

Before the Building Practitioners Board

	BPB Complaint No. CB25053
Licensed Building Practitioner:	John Logie (the Respondent)
Licence Number:	BP 123822
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry Veneer

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	Hamilton
Hearing Type:	In Person
Scheduled Hearing Date:	29 May 2019
Decision Date:	11 July 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

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 disciplinary offence under sections 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 (s 317(1)(b) of the Act); and
- (b) breached section 314B(b) of the Act (s 317(1)(h) 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.

Background to the Complaint

- [5] The Respondent provided a response to the complaint. A Notice of Hearing was issued on 15 April 2019. A Prehearing Telephone Conference was held on 2 May 2019. The Respondent attended. The Respondent noted at the Prehearing that he was going to consult his lawyer prior to deciding whether he would attend or not.
- [6] On Friday 24 May 2019 the Respondent sought an adjournment stating his legal representative had been ill and had not been able to prepare. He was told to provide detail so that the application could be considered. At 4.54 pm on Monday 27 May 2019 a Memorandum was received from legal counsel acting for the Respondent. He confirmed he had been instructed on 15 May 2019 and had been unwell since.
- [7] The Presiding Member declined the application noting the Respondent had delayed instruction of counsel, that hearing arrangements including travel for Board Members have been made and that the matter was not overly complicated.
- [8] On the day of the hearing the Board Officer received notice from the Respondent that he would not be attending. His legal counsel advised that he had not received any instructions in respect of the matter.

Evidence

- [9] 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.
- [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.

⁴ [2016] HZHC 2276 at para 164

⁵ *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:

[Omitted] Complainant

Daniel Kruger Building Consent Officer, Matamata Piako District Council

- [12] The Respondent who holds Bricklaying and Blocklaying – Structural Masonry Veneer Licence carried out building work as part of alterations to a bathroom. The work included installing framing, plasterboard and tanking for a wet area shower which was replacing a pre-formed shower cubicle. A building consent was not obtained for the building work. Mr Kruger from the Council noted that a building consent would normally be required for the installation of a wet area shower in such circumstances.
- [13] The Complainant noted that there were issues with the Respondent's building work and that the shower was leaking. She confronted the Respondent about the issues. He attempted to carry out remedial work but, in the Complainant's opinion, the remedial work was worse than the original work. Issues complained about with the Respondent's work included:
- (a) use of timber for a hob which should have been cement;
 - (b) insufficient noggin to support shower linings and fittings;
 - (c) failure to use metal trims;
 - (d) the use of ordinary plasterboard as opposed to a plasterboard designed for wet areas such as aqualine; and
 - (e) general issues as regards workmanship.
- [14] The Complainant had inspections of the Respondent's work carried out by [Omitted] and by [Omitted] of the Building and Construction ITO. Both noted the non-compliant work as described above.
- [15] The Respondent provided a response to the complaint in which he noted a commercial dispute and issues which were preventing him from returning to rectify issues. He acknowledged that he should not have undertaken the type of work that he did.

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 and incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [17] The Board has decided that the Respondent **has not** breached section 314B of the Act (s 317(1)(h) of the Act).
- [18] The reasons for the decision follows.

Negligence – Carrying out Building Work without a Building Consent

- [19] The Board’s considerations in relation to negligence and/or incompetence relate to both the failure to obtain a building consent and to the manner in which the building work was carried out.
- [20] Dealing first with the failure to obtain a building consent under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [21] All building work must also be carried out in accordance with a building consent. 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.*
- (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.*

- [22] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 *Grant of building consent*

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

- [23] 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 as set out in section 3:

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.*

[24] In *Tan v Auckland Council*⁶ 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.

[25] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[26] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[27] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[28] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

⁶ [2015] NZHC 3299 [18 December 2015]

- [29] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent.
- [30] The Board notes that the Council witness considered a building consent was required. The Board agrees as whilst, under clause 32 of Schedule 1 of the Act allows for the replacement of any sanitary plumbing and drainage there are limitations including that a comparable component or assembly is used. The wet area shower that was installed was not a comparable component or assembly. The Respondent should have known this, and it is noted that it is common knowledge within the industry that a building consent is needed for such work.
- [31] Turning to look at whether the failure amount to negligence the Board notes that 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.
- [32] 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.
- [33] 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 purposes of the Act¹⁰ which are outlined above. 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.
- [34] The Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent's conduct in failing to obtain a building consent did amount to negligence. It found that he had departed from what the Board considers to be an accepted standard of conduct as it considers a reasonable

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

licenced building practitioner would have ensured that a building consent was in place prior to the building work being carried out.

- [35] In terms of the building work itself the Board finds that the Respondent has carried out the building work in an incompetent manner.
- [36] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*¹² it was stated as “*an inability to do the job*”. The same seriousness tests also apply.
- [37] The Respondent is licensed in brick and blocklaying. His competence in carpentry work, which he has carried out, does not follow from him holding the class of licence that he does.
- [38] The building work that he carried out showed a distinct lack of knowledge and understanding of the requirements for that work. He made fundamental material selection errors. Given this the Board finds that he has carried out building work in an incompetent manner.
- [39] 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.

- [40] The matters are serious. The Complainant will either have to have the building work redone or will have to obtain a certificate of acceptance for what has been done. A certificate of acceptance is an inferior means of obtaining verification from the building consent authority that work complies with the building code. The Complainant has also been left with an inferior job and will incur rectification costs.
- [41] The Board, which includes persons with extensive experience and expertise in the building industry, considered the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Misrepresentation or Outside of Competence

- [42] As the Board has made a finding that the Respondent carried out building work in an incompetent manner it considers that there is no requirement to make a finding that he has worked outside of his competence.

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹³ [2001] NZAR 74

Penalty, Costs and Publication

- [43] 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.
- [44] The matter was dealt with at a hearing. The Respondent did not attend. Included in the documentation received was information relevant to penalty, costs and publication and 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

- [45] 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*¹⁴ 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.

- [46] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁵ 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.
- [47] The matters before the Board are serious. The implications for the Complainant are outlined above in paragraph [40]. The Respondent needs to learn from his mistakes and to take caution to work within his competence. A signal needs to be sent to him and to the industry.
- [48] Based on the above the Board's penalty decision is that the Respondent be fined the sum of \$3,000. The Board did consider a suspension of the Respondent's licence but decided that a fine would suffice given that the Respondent did acknowledge that he had carried out building work that he should not have.

¹⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [49] 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.”
- [50] 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 case¹⁶.
- [51] 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.*
- [52] 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. A hearing was required and the costs were significant. Notwithstanding the amount of costs ordered is significantly less than 50% of actual costs.

Publication

- [53] 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 Act¹⁸. 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.*
- [54] 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.
- [55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁰. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal

¹⁶ *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.

¹⁷ [2001] NZAR 74

¹⁸ Refer sections 298, 299 and 301 of the Act

¹⁹ Section 14 of the Act

²⁰ Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive²¹. 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*²².

- [56] 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 interest²³. 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.
- [57] Based on the above the Board will not order further publication.

Section 318 Order

- [58] 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 \$3,000.

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 for the note in the Register and the Respondent being named in this decision.

- [59] 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.

Submissions on Penalty, Costs and Publication

- [60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 July 2019**. 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.
- [61] 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

²¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²² *ibid*

²³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 11th day of July 2019



Richard Merrifield
Presiding Member

ⁱ **Section 318 of the Act**

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