

BPB Complaint No. C2-01383

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

AGAINST

Shanan Walker, Licensed Building Practitioner No. BP 117609

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The Complainant lodged a complaint with the Building Practitioners' Board (the Board) on 4 April 2016 in respect of Shanan Walker, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 27 July 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|-------------------------|
| Richard Merrifield | Deputy Chair(Presiding) |
| Mel Orange | Board Member |
| Bob Monteith | Board Member |
| Robin Dunlop | Board Member |
- [6] The matter was considered by the Board in Auckland on 1 November 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Gemma Lawson	Board Secretary
Shanan Walker	Respondent
Bruce Cortesi	Support Person for the Respondent
Graeme Calvert	Special Adviser to the Board

Members of the public were not present.

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

[9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.

[10] On 1 August 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint. It included a Technical Assessor’s report from Graeme Calvert.

[11] On 18 August 2016 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:

- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act).

[12] On 12 October 2016 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present and the hearing procedures were explained. His attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

[13] 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 Kingdom¹.

[14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and

¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

² [1992] 1 NZLR 720 at p 724

the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[15] In *McLanahan and Tan v The New Zealand Registered Architects Board*³ Collins J. noted that:

“ the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[16] The same applies as regards the disciplinary provisions in the Building Act.

[17] It must also be noted that the Board has jurisdiction only with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

[18] The hearing commenced at 10.40 a.m.

[19] At the hearing the Board was provided with an Opening Summary by Counsel for the Registrar which was read into the record.

[20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[21] The Complaint alleged the following issues with the building work carried out by the Respondent:

- (a) windows are not taped up correctly;
- (b) some wall sheets have not been creed off correctly with at least one screw missing and some screws overtightened,
- (c) corner flashings are too short and in some cases have been stretched to fit the corner so they are no longer square;
- (d) screws in the corner flashings are not square and stick out;
- (e) garage door is missing timber liners;
- (f) jamb flashings are different widths and look poor;
- (g) the floor joists don't have six screws at each end;
- (h) the hold down straps from the joist to the wall have HEX head screws in them, they need wafer head screws so that the GIB will fit;
- (i) the wooden shims under the structural steel need to be changed to plastic;
- (j) some of the GIB brackets are not correct;
- (k) some door openings are not fixed to the slab correctly;

³ [2016] HZHC 2276 at para 164

- (l) there is supposed to be DPC between truss and timber purlin as per the plans; and
 - (m) incorrect flashings ordered for under the window jambs.
- [22] The Complainant provided a letter from the Designer and a report from First Inspections to support the complaint.

Evidence

- [23] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*⁴ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [24] The hearing focused on the issues raised by the Technical Assessor in his report.
- [25] The Respondent was engaged on a labour-only basis to carry out certain aspects of a consented residential build. The contract notated that he was to erect exterior frames, complete shell lockable, all cladding, roofing, flashings, window fitment and door fitment including roller door.
- [26] The Respondent completed the contracted works. The Complainant outlined that the Respondent installed window joinery in a negligent manner and in such a way as to allow moisture to enter the home. He stated that up to seven repair attempts had been made and issues remained.
- [27] The Complainant submitted information from the project manager for the build, Mr Eagle, which set out aspects which he considered were either negligent or noncompliant. The Complainant also provided an inspection report by First Inspections Limited which confirmed the moisture issues. The report pointed to the installation of head flashings as a possible cause.

⁴ [2009] 1 NZLR 1

- [28] The Technical Assessor attended the site, reviewed consent documentation and complaint documentation and provided his opinion. He noted:

The exterior joinery has not been installed as per the building consent documentation and relevant industry technical literature. The Construction fails to satisfy the provisions of New Zealand Building Code E2 External Moisture.

The external gutter, fascia and roof component flashing do not appear to be installed as per the building consent documentation (expansion joints).

The assembly surrounding the joinery is currently allowing water to enter to the interior of the dwelling and has caused damage to interior linings trim and decoration.

