Before the Building Practitioners Board

	BPB Complaint No. C2-01834
Licensed Building Practitioner:	David Hoyes (the Respondent)
Licence Number:	BP 120927
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	Auckland
Hearing Type:	In Person
Hearing Date:	9 August 2018
Decision Date:	28 August 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

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

[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 was that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are*

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

maintained in order to protect clients, the profession and the broader community."

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

Evidence

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

David Hoyes	Respondent
Gavin Spaabaek	Building Control Officer, Kaipara District Council
Perry Veacock	Building Control Officer, Kaipara District Council

[7] The Complaint was made by the Kaipara District Council. It set out that during December 2017 and January 2018 the Respondent had undertaken construction on a property that he owned that required a building consent but that he had failed to first obtain one.

[8] The Complaint set out that when Council staff attended the address a new subfloor had been constructed on top of existing timber piles from a previously demolished Skyline garage and lean-to. The flooring, constructed of ply, encompassed the area of the garage, the lean-to and a new deck. The floor was continuous and at the same level. New framing had also been erected where the previous garage had been. The Complaint was supported by a number of photos of the building work.

[9] The Council issued a Notice to Fix on 9 January 2018. It stated that the Respondent had to either demolish the building work done or apply for a Certificate of Acceptance for the work done without a building consent and apply for a building consent for the balance of the building work to be done.

[10] The original Skyline garage had been built under a Building Permit in 1990. The lean-to had not been constructed under a Building Permit or Building Consent. The lean-to included basic sanitary fixtures. The garage and lean-to were used for storage and accommodation. There was also an unconsented fire place.

[11] The Respondent gave evidence that he had not been aware that the lean-to was not permitted or consented. He had purchased the property on the basis of assurances given and did not carry out any checks to ascertain the status of the buildings on the land. The Respondent's long-term intention was to improve the garage and lean-to

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

and to use it whilst constructing a residence on the land. A storm damaged the garage and lean-to. Because of this he demolished the original structures down to the piles and was in the process of rebuilding it with new and salvaged materials. He stated in his response to the Complaint:

> *We brought the property approximately 15 years ago with the garage already on the section. It had 2 roofs, 1 being deemed as a lean too. We were not told by the real estate when purchasing this was illegal and also she did not provide us information on property as she told us there wasn't any drawings. The garage was in disrepair with flooring framing and roof issues. The idea was to keep parts of the structure in the repair and re use some of the original cladding. With the weather conditions of Christmas and the state of the timber this did not happen. The new parts added to the property are a deck which is approximately 1300mm high and a carport of around 19m^2. Inside the garage there was a shower, hot water cylinder, fire place, kitchen sink and to the south eastern corner a long drop which was removed in the clean up of property. We were intending to still use as a garage and re using the stainless sink and shower base in the lean too part where it originally was. Please let me know your thoughts and how we can move forward with council approval.*

[12] Building work was stopped on the site. The Council and the Respondent entered into correspondence as regards what required a Building Consent. The Respondent did not, at the time of doing the building work, think that what he was doing was illegal.

[13] At the hearing the Respondent stated that the garage was only going to be used for storage. The Council noted that the roof construction allowed for a loft annex. The Respondent stated the annex was for storage. The Council noted that this was different to the original structure and that the garage may no longer be a like for like replacement.

[14] With regard to the flooring which was continuous and at the same level, the Respondent stated that the original intention was to rebuild the garage and the lean-to on the flooring and to use the balance of it as a deck. As a result of the Council's intervention he would only be rebuilding the garage and the lean-to area of the flooring would be used as additional decking.

[15] The Respondent was also intending to rebuild a 20m^2 carport using recycled cladding from the original deconstructed structures.

Board's Conclusion and Reasoning

[16] 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.

[17] 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.

[18] The Board's reasoning follows.

[19] 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.

[20] The onus is on the person carrying out the building work to show that one of the exemptions applies.

[21] The Board has found in previous decisions[6] 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 C2-01068[7].

[22] 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.*
>
> *[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.*

[23] 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.

[24] The questions for the Board to consider are whether, at the time the building work was undertaken by the Respondent, whether any of the exemptions apply and, if not, whether the Respondent knew or ought to have known that a building consent was required for what was being undertaken.

