

Before the Building Practitioners Board

	BPB Complaint No. C2-01746
Licensed Building Practitioner:	Lee Gallagher (the Respondent)
Licence Number:	BP 118032
Licence(s) Held:	Roofing AOP Torch on Roof Membrane

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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person – Consolidated with C2-01615
Hearing Date:	12 April 2018
Decision Date:	14 May 2018
Board Members Present:	
	Chris Preston (Presiding)
	David Fabish, LBP, Carpentry Site AOP 2
	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 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 Board Inquiry 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); 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.

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

Background to the Inquiry

- [3] The Respondent was engaged to carry out water proofing of a block wall.
- [4] After completion the area inside the building flooded during heavy rain and remedial work was required to make the building water tight.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Lee Gallagher	Respondent
Andrew Hollis	Licensed Building Practitioner, Carpentry, Respondent in C2-01615
[Omitted]	Complainant in C2-01615
[Omitted]	Witness, Gallagher Roofing and Waterproofing
[Omitted]	Witness for C2-01615

- [7] In the Respondent's written response to the Complaint dated the 11th October 2017, and then again at the hearing, the Respondent said that his employee [Omitted] undertook the restricted building work under his supervision.
- [8] [Omitted] is not licenced.
- [9] The Respondent confirmed that he did not view any plans or specifications for the job, did not visit that site, nor was he informed as to what product had been specified.
- [10] The Respondent claims that his understanding was that the job was in some way a "precautionary" measure and that he informed the builder, [Omitted], that he would not be providing any paper work for this job such as a producer statement or Record of Work.
- [11] The Respondent was advised by his employee that the block wall and foundations were not up to standard and this was then communicated to the [Omitted], but that the work was subsequently completed by the employee.
- [12] At the hearing [Omitted] gave evidence that when he arrived at the site he was faced with the situation where there was already back fill against the block wall and he simply could not have applied tanking down to the foundation level.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [13] The Technical Assessor's report confirmed that the waterproofing did not follow the consented plans as it did not extend down to the bottom of the foundations and was failing as parts were coming away from the block wall.
- [14] The Technical Assessor also noted that the product used was not as per the consented plans. However the Technical Assessor was of the view that it was an acceptable substitute.

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 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 should be disciplined.
- [16] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [17] 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*⁵. 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.

- [18] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁶ 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

⁵ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁶ [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [19] The Board is of the view that this is a very clear example of why the Licenced Building Scheme was set up. The Respondent took no responsibility for checking to see if there were consented plans and specifications or for checking what product had been specified. He made it clear in his evidence that on completion of the work he was not going to provide any paper work, including a record of work, for the job.
- [20] He did not visit the site even when he had been informed by his employee that the block wall and foundation were not of an acceptable standard and allowed the work to continue.
- [21] The Respondent did not provide any supervision once the issues of the foundation work were raised and as a result the application of the tanking membrane was applied incorrectly and was failing.
- [22] In the hearing the Respondent continued to justify his actions as being “how things are done” demonstrating that in this critical area of water proofing he appears to be happy to take risks and that he assumes he will not get held to account.
- [23] Waterproofing is a critical area especially when the water proofing membrane is going to be hidden and expensive to repair if it fails.
- [24] The Board is also of the view that to not have sighted the consented documents and to have allowed work to continue when his employee had advised him that there were problems is simply inexcusable.
- [25] 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 this regard.

Contrary to a Building Consent

- [26] 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 an amendment 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.
- [27] In *Tan v Auckland Council*⁷ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

⁷ [2015] NZHC 3299 [18 December 2015]

[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.

- [28] 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.
- [29] A Building Consent had been issued for this work. It specified the manner in which the foundation and block work was to be constructed, the type of tanking product to be used and that it needed to extend down to the foundation.
- [30] The Respondent did not sight the plans and specifications, did not know what tanking product was specified and allowed a substitute tanking product to be used with no real control or understanding of if the new product would have complied with the consent.
- [31] The completed job did not meet the requirements of the Building Consent.

Penalty, Costs and Publication

- [32] 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.
- [33] 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

- [34] 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:

[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.

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [35] 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.
- [36] The licensing regime was set up to raise standards and ensure that critical aspects of a build were carried out in accordance with any building consent issued and with the Building Code by having licensed person's complete it or supervise it. The Respondent has flagrantly disregarded the requirements set out in the Act and in doing so has put the objects of the scheme at risk. It is important that the Respondent and others learn from the Respondent's conduct and that the penalty provide a deterrent to others.
- [37] Based on the above the Board's decision is to suspend the Respondent's licence for a period of six months.

Costs

- [38] 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."
- [39] 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.
- [40] 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.*
- [41] 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.

Publication

- [42] 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:

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

¹² Refer sections 298, 299 and 301 of the Act

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.

- [43] 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.
- [44] 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.
- [45] 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.
- [46] Based on the above the Board will not order further publication.

Section 318 Order

- [47] For the reasons set out above, the Board directs that:
- | | |
|---------------------|--|
| Penalty: | Pursuant to section 318(1)(b) of the Building Act 2004, the Respondents licence will be suspended for a period of six months. |
| Costs: | 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. |
| 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. |
- [48] 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.

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

Submissions on Penalty, Costs and Publication

- [49] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **5 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

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

Signed and dated this 14th 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.*

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- (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.*