Before the Building Practitioners Board

	BPB Complaint No. C2-01888
Licensed Building Practitioner:	Simon Muirhead (the Respondent)
Licence Number:	BP 102150
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:	19 February 2019
Decision Date:	3 April 2019

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site 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

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were 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*[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*

[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
[4] [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.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Simon Muirhead	Respondent
[Omitted]	Complainant
Steve Alexander	Special Adviser
[Omitted]	Consultant for the Complainant
[Omitted]	Witness, Engineer

[8] The complaint related to an allegation that the Respondent had carried out building work that required a building consent without first obtaining one.

[9] The property on which the building work was carried out had a history of leaking. A reclad was required. The Complainant obtained a design for the purposes of obtaining a building consent. The Respondent was engaged to carry out some preliminary works while waiting for the building consent to be issued. Building work started in or about February 2017. A building consent application was lodged in May 2017.

[10] The Board sought the opinion of a Special Adviser as to whether the building work carried out prior to the building consent being issued required a building consent. The building work in question was:

(a) a carport roof was raised to a higher level by jacking the roof up as a whole roof plain. Timber framing was added between a masonry wall and the new height of the carport roof;

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

(b) two retaining walls. One was below 1.5 metres in height. The other was was 1.8 metres high and probably had a surcharge load;

(c) the removal of a substantial portion of the internal linings, ceiling linings and particle floor boards;

(d) new interior walls;

(e) removal and temporary re-fixing of widows; and

(f) excavation of a masonry wall between the house and the neighboring property.

[11] The Special Adviser's opinion was that reclad required a building consent and that the building work on the carport which included structural work, the retaining wall which was over 1.5 metres and removal of internal linings which provided bracing all required a building consent as exemptions under Schedule 1 of the Act did not apply.

[12] At the hearing the Special Adviser confirmed his report and noted building a retaining wall may have come within the urgency provisions of Section 41(1)(c) of the Act[6] as a large excavation had been made between the house and the boundary and this was brought to the attention of the council who had issued an abatement notice.

[13] The Respondent, at the hearing, accepted that the carport did require a building consent.

[14] In the case of the retaining wall he maintained he was not responsible for the supervision of the digger driver who undertook the excavation but, on the issuing of an abatement notice by the Council, did arrange with urgency and in consultation with [Omitted], the engineer to the job the construction of the retaining wall and that he did so without a consent.

[15] The Respondent could not provide documentary evidence of having sought approval from the Council for the building work to be done under urgency or any evidence of a certificate of acceptance being sought from the Council immediately following its completion.

[16] The Respondent claimed that the Council was aware that [Omitted] was involved.

[17] In the case of the internal linings the Respondent claimed that not all the linings had been removed and this was supported by the photos taken at the time.

[18] [Omitted] was of the opinion that in the case of the ceilings, these had been damaged by water and that the bracing provided would have been compromised to

[6] Note that section 41(1)(c) of the Act a building consent is not required in relation to building work carried out for the purpose of saving or protecting life or health or preventing serious damage to property but that a certificate of acceptance must be obtained as soon as practicable after completion under section 42 of the Act.

the extent that their removal would not have increased the risk further. He confirmed that he had provided advise to the Respondent in this regard.

[19] [Omitted] also believed, in the case of the internal wall linings, there was sufficient external wall bracing to secure the building following their removal.

[20] [Omitted], the Complainant's Consultant, maintained that a building consent should have been sought for the removal of the wall linings prior to the building work being undertaken and that there was no real plan for doing so and for making sure the building remained safe when the linings were removed.

[21] The Special Adviser was also of the view that the need for a Building Consent should have been investigated and that there was not enough care taken to assess the risk of the removal of the linings that were removed and that this did have an effect on the bracing.

[22] Evidence was given that the structural walls replaced / built were not load bearing and would have been covered under Schedule 1 of the Building Act.

Board's Conclusion and Reasoning

[23] The Board's considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent.

[24] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.

[25] The onus is on the person carrying out the building work to show that one of the exemptions applies.

[26] The Board has found in previous decisions[7] that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068[8].

[27] More recently the High Court in *Tan v Auckland Council*[9] the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

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

[7] Refer for example to Board Decision C1030 dated 21 July 2014
[8] Board Decision C2-01068 dated 31 August 2015
[9] [2015] NZHC 3299 [18 December 2015]

> *[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.*

[28] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[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 being negligent or incompetent.

[30] Negligence and incompetence are not the same. In *Beattie v Far North Council*[10] Judge McElrea noted:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[31] 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*[11] test of negligence which has been adopted by the New Zealand Courts[12].

[32] 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*[13] it was stated as *"an inability to do the job"*.

[33] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[14]. 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.

[34] 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[15]. The test is an objective one and in this respect it has been noted that the purpose of

[10] Judge McElrea, DC Whangarei, CIV-2011-088-313
[11] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[12] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[13] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[14] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[15] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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[16].

[35] 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.*

[36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[17] and be carried out in accordance with a building consent[18]. 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.

[37] Turning to seriousness in *Collie v Nursing Council of New Zealand*[19] 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.*

[38] 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 should be disciplined. The finding relates to the failure to obtain a building consent for the building work carried out on the carport.

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[16] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[17] Section 17 of the Building Act 2004
[18] Section 40(1) of the Building Act 2004
[19] [2001] NZAR 74

[39] The Board accepted that in the case of the retaining wall the Respondent was not responsible for the excavation and that once he was made aware of the issues and the abatement notice had sought advice from an Engineer and proceeded to retain the excavation.

[40] It was not clear from any documentary evidence that he had consulted the Council in respect to doing this work under urgency and the Board reminds the Respondent that, in the future, he must immediately notify the Council of the building work carried out under urgency and seek a Certificate of Acceptance for it.

[41] In the case of the internal wall linings the Board accepts that an engineer did have over sight of what was happening but remained unconvinced that the respondent had a real plan around the removal of the linings and the need for a Building Consent. More care must be taken in the future.

[42] By the Respondent's own admission at the hearing, and supported by the findings of the Special Adviser, the carport did require a building consent and it was negligent of the Respondent to have undertaken the work without one being in place. The Board would expect a licensed building practitioner to be aware of the requirement for a building consent and to obtain one prior to undertaking the work. A failure to do so means that a Certificate of Acceptance has to be applied for which is not as good as a building consent and Code Compliance Certificate.

Penalty, Costs and Publication

[43] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[44] 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*[20] 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.*

[20] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[21] 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.

[46] The Respondent did accept responsibility for the failure to obtain a building consent for the carport. There were reasonable arguments for not obtaining a building consent for other work carried out. These factors have been taken into account.

[47] Based on the above the Board's penalty decision is to censure the Respondent and order him to pay a fine of $1,000.

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 case[22].

[50] In *Collie v Nursing Council of New Zealand*[23] 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 $1,000 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 Act[24]. 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.*

[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[22] *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.
[23] [2001] NZAR 74
[24] 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 1990[25]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[26]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[27]. 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*[28].

[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 interest[29]. 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)(d) and 318(1)(f) of the Building Act 2004, the Respondent is censured and ordered to pay a fine of $1,000.**
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(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.**

[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.

[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] 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 **1 May 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.

[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 Act[i].

Signed and dated this 3rd day of April 2019

Chris Preston
Presiding Member

[i] ***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.