

**BPB Complaint No. C2-01377**

**IN THE MATTER OF**

**AGAINST**

Under the Building Act 2004 (the Act)

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

Simon Sparkes, Licensed Building Practitioner No. BP 101486

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**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 24 March 2016 in respect of Simon Sparkes, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (a) carried out or supervised building 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);
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
  - (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry and Site Licences issued 15 July 2015.
- [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 (Chair)
Mel Orange	Board Member
Catherine Taylor	Board Member
Bob Monteith	Board Member

[6] The matter was considered by the Board in Taupo on 14 September 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:

Gemma Lawson	Board Secretary
Simon Sparkes	Respondent
[Omitted]	Complainant
Jon Astwood	Technical Assessor, Holmes Farsight
Tim Watson	Technical Assessor, Holmes Farsight
[Omitted]	Witness, Remedial Builder
[Omitted]	Witness, Property Inspection

The Respondent was accompanied by two support persons.

Members of the public were not 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 16 May 2016 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 20 June 2016 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 in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

- [12] The Board requested a Technical Assessor be appointed to prepare a report. Jon Astwood and Tim Watson of Holmes Farsight report dated 5 August 2016 was received and circulated to the Respondent and Complainant.
- [13] On 1 September 2016 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 discussed.

### Function of Disciplinary Action

- [14] 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<sup>1</sup>.
- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>2</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.*
- [16] It must also be noted that the Board only has jurisdiction with regard to "the conduct of a licensed building practitioner" and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

### The Hearing

- [17] The hearing commenced at 10.35 a.m.
- [18] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

### Substance of the Complaint

- [19] The Complainant alleged that the Respondent had carried out building work in a negligent or incompetent manner and had carried out building work which did not comply with the building consent. In particular he alleged the Respondent failed to:
- (a) install exterior battens with even spacing;
  - (b) install deck bearers to support deck joists;
  - (c) prime the edge of Shadowclad;

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

<sup>2</sup> [1992] 1 NZLR 720 at p 724

- (d) install ceiling battens straight and level;
- (e) allow enough room around the flue when installing the ceiling battens;
- (f) install 6kN strapping to the deck;
- (g) build the deck as per the amended plan;
- (h) install building wrap overhead flashings for new exterior joinery;
- (i) install new joinery as per plan;
- (j) frame up and install joinery in the ensuite as per plan;
- (k) install horizontal Z flashings to the Shadowclad as per the plan
- (l) construct a wall straight and true;
- (m) provide proper support for a section of new chipboard floor; and
- (n) provide a record of work on completion of restricted building work.

### 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>3</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] The Complainant engaged the Respondent to assist with the completion of building work under a building consent. The initial phase of the work had been undertaken by another builder. The Respondent's work and or supervision of work took place between 31 August 2015 and 28 October 2015.
- [22] The Respondent provided a response to the Complaint on 9 April 2016. In it he responded to the allegations set out above. In general he stated the work was

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<sup>3</sup> [2009] 1 NZLR 1

incomplete when they left the site and would have been completed had he remained on site or that they would have picked up and rectified issues when a quality control inspection was carried out by him. He also submitted that changes were made to the sequence of building work at the Complainant's request. With regard to the record of work he contacted the Registrar of the Licensed Building Practitioner scheme on 30 November 2015 to seek guidance and was told to complete the memorandum with details of the work started and state the work had not been finished and that he was awaiting further instructions from the Complainant as to how they wanted to proceed and to provide them with a quote.

[23] The Respondent did accept that there were a few issues with the work. He offered to rectify the works in question but would seek payment of outstanding amounts if he did or leave matters as they were and not pursue outstanding amounts.

[24] The Board appointed a Technical Assessor to assist it with the investigation of the complaint by completing an analysis of the work. He provided a report dated 5 August 2016. The report included a chronology of the events and a table describing the alleged defective work, its compliance with the consented plans and the whether or not it met the requirements of the Act and or the Building Code using a colour code to assess the level of non-compliance. The following observations were made:

