

## Before the Building Practitioners Board

	BPB Complaint No. CB25409
Licensed Building Practitioner:	Kelvin Lalich (the Respondent)
Licence Number:	BP 116236
Licence(s) Held:	Carpentry and Site AOP 2

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Hamilton
Hearing Type:	In Person
Hearing and Decision Date:	30 June 2020

#### Board Members Present:

Chris Preston, Chair (Presiding)  
Mel Orange, Deputy Chair, Legal Member  
Bob Monteith, LBP, Carpentry and Site AOP 2  
Rob Shao, LBP, Carpentry and 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 about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at multiple addresses. 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, the systems and processes used, under his direction and oversight, to manage:
  - (i) the completion of restricted building work may have resulted in restricted building work being carried out without the supervision of a licensed building practitioner who held the required class of licence for the work undertaken; and/or
  - (ii) the provision of records of work may have resulted in incorrect, false or misleading records of work being provided; and/or
- (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT, he may have carried out or supervised brick and/or blocklaying work which he was not licensed to carry out; and/or

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

- (c) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have may have carried out or supervised brick and/or blocklaying work which he was not competent to carry out; and/or
- (d) 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 authorised, directed or allowed, on multiple occasions:
  - (a) the completion of restricted building work which was not carried out or supervised by licensed building practitioners who held the required class of licence for the work undertaken; and/or
  - (b) the provision of records of work that were incorrect, false or misleading.

### 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[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*<sup>4</sup> 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 are 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 persons<sup>5</sup>:

*... 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.*

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<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

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

- [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 is important to note as, on the basis of it, the 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 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 committed<sup>6</sup>. 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.

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[11] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Kelvin Lalich	Respondent
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	<i>[Omitted]</i> , Kelvin Lalich Builders Limited

[12] The Complainant was an employee of the Respondent's company Kelvin Lalich Builders Limited. He carried out bricklaying work for the company. During his employment, he obtained a Bricklaying and Blocklaying Licence with an area of practice of Structural Masonry Veneer. The Respondent was the only other licensed building practitioner in the company.

[13] The process used for the provision of records of work for the Complainant's restricted building work was that the company office would use a signed proforma record of work that the Complainant had provided for each of the jobs completed. The office manager would add the job-specific detail. The Complainant would not sight nor approve the records of work.

[14] Whilst in the Respondent's employ, the Complainant suffered an injury which resulted in him being unable to work. During the period that he was incapacitated records of work were submitted in the Complainant's name for three properties that he did not carry out or supervise. They were *[Omitted]*, *[Omitted]* and *[Omitted]*.

[15] The Respondent accepted that the Complainant was not the licensed building practitioner associated with the brick veneers at the properties. He gave evidence that he considered that the work was compliant and that he was competent to oversee the work. He considered that his licence allowed him to supervise the work. He accepted that his licence did not, in fact, allow for supervision of work that was outside of his licence class.

### Board's Conclusion and Reasoning

[16] 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

[17] The Board has decided that the Respondent **has not**:

- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
- (b) breached section 314B of the Act (s 317(1)(h) of the Act); or
- (a) 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).

- [18] The Board decided that it would not uphold the charges under section 317(1)(c), 317(1)(h) and 317(1)(i) of the Act on the basis that a finding of negligence was appropriate and sufficient.

#### Negligence and/or Incompetence

- [19] 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*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.
- [20] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>9</sup>. 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.
- [21] 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 Act<sup>10</sup>. 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 practitioner<sup>11</sup>.
- [22] Looking at the Respondent's conduct, the Board notes that he holds both Carpentry and a Site AOP 2 licences. As a licensed building practitioner, the Respondent should have been aware of the requirement that restricted building work is carried out or supervised by an appropriately licensed person and that he could not be that person. Section 84 of the Act provides:

*All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

- [23] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) provides:

5        *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

<sup>9</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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

- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
- (2) *This clause applies to building work that is—*
  - (a) *the construction or alteration of—*
    - (i) *the primary structure of a house or a small-to-medium apartment building; or*
    - (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
  - (b) *of a kind described in subclause (3); and*
  - (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
- (3) *The kinds of building work referred to in subclause (2)(b) are—*
  - (a) *bricklaying or blocklaying work;*
  - (b) *carpentry work;*
  - (c) *external plastering work;*
  - (d) *foundations work;*
  - (e) *roofing work.*

- [24] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order Carpentry and Bricklaying and Blocklaying are each designed as classes. They are distinct from each other, and each has different competencies that are assessed when the licenses are applied for. Site is not identified in the Building (Definition of Restricted Building Work) Order, and as such it is not a licence class that can carry out or supervise restricted building work.
- [25] It was evident to the Board that the Respondent knew he did not have a person on site who had a Bricklaying and Blocklaying licence and that he chose to forge ahead with the work regardless.
- [26] Over and above that, the Board noted that the office practices used for records or work bordered on reckless. The submission of records of work on behalf of the Complainant was treated as a purely administrative task with no real consideration given to compliance obligations. It was open to abuse and, in the instance of the three properties noted, was abused. The Complainant was somewhat complicit in this, in that he allowed the records of work to be used in the manner that they were. His contributory negligence will be taken into account when considering the appropriate penalty to be imposed.

- [27] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>12</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

- [28] The Board considered that whilst there may have been an element of carelessness in the Respondent's conduct it went beyond inadvertent error. There were three properties for which false records of work were submitted and no attention paid to the requirement for a licensed person to be engaged to carry out the bricklaying.
- [29] 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.

### **Penalty, Costs and Publication**

- [30] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [31] The Board heard evidence during the hearing relevant to penalty, costs and publication and decided to make orders at the hearing.

### Penalty

- [32] 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*<sup>13</sup> 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.*

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<sup>12</sup> [2001] NZAR 74

<sup>13</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [33] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>14</sup> 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [34] The Board decided that whilst the Respondent had been negligent there were significant mitigating factors including the Complainant's contributory negligence and the Respondent's ignorance of the requirements around restricted building work. On this basis, the Board decided that a censure would suffice. A censure is a formal expression of disapproval.

### Costs

- [35] 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."
- [36] 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<sup>15</sup>.
- [37] In *Collie v Nursing Council of New Zealand*<sup>16</sup> 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.*
- [38] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

### Publication

- [39] 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<sup>17</sup>. 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.*

<sup>14</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>15</sup> *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.

<sup>16</sup> [2001] NZAR 74

<sup>17</sup> Refer sections 298, 299 and 301 of the Act

- [40] 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.
- [41] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>18</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>19</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>20</sup>. 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*<sup>21</sup>.
- [42] 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 interest<sup>22</sup>. 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.
- [43] Based on the above, the Board will not order further publication.

#### **Section 318 Order**

- [44] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.
- Costs:** Pursuant to section 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 section 301(l)(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.**
- [45] 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.

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<sup>18</sup> Section 14 of the Act

<sup>19</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>20</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>21</sup> *ibid*

<sup>22</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Right of Appeal

[46] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 10<sup>th</sup> day of August 2020



**Chris Preston**  
Presiding Member

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### <sup>i</sup> **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."*

### <sup>ii</sup> **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*

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(b) *within any further time that the appeal authority allows on application made before or after the period expires.*