Before the Building Practitioners Board

	BPB Complaint No. CB25013
Licensed Building Practitioner:	John Whyte (the Respondent)
Licence Number:	BP 110876
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	Dunedin
Hearing Type:	In Person
Hearing Date:	5 March 2019
Decision Date:	1 April 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

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

Contents

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are*

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

maintained in order to protect clients, the profession and the broader community."

[4] The Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

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

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

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

John Whyte	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Respondent
[Omitted]	Witness for the Complainant
[Omitted]	Witness, Licensed Building Practitioner, Summonsed Witness

[8] The Respondent was contracted to undertake renovations to a residential dwelling on a labour only basis. The building work included a bathroom renovation, the installation of a new Velux skylight roof window in a low pitch roof, the installation of a French door in replacement of a window, the removal of a window and the install of thermal insulation in the gap, and the replacement of weatherboards.

[9] The building work was undertaken without a building consent. Following its completion, the Complainant put the house on the market. As part of the sale process questions were raised by the purchaser over the compliance of the building work. The Territorial Authority considered that a building consent should have been obtained and required that a Certificate of Acceptance be applied for. The Complainant applied for a Certificate of Acceptance which was not granted. One reason cited for the Certificate of Acceptance not being issued was that it could not established that the tanking had extended the required distance of 1500mm from the shower rose. The purchaser has filed civil proceedings seeking damages.

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

[10] The Respondent's position, as regards a building consent, was that he had advised the Complainant's partner that a building consent would be required for the building work but that it was the owner's responsibility to obtain one. The Complainant's partner did not accept that the advice to get a building consent had been given. The complaint set out that the Complainant had not been advised that a wet area shower is not any different to any other shower.

[11] The Respondent gave evidence that he had done numerous bathroom renovations of a similar nature and that, as a result of his knowledge and experience, he knew that a consent would be required for a wet area shower. In questioning he stated that he knew that a building consent had not been obtained for the building work undertaken. He also accepted that Building Consent Authority inspections would normally be required but that none were carried out as there was no building consent.

[12] The Respondent submitted that he was not authorised to apply for a building consent nor was he qualified to complete drawings and make an application. His practice was to not ask for a building consent if one is not provided. In his written response to the complaint he variously stated:

> *My sole responsibility under the terms agreed was to carry out the work directed to, at a minimum, the standards under the Building Code in a tradesperson-like fashion and within the budget prescribed by the client.*
>
> *In regard to permits, it is the practice within our business that, unless specifically authorised and billed for the service, we would not take responsibility, nor make enquiries into whether a home owner had gained appropriate permits. However, where work was indicated that ought to have a permit, we would normally indicate this to a client and leave the matter in their hands. In this instance we assumed that the property owners had gained the appropriate consents for this work to be undertaken.*

[13] The Respondent also provided correspondence as part of his response which made submissions as regards the application of sections 14B and 44 of the Act noting:

> *At no time was an authority form completed giving John the authority to act on behalf of the owner to arrange the building consent. Therefore the responsibility to obtain this lay entirely with the property owner. On this basis John had no responsibility to oversee the other parts of the work carried out.*

[14] Evidence was heard that the bathroom renovation included the installation of a wet room tiled shower which replaced an acrylic shower with a shower tray and the relocation of a sink from one side of the bathroom to the other. A plumber undertook the plumbing work. As regards the wet room shower:

(a) The tiled shower was 1200mm by 900mm with a 1200mm glass screen and an open end making it a wet area shower. it replaced an existing shower that was 900mm by 900mm;

(b) aqua line plasterboard was installed on the full length of wall that had the 900mm dimension. Aqua line plasterboard was also installed over the 1200mm of the other wall;

(c) membrane tanking was installed by a tiler recommended by the Respondent but engaged by the Complainant. The Respondent was not sure of the extent of the tanking but believed it extended at least 200mm past the end of the tiled shower floor and that this met Building Code requirements;

(d) a 500mm by 1000mm window was removed, insulation was installed in the opening and the opening was covered in both internally and externally; and

(e) the floor joists were lowered and Hardies Compressed sheet was laid on the floor which was tiled by the tiler who created the drainage fall. The Respondent believed the fall that was created was 20mm and that this met Building Code requirements.

[15] Evidence was also heard that:

(a) the Velux skylight roof window that was installed was 900mm by 600mm and was one that was designed for a roof of a 15% or greater pitch. It was supplied by the Complainant. The roof had a 4% pitch. It was not leaking;

(b) a window was replaced with a French door; and

(c) weatherboards were replaced. The profiles of new and old weatherboards did not match.

[16] The Complainant also raised issues with the quality of the building work completed.

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 and/or incompetence relate to the failure to obtain a building consent.

[19] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act. The onus is on the person carrying out the building work to show that one of the exemptions applies.

[20] The Board has found in previous decisions[6] that a licenced person who commences or undertakes building work without a building consent, when one was required, can

[6] Refer for example to Board Decision C1030 dated 21 July 2014

be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068[7].

