

Before the Building Practitioners Board

	BPB Complaint No. CB24060
Licensed Building Practitioner:	Matthew Kitto (the Respondent)
Licence Number:	BP 110011
Licence(s) Held:	Profiled Metal Roof and/or Wall Cladding

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:	20 November 2018
Decision Date:	17 December 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
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 a disciplinary offence under section 317(1)(b) 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 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] The Respondent did not respond to the Notice of Hearing and did not appear at the hearing. He did provide a response to the complaint when it was brought to his attention.
- [6] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided notice of it. Under Regulation 12 if a complaint is to proceed to a hearing the Board must give notice of the hearing to the Respondent.
- [7] A Notice of Hearing was sent to the Respondent’s address as per the Register.
- [8] The Register of Licensed Building Practitioners must contain certain information including under section 301(1)(d) an “address for communications under this Act”. Under section 302 the licensed building practitioner must keep their details up to date:

302 Obligation to notify Registrar of change in circumstances

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
- (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
- (b) *includes any change that may be prescribed (if any).*
- [9] As the Respondent has not provided any updated details the address to be used for communications with him is that contained in the Register.
- [10] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
- (a) *delivered personally to the person; or*
- (b) *delivered to the person at the person's usual or last known place of residence or business; or*

- (c) *sent by fax or email to the person's fax number or email address;
or*
- (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*

(5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

- [11] Given the above provisions the Board finds that the required notices under the Regulations have been provided to the Respondent.
- [12] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not maintaining up to date contact details as per the requirements of the Act.
- [13] As such the Board finds that it is appropriate that it considers the complaint.

Evidence

- [14] 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.
- [15] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [16] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|-----------|---------------------|
| [Omitted] | Complainant |
| [Omitted] | Witness – [Omitted] |
- [17] In an opening statement the Complainant said he would like the roof fixed as he cannot sell the property as it is. In summary the Board heard evidence that the re-roofing carried out/supervised by the Respondent could not be considered complete to an acceptable industry standard or fully compliant with the NZ Metal Roof and Wall Cladding Code of Practice Version 2.2.
- [18] The Board then asked [Omitted], who has worked in the roofing industry [Omitted], for general comments before going through his photos contained in his report. He said the roof had been let down by the lack of attention to detail. He then went

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

through the photos that had been provided to the Board and made the following comments:

- Photo 2 shows the corrugations not lining up between the main roof and veranda;
- Photo 4 shows scuff marks on the colour sheet and rivet not the colour of the roof. Some screws had paint damage and some were not the colour of the roof;
- Photo 7 shows that the left-hand sheet is not bedding into the next sheet and could allow water to drive up over the lapped corrugation;
- Photo 8 in the middle shows a sheet screwed hard down to try and make it cover the next sheet lap;
- Photo 13 shows that the cut sheets off the main roof have been screwed hard down on the flashing with no air gap. Corrosion is already evident where the troughs of the sheets touch the flashing;
- Photo 14 shows screws at an angle and washers in some cases being squeezed out to one side leading to potential for leaks to occur;
- Photos 19 and 20 showing a screw over tightened to the point where the sheet has been dented;
- Photos 24 and 25 showing ridge hard onto main roof valley flashing which is not best practice;
- Photo 26 showing poor workmanship in the lapping and cutting and also creating a junction which is likely to collect debris; and
- Photo 37 showing poor flashing detail, water can be retained causing corrosion.

Board's Conclusion and Reasoning

[19] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

[20] 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.

[21] 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

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

- [22] 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”.
- [23] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [24] 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 Act¹¹. 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 practitioner¹².
- [25] 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:*

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)

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

(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.*

[26] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[27] 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.

[28] While the roof installation is apparently watertight there are already signs of corrosion from poor workmanship. Also some screws have washers missing and some are driven at an angle which could allow water to penetrate.

[29] A number of flashings and sheet laps have not been completed in a tradesman like manner and could lead to leaking, corrosion and debris building up in the future. Some screws are of the wrong colour and/or have paint damage.

[30] There is a risk that, as a result of the manner in which the Respondent has carried out and/or supervised the re-roof that the roof will, over time, fail to meet the performance requirements in E2 External Moisture of the Building Code or the Durability requirements in clause B2.

[31] 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 should be disciplined.

Penalty, Costs and Publication

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

[33] The Respondent is to file evidence and submissions as regards penalty, costs and publication prior to the Board making its decision.

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

Penalty

[34] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁶ 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.

[35] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[36] The Respondent's conduct is at the mid-level of seriousness. The Respondent, in his response to the complaint, has stated that he will attend to the matters. The reality is that the issues should not have arisen in the first place.

[37] Based on the above the Board's penalty decision is that the Respondent pay a fine of \$2,500.

Costs

[38] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[39] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁸.

[40] In *Collie v Nursing Council of New Zealand*¹⁹ 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.

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁸ *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.

¹⁹ [2001] NZAR 74

[41] 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

[42] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act²⁰. 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.

[43] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[44] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.

[45] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁵. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

[47] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(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.

²⁰ Refer sections 298, 299 and 301 of the Act

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

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

- [48] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

- [49] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 January 2019**. 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.
- [50] 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 findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 17th day of December 2018



Richard Merrifield
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.*