Before the Building Practitioners Board

	BPB Complaint No. CB25398
Licensed Building Practitioner:	Peter White (the Respondent)
Licence Number:	BP 128348
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 Type:	On the Papers
Draft Decision Date:	6 August 2020
Final Decision Date:	6 October 2020

Board Members:

Chris Preston, Chair (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site 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.

Disciplinary Finding:

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

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Summary of the Board's Decision

[1] The Respondent has carried out building work in a negligent manner. He is censured and ordered to pay costs of $1,000.

The Charges

[2] On 6 August 2020, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.

[3] 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.

[4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

[5] The complaint to the Board also contained an allegation that the Respondent had carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[6] With regard to that allegation the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

> ***Complaint not warranting further investigation***
> *A complaint does not warrant further investigation if—*
>
> *(a) it does not come within the grounds for discipline; or*

[7] The Board made the decision on the basis that the building work was not carried out under a building consent. As such the conduct cannot come within section 317(1)(d) of the Act which only relates to building work where a building consent has been issued.

Disciplinary Offences to be Investigated

[8] 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).

[9] Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

[10] 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 procedures[1]. 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 legislation[2]. 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.

[11] 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.

[12] 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 Complainant and the Respondent will be provided with an opportunity to 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.

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[1] Clause 27 of Schedule 3

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

Evidence

[13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[3]. 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.

[14] The Respondent undertook building work at 10b Kinsale Avenue in Auckland. The work was carried out under schedule 1 of the Building Act. A building consent was not issued.

[15] The work undertaken included replacing the front door and window unit with a French door, the removal of a carport and the replacement of a deck handrail.

[16] The complaint provided a description of the work that she felt was substandard and photos to support the allegations.

[17] The main issues raised were the poor installation of the French doors, including the lack of flashings, the door not being level and that the door was not weathertight. The Respondent maintained that this installation was temporary while he waited for the Complainant's son to remove a deck.

[18] The Complaint also raised issues with a deck handrail installed which was not what was expected and was, in the Complainant's words, too heavy and bulky, with the installation of a glulam post which was not concreted into the ground, and concerns with a lack of communication. She alleged that the building work was left in an unfinished, and some cases, a dangerous state.

[19] The Respondent accepted that there were considerable delays to the job and that it was not complete. He accepted his lack of communication with the Complainant but stated that at the time he was having some personal issues that simply distracted him from attending to the job and the issues. The Respondent also noted that the contractor he employed on the job left the company halfway through the Complainant's project.

Draft Conclusion and Reasoning

[20] 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

[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

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

into. This is described as the *Bolam*[4] test of negligence which has been adopted by the New Zealand Courts[5].

[22] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[6]. 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 Act[7]. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[8].

[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:*
> *(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 Code[9] and be carried out in accordance with a building

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[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
[9] Section 17 of the Building Act 2004

consent[10]. 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.

[26] Turning to seriousness in *Collie v Nursing Council of New Zealand*[11] 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 Board is of the view in this case that there was a lack of clear supervision of the contractor the Respondent was using and a lack of a clear and timely communication to ensure that the client's expectations were understood.

[28] The Board finds that the French doors were not installed with due care and skill and that the work site was abandoned in an unsafe condition. It also finds that there was a lack of supervision by the Respondent of his contractor and that there was no plan to replace him so that the work could be continued in a timely manner.

[29] The Board accepts, at face value, that the Respondent had personal issues at the time. This will be taken into consideration as mitigation when setting the penalty.

[30] 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

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

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

<u>Penalty</u>

[33] 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*[12] commented on the role of

[10] Section 40(1) of the Building Act 2004
[11] [2001] NZAR 74
[12] 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.*

[34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[13] 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[35] The negligence found was the lower end of the scale. There were mitigating factors present. On this basis, the Board's penalty decision is that the Respondent will be censured. A censure is a formal expression of disapproval.

Costs

[36] 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."

[37] 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[14].

[38] In *Collie v Nursing Council of New Zealand*[15] 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.*

[39] 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 $1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

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[13] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[14] *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.

[15] [2001] NZAR 74

Publication

[40] 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[16]. 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.*

[41] 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.

[42] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[17]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[18]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[19]. 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*[20].

[43] 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[21]. 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.

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

Draft Section 318 Order

[45] For the reasons set out above, the Board directs that:

Penalty:	**Pursuant to section 318(1)(d) 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 $1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

[16] Refer sections 298, 299 and 301 of the Act
[17] Section 14 of the Act
[18] Refer sections 200 and 202 of the Criminal Procedure Act
[19] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[20] ibid
[21] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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

[46] 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

[47] 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.

[48] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **09 September 2020**. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sough 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 compellable 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 .

[49] 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.

[50] 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.

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

Request for In-Person Hearing

[52] 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.

[53] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **09 September 2020**.

Submissions Made

[54] The Board received a submission from the Complainant. It was not relevant to the Board's Draft Decision.

[55] The Respondent did not provide a response.

Final Decision

[56] Given the above, the Board affirms its draft decision and penalty.

Final Section 318 Order

[57] For the reasons set out above, the Board directs that:

Penalty: **Pursuant to section 318(1)(d) 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 $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(l)(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.

Right of Appeal

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

Signed and dated this 15th day of October 2020

Chris Preston
Presiding Member

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[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.

(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.