

Before the Building Practitioners Board

	BPB Complaint No. C2-01784
Licensed Building Practitioner:	Jonathan Van De Klundert (the Respondent)
Licence Number:	BP 117331
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	Dunedin
Hearing Type:	In Person
Hearing Date:	11 July 2018
Decision Date:	20 August 2018
Board Members Present:	
	Chris Preston (Presiding)
	Richard Merrifield, 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 a disciplinary offence under section 317(1)(b) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Procedure	3
Evidence	3
Board’s Conclusion and Reasoning	4
Penalty, Costs and Publication	7
Penalty	7
Costs.....	8
Publication	8
Section 318 Order	9
Submissions on Penalty, Costs and Publication	10
Right of Appeal	10

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 offence the Board resolved to investigate was 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.

Procedure

5. Evidence was presented at the hearing. Based on the Complainant’s submissions as regards the placement of a lintel between the hallway and the lounge it was moved by the Board that the hearing would be adjourned to allow time to obtain a statement from [Omitted] who worked with the Respondent and who the Complainant says would have observed the Respondent doing this work.
6. A statement was obtained and is dealt with under the section on evidence below.

Evidence

7. 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.
8. In addition to the documentary evidence before the Board heard evidence at the hearing from:

[Omitted]	Complainant
Jonathan Van De Klundert	Respondent
[Omitted]	Witness
[Omitted]	Replacement Builder
Warren Nevill	Technical Assessor

9. The Respondent did carry out building work at [Omitted]. The Complainant’s main allegations were that:
 - a. The measurement of the new windows was incorrect and that the windows did not fit correctly when installed;
 - b. Removed two load bearing walls; and
 - c. That there were several more minor issues which that demonstrated a general lack of care by the Respondent.
10. The Technical Assessors report set out the issues arising from the Complaint. He confirmed that a load bearing wall was removed and that a building consent would have been required but was unable to determine who did this work.

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

11. The Technical Assessor also raised the replacement of exterior cladding as potential area which may have required a building consent.
12. The Respondent confirmed he had replaced a window with a large stacker door along with some weather boards and insulation, the window on the kitchen side and did some work on the bathroom. He denied removing load bearing walls or installing the lintel between the hall and lounge.
13. The Complainant was not able to confirm that she had seen who installed the lintel as she was out of the house with a friend. She advised that [Omitted] who worked for the Respondent would have been at the house when this was done.
14. A statement was obtained from [Omitted]. He was not able to confirm who installed the lintel between the lounge and hallway.

Board's Conclusion and Reasoning

15. The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
16. The Board's finding is made on the basis that a building consent was required for aspects of the building work that the Respondent was undertaking when the Council intervened and that he has been negligent in failing to first obtain one.
17. The Board's reasoning follows.
18. Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
19. The onus is on the person carrying out the building work to show that one of the exemptions applies.
20. The Board has found in previous decisions⁶ that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁷.
21. More recently the High Court in *Tan v Auckland Council*⁸ the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

[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.

⁶ Refer for example to Board Decision C1030 dated 21 July 2014

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ [2015] NZHC 3299 [18 December 2015]

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

22. The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
23. The questions for the Board to consider are whether, at the time the building work was undertaken by the Respondent, any of the exemptions applied and, if not, whether the Respondent knew or ought to have known that a building consent was required for what was being undertaken.
24. The Board was not able to determine who installed the lintel between the lounge and the hallway. As such it could not find on this issue. The Board found obtaining evidence on who installed the lintel difficult and frustrating. Nobody seems to know who did it. If substantive proof can be presented in the future then the Board may look at initiating its own Inquiry and take the appropriate action.
25. The Board does find how ever find that the installation of the stacker door, being larger than the window that it replaced, and the installation of replacement weather boards and insulation would have required a building consent as the building work did not come within the provisions of Schedule 1 of the Act. A building consent was, therefore, required before the work was undertaken.
26. As a building consent was required, the next consideration for the Board is whether the Respondent was negligent or incompetent under section 317(1)(b) in not obtaining one.
27. Negligence and incompetence are not the same. In *Beattie v Far North Council*⁹ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.
28. Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

29. Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*¹² it was stated as “*an inability to do the job*”.
30. The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
31. When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹⁴. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁵.
32. The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

33. The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁶ and be carried out in accordance with a building

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁵ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁶ Section 17 of the Building Act 2004

consent¹⁷. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

34. Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁸ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

35. Taking the above into consideration the Board finds that the Respondent has been negligent in that he should have known that a building consent was required and that he has failed in his duties as a licensed building practitioner in not obtaining one prior to carrying out the related building work.
36. On this basis the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.
37. In terms of the other issues raised by the Complainant the Board was of the view that while in this case the standards of professionalism was not what the Board would have expected of the Respondent, they did not reach the threshold for disciplinary action in respect to these issues.

Penalty, Costs and Publication

38. 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.
39. 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

40. 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*¹⁹ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times,

¹⁷ Section 40(1) of the Building Act 2004

¹⁸ [2001] NZAR 74

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.

41. The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁰ 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.
42. The matters before the Board were serious. Consenting is fundamental to the ensuring the performance of buildings. Circumventing it puts that performance and the occupants at risk. Based on this and the above principles the Board's penalty decision, therefore is that the Respondent pay a fine of \$3,500.00.

Costs

43. 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."
44. 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 case²¹.
45. In *Collie v Nursing Council of New Zealand*²² 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.

46. Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,500.00 toward the costs of and incidental to the Board's inquiry.

Publication

47. 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 Act²³. The Board is also able,

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

²¹ *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.

²² [2001] NZAR 74

²³ Refer sections 298, 299 and 301 of the Act

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.

48. 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.
49. Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. 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*²⁷.
50. 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 interest²⁸. 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.
51. Based on the above the Board will not order further publication.

Section 318 Order

52. 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 \$3,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

53. 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

54. The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **10 September 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

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

Signed and dated this 20th day of August 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).*

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- (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.*