

**BPB Complaint No. C2-01194**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

[The Respondent], Licensed Building Practitioner No. [omitted]

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**COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 20 May 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 11 April 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- |                    |                          |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Robin Dunlop       | Board Member             |
| Dianne Johnson     | Board Member             |
| Catherine Taylor   | Board Member             |
- [6] The matter was considered by the Board in Auckland on 1 March 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- |                    |                              |
|--------------------|------------------------------|
| Marjla Urlich      | Counsel for the Registrar    |
| Gemma Lawson       | Board Secretary              |
| [Omitted]          | Respondent                   |
| William Hursthouse | Special Adviser to the Board |

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[Omitted]	Representing the Complainant
[Omitted]	Auckland Council
[Omitted]	Witness, owner of the property

Members of the public were present.

- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### **Board Procedure**

- [9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 10 September 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [11] On 21 December 2015 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (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).
- [12] The Board requested a Special Adviser be appointed to prepare a report. William Hursthouse's report dated 27 October 2015 was received and circulated to the Respondent and Complainant.
- [13] On 11 February 2016 at 1.15 p.m. a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

### **The Hearing**

- [14] The hearing commenced at 9.40 a.m. on 1 March 2016.
- [15] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [16] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.
- [17] The Board heard all evidence and received submissions prior to its meeting in Committee to consider the matters before it.
- [18] The Board's written reasons for its decisions are as follows.

### **Substance of the Complaint**

- [19] In summary, the Complainant alleges that the Respondent constructed an extension and renovation on a property illegally and without first obtaining a building consent.

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## Evidence

- [20] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>1</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

- [21] A complaint was received from Helen Teale an adjoining owner to the property in question situated at [omitted]. The building work in question consisted of the conversion of a carport to a bedroom and installation of a new bathroom and the relocation of the laundry.
- [22] The owner [omitted] purchased the property knowing it had unconsented work carried out on the house. He attempted to apply to Auckland Council for a certificate of acceptance but did not have any plans and other documentation so the application was declined. [Omitted] then engaged the Respondent to bring the building up to the standards in the building code so a certificate of acceptance could again be applied for.
- [23] While a lot of the work under taken by the Respondent would have been exempt work under Schedule 1 of the Act the following work was also undertaken;
- (a) changing the unconsented laundry into an ensuite;
  - (b) moving the laundry into a closed in section of the outside porch;
  - (c) excavating for and forming a new continuous footing along the outside wall of the garage; and
  - (d) work required to prevent the spread of fire to a neighbouring property.

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<sup>1</sup> [2009] 1 NZLR 1

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- [24] The Respondent, when questioned about a building consent said that he started to rectify unconsented work in order to bring it up to the building code and then continued on with other new work.

### **Board's Conclusion and Reasoning**

- [25] The Board has found in previous decisions<sup>2</sup> that a licenced person 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 C2-01068<sup>3</sup>.

- [26] More recently the High Court in *Tan v Auckland Council*<sup>4</sup> 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.*

- [27] 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.
- [28] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, knew or ought to have known that a building consent was required.
- [29] The Respondent said that he started to rectify the unconsented work in order to bring it up to code but admitted that he continued on with what, in the Board's view, can be regarded as new non-exempt work which should have been the subject of a building consent. On this basis, in accordance with the discussion above, that Board finds that the Respondent has been negligent.
- [30] With respect to the disciplinary charge under s 317(1)(d) the Board notes that as there was no building consent the conduct of the Respondent does not come within this ground for discipline.

### **Board Decision**

- [31] The Board has decided that the Respondent has carried out building work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [32] The Board has decided that the Respondent has not carried out building work that does not comply with a building consent (s 317(1)(d) of the Act).

<sup>2</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>3</sup> Board Decision C2-01068 dated 31 August 2015

<sup>4</sup> [2015] NZHC 3299 [18 December 2015]

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## Penalty

[33] 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 Act<sup>1</sup>.

[34] The Board is aware that the common understanding of the purposes 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. 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.*<sup>5</sup>

[35] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>6</sup>:

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[36] The High Court in *Patel v Complaints Assessment Committee*<sup>7</sup> has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

*[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*

*[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 proceeded with its decision on penalty on the basis of the above principles.

[38] The respondent did admit to not obtaining a building consent when one was required.

[39] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*<sup>8</sup> the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.

[40] Given the above the Board proposes a penalty of \$1,000.00 as appropriate.

<sup>5</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>6</sup> [1992] 1 NZLR 720 at p 724

<sup>7</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>8</sup> [2011] 3 NZLR 850.

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## Costs

- [41] 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.”
- [42] 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*<sup>9</sup> 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.”*

- [43] The judgment in *Macdonald v Professional Conduct Committee*<sup>10</sup> confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*<sup>11</sup> where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- [44] In *Collie v Nursing Council of New Zealand*<sup>12</sup> 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.*

- [45] The Board proceeded with its decision on costs on the basis of the above principles.
- [46] The Board notes that the Respondent has been cooperative in regard to the Board’s inquiry. This and the Respondent’s financial position are appropriate matters to be considered in mitigation.
- [47] Under all the circumstances, the Board has reduced the order for costs and the sum of \$1,000.00 is considered to be a reasonable amount toward the costs of and incidental to the Board’s inquiry.

## Publication of Name

- [48] 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

<sup>9</sup> HC, Wellington, AP23/94, 14 September 1995

<sup>10</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>11</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>12</sup> [2001] NZAR 74

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Building Practitioners' scheme as is required by the Act. This ensures members of the public are able to enquire into the licensed person's recent disciplinary history.

[49] 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.*

[50] As a general principal 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.

[51] 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.

### Final Decision

[52] 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 \$1,000.00.

**Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000.00 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

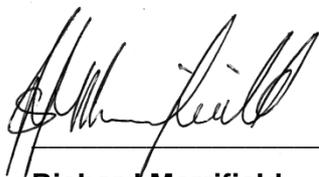
**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

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.

### Right of Appeal

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

Signed and dated this 4<sup>th</sup> day of April 2016



**Richard Merrifield**  
Presiding Member

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### <sup>i</sup> 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

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- (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.