

Before the Building Practitioners Board

	BPB Complaint No. BP25237
Licensed Building Practitioner:	Michael Gallagher (the Respondent)
Licence Number:	BP 131125
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	17 December 2019
Decision Date:	27 February 2020

Board Members Present:

Chris Preston (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site 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.

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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 contrary to section 317(1)(b) of the Act, IN THAT, he may have:
 - (i) failed to adequately and safely deal with asbestos removal; and
 - (ii) removed subfloor structural elements without providing adequate temporary support; and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have obtained a deposit of 30% of the total value of the contract without an intention to complete the building work.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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 maintained in order to protect clients, the profession and the broader community.”

[4] In a similar vein the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[5] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

[6] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

[7] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges and it decides what evidence is

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

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

required at a hearing to assist it in its investigations. In this respect the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

- [8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [10] 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.
- [11] The Respondent did not respond to the complaint, has made no submissions for hearing, has in no way engaged with the process and did not attend the hearing.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from [omitted] the Complainant.
- [13] The building work to which the complaint related was demolition work in preparation for steel support beams. The Complainant alleged the work was carried out negligently in the structural supports had been removed without propping being put in place to support the structure and that rubbish including asbestos was not dealt with appropriately. A large deposit for building work was taken but very little of the work was carried out.
- [14] [Omitted] confirmed that the asbestos siding which had been removed by the Respondent had not been removed from the property and was not disposed of in a safe manner but that it had been simply piled up along with a lot of other rubbish on site.
- [15] He confirmed that some of the bracing elements had been removed from the sub floor and that the Respondent had abandoned the site and left it in what he considered a dangerous condition.
- [16] He confirmed that some of the timber under the house on the ground was Heart Rimu which was consistent with the timber used to brace the subfloor.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[17] [Omitted] confirmed there was no formal contract in place but that he had agreed to proceed on the basis of the quotation given. With respect to the payment of the deposit and the amount of work completed prior to the Respondent abandoning the job [omitted] had taken the issue to the disputes tribunal and had obtained some compensation.

Board's Conclusion and Reasoning

[18] 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.

[19] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[20] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

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

[22] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁹. 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.

[23] 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 Act¹⁰. 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 practitioner¹¹.

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

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[24] 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:*
- (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.*

[25] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹² and be carried out in accordance with a building consent¹³. 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.

[26] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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.

[27] It was clear from the evidence given that the Respondent had not taken all due care and consideration when dealing with the removal and disposal of the asbestos siding. The dumping of the asbestos along with all the other rubbish on site into one pile suggested the he had no intention of treating the asbestos any differently from general rubbish and in abandoning the work before it was disposed of had subject others to risk.

[28] In the process of preparing the site for the steel beams structural bracing had been removed to the point that the building was unsafe.

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ [2001] NZAR 74

- [29] Because the Respondent did not appear the Board was unable to determine at what stage the Respondent was at or if temporary bracing would have been installed.
- [30] In any event, he abandoned the job leaving the site unsafe and a risk to other people. Even if the Respondent had, at that point, decided to leave the job, he should have made sure the site was safe. He did not.
- [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 that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Disrepute

- [32] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹⁵ and discussed the legal principles that apply.
- [33] The Act does not define conduct which brings or is likely to bring the regime into disrepute. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁶ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁷ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹⁸

- [34] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions¹⁹;
- honest mistakes without deliberate wrongdoing²⁰;
- provision of false undertakings²¹; and
- conduct resulting in an unethical financial gain²².

¹⁵ Board decision dated 2 July 2015.

¹⁶ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁷ [2012] NZCA 401

¹⁸ [2012] NZAR 1071 page 1072

¹⁹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²¹ *Slack, Re* [2012] NZLCDT 40

[35] In this case there was an allegation of unethical financial gain but insufficient supporting evidence for the Board to uphold the ground of discipline. Moreover, while the conduct of the Respondent fell short of what would be expected of a professional in this case the Board did not consider it met the high threshold required to make a finding. In this respect the Board notes the Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[36] The Board does make comment however that the Respondent should make sure he understands his obligations under the Building Act to provide a contract for all work over \$30,000. He should also note that there is an ethical obligation as well as a legal obligation under Part 4A of the Act that he will keep the client aware of cost changes (variations), work progress, changes in design and to engage with clients in a professional manner.

Penalty, Costs and Publication

[37] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[38] The Respondent did not attend the hearing. There has in fact been no response from the Respondent in regard to this complaint. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[39] 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*²³ 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.

²² *Colliev Nursing Council of New Zealand* [2000] NZAR 7

²³ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [40] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²⁴. The High Court when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [41] Cancellation of a licence is the equivalent of striking off within the licensed building practitioner regime.
- [42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁵ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [43] The Respondent has been found to have been negligent. He has not engaged in the disciplinary process. The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*²⁶ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [44] The level of negligence was high. There were associated health and safety risks from both the removal of structural support and the manner in which asbestos was dealt with. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner acts as the Respondent has puts those objects at risk.
- [45] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary

²⁴ [2012] NZAR 481

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

²⁶ [2011] 3 NZLR 850.

complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*²⁷ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.

[46] Taking all of the above factors into account the Board considers that a suspension of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.

[47] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

Costs

[48] 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."

[49] 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 case²⁸.

[50] In *Collie v Nursing Council of New Zealand*²⁹ 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.

[51] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

[52] 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 Act³⁰. 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.

²⁷ [2011] 3 NZLR 850.

²⁸ *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.

²⁹ [2001] NZAR 74

³⁰ Refer sections 298, 299 and 301 of the Act

- [53] 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.
- [54] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³³. 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*³⁴.
- [55] 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 interest³⁵. 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.
- [56] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Building Act 2004, the Respondent's licence will be suspended for a period of six months and the Registrar is directed to record the suspension in the Register.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 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 the note in the Register and the Respondent being named in this decision.

- [58] 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.

³¹ Section 14 of the Act

³² Refer sections 200 and 202 of the Criminal Procedure Act

³³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁴ *ibid*

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [59] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 20 March 2020. 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.
- [60] 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

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

Signed and dated this 27th day of February 2020



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*

-
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (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.*