[25] The possible exemptions under Schedule I are summarised as follows:

---

[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]

Clause	**Where Might it Apply?**	**Provisos**	**Does it Apply?**
1(2) – Replacement of any component or assembly	Original garage	1(3)(b) – do not include complete or substantial replacement of any component or assembly contributing to the building's structural behaviour	No, proviso applies
7 – Repair or replacement of an outbuilding	Original garage	The repair or replacement of all or part of an outbuilding if— (a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and (b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and (c) the outbuilding is a detached building that is not more than 1 storey; and (d) the outbuilding is not intended to be open to, or used by, members of the public.	Yes
18 – Carports	Carport	Building work in connection with a carport that— (a) is on the ground level; and (b) does not exceed 20 square metres in floor area.	Yes
24 – Decks	Deck	Building work in connection with a deck, platform, bridge, boardwalk, or the like from which it is not possible to fall more than 1.5 metres even if it collapses.	Yes
30 – Demolition	Deconstruction of original structures	The complete demolition of a building that is detached and is not more than 3 storeys.	Yes

[26] On the basis of the above the replacement of the garage did not require a Building Consent as it fell within Clause 7. Whilst it is noted that Clause 7 only applies to a single story garage the Board considered the structure came within this as the roof pitch was to be the same and because Clause 1.1.2(f) of NZS 3604 states that "single-storey buildings may include a part storey basement or a part storey in the roof space".

[27] The demolition work and the carport did not require Building Consents as they both come within the respective provisions of Schedule 1. The deck also came within Clause 24 of Schedule 1 as it was less than 1.5 metres from the ground. The Board does note, however, that all building work must, irrespective of whether it requires a building consent, meet the provisions of the Building Code[9] and that, as constructed, it did not as it was on the same level as the garage sub floor with no fall or separation between it and where the cladding would go to all for moisture to drain.

[28] The building work that did not come within any of the above was the lean-to. It was not consented or permitted in the first place and, as such, it did not come within the repair, maintain or replace provisions. Furthermore as it was intended to have sanitary fixtures and to be used for accommodation it did not come within any of the other available exemptions. A Building Consent was required.

[29] 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.

[30] Negligence and incompetence are not the same. In *Beattie v Far North Council*[10] 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.*

[31] 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*[11] test of negligence which has been adopted by the New Zealand Courts[12].

[32] 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*[13] it was stated as *"an inability to do the job"*.

---

[9] Refer sections 17 and 42A(2) of the Act.
[10] Judge McElrea, DC Whangarei, CIV-2011-088-313
[11] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[12] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[13] Ali v Kumar and Others [2017] NZDC 23582 at [30]

[33] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[14]. 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.

[34] 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 Act[15]. 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[16].

[35] 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.*

[36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[17] and be carried out in accordance with a building consent[18]. 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.

[14] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[15] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[16] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[17] Section 17 of the Building Act 2004
[18] Section 40(1) of the Building Act 2004

[37] Turning to seriousness in *Collie v Nursing Council of New Zealand*[19] 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.*

[38] 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. In this respect the Board does not consider that the Respondent can rely on his misunderstanding that the lean-to had been consented. It was his responsibility to confirm it was and, given that such information is readily available from the Council, he should have carried out his due diligence before carrying out the building work, if not prior to purchasing.

[39] 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.

Penalty, Costs and Publication

[40] 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.

[41] 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.

<u>Penalty</u>

[42] 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*[20] 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:

[19] [2001] NZAR 74
[20] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[43] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[21] 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.

[44] The Board considered the negligence in this case to be at the lower level. It has also taken into consideration that the building work was being carried out on the Respondent's own property and that he stopped once the contravention was brought to his attention. On this basis the Board's penalty decision is that the Respondent pay a fine of $1,000. This is a reduced amount based on the mitigation noted.

Costs

[45] 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."

[46] 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[22].

[47] In *Collie v Nursing Council of New Zealand*[23] 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.*

[48] 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

[49] 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[24]. The Board is also able,

[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[22] *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.
[23] [2001] NZAR 74
[24] 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.*

[50] 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.

[51] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[25]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[26]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[27]. 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*[28].

[52] 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[29]. 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.

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

Section 318 Order

[54] 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 $1,000.**
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.**

[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[55] 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

[56] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **18 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

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

Signed and dated this 28th 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).

(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.