

## Before the Building Practitioners Board

	BPB Complaint No. CB24108
Licensed Building Practitioner:	Nicholas Mavroyannis (the Respondent)
Licence Number:	BP 114527
Licence(s) Held:	Design AOP 1

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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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	On the Papers
Hearing Date:	20 March 2019
Decision Date:	2 April 2019

#### Board Members Present:

Chris Preston (Presiding)  
Robin Dunlop, Retired Professional Engineer  
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 a disciplinary offence under section 317(1)(b) of the Act.

## Contents

<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	2
<b>Procedure</b> .....	3
<b>Evidence</b> .....	3
<b>Board’s Conclusion and Reasoning</b> .....	4
<b>Penalty, Costs and Publication</b> .....	6
Penalty .....	6
Costs.....	7
Publication .....	7
<b>Section 318 Order</b> .....	8
<b>Submissions on Penalty, Costs and Publication</b> .....	8
<b>Right of Appeal</b> .....	9

## Introduction

[1] The hearing resulted from a board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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*<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*

<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.

<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

*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.

#### **Procedure**

- [5] The matter was originally set down to be heard in person. Following a letter from the Respondents Legal Counsel on 15 March 2019 which set out the Respondent’s acceptance of responsibility and a submission that the matter could be dealt with on the papers it was agreed that appearances at a hearing were not required. A Board Minute to this effect was issued on 18 March 2019.

#### **Evidence**

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.
- [7] 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.
- [8] The Board Inquiry was initiated following a hearing into the conduct of another licensed building practitioner where issues with a design developed by the Respondent for access to a garage were noted.
- [9] In the letter dated the 15 March 2019 from Morgan Coakle, Lawyers for the Respondent Legal Counsel submitted:
- (a) A junior draftsman drew the site plans and elevations. The Respondent did not check the drawings before they were lodged.
  - (b) The Respondent accepts there was an error in the drawings.
  - (c) After the issue was discovered, the Respondent did not have an onsite meeting with the Complainant to discuss or decide how to correct the error. Instead he was contacted by the supervisor who advised him of the proposed remedy and asked him to provide amended drawings for a minor variation.
  - (d) There was pressure on the Respondent to prepare and submit the drawings to Council to obtain the consent.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (e) The Respondent would typically order a topography plan before commencing work, but in this case because it was rushed, the drawings were based on prior/original drawings and plans on the Council file.
- (f) Unfortunately the drawings and plans on the Council file were inaccurate, so an error with the slope of the property in relation to the level of the proposed garage in question was translated into his plans.
- (g) The Respondent accepts and admits that by providing the drawings with the error he carried out or supervised building work in a negligent manner, under section 317(1)(b) of the Building Act 2004.
- (h) The Respondent does not accept or admit any assertion or allegation in relation to what happened after the error was discovered or ought to have been discovered - i.e. "how the changes were made, what process was followed and who was responsible for obtaining Council approval to the variations made". In particular he does not accept or admit he had an onsite meeting with [Omitted] before construction started or at any other time to discuss or decide how to correct the error.

#### **Board's Conclusion and Reasoning**

- [10] 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.
- [11] The Board reached its decision on the basis of the Respondent's acceptance of negligence as outlined above.
- [12] 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>6</sup> test of negligence which has been adopted by the New Zealand Courts<sup>7</sup>.
- [13] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>8</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.
- [14] 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

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<sup>6</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>9</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>10</sup>.

[15] 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.*

[16] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>11</sup> and be carried out in accordance with a building consent<sup>12</sup>. 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.

[17] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</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.*

[18] The Respondent has accepted responsibility for an error made in the drawings due to poor processes and to the ground for discipline in section 317 (1)(b).

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

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

<sup>11</sup> Section 17 of the Building Act 2004

<sup>12</sup> Section 40(1) of the Building Act 2004

<sup>13</sup> [2001] NZAR 74

- [19] The Board was of the view the lack of process and care due to pressure has led to a mistake that placed undue responsibility on the Builder who was not licenced in design and that when the Respondent was made aware of the design error he did not take proactive steps to visit the site and make sure that an accurate topography plan was produced.
- [20] The building process requires good design and in this case the need for speed took over from good professional process and standards.
- [21] 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**

- [22] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [23] The matter was dealt with on the papers. Included 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

- [24] 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>14</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.*

- [25] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>15</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 have the advantage of simplicity and transparency. The court recommended adopting a

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<sup>14</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>15</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [26] The Board noted that the lack of care demonstrated by the Respondent led to significant onsite issues. The Board was initially minded to impose a suspension of the Respondent's licence. The Respondent did, however, acknowledge his lack of care and the Board is confident, as a result of the disciplinary process and his learnings from it, that he will put processes in place to ensure it is not repeated. Given these factors the Board has decided that it will not suspend but will impose a fine of \$1,500.

### Costs

- [27] 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."
- [28] 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>16</sup>.
- [29] In *Collie v Nursing Council of New Zealand*<sup>17</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.*

- [30] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry.

### Publication

- [31] 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>18</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.*

- [32] 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

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<sup>16</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>17</sup> [2001] NZAR 74

<sup>18</sup> Refer sections 298, 299 and 301 of the Act

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

- [33] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>19</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>20</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>21</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>22</sup>.
- [34] 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>23</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.
- [35] Based on the above the Board will not order further publication.

### Section 318 Order

- [36] 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 \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1500 (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.**

- [37] 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

- [38] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 April 2019**. The submissions should focus on mitigating matters as they relate to the penalty,

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<sup>19</sup> Section 14 of the Act

<sup>20</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>21</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>22</sup> *ibid*

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



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.

- [39] 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

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

Signed and dated this 2<sup>nd</sup> day of April 2019



**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.”*

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.*