

BPB Complaint No. C2-01434

IN THE MATTER OF

AGAINST

Under the Building Act 2004 (the Act)

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

Stuart Wilson, Licensed Building Practitioner
No. BP 113942

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 21 June 2016 in respect of Stuart Wilson, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [Omitted] 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 Site Area of Practice 2 Licence issued 12 April 2016.
- [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) | Licensed in Carpentry and Site Area
of Practice 2 |
| Brian Nightingale | Board Member | Registered Quantity Surveyor and
Registered Construction Manager |
| Mel Orange | Board Member | Legal Member appointed under s
345(3) of the Act |
| Bob Monteith | Board Member | Licensed in Carpentry and Site Area
of Practice 2 |
- [6] The matter was considered by the Board in Taupo on 31 January 2017 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:

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Gemma Lawson Board Secretary

Stuart Wilson Respondent

John Rennie Special Adviser to the Board (by telephone)

- [8] No Board Member declared any conflict 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 10 October 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.
- [11] On 3 November 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] The Board requested a Technical Assessor be appointed to prepare a report. John Rennie and Stuart Wilson’s report dated 19 January 2017 was received and circulated to the Respondent and Complainant.
- [13] On 18 January 2017 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

- [14] 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.
- [15] 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 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.*

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

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- [16] 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.”

- [17] The same applies as regards the disciplinary provisions in the Building Act.
- [18] 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

- [19] The hearing commenced at 10.20 a.m.
- [20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [21] The Complainant alleged the Respondent had changed the location and design of a retaining wall from that shown on the consented plans and in doing so breached the district planning rules.

Evidence

- [22] 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

³ [2016] HZHC 2276 at para 164

⁴ [2009] 1 NZLR 1

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.

- [23] The Respondent's building business was engaged to complete the construction of a new residential dwelling by the Complainant. The build proceeded and a Code Compliance Certificate was issued. Post its issue the Complainant raised a matter as regards foundation vents with the Building Consent Authority (Taupo District Council). When carrying out an inspection the Consent Authority noted that since Code Compliance had been issued, various items had been changed by the owner in such a way that they no longer complied with the Building Code. They also noted that a retaining wall was inside a minimum set back from the boundary (as stipulated within the district planning rules) and that a resource consent for this would be required. A resource consent was applied for and granted.

- [24] The Respondent provided a written response to the complaint. In it he noted, with respect to the top retaining wall to which the complaint related, that:

The top retaining wall was shown on the working drawings inside the 5m front setback. It was constructed 2m from the front boundary in order to split existing ground levels on site.

The working drawings indicated a 500mm cut on the top section of the site, this was not done. The top retaining wall was in fact constructed to approximately 1m in height.

- [25] The Respondent gave evidence at the hearing that the change to the retaining wall was discussed with and approved by the Complainant. It was also discussed with the Building Inspector prior to it being undertaken. The designer was not consulted. A consent variation was not processed. The following detail from a Site Notice dated 5 November 2014 was included in the evidence:

This is a note to highlight the retaining wall parallel with road and drive looks higher than shown on the approved plan. I advised Logan Frew the builder that before this work is done the retaining wall may need to be revised by engineer if over 1m. This is because it is carrying a surcharge and will probably require a barrier type fence where person are likely to frequent.

- [26] The Respondent gave evidence that the retaining wall was changed from that which was consented so as to avoid the need for a barrier to protect from falling and to remove surcharge loadings in the consented design. He also noted that the Taupo District Plan requires that a resource consent be obtained for a cut of 1.5m or greater and that changing the retaining wall design avoided a resource consent having to be applied for. He stated the redesign also provided better site access and a more useable space. He accepted that as built plans with the changes to the retaining wall had not been completed and submitted to the Building Consent Authority.

- [27] The Technical Assessor noted in his report that:

The upper retaining wall that is subject to the complaint has been constructed in a different position from that shown on the approved consented plans. Section 40 of the Building Act 2004 requires building work to be carried out in accordance with a building consent.

The height and position of the upper retaining wall as constructed exceeds the permitted works as defined within the Taupo District plan.

- [28] The Technical Assessor also noted possible issues with surcharge from the retaining wall as designed in the consented plans but accepted in questioning that the retaining wall had been designed by a licensed person, that it did not require an engineered design, and that it had been granted building consent.

Boards Conclusion and Reasoning

Negligence and Incompetence

- [29] 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 and to the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁶ as regards the threshold for disciplinary matters.
- [30] The Board has previously held⁷ that a licensed building practitioner who does not take the necessary steps to ensure a building consent is in place or to obtain the required variations to a building consent can be found to have been negligent. Full reasoning was provided by the Board in decision C2-01068⁸.
- [31] In the current matter though the Board considers the circumstances fall more appropriately within the disciplinary charge of s 317(1)(d). Accordingly it is best that it is dealt with under that charge.

