

Before the Building Practitioners Board

	BPB Complaint No. CB25085
Licensed Building Practitioner:	Alan Reid (the Respondent)
Licence Number:	BP 102942
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	Tauranga
Hearing Type:	On the Papers
Hearing Date:	10 July 2019
Decision Date:	23 July 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
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.

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Introduction

- [1] The hearing resulted from a complain 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 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.

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

- [5] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it.
- [6] Under regulation 7(2) of the Complaints Regulations the Registrar must, when compiling the Registrar’s Report, provide a copy of the complaint to the Respondent. Similarly under regulation 12 if the complaint is to proceed to a hearing the Board must give notice of the hearing to the Respondent.
- [7] The Respondent was served in person with the complaint on 19 December 2018. He acknowledged service. Notwithstanding he has not provided any form of response to the complaint or the allegations made.
- [8] The Board is satisfied that notice has been given and that the Respondent has had a reasonable opportunity to respond to it and to engage in the investigation process but has chosen not to.

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.
- [11] Given that the Respondent has not engaged in the investigation and has not provided any further evidence for the Board to consider the Board decided that no

⁴ [2016] HZHC 2276 at para 164

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

further evidence was required and that a hearing was not necessary. Both the Complainant and the Respondent were provided with an opportunity to make written submissions prior to the hearing. The Complainant provided additional submissions and information which was taken into account. A copy of that information was provided to the Respondent.

- [12] The complaint related a residential dwelling that the Respondent sold to the Complainant. The Complainant made various allegations including that the Respondent had undertaken building work that required resource and building consents without having obtained them whilst he was the owner of the dwelling. The specific work was the construction of a retaining wall, the construction of a barbeque area with retained walls and the diversion of a watercourse.
- [13] The Dunedin City Council issued a Notice to Fix under sections 164 and 165 of the Act. It stated:

Particulars of contravention or non-compliance:

Non-compliance with section 40 of the Building Act 2004, "buildings not to be constructed, altered, demolished or removed without building consent".

Failing to obtain a building consent for the construction of:

1. *The retaining walls at the front of the property;*
2. *A barbeque area at the rear of the property which has concrete walls retaining fill over 1.5 metres.*

And the water course running through the property has been altered without resource consent from the Otago Regional Council and has been piped under the barbeque area without building consent.

To remedy the contravention or non-compliance you must:

Under sections 96 - 99 of the Building Act 2004:

- *Apply for and obtain a certificate of acceptance for the construction of a retaining wall at the front of the property and the construction of the retaining walls supporting the barbecue area at the rear of the property. The certificate of acceptance is also required for the drainage work involved with the alterations to the water course which have been done without consent from the Otago Regional Council.*
- *Please contact the Otago Regional Council in respect to the water course.*
- *All remedial building work will require a building consent and require an engineer's design and approval.*

- [14] The retaining wall in question was approximately 4 metres high and it carried a load surcharge from an adjacent lawn. Engineering reports obtained by the Complainant indicated that there were issues with the building work that had been carried out.
- [15] The Respondent was licensed on 21 January 2011. The Board only has jurisdiction over a licensed building practitioner during periods when they are licensed. There was no clear indication within the complaint documentation as to when the building work was carried out. Further investigations were carried out to ascertain whether the related building work was carried out after January 2011.
- [16] The Complainant supplied additional information and various documents which indicated the work was carried out some time in 2012. In particular the Board was provided with as built drainage plans. One of those, issued on 20 February 2012 following a drainage inspection on 24 January 2012, did not show any stormwater drains associated with the work. Another, issued 11 May 2015, did show the storm water drains.

Board's Conclusion and Reasoning

- [17] 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.
- [18] The Board's considerations in relation to negligence relates to the failure to obtain a building consent and a resource.

Building and Resource Consents

- [19] 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).
- [20] 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.*

- [21] 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.*

- [22] 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.*

- [23] 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.

⁶ [2015] NZHC 3299 [18 December 2015]

[24] 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.

[25] 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.

[26] The Board considers the Court in *Tan* 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 (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[27] Turning to resource consents section 37 of the Act provides:

37 Territorial authority must issue certificate if resource consent required

- (1) *This section applies if a territorial authority considers that—*
- (a) a resource consent under the Resource Management Act 1991 has not yet been obtained; and*
 - (b) the resource consent will or may materially affect building work to which a project information memorandum or an application for a building consent relates.*
- (2) *The territorial authority must issue a certificate, in the prescribed form, to the effect that until the resource consent has been obtained—*
- (a) no building work may proceed; or*
 - (b) building work may only proceed to the extent stated in the certificate.*
- (3) *The certificate must be—*
- (a) attached to the project information memorandum; or*
 - (b) if no project information memorandum has been applied for, provided to the building consent authority.*

The Facts

[28] The Board had evidence by way of the Notice to Fix that significant building work had been carried out without a building consent. The Notice to Fix also made it clear that a resource consent was required for the work that was undertaken. One was not obtained prior to the work being undertaken.

- [29] One of the structures, a retaining wall carrying a surcharge, was some four metres high. Such a structure would have required a specific engineered design. There was no evidence that one had been obtained prior to the work being undertaken.
- [30] The Board also had evidence before it that, on the balance of probabilities, the Respondent was responsible for the building work undertaken and that it was at a time that he was licensed. In this respect the Board notes that the Respondent has had ample opportunity to refute the allegations but has not done so.
- [31] 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.

Negligence

- [32] 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.
- [33] The New Zealand Courts have stated that assessment of negligence and/or incompetence 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.
- [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 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.
- [35] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹² the Court's noted, as regards the threshold for disciplinary matters, that:

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

¹² [2001] NZAR 74

[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.

- [36] Looking at the facts and at the tests above the Board notes that the retaining wall in particular was a significant structure that fell well outside of any exceptions to the requirement to obtain a building consent and that specific engineering design for it would have been required. Given this and 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

- [37] 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.
- [38] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [39] 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*¹³ 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.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁴ 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

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

¹⁴ 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.

- [41] The Board notes that the conduct took place in 2012. At that time the scheme was new and the Board was being more lenient toward practitioner transgressions. It is appropriate that the Respondent be dealt with in a similar fashion. At the same time the disregard for the requirement to obtain the necessary consents was somewhat flagrant.
- [42] The Board's normally starting point for a matter of this nature would be a fine of \$2,500. Given the factors noted above the Board has decided to reduce this to a fine of \$1,000 which is consistent with fines imposed at the same time as this offending.

Costs

- [43] 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."
- [44] 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 case¹⁵.
- [45] In *Collie v Nursing Council of New Zealand*¹⁶ 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.

- [46] The Board notes the matter was dealt with on the papers. Ordinarily costs for a hearing would be in the order of \$1,000 but the Board has reduced this to \$750 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [47] 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 Act¹⁷. 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.

¹⁵ *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.

¹⁶ [2001] NZAR 74

¹⁷ Refer sections 298, 299 and 301 of the Act

- [48] 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.
- [49] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁰. 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*²¹.
- [50] 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 interest²². 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.
- [51] Based on the above the Board will not order further publication.

Section 318 Order

- [52] 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 \$1,000.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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.
- [53] 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.

¹⁸ Section 14 of the Act

¹⁹ Refer sections 200 and 202 of the Criminal Procedure Act

²⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²¹ *ibid*

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

Submissions on Penalty, Costs and Publication

- [54] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 August 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.
- [55] 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

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

Signed and dated this 23rd 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.*

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- (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.*