

## Before the Building Practitioners Board

	BPB Complaint No. C2-01696
Licensed Building Practitioner:	Mike Haturini (the Respondent)
Licence Number:	BP 126526
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	27 March 2018
Decision Date:	16 April 2018

#### Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)  
Mel Orange, Legal Member  
David Fabish, LBP, Carpentry Site AOP 2  
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)(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 Regulations<sup>1</sup> 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); and
- (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).

## 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

- [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*<sup>4</sup> 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 committed<sup>5</sup>. 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 at the hearing, in addition to the documentary evidence received, from:

Mike Haturini	Respondent
[Omitted]	Complainant
[Omitted]	Witness
William Hursthouse	Technical Assessor

- [7] The Complainant engaged the Respondent to carry out the construction of three new homes. The work was carried out between 15 March 2016 and 31 March 2017.
- [8] The Complainant alleged the Respondent did not follow the consented building plans and did not build the houses to the Building Code. Specifically he alleged the Respondent did not follow instructions issued to him by Council Inspectors and moved forward with the building without passing the required inspections and that there were a number of items shown in photographs which displayed poor workmanship.
- [9] The Respondent provided a written response to the Complaint. The Respondent variously stated:
- (a) he was initially contracted to complete the retaining walls at the property. It was then proposed that he build the three homes at the property;

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (b) when they were at the stage of the structural steel beginning he was informed that four builders from [Omitted] would be working on lot 1 and that his team was to focus on lots 2 and 3;
  - (c) he was then approached to help manage the workers from [Omitted] on lot 1. He confirmed he would work alongside them if needed but would not manage or sign off their work. On lot 1 he only helped to build certain parts of the main roof;
  - (d) once the structural steel was fully erected, [Omitted] started to make changes to the layout. [Omitted] built internal gutters on lot 2 to the first revision of the plans. When he received the new plans [Omitted] from [Omitted] worked out it would cost too much to change so he advised that it was to be left as is;
  - (e) the photos the Complainant supplied and comments stating he did not build to the plans are false and that the Complainant had not supplied the original plans which show the original falls and layout of the gutters and roof;
  - (f) he terminated his services with [Omitted] because he was not being paid. He still has outstanding invoices; and
  - (g) throughout his 12 years in the industry he's never had any complaints about his work.
- [10] William Hursthouse was appointed as a Technical Assessor to review the file. His report provided an analysis and comment on the work. It included a noncompliance table. Two key areas of non-compliance and implications of non-compliance were:
- (a) in respect of lot 3 and a Council Inspector's note of 28 April 2017 and 9 June 2017 which the Technical Assessor noted could result in significant remedial works; and
  - (b) in respect of lot 2 and a new roof that was constructed before an amendment to the building consent issued and numerous changes that were made prior to amendments being processed.
- [11] At the hearing the Complainant noted that the Respondent had access to the architect throughout, that his payment claims were being made ahead of actual progress on the job and that the issues caused by the Respondent meant that significant additional costs had been incurred. He also stated that when the Respondent ceased to be involved a senior Council Inspector was called in to give them a clean cut over point and that it took some 6-8 months to get them back on track.
- [12] The Respondent stated that he was not the project manager but that [Omitted] was. He noted there were continual changes and that he did not have open access to the architect and that getting changes dealt with was difficult. He also stated that he regretted not waiting for stamped plans before proceeding with some of the changes and that the project manager had instructed him to advance work so as to obtain payments.

- [13] The Technical Assessor's report included a table with a building chronology. It included Council inspections and highlighted multiple issues with changes to the consent for which documentation was outstanding. It also notated a site meeting with the Council on 18 May 2017 after the Respondent's involvement which noted 10 compliance issues. Subsequent inspections noted remedial work that was being undertaken. The Technical Assessors summary of the site meeting for lots 2 and 3 which the Respondent stated he mainly focused on noted:

**Lot 2**

*Site meeting of Lot 2, to sort out outstanding issues as there is a new builder.*

*(1) Photograph taken of height in relation of boundary and maximum building height certificate for lot 2*