Contrary to a Building Consent

- [32] 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.
- [33] In *Tan v Auckland Council*⁹ 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 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.

- [34] 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.

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

⁶ [2001] NZAR 74

⁷ Refer for example to Board Decision C1030 dated 21 July 2014

⁸ Board Decision C2-01068 dated 31 August 2015

⁹ [2015] NZHC 3299 [18 December 2015]

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Moreover undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

- [35] As stated above an exception from the rule that no building work can be carried out except in accordance with a building consent is made for minor variations as defined in s 45A of the Act. If it applies then work can continue if the variation is considered to be minor in nature and guidance documentation is available as to the process to be used when dealing with what might be a minor variation. The required documentation is then submitted at a later stage and often as a mop up at the end of the job.
- [36] Key to this minor variation process is obtaining agreement with the owner and then consulting with the designer and the building consent authority. The rationale for these latter steps is to ensure that the variation is actually minor before work is undertaken and that the variation will still meet Building Code and will not adversely affect other parts of the building work.
- [37] Put quite simply the minor variation has to be agreed to by all the key parties prior to it being undertaken, not once it has already been done.
- [38] It must also be borne in mind that not all variations which a licensed building practitioner or others may consider are minor will be accepted as such by a building consent authority. Treating matters as minor without investigation creates a risk that s 40 of the Act may be breached and that building work is carried out contrary to a consent. The Board accepts, in this instance, however, that the variation was most likely a minor variation.
- [39] In the case before the Board some, but not all, of the steps for a minor variation were taken. The owner agreed and the building inspector was advised but the designer was not engaged to ascertain the implications of the change and “as built” plans were not provided when the Code Compliance Certificate was sought. The result has been that the Complainant has been put to the expense and inconvenience of having to obtain a resource consent. This is a matter which would most likely have been identified and assessed as part of the variation had the designer been consulted. A decision could have then been made as to whether to proceed as per the consented plans or to process a variation.
- [40] Given these factors the Board finds that the disciplinary offence under s 317(1)(d) has been committed.

Board Decision

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

Disciplinary Penalties

- [43] 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.

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- [44] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [45] 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 were the reasons and the intention behind the decision to depart from the building consent.
- [46] 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 are further matters which the Board should take into consideration.
- [47] 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.¹⁰*
- [48] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*¹¹:
- 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.*
- [49] The High Court in *Patel v Complaints Assessment Committee*¹², 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.*
- [50] In *Lochhead v Ministry of Business Innovation and Employment*¹³, an appeal from a decision of the Board, the court, in respect of penalty noted:

¹⁰ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹¹ [1992] 1 NZLR 720 at p 724

¹² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹³ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.

[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).

- [51] Whilst not building in accordance with a building consent is a serious matter the disciplinary offending in this case is at the lower end. The Board notes that the resource consent was granted and the overall building outcome for the owner may well be better than what was originally designed. As such the Board considers that only a censure is required.

Costs

- [52] 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.”
- [53] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*¹⁴ 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 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.”

- [54] The judgment in *Macdonald v Professional Conduct Committee*¹⁵ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹⁶ where the judgment

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

¹⁵ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹⁶ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

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referred with approval to the passages from *Cooray and Macdonald* in upholding a 24% costs order made by the Board.

- [55] In *Collie v Nursing Council of New Zealand*¹⁷ 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.

- [56] The matter was dealt with at a hearing albeit a short one. The Respondent was cooperative. In most cases where a hearing is required costs in the order of \$1,500 are ordered. In the circumstances of the current case though the Board considers the sum of \$500 will be adequate.

Publication of Name

- [57] 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.

- [58] 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.

- [59] 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.

- [60] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁰. In *N v Professional Conduct Committee of Medical Council*²¹ the High Court pointed to the following factors:

The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:

- *issues around the identity of other persons such as family and employers;*
- *identity of persons involved and their privacy and the impact of publication on them; and*

¹⁷ [2001] NZAR 74

¹⁸ Section 14

¹⁹ Refer ss 200 and 202 of the Criminal Procedure Act

²⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²¹ *ibid*

- *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[61] 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 interest²². 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.

[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.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$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 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 **10th April 2017**.

[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 17th day of March 2017.



Richard Merrifield
Presiding Member

²² Kewene v Professional Conduct Committee of the Dental Council - [2013] NZAR 1055

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.*