

Before the Building Practitioners Board

	BPB Complaint No. CB25047
Licensed Building Practitioner:	Reece McPherson (the Respondent)
Licence Number:	BP 129265
Licence(s) Held:	Roofing – AOP Concrete or Clay Tile

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:	25 September 2019
Decision Date:	13 November 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry Site AOP 1

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.

The Respondent **has not** committed a disciplinary offence under section 317(1)(d) 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) 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).

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

Reece McPherson	Respondent
[Omitted]	Complainants
[Omitted]	Witness

- [8] The Respondent was engaged as a subcontractor to carry out work on a roof as part of an alteration to a dwelling. The building work was carried out under a building consent. Contractual issues arose with the main contractor and building work came to a premature end.
- [9] The Complainant was concerned with the quality and compliance of the building work carried out including that in relation to the roof. As a result the services of a roofing consultant, [Omitted], were sought to carry out a review of the roofing work completed. He made various findings and recommendations in respect of the Respondent’s work. They were:

⁴ [2016] HZHC 2276 at para 164

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

1. *The installation of the tiles has primarily been let down by the incorrect setting out of the tile battens creating too larger horizontal lap in the tiles.*
2. *This has in turn resulted in the tiles sitting too far down the underlying tile, beyond the flat recessed area where the noses should sit, causing the tiles to ride up creating a visible gap under the bottom edge of the noses.*
3. *A spare tile measured 275mm by 450mm, which means it would appear to be a Wunderlich Terracotta Tile manufactured in Melbourne.*
4. *This particular pattern of Wunderlich tiles is designed to be installed on a mean batten spacing of 365mm.*
5. *The installed spacing of 330mm on the courses checked would confirm the visual situation of the tiles not sitting correctly where they lap.*
6. *The roof has, therefore, not been set out and installed in accordance with the manufacturer's requirements.*
7. *The only remedy to correct this situation is for the roof and tile battens to be removed, and correctly reinstalled.*
8. *Other points noted such as the inaccurate alignment of barge tiles, missing or chipped tiles and unevenly cut tiles, are items which could have been remedied if the roof itself had been correctly installed.*
9. *The lead flashings with cover ranging from 15mm to 40mm do not have compliant cover behind the weatherboards. E2 requires 75mm. These need to be remedied.*
10. *The tapering gap between the underside of the weatherboards and tiles is an aesthetics issue.*

[10] At the hearing the Respondent accepted that he had both carried out and supervised the work.

[11] A written response to the complaint from the Respondent's legal counsel dated 22 January 2019 stated:

4. *Whilst we have not been provided a full roofer's report our client has been in communication with the owner and roof inspector over the last week. He acknowledges that extensive remedial works are required to the roof and is seeking to find a remedy for the owner including indicating that he is prepared to complete any necessary works for the owner. It is therefore hoped that an amical solution can be found and that this complaint need not be taken any further.*

[12] A further response from the Respondent's legal counsel dated 5 March 2019 stated:

2. *As per our letter of 22 January 2019 our client has acknowledged that extensive remedial works are required to be completed at the property. He however repeats that much of the work appears to be incomplete as he had run out of materials and been pulled off the job by the main contractor.*
4. *He wishes to make the following comments about specific photos and the report provided.*
 - i. *Photos 1 and 17 - Our client accepts the issues identified in these photos were the result of an incorrect set up which he applied. He is however aware of the set up required for this job and understands that a total re-roof will be required.*
 - ii. *Photo 2 – Due to the dispute the contractor was having with the owner he confirms that these photos show tiles that he had cut having been left on the roof. He confirms this was in an effort to maintain that the roof was watertight in the circumstances that he had run out of materials and was being pulled off the job by the main contractor.*
 - iii. *Photos 26,25,27,28,29 and 30 –The suggestion here is that the flashing upstand is incorrect with the code of compliance which requires a minimum of 80mm. He maintains that he has complied with the standard and that all is at or above 80mm. He would like for this to be checked again from another angle as he is not convinced that the person who measured it could have gauged a true reading from the inside.*
 - iv. *Photos - 7,9,22,27,28,29 and 30 - Our client repeats his position, as stated in general and in regard to photo number 2, to say any errors showing in these photos are consistent with his position that he was not able to complete works due to being pulled off the job and having run out of materials.*

[13] At the hearing the Respondent accepted he had made an error with regard to the set out and confirmed the submissions from his legal counsel in respect of the items above.

Board's Conclusion and Reasoning

[14] 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.

- [15] The Board has also decided that the Respondent **has not** 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).

Negligence and/or Incompetence

- [16] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [17] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [18] 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 Act⁹. 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 practitioner¹⁰.
- [19] 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*

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[20] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹ and be carried out in accordance with a building consent¹². 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.

[21] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³ 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.

[22] The Respondent accepted that the building work was not carried out in an acceptable manner and the Board agreed. There were multiple workmanship, quality and compliance issues. It would appear that quality and compliance came at the cost of speed. The consequences of this are significant. Considerable rework if not a reroof will be required.

[23] 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.

Contrary to a Building Consent

[24] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

40 *Buildings not to be constructed, altered, demolished, or removed without consent*

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ [2001] NZAR 74

- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [25] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.
- [26] Building contrary to a building consent is a form of strict liability. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established¹⁴.
- [27] There was, however, no evidence of contraventions of the building consent before the Board and as such the Board could not uphold the ground of discipline.

Penalty, Costs and Publication

- [28] 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.
- [29] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [30] 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*¹⁵ 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.

- [31] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁶ 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

¹⁴ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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.

- [32] The Respondent noted that he had received a deposit but had not been paid by the balance of his invoice by the main contractor for the work and that he was prepared to rectify the matter at his cost. He stated that, at the time, he had too much work on and was experiencing cash flow issues both of which impacted on his work. The Respondent submitted that he had learnt from the experience and had made significant changes to his business practices to ensure quality and compliance was prioritised.
- [33] The Board adopted a starting point of a fine of \$3,000. This was consistent with penalties imposed for similar disciplinary offending. The Board noted the Respondent's responsible approach to the hearing and taking the mitigation heard into account it decided to reduce the fine by one third to \$2,000.

Costs

- [34] 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."
- [35] 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 case¹⁷.
- [36] In *Collie v Nursing Council of New Zealand*¹⁸ 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.
- [37] Costs for a hearing before the Board are normally in the order of \$2,000. In this instance, however, the Board has decided to reduce the order to \$750 on the basis of the Respondent's cooperative attitude to the matter.

Publication

- [38] 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 Act¹⁹. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

¹⁷ *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.

¹⁸ [2001] NZAR 74

¹⁹ Refer sections 298, 299 and 301 of the Act

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.

- [39] 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.
- [40] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²¹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²². 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*²³.
- [41] 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 interest²⁴. 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.
- [42] Based on the above the Board will not order further publication.

Section 318 Order

- [43] 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 \$2,000.
Costs:	Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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.

²⁰ Section 14 of the Act

²¹ Refer sections 200 and 202 of the Criminal Procedure Act

²² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²³ *ibid*

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [44] 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.

Right of Appeal

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

Signed and dated this 13th day of November 2019



Richard Mernfield
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.*