*(2) Siting certificate: to be provided at the next inspection.*

*(3) Note from previous inspector – RF - Purlin size and fixings: no ply in place as per sheet 401/an3 x Trusses only sitting on top of block screwed to beam - provide solution and provide amended details if required. RF - Truss connections: no detail provided – minor variation required. There is an amendment to be submitted that should include this. If amendment approved this should cover this detail. Check that the amendment includes these details and submit ASAP.*

*(4) Note from previous inspector – Sighted gutter at gradient of 1° as per plan. Note. This roof area only has one outlet shown on the plan, which was installed. Please check with architect whether an overflow is required. This overflow is going to be incorporated in rainhead, architect to confirm that the two areas with only one outlet are sufficient for the area.*

*(5) Note from previous inspector - Informed the bricklayer to refer to the standard for now as the plans have very little detail. These details are all standard details but they should still nevertheless be supplied to work from. (Jamb/sill/head/internal, external corners) It's the architect's responsibility to supply a full weathertight design. The contractor needs to get the required details from the architect. Amendment to be submitted has extra details included check appropriate details are included on amendment before submission.*

*(6) photos of head and sill flashings requested. The old builder has not provided these. Sighted espan around windows, cladding inspection needs to take place to cover these and any other issues.*

*(7) On site minor variation: minor variation required for the change of gib to elephant board*

*(8) additional windows removed no need for any action on this*

*(9) Producer statement pressure test received (only if test not witnessed): to be provided the next inspection*

*(10) Minor variation needed for small shift of gas fireplace in TV room ground floor*

### *Outstanding inspections*

*(A) cladding inspection required see note 6 above.*

*(B) framing inspection – membrane roof checked only, no other framing checked, the engineer has provided observations of steel and associated beams, I have not sighted these. Some photos have been taken, D. Walker carried out the preline and would have highlighted any glaring issues with framing. I have requested a frame inspection to take place of two walls downstairs (two critical areas) with gib removed to make a judgement based on this and available photos, a decision then can be made if further investigation required. Truss plan available, some gib to be removed with access for a check to take place of the roof.*

*(C) ICA - Upper floor not inspected, all lower floor passed. Cladding inspector to check for any major issues. Based on previous wrap being passed this is sufficient.*

*(D) preline and plumbing passed by David. Walker*

### **Lot 3**

*Site meeting. To discuss way forward. Sighted framing to roof upper and lower. New two story dwelling. This inspection to look at framing issues. Sighted reframing to upper and lower levels. There are many issues to resolve. This inspection therefore limited to roof framing only. The following issues were raised:*

*(1) Pitched long run iron roof to upper level removed as pitch is too low*

*(2) Ridge Beam not supported and butt jointed halfway along its length*

*(3) 90 x 45 Rafters too small for span. Jack studs have been installed from 150 x 63 LVL ceiling joists to underside of Rafters to help support them. Engineer needs to sign off on this solution.*

*(4) Consented plans call for building wrap over Rafters followed by castellated 20 mm battens, then a further layer of building wrap over castellated battens, then purlins fixed over castellated battens. This has not been done, the wrap has been missed out completely.*

*(5) Rafter fixings have already been remediated with hanger fixings to both ends.*

*(6) Sighted areas of membrane roofing framework. All membrane roofing and substrate will have to be removed for following reasons:*

*(7) Not enough fall to some parts, especially internal gutters.*

*(8) Installation of wrap, castellated batten, wrap, then ply substrate to create vented cavity not done as per plan.*

*(9) In many areas solid blocking is achieved with 20 mm battens. The ply substrate is moving and already there is evidence of torch on membrane splitting. This will all have to be removed.*

*(10) All membrane roof and substrate to be removed. Remedial action to correct insufficient falls required.*

*Cavity to be installed as per plan, substrate to be fixed of correctly using*

*adequate length screws.*

*Note: full re-inspection roof framing will be required before roofing takes place.*

- [14] Evidence was heard that, as regards a roofing area that the Council required solid noggling, that the plans were missing details which should have been picked up at consenting but the opinion of the Technical Assessor was that the issue should have been identified and dealt with by the Respondent as it was an obvious issue.
- [15] Additional evidence was also heard as regards some of the issues noted on site. In particular about the nailing pattern of weatherboards which the Respondent stated he both carried out and supervised, vermin strip which he accepted was installed incorrectly in that it was too high and floor joists that had been notched and incorrectly affixed.
- [16] With regard to the management of changes to the building consent the Complainant's position was that it was up to the Respondent to manage it. The Respondent gave evidence that he was a labour only contractor and that the Complainant had employee designers and [Omitted] giving on site instructions that he was following. The Complainant stated the three designers were interior designers and that he had one designer who worked up a brief for the architect but that it was for the Respondent to decide what could and could not be done and to deal with consenting issues. His staff would only suggest changes to the builder, they would not direct them.
- [17] The documentation before the Board included multiple versions of consented plans.

