

Before the Building Practitioners Board

	BPB Complaint No. CB25384
Licensed Building Practitioner:	Kevin Phillips (the Respondent)
Licence Number:	BP 104696
Licence(s) Held:	Carpentry, Site AOP 2, External Plastering PPCS

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
Draft Decision Date:	16 April 2020
Final Decision:	26 May 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design 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.

Contents

Introduction	2
Regulation 9 Decisions	2
Draft Decision Process	3
Disciplinary Offences Under Consideration	4
Evidence	4
Draft Conclusion and Reasoning	5
Draft Decision on Penalty, Costs and Publication	7
Penalty	7
Costs.....	8
Publication	9
Draft Section 318 Order	10
Submissions on Draft Decision	10
Request for In-Person Hearing	11
Right of Appeal	11

Introduction

- [1] On 16 April 2020 the Board received a Registrar’s Report in respect of a complaint into the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] Having received the report the Board decided that regulation 9 applied to aspects of the complaint but not to the allegation that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act). Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had:
- (a) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act);
 - (b) breached section 314B of the Act (s 317(1)(h) of the Act); and/or
 - (c) 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 (s17(1)(i) of the Act).

- [5] With regard to those allegations the Board decided that regulation 9(f)(ii) applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) *the investigation of it is—*
(ii) *unnecessary*

- [6] The reasons why the Board decided that regulation 9(f)(ii) applied were:

Section 317(1)(db) allegation:

The reference to “licensed to carry out or supervise” in the section is a reference to licensing under the Act. The licensing the complaint referred to was in respect of a proprietary product. There was no requirement to hold a licence under the Act to carry out the building work that the Respondent completed.

Section 317(1)(h) allegation:

The section relates to breaches of section 314B and in this instance the allegation was that the Respondent had breached section 314B(b) which stipulates that a licensed building practitioner must carry out or supervise building work only within his or her competence. The Board considered that the work was within the Respondent’s competence and that the more appropriate charge under which to consider the complaint was that of section 317(1)(b) which deals with having carried out or supervised building work in a negligent or incompetent manner.

Section 317(1)(i) allegation:

Section 317(1)(i) deals with bring the licensing regime under the Act into disrepute. In considering whether the investigation of a complaint or an allegation made as part of a complaint is necessary the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In this respect the Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

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

It is on this basis that the Board has decided that it will not proceed with the allegation of disrepute.

Draft Decision Process

- [7] The Board’s jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides

that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

- [8] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [9] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [10] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.
- [12] The Respondent was engaged to renovate two bathrooms including to replace two showers in a residential dwelling. The building work came within the repair, maintenance and replacement building consent exemptions in Schedule 1 of the Building Act.
- [13] The showers were replaced with a proprietary product (Atlantis Quub). Following completion the Complainant raised concerns with the work including that the showers leaked and with the quality of the workmanship.
- [14] The Complainant arranged for report on the install from *[Omitted]*. The report noted:

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

As discussed, your showers have been very poorly installed. The Atlantis Quub shower is one of the most difficult showers on the market and should only be installed by an experienced Atlantis installer.

[15] The report, based on photographs provided by the Complainant, went on to note potential problem that may be experienced with the showers:

- *Ellure walls liners are approximately 30mm above the shower base. These should be hard down.*
- *Ellure wall is badly split near the shower mixer in Ensuite*
- *Ellure trims trimmed in correctly*
- *Top braces under stress which has opened up mitres*
- *Glass door is damaged top corner*
- *Silicone all over the glass and alloy.*
- *Glass not level with wall channels*
- *Door does not close properly ensuite*
- *PVC seals not fitted correctly*
- *Scratching to under door infill bathroom*
- *Hinges fitted backwards*
- *Bathroom shower is leaking at the wall channel junction right side*

Due to the protective coating on the glass, the excess silicone can not be removed without damaging the coating. Also all of the alloy trim needs replacing. You will need new wall linings too. The gib behind will need replacing as it will be damaged when the linings are removed. The only items that are reusable are both shower bases, door handles and the hinges.

[16] The photographs of the Respondent's work were also provided to the Board as part of the complaint documentation.

[17] Respondent provided a written response to the complaint. He noted that he had installed a variety of shower units over the 41 years that he had been in the industry but had not previously installed an Atlantis shower. He noted that he had not previously had any issues with the showers that he had installed.

[18] The Respondent noted he made an offer to redo the work and referred to a commercial dispute over remediation versus replacement. He stated he made a payment to have the work fixed. The Respondent noted that the work he carried out did not have had to be done by a licensed building practitioner.

Draft Conclusion and Reasoning

[19] 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.

[20] The Respondent has noted that the work he carried out did not have to done by a licensed building practitioner. Whilst that is correct as the work was not restricted

building work it does not mean that he cannot be disciplined for it. Section 317(1)(b) relates to building work which is defined in the Act. The definition includes the type of work carried out by the Respondent.

- [21] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁴ test of negligence which has been adopted by the New Zealand Courts⁵.
- [22] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁶. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [23] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act⁷. 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 practitioner⁸.
- [24] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*

⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁵ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁶ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

⁸ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

(b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[25] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code⁹. As such, when considering what is and is not an acceptable standard, the Building Code must be taken into account.

[26] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁰ the Court's noted, as regards the threshold for disciplinary matters, that:

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

[27] The Respondent installed two showers. The manner in which he installed them created a risk that they would leak. They did not meet the Objectives, Functional Requirements or Performance Criteria of Clause E3 (Internal Moisture) of the Building Code which in turn could have put the occupants at risk. The showers had to be replaced to deal with both compliance and workmanship issues.

[28] 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.

Draft Decision on Penalty, Costs and Publication

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

[30] 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 and the Complainant an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[31] 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*¹¹ commented on the role of

⁹ Section 17 of the Building Act 2004

¹⁰ [2001] NZAR 74

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

"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.

- [32] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹² 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.
- [33] The Board considered that the disciplinary offending was at the lower end of the scale and that a fine of \$1,500 would be an appropriate penalty. It noted the mitigation present including the remediation paid for by the Respondent and it has decided that the fine will be reduced to a censure. A censure is a formal expression of disapproval.

Costs

- [34] 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."
- [35] 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 case¹³.
- [36] In *Collie v Nursing Council of New Zealand*¹⁴ 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.*
- [37] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the

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

¹³ *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.

¹⁴ [2001] NZAR 74

Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[38] 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 Act¹⁵. 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.

[39] 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.

[40] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. 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*¹⁹.

[41] 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 interest²⁰. 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.

[42] Based on the above the Board will not order further publication.

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

²⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Draft Section 318 Order

[43] 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 censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (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.

[44] 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 Draft Decision

[45] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[46] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **25 May 2020**. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new compelling evidence that was not available at the time the regulation 9 decision not to proceed was made then a further complaint in respect of the matter may be made .

[47] If submissions on the Board's Conclusion and Reasoning or on matters relating to penalty costs and publication are received, then the Board will meet and consider those submissions.

[48] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[49] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[50] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.

[51] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **25 May 2020**.

Right of Appeal

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

Signed and dated this 4th day of May 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 26 May 2020 on the basis that no further submissions were received.

Signed and dated this 26th day of May 2020



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

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- (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.*