

Before the Building Practitioners Board

At [REDACTED]

BPB Complaint No. C1100

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[REDACTED] Licensed Building Practitioner [REDACTED]

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 LBP") carried out or supervised building work in a negligent and/or incompetent manner contrary to s 317(1)(b) of the Building Act 2004 (the Act).

1.2 The LBP has a Carpentry licence issued 9 September 2010, and a Site licence AOP 2 issued 4 August 2011.

1.3 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).

1.4 The Board heard the complaint on 5 May 2014 in [REDACTED]. The Board Members present for the hearing were:

David Clark	Chairman (Presiding)
Chris Preston	Deputy Chairman
Brian Nightingale	Board Member
Mel Orange	Board Member
Colin Orchiston	Board Member
Dianne Johnson	Board Member
Richard Merrifield	Board Member
Catherine Taylor	Board Member

1.5 The Board's decision was issued on 3 June 2014. The Board invited the LBP to make written submissions on the matter of possible disciplinary penalties and payment of costs.

1.6 By letter dated 20 June 2014, the Board received the LBP's submissions on penalty, publication of name and costs. At its meeting in Wellington on 21 July 2014 the Board considered those submissions, 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. The Board's decision in respect of the matters raised in the complaint hearing established that s 317(1)(da)(ii) applies. 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 as follows:

- (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."*

2.2 The LBP made detailed submissions and accepted a level of responsibility and stated he had learnt from the events leading to the complaint. This was borne out by the evidence at the hearing and the Board has taken this into consideration in making its decision on penalty and costs.

2.3 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

2.4 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.

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

- 2.5 The Board notes that the LBP's submissions in respect of penalty, costs, and publication of name refer to this matter being in the nature of a "test case". The lack of clarity around the issue was not assisted by the advice the LBP received from various sources. But the Board does not agree with the LBP's submission that the law is unclear, or that the penalty should be affected by contractual considerations. For that reason, the Board's decision has emphasised the statutory duty to supply a Record of Work, but has suggested issues that should be in the minds of LBPs when dealing with the practicalities of complying with the requirements.
- 2.6 The LBP had genuine – if misguided – reasons for with-holding the Record of Work. In its decision, the Board makes it clear that contractual disputes do not give rise to an entitlement to withhold the Record of Work required by s 88 of the Act. But this matter has not previously come before the Board, and in consequence the LBP has already borne a "penalty" by way of costs in obtaining legal advice. In these specific circumstances the Board takes the view that it is fair to set a penalty at the lower end of the available range.

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 Whilst the LBP has not provided a detailed financial position he has submitted that he would suffer financial hardship from a high level of costs.
- 3.3 The LBP 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."*
- 3.4 The judgment in *Macdonald v Professional Conduct Committee*³ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*⁴ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- 3.5 The Board notes that the Respondent has been cooperative in regard to the Board's inquiry and had not obstructed the Registrar in his investigation. These matters including what his financial position is understood to be are appropriate matters to be considered in mitigation.
- 3.6 Under all the circumstances, the Board has reduced the order for costs.

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

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

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

4 Publication of Name

- 4.1 As a consequence of these decisions the LBP's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licenced Building Practitioners' scheme. Having taken into account the circumstances, 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 LBP is censured

Costs:

Pursuant to section 318(4) of the Act, the LBP is ordered to pay costs of \$750 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication of name

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 be no action taken to publicly notify the Board's action, except for the note in the register.

Signed and dated this day of

9 SEPTEMBER 2014



David Clark
Presiding Member

Advice Note:**Extracts from the Building Act 2004:*****S 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.

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.