#### **Board's Conclusion and Reasoning**

- [18] 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); and
  - (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 should be disciplined.
- [19] The reasons for the Board's decision follows.

#### **Negligence and/or Incompetence**

- [20] 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*<sup>6</sup>. Judge McElrea provided guidance on the interpretation of those terms:

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<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

*[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.*

- [21] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>7</sup> 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.*

- [22] The build was not straight forward. Nor were the onsite arrangements with multiple entities being involved over multiple sites. The Respondent appeared to be out of his depth in undertaking a project of this scale and what has occurred highlights the risks associated with labour only contractors and unclear project management arrangements. That aside the Respondent, as a licensed building practitioner, is responsible for his building work and for the building work that is carried out under his supervision. In this respect there was substantial evidence before the Board of significant issues that required considerable remediation. Not all of those issues were caused by the Respondent but sufficient of them were related to the Respondent for the Board, which includes persons with extensive experience and expertise in the building industry, to make a finding that the Respondent has been negligent in that he has displayed a lack of reasonably expected care.

#### Contrary to a Building Consent

- [23] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

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<sup>7</sup> [2001] NZAR 74



- [24] In *Tan v Auckland Council*<sup>8</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

*[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes 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.*

- [25] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [26] There were multiple instances of building work progressing in advance of building consent changes and whilst the Board accepts that there were confused on site arrangements as regards who was responsible for what the Respondent, as a licensed building practitioner, is required to build in accordance with the building consent. In this respect running ahead of consented changes runs the risk that the changes will not be approved or will not be approved in the form submitted and that, as a result remedial work is required.
- [27] Additionally there was also evidence by way of the Council inspections, as summarised by the Technical Assessor, of building work completed by the Respondent or under his supervision that did not comply with the building consent.
- [28] Given the above the disciplinary offence is found to have been committed.

### **Penalty, Costs and Publication**

- [29] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [30] 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**

- [31] 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*<sup>9</sup> commented on the role of "punishment"

<sup>8</sup> [2015] NZHC 3299 [18 December 2015]

<sup>9</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.*

- [32] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>10</sup> 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.
- [33] In coming to its penalty decision the Board has taken the confused on site arrangements and the lack of clarity over who was responsible for what into account. It has also considered the impact the Respondent's conduct has had on the Complainant.
- [34] Taking all of the factors into account that Board has decided that a censure is the appropriate penalty. The Respondent should note that a censure is a formal expression of disapproval.

#### Costs

- [35] 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."
- [36] 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 case<sup>11</sup>.
- [37] In *Collie v Nursing Council of New Zealand*<sup>12</sup> 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.*
- [38] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

<sup>10</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>11</sup> *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.

<sup>12</sup> [2001] NZAR 74

## Publication

- [39] 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 Act<sup>13</sup>. 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.*

- [40] 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.
- [41] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>14</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>15</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>16</sup>. 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*<sup>17</sup>.
- [42] 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 interest<sup>18</sup>. 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.
- [43] Based on the above the Board will not order further publication.

## **Section 318 Order**

- [44] For the reasons set out above, the Board directs that:

<b>Penalty:</b>	<b>Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.</b>
<b>Costs:</b>	<b>Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.</b>

<sup>13</sup> Refer sections 298, 299 and 301 of the Act

<sup>14</sup> Section 14 of the Act

<sup>15</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>16</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>17</sup> *ibid*

<sup>18</sup> *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.**

- [45] 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**

- [46] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **9 May 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**

- [47] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 16<sup>th</sup> day of April 2018



**Richard Merrifield**  
Presiding Member

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#### <sup>i</sup> **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.*