

Before the Building Practitioners Board

	BPB Complaint No. CB26102
Licensed Building Practitioner:	Dion Taylor (the Respondent)
Licence Number:	BP121564
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	Blenheim
Hearing Type:	In Person
Hearing Date:	28 April 2023
Decision Date:	10 May 2023

Board Members Present:

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
Mrs J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, 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.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act, in relation to the installation and replacement of windows, including the head flashings.

It is not within the Board's jurisdiction to consider the further matters under section 317(1)(b) of the Act listed in the Notice of Proceeding dated 16 February 2023 or the charges under sections 317(1)(c), (d) and (h) of the Act.

The Respondent is fined \$2,000 and ordered to pay costs of \$2,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent was engaged by the Complainant to construct a family room and bedroom addition to their existing dwelling under a building consent which included a membrane roof between the addition and the existing dwelling. The Respondent was also engaged, separate to the consented addition, to replace two window units and install a set of French doors in the existing house and reposition a window to the altered bedroom.
- [2] The Respondent was a Licensed Building Practitioner for only some of the time over which the work was carried out. The Board can only inquire into “the conduct of a licensed building practitioner”¹ As such, the first issue the Board had to consider was what work was carried out or supervised by the Respondent when he was a Licensed Building Practitioner.
- [3] Having determined that the building work which was within the scope of the Board’s inquiry was the installation of the window flashings, the question for the Board was whether the Respondent’s carrying out and or supervision of the building work was negligent or incompetent. This required a determination of two issues – had the

¹ Section 315 of the Act

Respondent departed from an acceptable standard, and if so, was that departure serious enough to warrant a disciplinary finding.

- [4] The Board investigated the issues and noted that the Respondent accepted that this work was unacceptable. It decided that the Respondent had been negligent in his carrying out and supervision of the building work. The Respondent was fined \$2,000 and ordered to pay costs of \$2,000.
- [5] As regards the other disciplinary offences, the Board gave notice that it would investigate at this hearing, it determined that the relevant work was carried out or supervised when the Respondent was not a Licensed Building Practitioner. As such, the Board has no jurisdiction to investigate those matters further.
- [6] The Board will, under section 85 of the Act, refer those matters to the Registrar of Licensed Building Practitioners.

The Charges

- [7] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.²
- [8] In this matter, the disciplinary charges the Board resolved to further investigate³ were that the Respondent may, in relation to building work at [Omitted] have:
 - (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act in respect of
 - (i) the installation and replacement of windows, including the head flashings (noting that the building work was carried out under an exemption to the requirement for a building consent); and
 - (ii) a failure to obtain a building consent change for a change of roofing membrane product.
 - (b) carried out or supervised restricted building work of a type that he is not licensed to carry out or supervise contrary to section 317(c) of the Act in respect of the installation of a roof membrane.
 - (c) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act, in respect of
 - (i) a change of roofing membrane product from that which was consented; and

² 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

³ The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- (ii) a failure to obtain a membrane substrate inspection; and
- (d) breached section 314 B(b) of the Act (carrying out or supervising building work that was not within his competency) contrary to section 317(1)(h) of the Act in respect of the installation of a roofing membrane.

Matters within Jurisdiction

- [9] 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.
- [10] The Respondent was not a Licensed Building Practitioner from 16 August 2017 to 16 August 2018 and again from 10 April 2019 to 18 February 2021.
- [11] This project commenced on or about November 2020 and continued with the Respondent until October 2021. The Board is inquiring into two aspects of the work the Respondent carried out or supervised – the installation and replacement of the windows, including head flashings and various conduct associated with the roofing membrane product.
- [12] Based on the Complainant’s documented timeline, which the Board accepts, the roofing membrane work was carried out on 10 February 2021. At that time, the Respondent was not a Licensed Building Practitioner and, therefore, any charges related to the roofing membrane are not within the Board’s jurisdiction to consider.
- [13] The Respondent should note it is an offence under section 85 of the Act for an unlicensed person to carry out restricted building work, with the penalty being a fine not exceeding \$50,000. The prosecuting authority for offences under section 85 is the Ministry of Business Innovation and Employment, and a copy of this decision will be provided to the Registrar of Licensed Building Practitioners. The Board cannot deal with such matters. In this case, there may have been a failure to obtain a building consent for a change in roofing product and the installation of the roofing product by the Respondent when he may not have had the applicable license to carry out or supervise that work. Therefore, the Respondent may have committed an offence under section 85 of the Act.
- [14] Given the above, the Board will refer the matter to the Registrar of Licensed Building Practitioners.
- [15] The second aspect of work that the Board notified that it would inquire into is the window and flashing installation. Again, accepting the Complainant’s recorded timeline, this work occurred initially in December 2020, with the Respondent explaining that he tacked the windows and the French doors in place. In March 2021, the Respondent installed the window in the new position on the South wall. In April 2021, the Respondent installed the flashings to all three replacement windows and the French doors. As such, the work of finalising the window installation and installing the flashings occurred when the Respondent was a Licensed Building Practitioner and is therefore within the Board’s jurisdiction to investigate.

Evidence

[16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.