- (a) exterior shadowclad cladding and flashings:
  - (i) vertical sheet join not lapped as per consent documents and manufacturer requirements, potential for failure with clause E2 external moisture;
  - (ii) horizontal 'Z' flashing not taped or covered by layer of wrap as per consent documents and manufacturer requirements, potential for failure with clause E2 external moisture;
  - (iii) no evidence provided of sheet edge priming to all cuts, potential for failure with clause B2 durability;
  - (iv) batten surrounds to windows, detail not in accordance with the building consent or the shadowclad specification and installation guide, may affect the performance, weather tightness (E2) and durability (B2) of the cladding and window installation;
- (b) pile construction – deck pile not correctly supporting the deck bearers, does not comply with the building consent, potential for failure with clause B1 structure;
- (c) deck framing – 6kN straps not installed to boundary joist under decking, does not comply building consent, potential for failure with clause B1 structure;
- (d) wall framing construction –
  - (i) missed jamb packers for direct fixed cladding, does not comply with the building consent;
  - (ii) wall/s not straight and true, NZS3604 tolerances exceeded;
- (e) internal ceiling framing construction;
  - (i) 25mm deviation exceeds NZS3604 tolerances; and
  - (ii) ceiling battens hard up against fire flue, potential for failure clause C2 prevention of fire.

- [25] At the hearing the Board heard evidence from the Technical Assessors that whilst the building work was still to be completed and aspects of the non-compliant work could be remediated or rectified, some of it (such as that related to the exterior cladding and the deck) would require a certain degree of deconstruction to remediate or rectify and their opinion was that there was no reason why the work should not have been done correctly in the first place.
- [26] The Complainant gave evidence that the defective work has been fixed and there will not be any long term detriment. He found the Respondent's lack of willingness to engage over issues disappointing and stated that it was only when he had an independent report completed on the work that the Respondent took any notice of the issues raised.
- [27] The Respondent gave evidence that he had employed a new builder just prior to the job getting underway. The new builder was qualified but not licensed and had stated he had 10-12 years trade experience. The builder worked on the job together with an apprentice. The Respondent supervised and relied on the builder. He stated he was disappointed with the builder as he felt he had been let down by him. That builder no longer works for the Respondent and the Respondent is now reluctant to take on new staff.
- [28] At the time of the build the Respondent was looking after two smaller jobs whilst the builder and apprentice did the Complainant's job. He would attend site in the morning and give instructions and was available if there were issues or questions. He accepted he should have checked the work more carefully and have paid more attention to what was being done on site. He also noted that the building inspector had not picked up the issues and had passed the work.
- [29] The Board also heard from [Omitted], the author of a report obtained by the Complainant about the Respondent's work which had been provided to the Board.
- [30] The licensed building practitioner who carried out the remedial work and completed the building work gave evidence. He stated he removed areas of the shadowclad ply to rectify non-compliant work identified in the Technical Assessor's report and to insert missing and or extra timber elements required for fixing the cladding. He also gave evidence as to plasterboard bracing which had not been completed in accordance with manufacturer's specifications.
- [31] Following the hearing the Respondent provided a record of work dated 14 September 2016 by way of email. The email was addressed to the owner, the territorial authority and the Board.

## **Boards Conclusion and Reasoning**

### **Negligence or Incompetence**

- [32] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>4</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

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<sup>4</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [33] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>5</sup> as regards the threshold for disciplinary matters:

*[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.*

- [34] The Board notes the Respondent has accepted there were areas that required remediation and or rectification. It notes issues can arise during a build and it does not always follow that a licensed building practitioner has been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right first time and not to have to rely on tidying up afterwards.
- [35] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:
- (a) the extent of the error, omission or noncompliance;
  - (b) whether failings by the Respondent in their planning and execution of the building work have contributed to the issues arising or not; and
  - (c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.
- [36] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioner's attention it is more likely a disciplinary outcome will follow but the Board will take into account the overall circumstances leading up to and after the issue occurred.
- [37] The Board notes that there were several areas of work which went beyond simple errors and could not be classed as incomplete work. In particular the issues in relation to the shadowclad which required deconstruction to rectify and the construction of the deck which required a consent variation.
- [38] The Board also needs to look at the issues before it in the context of supervision as whilst the Respondent both carried out and supervised building work, the areas of noncompliance relate to his supervision of others. In Board Decision C2-01143<sup>6</sup> the Board discussed the definition of supervise in s 7<sup>7</sup> of the Act and the levels of

<sup>5</sup> [2001] NZAR 74

<sup>6</sup> Board Decision dated 14 April 2016

<sup>7</sup> Section 7:

supervision it considered necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

[39] The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[40] In this instance it was clear to the Board that the level of supervision provided by the Respondent fell below the standards expected of a reasonable licensed building practitioner. The Respondent relied on a builder whom he was not overly familiar with and did not take care to ensure the work was being completed in a compliant manner. Accordingly the Board finds that the Respondent has been negligent (but not incompetent) in his supervision of the building work carried out.

