

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01068

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[Omitted], Licensed Building Practitioner No. [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD IN RESPECT OF PENALTY, COSTS AND PUBLICATION OF NAME

1 Introduction

- 1.1 This decision arises out of a decision by the Building Practitioners Board ("the Board") where the Board found that the Licensed Building Practitioner ("the Respondent") had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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).
- 1.2 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 15 June 2012.
- 1.3 The Board considered the complaint under the provisions of Part 4 of the Act, the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations) and the Board's Complaint Procedures.
- 1.4 The Board heard the complaint on 16 July 2015 in Auckland. The Board Members present for the hearing were:
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|--------------------|----------------------|
| David Clark | Chairman (Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Richard Merrifield | Board Member |
- 1.5 The Board's decision was issued on 31 August 2015. The Board invited the Respondent to make written submissions on the matter of possible disciplinary penalties and payment of costs.
- 1.6 On 14 September 2015, the Board received the Respondent's submissions and it has considered those and made the following decision.

2 Penalty

2.1 The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.

2.2 The Board is aware that the common understanding of the purposes of professional discipline is to uphold the integrity of the profession. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

“The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.”¹ ”

2.3 The integrity of the Licensed Building Scheme also needs to be at a level where standards are upheld. It is fundamental that this occurs to ensure that the public is protected and confidence in the industry is maintained.

2.4 The Respondent by way of his counsel [omitted] made a detailed submission that the appropriate penalty would be a censure. He traversed various mitigating factors including: an admission of wrongdoing; a degree of uncertainty on site as to whether a consent was required; cessation of works once it became apparent that a consent was necessary; and circumstances relating to the complaint and to the Respondent’s personal circumstances.

2.5 The Board has taken those submissions into consideration, and whilst neither of the charges are matters to be taken lightly, the Board considers it appropriate in this case given the circumstances which led to the complaint and the mitigation put forward that a censure is the appropriate penalty.

3 Costs

3.1 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.”

3.2 The Respondent defended the hearing and the findings of the Board are such that a contribution to the costs of its inquiry is appropriate. 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. The judgement in *Cooray v The Preliminary Proceedings Committee*² included the following:

“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

3.3 The judgment in *Macdonald v Professional Conduct Committee*³ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the

¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

² HC, Wellington, AP23/94, 14 September 1995

³ HC, Auckland, CIV 2009-404-1516, 10 July 2009

Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*⁴ where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

- 3.4 The Board notes that the Respondent has been cooperative in regard to the Board's inquiry and accepted one of the charges he faced. This and the Respondent's financial position as outlined for the Board in the submissions received are appropriate matters to be considered in mitigation.
- 3.5 Under all the circumstances, the Board has reduced the order for costs and the sum of \$500 is considered to be a reasonable amount toward the costs of and incidental to the Board's inquiry.

4 Publication of Name

- 4.1 As a consequence of these decisions the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licenced Building Practitioners' scheme as is required by the Act.
- 4.2 Having taken into account the circumstances of the case and the mitigation presented, the Board does not find it necessary to further publish the Respondent's name or to specifically identify him in other publications.

5 Board's Decision

- 5.1 For the reasons set out above, the Board directs that:

Penalty: Pursuant to s 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 \$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.

⁴ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

6 Right of Appeal

- 6.1 The Respondent has a right to appeal the Board decisions under s 330(2) of the Actⁱⁱ.
Signed and dated this 23rd day of September 2015

David Clark
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—

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- (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.*