

Before the Building Practitioners Board

	BPB Complaint No. C2-01899
Licensed Building Practitioner:	Tony Songhurst (the Respondent)
Licence Number:	BP 129264
Licence(s) Held:	Carpentry and Site AOP 1

Penalty Decision of the Board under section 318 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	6 November 2018
Substantive Decision Date:	3 December 2018
Penalty Decision Date:	4 February 2019
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	David Fabish, LBP, Carpentry Site AOP 2
	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.

Contents

Introduction	2
Penalty	2
Costs	3
Publication of Name	3
Section 318 Order	3
Right of Appeal	4

Introduction

- [1] This penalty decision arises out of the Board’s substantive decision in which it found 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).
- [2] 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.
- [3] In its substantive decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.
- [4] On 14 January 2019, the Board received the Respondent’s submissions.
- [5] The Respondent made reference to his understanding that the hearing had been adjourned to allow the Board to consider the involvement of other licensed building practitioners in the project. In this respect the Respondent should note that the Board has not proceeded against the Respondent on the allegations relating to the work which he stated was carried out by other licensed persons. The Board’s findings only relate to the Respondent’s proven conduct. Any inquiry into or investigation of a complaint in respect of the conduct of other licensed building practitioners is a separate matter.
- [6] In respect of the submissions on penalty, costs and publication the Board has considered them and made the following decisions.

Penalty

- [7] The Board’s initial view was that the Respondent should pay a fine of \$2,000.
- [8] The Respondent has submitted that the penalty is excessive and not aligned with other decisions of the Board. The Respondent made reference to C1090 heard in April 2014, C1119 heard in October 2014 and C2-01068 heard in July 2015. The Respondent has selected cases with lower penalties and ones that were heard and dealt with in the infancy of the regime when the Board was being lenient.

[9] The Board has reviewed the more recent penalties imposed for similar offending and is satisfied that the proposed penalty is consistent with those imposed for similar levels of disciplinary offending.

[10] The Respondent also submitted that the focus of the Board's penalty should not be punishment. As noted in the Board's substantive decision 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*¹ 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.

[11] Having considered the submissions received the Board has decided to uphold its initial view.

Costs

[12] The Board's initial view was that \$2,000 in costs was appropriate. This remains the case and it is noted that the Respondent did not provide a comprehensive response to the complaint when it was first brought to his attention and did not provide the information as regards the other licensed persons involved.

[13] The Respondent should note that 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*² the High Court held that it was permissible to take into account as an adverse factor that the practitioner had responded to the complaints and discipline process in a belligerent way.

[14] The costs imposed are far less than the High Court 50% guideline and whilst the Respondent has not been belligerent there are certainly no reasons to provide any further reductions in the level of costs to be imposed.

Publication of Name

[15] The Board's initial view was there were no good reasons to further publish the matter. The Respondent has asked that his name not be published. This was the effect of the Board's indicative order. The matter must, however, be noted on the Register. The Board has no discretion as regards the details that are published on the Register.

Section 318 Order

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

¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

² [2011] 3 NZLR 850.

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 \$2,000 (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.

- [17] 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.

Right of Appeal

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

Signed and dated this 4th day of February 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.*