

Before the Building Practitioners Board

	BPB Complaint No. CB25186
Licensed Building Practitioner:	Tyler Wilson (the Respondent)
Licence Number:	BP 130160
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
Hearing Date:	16 April 2020
Draft Decision Date:	16 April 2020
Final Decision Date:	27 May 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP Carpentry and Site AOP 1

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Boards 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] On 16 April 2020 the Board received a Registrar’s Report in respect of a complaint into the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] Having received the report the Board decided that regulation 9 applied to aspects of the complaint but not to the allegation that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act). Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act).
- [5] With regard to that allegation the Board decided that regulation 9(a) 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;*

[6] The building work was carried out under an exemption to the requirement for a building consent¹. Because it was the building work was not restricted building work as, under section 401B of the Act, restricted building work only applies to building work which is carried out under a building consent². Accordingly, the disciplinary provision cannot apply to the Respondent's conduct.

Draft Decision Process

[7] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures³. 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 legislation⁴. As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

[8] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.

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

¹ The work was carried out under clause 1 of Schedule 1 of the Act.

² 401B *Order in Council declaring work to be restricted building work*

(1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*

(2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*

(3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*

(4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

³ Clause 27 of Schedule 3

⁴ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Disciplinary Offences Under Consideration

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

Evidence

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

[12] The Respondent was engaged to carry out a bathroom renovation for the Complainant. The work was carried out under clause 1 of Schedule 1 of the Act. It allows for certain types of building work to be carried out without a building consent. The work involved the replacement of existing cabinetry and fittings. The Complainant raised issues with the workmanship following completion including allegations about plumbing work carried out by a plumber and an electrician. Another builder was engaged to carry out remedial work which involved stripping out the building work completed by the Respondent and starting afresh.

[13] The remedial builder noted, as regards the building work:

- *the existing shower wasn't fit for purpose and was installed upside down;*
- *timber supports for plumbing and shower fixings were floating there, and had not been fixed back;*
- *when removing the bath, we found the cradle was little more than props supporting the bath;*
- *upon removing mirror cabinet, which wasn't gibbed around correctly – up to 10mm gaps, we found they had cut a metal diagonal brace out;*
- *the cabinet should have been pushed into the wall 70mm rather than the whole 90mm they were trying to achieve. To rectify this we have made one of our aquagib sheets into a BL1;*
- *the seratone (installed by the Respondent) was poorly installed with large gaps and props trying to hold it back as 1 stud had a vicious 20mm bow that should have been planed back before installation;*
- *we also noticed the cut edges of the seratone hadn't been primed/painted; and*
- *the existing toilet wasn't sitting level – this was due to a dip in the floor, which was simply rectified by putting a nog between the two joists.*

[14] The remedial builder's opinion it was "Just overall poor workmanship ...".

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

- [15] The Board was provided with photographs of the Respondent's work. Included were the following photographs defective, poor quality or noncompliant work:



Bath Installation



Cabinet Installation



Seratone Installation



Cut Brace

- [16] The Complainant received \$15,000 compensation from the Respondent through the Disputes Tribunal.
- [17] The Respondent provided a written response. He stated the work was carried out by him and his labourer. He took some responsibility for the workmanship issues raised.

Draft Conclusion and Reasoning

- [18] 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.
- [19] The Board's finding of negligence relates to:
- (a) the quality of the workmanship;
 - (b) noncompliance with Clause E3 of the Building Code; and
 - (c) noncompliance with Clause B1 of the Building Code.
- [20] 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [21] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [22] 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 Act⁹. 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 practitioner¹⁰.
- [23] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[24] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹. As such, when considering what is and is not an acceptable standard, the Building Code must be taken into account.