[21] More recently the High Court in *Tan v Auckland Council*[8] the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*
>
> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[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.*

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

[23] The Respondent has argued that it is the owner's responsibility to obtain a building consent. He has referred to Section 14B of the Act which does stated that an owner is responsible for obtaining any necessary consents and to section 44 of the which Act states:

> ***44 When to apply for building consent***
>
> *(1) An owner intending to carry out building work must, before the building work begins, apply for a building consent to a building consent authority that is authorised, within the scope of its accreditation, to grant a building consent for the proposed building work.*

[24] It is clear that the owner does have responsibilities as regards obtaining a building consent. The Board does not contend otherwise.

[25] The Respondent has further submitted that he was not authorised to obtain a consent on behalf of the owner. The Board accepts that this was the case.

[26] What the above High Court decision reference above says, and what the Board is considering, is whether the Respondent was negligent or incompetent for carrying out the building work without a building consent being in place or for ensuring one had been obtained prior to commencing. The Board is not considering whether he was negligent or incompetent for failing to obtain one. That was not his

[7] Board Decision C2-01068 dated 31 August 2015
[8] [2015] NZHC 3299 [18 December 2015]

responsibility. His responsibility was to make sure that the proposed building work, if it required a building consent, was consented prior to it being carried out. In other words, the Respondent's responsibility was to ensure he did not carry out unconsented building work.

[27] Having made that finding the next question for the Board is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing being negligent or incompetent.

[28] Negligence and incompetence are not the same. In *Beattie v Far North Council*[9] Judge McElrea noted:

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

[29] 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*[10] test of negligence which has been adopted by the New Zealand Courts[11].

[30] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[12] it was stated as *"an inability to do the job"*.

[31] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[13]. 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.

[32] 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[14]. 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

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

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[15].

[33] 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.*

[34] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[16] and be carried out in accordance with a building consent[17]. 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.

[35] Turning to seriousness in *Collie v Nursing Council of New Zealand*[18] 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.*

[36] The first question for the Board to consider is whether a building consent was required. The Respondent gave evidence that he was aware that a consent was required but that it was not his responsibility to obtain one. He also gave evidence that he knew a building consent had not been obtained but that he proceeded with the work regardless.

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

[37] The Board notes that the following building work undertaken did not fall within the exemptions outlined in Schedule 1 of the Act: the wet area shower, the relocation of the bathroom vanity, the install of a Velux skylight roof window and the installation of thermal insulation in an exterior wall. A building consent was required. The replacement of cladding and the replacement of a window with a French door may have come within the provisions of Schedule 1.

[38] A building consent for certain aspects of the work was, therefore, clearly required.

[39] The Respondent, on his own evidence, knew that a building consent was required for, at the least, the wet area shower. On his own evidence he also chose to proceed with the building work knowing that a building consent had not been obtained.

[40] 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 by carrying out building work that required a building consent without one being obtained.

[41] Turning to considerations of seriousness the Board notes the building work completed was not, in many instances, Building Code compliant. For example, the shower tanking was most likely inadequate, and the Velux skylight roof window was the incorrect type for the roof pitch it was installed into. Had a consent been obtained prior to the building work being carried out then Building Code compliance would have been considered as part of the consenting process. Importantly, as part of the inspection regime that is put in place as part of a building consent, items that were not in accordance with the building consent or the Building Code would probably have been identified and rectified.

[42] The result of the building work being carried out and completed without a building consent has been that the Complainant has not able to obtain a Certificate of Acceptance and is now facing a civil law suit. The conduct is clearly sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

[43] 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.

[44] 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

[45] 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*[19] 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.*

[46] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[20] 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.

[47] The Board noted that the Respondent was aware of the requirement for a building consent for the building work that he carried out but that he simply chose to carry out the work. There was a degree of wilfulness to the conduct and the Board considers that to be an aggravating factor. It is also an aggravating factor that aspects of the building work were below the standards to be expected of a Licensed Building Practitioner. The Board did not see that there were any mitigating factors.

[48] Based on the above the Board's penalty decision is that the Respondent pay a fine of $2,000. The fine is consistent with penalties imposed by the Board for similar disciplinary offending.

Costs

[49] 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."

[50] 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[21].

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[21] *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.

[51] In *Collie v Nursing Council of New Zealand*[22] 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.*

[52] Based on the above the Board's costs order is that the Respondent is to pay the sum of $1,500 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of the actual costs incurred.

Publication

[53] 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[23]. 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.*

[54] 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.

[55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[24]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[25]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[26]. 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*[27].

[56] 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[28]. 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.

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

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[22] [2001] NZAR 74
[23] Refer sections 298, 299 and 301 of the Act
[24] Section 14 of the Act
[25] Refer sections 200 and 202 of the Criminal Procedure Act
[26] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[27] ibid
[28] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[58] 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 $1,500 (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.

[59] 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

[60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **24 April 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.

[61] 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

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

Signed and dated this 1st day of April 2019

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:

(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.