

Before the Building Practitioners Board

	BPB Complaint No. C2-01519
Licensed Building Practitioner:	Gregory Padman (the Respondent)
Licence Number:	BP 125914
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:	17 May 2017
Decision Date:	30 May 2017
Board Members Present	Chris Preston (Presiding) Richard Merrifield Robin Dunlop Catherine Taylor

Procedure:

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

Board Decision:

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

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Function of Disciplinary Action

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

[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 with their architect. The disciplinary process for architects exists to ensure

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

professional standards are maintained in order to protect clients, the profession and the broader community.”

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

Background to the Complaint

- [5] The Complainant engaged the Respondent to undertake structural repairs to the property that included a new ring foundation, the pouring of a concrete floor slab and the replacement of rotten timber and cladding. The Complainant had a limited budget.
- [6] The Respondent worked on the project over a six-month period before the Complainant terminated the arrangement on the basis of the amount of time being taken to complete the work and the quality of the work undertaken.

Evidence

- [7] 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.
- [8] The Complainant advised that the back wall of the property was in poor condition and that he had had some preliminary plans drawn up detailing the repairs. It was the intention of the Complainant to have these plans finalised and added to a building consent issued some years earlier but never uplifted.
- [9] In the circumstances, this building consent was no longer applicable and a new building consent had to be applied for. The plans were not finalised at the time the work commenced and the Respondent did not see them.
- [10] The Respondent commenced work on the perimeter foundation and other repairs without checking that a building consent had been obtained given that he was of the view that the foundation work came under Schedule 1 of the Building Act 2004 even though the replacement was not like for like.
- [11] A concrete floor slab was poured within the perimeter foundation – again the replacement was not like for like.
- [12] The Respondent also did not use galvanised bolts for the hold downs as required by NZS 3604.
- [13] Rotten timber framing was not replaced although the Respondent noted that the work was incomplete at the time he finished work.

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

- [14] The Complainant alleged that the Dunedin City Council had issued a Notice to Fix, although there was no evidence that this had been given in writing.
- [15] The Dunedin City Council refused to issue a Certificate of Acceptance and the work was subsequently deconstructed and rebuilt.

Board's Conclusion and Reasoning

- [16] 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.
- [17] The Board has found in previous decisions⁶ that a licensed building practitioner who commences or undertakes building work without a building consent could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct can come within the provisions of s 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁷.
- [18] More recently in *Tan v Auckland Council*⁸ in the High Court, Justice Brewer stated that 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.

- [19] 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.
- [20] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required.
- [21] Under section 40 of the Act building work must not be undertaken without a building consent. There are some exceptions to this. The majority of the exceptions are contained in Schedule 1 of the Act. The specific exception the Respondent relied on

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

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ [2015] NZHC 3299 [18 December 2015]

was clause 1 of Schedule 1 which allows for like for like replacement for the purposes of general repair, maintenance and replacement.

- [22] The Respondent agreed that the replacement of the perimeter foundation was not a like for like replacement under Schedule 1 of the Act and admitted that it required a building consent as did the concrete floor slab given it was also not like for like. He admitted that he should have had a copy of the consented plans on site before he commenced work.
- [23] He also agreed that the use of galvanised bolts was required by NZS 3604, though he did state that this error could have been fixed. The Board noted that this particular work should have been completed correctly in the first instance.
- [24] The Board also noted that the licensed building practitioner worked on his own account and in these circumstances completing annual CPD requirements was essential to ensure he is up-to-date with modern building practice.

Penalty, Costs and Publication

- [25] 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.
- [26] The Respondent made submissions at the hearing as regards penalty, costs and publication. In particular he admitted that he should have checked that a building consent was in place commenting that he was driven by the need to make the property habitable and to work within the budgetary constraints of the Complainant, notwithstanding that his actions resulted in increased costs and stress to the home owner.

Penalty

- [27] 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*⁹ 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.

- [28] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁰ the Court noted that whilst the statutory principles of sentencing set

⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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.

[29] Based on the above, the Board's penalty decision is to order a fine of \$2,000.

Costs

[30] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[31] 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 case¹¹.

[32] In *Collie v Nursing Council of New Zealand*¹² 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.

[33] 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.

Publication

[34] 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 Act¹³. The Board is also able, under s 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.

[35] 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.

[36] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out

¹¹ *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.

¹² [2001] NZAR 74

¹³ Refer sections 298, 299 and 301 of the Act

¹⁴ Section 14 of the Act

grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction the Courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. 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*¹⁷.

[37] 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 interest¹⁸. 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.

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

Section 318 Order

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

Penalty: Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to s 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 s 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.

[40] 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

[41] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **21 June 2016**. 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.

¹⁵ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁷ *ibid*

¹⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 30th day of May 2017



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.*