[25] In this instance clauses E3 and B1 of the Building Code had not been complied with. Clause E3 deals with internal moisture. It provides:

OBJECTIVE

E3.1 *The objective of this provision is to—*

- (a) *Safeguard people against illness, injury, or loss of amenity that could result from accumulation of internal moisture; and*
- (b) *Protect household units and other property from damage caused by free water from another household unit in the same building.*

FUNCTIONAL REQUIREMENT

E3.2 *Buildings must be constructed to avoid the likelihood of—*

- (a) *Fungal growth or the accumulation of contaminants on linings and other building elements; and*
- (b) *Free water overflow penetrating to an adjoining household unit; and*
- (c) *Damage to building elements caused by the presence of moisture.*

[26] The manner in which the bath was installed meant there was a risk that internal moisture from the bath would not be effectively managed. It was also likely that the

¹¹ Section 17 of the Building Act 2004

shower, which was reported to have been installed upside down, would not have performed as expected or required.

[27] Clause B1 covers structural requirements. it provides:

OBJECTIVE

B1.1 *The objective of this provision is to:*

(a) Safeguard people from injury caused by structural failure,

*(b) Safeguard people from loss of amenity caused by structural behaviour,
and*

(c) Protect other property from physical damage caused by structural failure.

FUNCTIONAL REQUIREMENT

B1.2 *Buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.*

[28] The Respondent cut through a structural element, a wall bracing unit. No steps were taken to replace the brace or otherwise ensure the bracing was still adequate. Cutting through the brace compromised the structural integrity of the dwelling.

[29] The Board also notes that by carrying out building work that compromised a structural element may have taken the work outside of the parameters of the building consent exemption in clause 1 of Schedule 1¹². The Respondent should have given consideration to whether a building consent was required or to a solution that did not require cutting the brace.

[30] Turning to the quality of the workmanship the photographs provided showed work that fell well below the standards expected of a competent licensed building practitioner. It was amateurish and verged on being incompetent¹³.

[31] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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.

¹² Clause 1 deals with general repair, maintenance, and replacement. The provisions include an exclusion in subclause (3)(b) that provides the exemption does not apply to complete or substantial replacement of any component or assembly contributing to the building's structural behaviour.

¹³ Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard.

¹⁴ [2001] NZAR 74

- [32] The level or degree of departure was such that a disciplinary outcome is warranted. It was not inadvertence or oversight. It was poor and noncompliant workmanship. The removal of a bracing element was particularly concerning. It was deliberate and was done without forethought as to the potential long-term implications of doing so.
- [33] 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

- [34] 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.
- [35] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent and the Complainant an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [36] 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*¹⁵ 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.

- [37] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁶ 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.
- [38] The disciplinary offending was at the moderate level. The Board considered a fine to be the appropriate penalty. A starting point of \$2,500 was adopted. This sum was consistent with other penalties imposed by the Board for similar offending.

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [39] The Board noted that there was a limited acceptance of responsibility by the Respondent and that he was ordered to pay compensation by the Disputes Tribunal. On the basis of those factors the Board decided to reduce the fine to \$1,500.

Costs

- [40] 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.”
- [41] 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 case¹⁷.
- [42] In *Collie v Nursing Council of New Zealand*¹⁸ 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.

- [43] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

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 Act¹⁹. 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.

- [45] 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.

¹⁷ *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.

¹⁸ [2001] NZAR 74

¹⁹ Refer sections 298, 299 and 301 of the Act

- [46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²¹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²². 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*²³.
- [47] 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 interest²⁴. 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.
- [48] Based on the above the Board will not order further publication.

Draft Section 318 Order

- [49] 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 \$1,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

- [50] 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.

²⁰ Section 14 of the Act

²¹ Refer sections 200 and 202 of the Criminal Procedure Act

²² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²³ *ibid*

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Draft Decision

- [51] 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.
- [52] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **26 May 2020**. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new 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 .
- [53] 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.
- [54] 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.
- [55] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [56] 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.
- [57] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 May 2020**.

Right of Appeal

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

Signed and dated this 5th day of May 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 27 May 2020 on the basis that no further submissions were received.

Signed and dated this 27th day of May 2020



Chris Preston

Presiding Member

ⁱ Section 318 of the Act

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