### **Contrary to a Consent**

[41] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[42] In *Tan v Auckland Council*<sup>8</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

*[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.*

[43] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[44] Whilst the Board noted there were items of noncompliance with the Building Consent it considers they were not sufficiently serious, on the basis of the tests outlined

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*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) is performed competently; and*
- (b) complies with the building consent under which it is carried out.*

<sup>8</sup> [2015] NZHC 3299 [18 December 2015]



above, to warrant a disciplinary outcome. The Board also notes that it has made a finding of negligence and as such, in this instance, a finding under s 317(1)(d) is not necessary. This will not always be the case and it is only the level of seriousness that has differentiated outcome in the hearing.

## Record of Work

- [45] There is a statutory requirement under s 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>9</sup>.
- [46] Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [47] The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup> and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [48] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work. A record of work is not a statement as to the quality or compliance of the work<sup>11</sup>. Rather it is a record of who did what in the way of restricted building work under a building consent.
- [49] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply states “on completion of the restricted building work ...”.
- [50] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will no longer be carrying out further work. In such circumstances the Board has held that the record of work is due soon after it is clear the licensed building practitioner’s involvement has ceased.
- [51] In the present situation a point of time was reached where it was clear the Respondent was not going to be carrying out any further restricted building work. In such circumstances even though the intended work has not been completed, the Respondent’s restricted building work under the building consent had, in effect, been completed and a record of work was due.
- [52] What was initially provided was a description of work carried out which includes both restricted building work and no restricted work. It is headed up “This is not a memorandum of Restricted Building Work”. The provided statement does not meet the requirements for a record of work as set out in Form 6A of the Building (Forms) Regulations 2004 (New Zealand). Whilst reg 6 of the same regulations states that

<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>11</sup> Refer s 88(4) of the Act.

minor differences in the form used from that prescribed may not invalidate it, the differences here did not meet the tests in that regulation.

- [53] The Board therefore finds that a record of work has not been provided. It does note that since the hearing, one has been provided but it came too late to prevent a disciplinary finding and even if provided at the time of the complaint it would still have been well past due date.
- [54] The Respondent should bear in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work LBPs can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed. The Respondent attempted to do this with his statement of work but could have achieved the same by simply doing what was required of him with a record of work.
- [55] The Respondent is also reminded that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. A claim that the licensed building practitioner was not asked for a record of work will not be a defence. LBPs must act of their own accord and not wait for others to remind them of their obligations.
- [56] Section s 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed.
- [57] The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.
- [58] No reasons other than what has been outlined above have been advanced by the Respondent.

### **Board Decision**

- [59] The Board has decided that Respondent has:
- (a) carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act); and
  - (b) has failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)
- and should be disciplined.
- [60] The Board has also decided that Respondent has not carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act).

## Disciplinary Penalties

- [61] 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>.
- [62] The Board's Complaints Procedures allow the Board either to set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [63] As part of the materials provided to the Board for the Hearing, the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in these were the losses incurred and the partial acceptance of responsibility at the hearing.
- [64] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.
- [65] As stated earlier 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.
- [66] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>12</sup> has 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.*

- [67] The Board considered a fine of \$2,000 was appropriate but taking the consideration heard into account the fine has been reduced to \$1,500.

## Costs

- [68] 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."
- [69] 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 case. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>13</sup> included the following:

<sup>12</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>13</sup> HC, Wellington, AP23/94, 14 September 1995

*“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.”*

[70] The judgment in *Macdonald v Professional Conduct Committee*<sup>14</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>15</sup> where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[71] In *Collie v Nursing Council of New Zealand*<sup>16</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.*

[72] The Board has decided that the Respondent is to pay the sum of \$1,500 toward the costs and expenses of, and incidental to, the inquiry by the Board. This is consistent with the costs imposed by the Board for similar matters.

### **Publication of Name**

[73] 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 Act.

[74] 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.*

[75] 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.

[76] The Board does not consider that any further publication is required.

### **Penalty, Costs and Publication Decision**

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

<sup>14</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>15</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>16</sup> [2001] NZAR 74

- Penalty:** Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.
- 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 him being named in this decision.

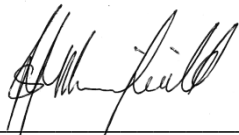
### Submissions on Penalty Costs and Publication

- [78] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business at **4pm on 21 November 2016**.
- [79] If no submissions are received then this decision will become final.
- [80] 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.

### Right of Appeal

- [81] The right to appeal Board decisions is provided for in s 330(2) of the Act<sup>i</sup>.

Signed and dated this 28<sup>th</sup> day of October 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*
    - (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:*

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- (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.*