Negligence or Incompetence

[17] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁶ test of negligence.⁷ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁸ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

[18] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²

[19] The windows and doors in question include french doors in place of an existing window on the east wall, two replacement windows on the west wall and the moving of a window to the south wall. (Document 4.4, Page 443 of the Board's file). The Respondent said that in December 2020, he temporarily tacked the windows into place with no head flashings.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

⁹ *Collie v Nursing Council of New Zealand* [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”.

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

- [20] The Respondent says in March 2021, and the Complainant documents it as 7 April 2021, he installed the head flashings for the windows and french doors. The relevance of the date is to ensure the work was carried out when the Respondent was a Licensed Building Practitioner and on either date he was.
- [21] The allegedly negligent or incompetent work was described by the Complainant as:
- (a) Head flashings installed over (outside) the cladding.
 - (b) Incorrect sealant used, which did not stick to the oil based stain.
 - (c) Drainage channels blocked with foam.
 - (d) No flashing tape around the window cavities.
 - (e) No angle on head facings so water could gather above the windows/door.
 - (f) Non-galvanised screws and nails used.
 - (g) The window in the south wall had no lintel.
- [22] The Respondent stated that he both carried out and supervised this work. He acknowledged at the hearing that the windows and french doors were incorrectly installed and were not in accordance with the building code.
- [23] The Respondent stated that he knew at the time of installation that he had not installed the windows and french doors correctly and that what he had done would not be sufficient or watertight. His explanation for completing the work in this manner was that he was feeling uncomfortable on site and needed to leave.
- [24] Accordingly, the Board finds that the work was not carried out to an acceptable standard. As the work also did not comply with the Building Code it follows that it cannot have been supervised to an acceptable standard.

Was the conduct serious enough

- [25] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.
- [26] The Complainant gave evidence that one window “catastrophically leaked” and that all of the windows had the same issues and were all at risk of failure in the same way. Given the potential consequences of the workmanship issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent’s conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent

- [27] The Board finds the Respondent’s carrying out and supervision of the work departed from an acceptable standard and that he has been negligent but not incompetent. The Board makes this finding by focusing on the incorrect installation of the windows and french doors.

[28] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act in relation to the installation and replacement of windows, including the head flashings.

Board's Decision

[29] The Respondent has committed a disciplinary offence under section 317(1)(b) of the Act.

[30] It is not within the Board's jurisdiction to consider the further matters under section 317(1)(b) listed in the Notice of Proceeding dated 16 February 2023 or the charges under sections 317(1)(c), (d) and (h).

Penalty, Costs and Publication

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

[32] 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

[33] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹³ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁴

- (a) protection of the public and consideration of the purposes of the Act;¹⁵
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁶
- (c) setting and enforcing a high standard of conduct for the industry;¹⁷
- (d) penalising wrongdoing;¹⁸ and
- (e) rehabilitation (where appropriate).¹⁹

¹³ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

¹⁴ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁵ Section 3 Building Act

¹⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁷ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

- [34] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases²⁰ and applying the least restrictive penalty available for the particular offending.²¹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²² that is consistent with other penalties imposed by the Board for comparable offending.²³
- [35] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.²⁴
- [36] In this matter, the Board adopted a starting point of a fine of \$1500 because not all of the charges initially notified by the Board were investigated. Only one charge was proceeded with and upheld.
- [37] The Respondent's acknowledgement in his written response to the Investigator and at the hearing that the work was unacceptable is a mitigating factor. Aggravating factors are that the Respondent knowingly installed/supervised the installation of non-compliant work, one window has already leaked, and there is potential for all of the windows and doors in issue to leak. Taking these mitigating and aggravating factors into account, the Board decided to increase the fine from the starting point to \$2,000.
- [38] The Board advises the Respondent to educate himself on the regulatory requirements of being a Licensed Building Practitioner and, to that end, refer to the Licensed Building Practitioners' Handbook on the website.

Costs

- [39] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.²⁵
- [40] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁶. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁷.

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁴ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

²⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁶ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁷ *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.

- [41] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was moderate. Adjustments are then made.
- [42] The Board recognises that of the four charges against the Respondent only one was able to be progressed at the hearing. On this basis, the usual tariff for a half-day hearing of \$3,500 has been discounted.
- [43] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [44] 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,²⁸ and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [45] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁹ Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.³⁰
- [46] Based on the above, the Board will not order further publication.

Section 318 Order

- [47] 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 \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(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.

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [48] 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

- [49] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **2 June 2023**. 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.

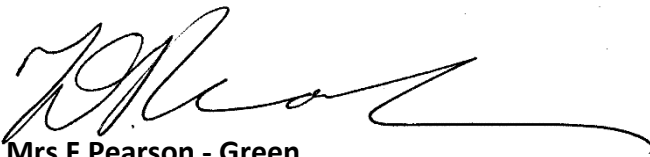
Right of Appeal

- [50] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Direction

- [51] A copy of this decision is to be provided to the Register with respect to the matters raised with regard to section 85 of the Building Act.

Signed and dated this 12th day of May 2023.



Mrs F Pearson - Green
Presiding Member

Section 3 of the Act

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:*

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- (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.*

ii 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.”*

iii Section 318 Disciplinary Penalties

- (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 1 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.*

iv 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.*