Before the Building Practitioners Board

	BPB Complaint No. C2-01810
Licensed Building Practitioner:	Craig Jones (the Respondent)
Licence Number:	BP 112765
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	Whangarei
Hearing Type:	In Person
Hearing Date:	20 June 2018
Decision Date:	23 July 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(b) and 317(1)(da)(ii) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(d) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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

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

public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[4] The Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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:

Craig Jones	Respondent
[Omitted]	Complainant
[Omitted]	Complainant

[7] At the opening of the hearing it was agreed with the persons attending that, given the report from [Omitted] a witness from [Omitted] which was included in the evidence was both clear and complete there was no need to call [Omitted] and he was excused.

[8] The Complainants had engaged the Respondent to assemble a kit set home supplied by [Omitted].

[9] The Respondent and the Complainant were friends at the time and the Respondent had been given the work as he was new in the area and needed to establish himself.

[10] The Respondent was paid to project manage and undertake the building work including coordination of the sub trades as required.

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[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[11] There was an informal contract in place.

[12] After the build was complete and the Complainants were confronted with water ingress they decided to engage a report from [Omitted] on the standard of the work that had been undertaken. The Board did note that [Omitted] were the supplier of the kit set and took this into account in terms of the weight it should give the [Omitted]report.

[13] The local Council, as part of its inspections, also found non-compliant work which was consistent with those identified in the [Omitted].

[14] The [Omitted]and the Council set out a number of issues, the most important ones being the incorrect installation of the electrical meter box, the gap above the head flashings being more than 5mm, the non-installation of H flashings, the gap between the flashing stop end and the back of the cladding, the gap between the underside of the window head flashing and the cladding, the incorrect corner flashings and water penetrating into the roof space at the roof to wall junction.

[15] In addition the Complainants claimed the Respondent did not seek approval from the Council for the change to the type of electrical meter box that was installed.

[16] The Respondent, in his evidence, agreed that there was water coming into the house but he was unsure where this was coming from and why. The evidence before the Board showed that the replacement builder was able to correct the leak by the appropriate installation of H flashings.

[17] In terms of the H flashing the Respondent stated that the detail was not in the plans and that when he asked for details from the Complainant they were not supplied to him.

[18] The electrical meter box was supplied by the electrician but the Respondent agreed it was not as per the consented plans. He claimed that a flashing kit came with the electrical box but that the Council needed additional flashings as well.

[19] In the case of the record of work the Respondent did not provide this as he was working under the belief that he was going to return to the site to fix the issues and complete the work. The Respondent was, on 4 June 2017, advised that he was no longer required on site and was asked to return the keys. He did not return after that date to carry out any further building work. A record of work has not been provided. The building work that the Respondent carried out included structural and weathertight work under a building consent and as such it involved restricted building work.

Board's Conclusion and Reasoning

[20] The Board has decided that the Respondent **has**:

(a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);

(b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and should be disciplined.

[21] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[22] The reasons for the Board's decision follows.

Negligence and/or Incompetence

[23] Negligence and incompetence are not the same. In *Beattie v Far North Council*[6] 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.*

[24] 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*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[25] 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*[9] it was stated as *"an inability to do the job"*.

[26] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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.

[27] 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

[6] Judge McElrea, DC Whangarei, CIV-2011-088-313
[7] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

assessment of what is appropriate conduct, bearing in mind the purpose of the Act[11]. 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 practitioner[12].

[28] 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.*

[29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. 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.

[30] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] 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.*

[31] Looking at the conduct in question, in respect to the issues around the electrical meter box, the flashing installation and the roof leaking the Board is of the view that

[11] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[12] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74

a competent builder should have either been able to install these correctly or would, at the least, have asked for advice in a timely manner as to the correct installation methods.

[32] On questioning the Respondent he knew the H flashings had not been installed correctly and would lead to issues of weather tightness and whilst he did seek information from [Omitted] he did not follow this up with [Omitted] and seemed to be satisfied that, having given notice of the issue, it was up to the Complainants to find a solution.

[33] The Board was of the view that if the H flashing detail was missing from the plans (as claimed by the Respondent) then he should have contacted [Omitted], as he had done on other issues, and asked for the details. He did not, and completed the work knowing it was not correct and that it might fail which it did.

[34] In this case the flashings and detail required to make the building weather tight was not done to an acceptable standard.

[35] Given the above factors 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.

Contrary to a Building Consent

[36] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.

[37] The matter that relates to this charge, and which has not been dealt with under negligence was the install of the electrical meter box. Whilst the Board considered that a change to the consent may have been needed and that, if so, the Respondent should not have completed the work until this was clarified the Board decided that this does not reach the threshold for discipline outlined above in paragraph [30].

Record of Work

[38] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[16].

[39] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[40] The Board discussed issues with regard to records of work in its decision C2-01170[17] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[41] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[42] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …".

[43] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred in or about 4 June 2017 when the Respondent left site and was told to return his keys. At or about this date he should have known that the contractual relationship was over and that he would not be completing any further restricted building work. A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[44] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons were advanced other than the Respondent's mistaken belief that he might be returning to fix issues. This was not a good reason not to provide the record of work.

Penalty, Costs and Publication

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

[46] 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.

[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Penalty

[47] 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*[18] 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.*

[48] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[19] 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.

[49] The negligence found to have occurred resulted in leaks and, as such, the conduct is serious. The Board considered, however, that a fine would be the appropriate penalty.

[50] The Board also notes that the Respondent has been found to have not provided a record of work. The Board's normal starting point for a record of work matter is a fine of $1,500.

[51] Based on the above the Board's penalty decision for the two charges is a fine of $2,500.

Costs

[52] 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."

[53] 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[20].

[18] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[20] *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.

[54] In *Collie v Nursing Council of New Zealand*[21] 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.*

[55] Based on the above the Board's costs order is that the Respondent is to pay the sum of $1,500 toward the costs of and incidental to the Board's inquiry.

Publication

[56] 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[22]. 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.*

[57] 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.

[58] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[23]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[24]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[25]. 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*[26].

[59] 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[27]. 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.

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

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[21] [2001] NZAR 74
[22] Refer sections 298, 299 and 301 of the Act
[23] Section 14 of the Act
[24] Refer sections 200 and 202 of the Criminal Procedure Act
[25] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[26] ibid
[27] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[61] 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 $2,500.**
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.

[62] 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

[63] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 August 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

[64] The right to appeal Board decisions is provided for in section 330(2) of the Act[ii].

Signed and dated this 23rd day of July 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.

(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.