

Before the Building Practitioners Board

	BPB Complaint No. C2-01862
Licensed Building Practitioner:	Aigars Vanags (the Respondent)
Licence Number:	BP 131107
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	Christchurch
Hearing Type:	In Person
Hearing Date:	15 August 2018
Decision Date:	30 August 2018

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Mike Timings, Barrister and Solicitor for the Respondent

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 section 314(b) (section 317(1)(h)) 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 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) breached section 314B(b) of the Act (s 317(1)(h) 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

- [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 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.

- [6] In addition to the documentary evidence before the Board heard evidence at the hearing from:

[Omitted]	Complainant
[Omitted]	Complainant’s father
Aigars Vanags	Respondent
[Omitted]	Labourer to the Respondent
[Omitted]	Respondent’s wife

- [7] The hearing was split into two sections. The first section was to deal with the electrical work and plumbing work. The Respondent accepted that he either did that work himself or supervised an unlicensed person who was carrying out that work.
- [8] The Respondent accepted that this was not appropriate and said he was doing this to help the Complainant reduce costs and that he would not make this same error of judgment in the future.
- [9] At this point, the Presiding Member advised that the question of the quality of the electrical and plumbing work would be left to the appropriate licencing boards to which a complaint had been made. This Board would only be looking at the Respondent’s behaviour as it related to working outside the Respondent’s competency and the need for a building consent to undertake the work.

⁴ [2016] HZHC 2276 at para 164

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

- [10] The second area of inquiry was in respect to the standard of workmanship. It related primarily to the installation of plaster board and its plastering and painting as part of an earthquake repair and the supply and installation of a kitchen.
- [11] Evidence was presented regarding the scope of works which the Respondent claims he followed. He stated the limited scope was, in part, the reason why inspections by other qualified people were unable to make fair assessment of the quality of the work. Specifically, he claimed he was asked to paint over wallpaper or backing paper and as such there was always going to be a quality issue.
- [12] This was refuted by the Complainant and on further questioning the Respondent admitted that in fact many of the walls and ceilings did have new plaster board installed which would have facilitated a higher level of finish.
- [13] The Respondent did concede that there were issues with the quality of the plastering due in most part to the slow drying of the plaster and with issues that showed up after the painting had been done. He noted that had he been allowed to return to site the issues would have been rectified. It was noted that this would have required substantial re-work as the sealant and painting had already been completed at that time and would have had to be redone.
- [14] In the case of the kitchen the Complainant gave evidence that she had been shown a relatively simple outline of the kitchen and that this showed (and she claims it was discussed) that the cupboards would be to the ceiling height.
- [15] The kitchen was an “off the shelf” Mitre 10 product and the cupboards did not go to the ceiling.
- [16] In addition, the sink position was changed in consultation with the Complainant. A building consent was not obtained for this change.
- [17] The Respondent did not provide a contract which is subject to a complaint to the Ministry of Business Innovation and Employment (MBIE) and was not dealt with by the Board at this hearing but the Board noted that the kitchen design was not signed off by the Complainant. Nor was the change to the positioning of the bathroom vanity signed off by the Complainant which would be considered good practise in the industry to avoid conflicting versions of what was said or agreed to. It is noted that the change in the positioning of the bathroom vanity may have required a change to the Building Consent.
- [18] The Respondent claimed the wall archway he built was not a load bearing wall and the Board had no evidence to say that it was.
- [19] The Respondent’s Representative gave a closing submission where he restated that the Respondent accepts the fact he should not have undertaken or supervised the electrical and plumbing work and that while he accepts there were issues with the plastering and painting he was always prepared to return and rectify the issues if an

agreement on the commercial dispute could be reached and that, given it could not be reached, he was then effectively stopped from returning.

[20] He also made submissions that any penalty and cost should be at the low end.

Board's Conclusion and Reasoning

[21] 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) breached section 314B(b) of the Act (s 317(1)(h) of the Act);
- and should be disciplined.

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

Negligence and/or Incompetence

[23] There are two aspects that the Board needs to consider with regard to negligence. The first is whether a building consent was required for the change in location of the sink. The second is in relation to the quality of the building work undertaken.

Building Consent

[24] 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.

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

[26] 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 provided⁷ by the Board in decision C2-01068⁷.

[27] 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.

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]

[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.

- [28] 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.
- [29] 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.
- [30] Clause 32(2) of Schedule 1 of the Act allows for the replacement of sanitary plumbing and drainage in or associated with a building, provided that a comparable component or assembly is used and the replacement is in the same position. As the replacement in this instance was not in the same position the exemption does not apply and a building consent was required. One was not obtained and the Respondent is accordingly found to have been negligent.

Building Work

- [31] The Board does not accept that there were some minor plastering and painting issues that could be remediated as part of an end of job snag list. The Respondent accepted that there were a lot of issues with the plaster work due to the slow drying of the plaster. The Board is of the view that in completing the work the Respondent did not give sufficient time for the plaster to dry before applying the sealant and painting, especially on the joins, and that the rework now required is beyond what would be expected from a competent trades person.
- [32] 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.

Outside of Competence

- [33] As regards working outside of one's competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [34] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence.

Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class⁹ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

- [35] The Respondent accepted he should not have undertaken or allowed Glen Falconer to undertake the electrical or plumbing work.
- [36] This is a serious issue of health and safety and undermines the integrity of the licencing schemes. The Respondent should have known better.
- [37] All too often the Board hears the excuse that the practitioner was helping the consumer or doing it under instruction of the consumer. Neither of these reasons is acceptable when it comes to the health and safety of the current home owners, and also those who may own this home in the future.
- [38] It is a fundamental principle and part of the law that a practitioner work with in his competency and in this case the Respondent has not.

Penalty, Costs and Publication

- [39] 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.
- [40] The Respondent made submissions at the hearing that the penalty and costs should be at the lower end of the scale.

Penalty

- [41] 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*¹⁰ 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.

⁹ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹¹ 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.
- [43] The matters before the Board were serious, especially as regards the failure to obtain a building consent and the Respondent working outside of his competence. Based on the above and the submissions received at the hearing the Board's penalty decision is that the Respondent pay a fine of \$3,000.

Costs

- [44] 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."
- [45] 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 case¹².
- [46] In *Collie v Nursing Council of New Zealand*¹³ 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.*
- [47] 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

- [48] 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 Act¹⁴. 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.

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

¹² *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.

¹³ [2001] NZAR 74

¹⁴ Refer sections 298, 299 and 301 of the Act

- [49] 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.
- [50] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. 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*¹⁸.
- [51] 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 interest¹⁹. 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.
- [52] Based on the above the Board will not order further publication.

Section 318 Order

- [53] 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 \$3000.00.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1500.00 (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.**
- [54] 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.

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [55] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **20 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.
- [56] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the Board's findings. If the Respondent disagrees with the Board's decision then there is a right of appeal from the Board's decision.

Right of Appeal

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

Signed and dated this 30th 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.*