- [29] The Respondent accepted that there were issues with moisture ingress and that he had not provided for expansion in the joints in the long runs of fascia and guttering. The expansion requirements were not on the plans but the consented documents referred to and incorporated the details in E2/AS1 and the Technical Assessor confirmed it was a requirement under that acceptable solution.
- [30] The Respondent stated he had made various repair attempts to deal with leaking windows but had not been able to trace the problem. This included removing one window and reinstalling it. He had ordered and taken delivery of new flashings and cladding and the next step he was going to take was to reinstall a window with new flashings to see if this fixed the problem. If it did he would then do the same for the other affected windows. He was not, however, allowed to try this repair methodology by the Complainant. He stated he was and had always been willing to repair the problem and to take responsibility for it.
- [31] At the hearing the methodology used to install windows was discussed and the Technical Assessor's opinion was sought on whether or not it would have met the functional requirements of E2. The Technical Assessor gave his opinion that the dwelling could be built as designed and that if it had been built that way it would have met the functional requirements of E2. He also expressed his opinion that a possible cause of the leaks was the way in which the flashings had been installed although it was noted that what he considered to be critical elements such as an air seal had been installed.
- [32] During questioning the Respondent noted that he did not consider the window flashings as drawn and consented would work. In particular the requirement to fold the corrugated cladding at a 90 degree angle was impracticable. As such he drew amended flashing details and had these manufactured. He did not have these assessed or verified by a licensed designer. He did not notify the Council of a variation to the consented documents.
- [33] The Respondent provided various documents that were admitted into evidence.

Boards Conclusion and Reasoning

- [34] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v*

*Far North Council*⁵. Judge McElrea provided guidance on the interpretation of those terms:

[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.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[35] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁶ as regards the threshold for disciplinary matters:

[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.

[36] The Board found it difficult to determine the true cause of the leaks and considered that there was insufficient evidence for it to determine, on the balance of probabilities, that the Respondent had installed them negligently.

[37] As regards the gutter and fascia the Board notes the Respondent has accepted that it was not completed as per E2/AS1. The Board, however, considers this matter does not reach the seriousness threshold for a disciplinary outcome.

[38] The Respondent accepted he had carried out design work and had varied the consent without submitting the same to the building consent authority. These are serious matters.

[39] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[40] In *Tan v Auckland Council*⁷ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes

⁵ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁶ [2001] NZAR 74

⁷ [2015] NZHC 3299 [18 December 2015]

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.

- [41] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [42] On the basis of the above the Board finds that the Respondent has been negligent in carrying out design work, which he was not licensed to do, and in varying a building consent without taking the appropriate steps required of him.
- [43] The Board also finds that the Respondent has carried out building work that does not comply with a building consent. The window flashings, as designed by the Respondent were, in essence, not as per the building consent. The same applies to the lack of expansion provision in the fascia and guttering.
- [44] The Respondent should note that he could have also faced a charge under s 317(1)(c) of the Act for carrying out design work. He is cautioned against doing so in the future.

Board Decision

- [45] The Board has decided that Respondent has:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act);
- and should be disciplined.

Disciplinary Penalties

- [46] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.
- [47] The Board's Complaints Procedures allow the Board either to set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [48] As part of the materials provided to the Board for the Hearing, the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was the approach taken to try and rectify the issues, the acceptance of responsibility, and the personal impact the events have had on the Respondent.
- [49] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there a further matters which the Board should take into consideration.
- [50] The Board is aware that the common understanding of 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*⁸

[51] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁹:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[52] The High Court in *Patel v Complaints Assessment Committee*¹⁰ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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.

[53] The Board noted the Respondent had faced up to the issues and had taken reasonable steps to try and deal with them. Ordinarily a fine in the order of \$2,000 would be ordered for a matter such as this but given the mitigation heard the Board has decided that a censure is appropriate.

Costs

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

[55] 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. The judgement in *Cooray v The Preliminary Proceedings Committee*¹¹ included the following:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases

⁸ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁹ [1992] 1 NZLR 720 at p 724

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

¹¹ HC, Wellington, AP23/94, 14 September 1995

where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

[56] The judgment in *Macdonald v Professional Conduct Committee*¹² confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹³ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[57] In *Collie v Nursing Council of New Zealand*¹⁴ 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.

[58] The Board considers costs of \$1,000 to be reasonable. Costs have been reduced from the normal order for a half day hearing on \$1,500 based on the cooperative approach taken by the Respondent.

Publication of Name

[59] 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 Licenced Building Practitioners’ scheme as is required by the Act.

[60] The Board is also able, under s 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.

[61] 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.

[62] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

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

Penalty: Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is censured.

¹² HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹³ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁴ [2001] NZAR 74

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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 s 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.


Submissions on Penalty Costs and Publication

- [64] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **4pm on 28 November 2016**.
- [65] If no submissions are received then this decision will become final.
- [66] 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

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

Signed and dated this 4th day of November 2016.



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:*

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- (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.*