case¹⁰.
- [27] In *Collie v Nursing Council of New Zealand*¹¹ 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.

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

¹⁰ *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.

¹¹ [2001] NZAR 74

- [28] Based on the above the Board's costs order is that the Respondent is pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

Publication

- [29] 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 Act¹². 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.

- [30] 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.
- [31] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁵. 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*¹⁶.
- [32] 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 interest¹⁷. 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.
- [33] Based on the above the Board will not order further publication.

Section 318 Order

- [34] 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 \$2,000.00.

¹² Refer sections 298, 299 and 301 of the Act

¹³ Section 14 of the Act

¹⁴ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁶ *ibid*

¹⁷ *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 \$1,000.00 (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.

- [35] 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

- [36] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **11 January 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

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

Signed and dated this 30th day of November 2017



Richard Merrifield
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.