

**BPB Complaint No. C2-01053**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

**AGAINST**

SHAMSHER ALI, Licensed Building Practitioner No. BP 100469

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

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**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"):

(a) carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner in a negligent or incompetent manner (s.317(1)(b)); and

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s.317(1)(d))

and should be disciplined.

1.2 The Respondent is a Licensed Building Practitioner with Carpentry and Site Area of Practice 1 licences issued on 8 July 2010.

1.3 The Board has 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 11 February 2015 in Auckland. The Board Members present for the hearing were:

David Clark	Chairman (Presiding)
Mel Orange	Board Member
Dianne Johnson	Board Member
Richard Merrifield	Board Member
Catherine Taylor	Board Member

1.5 The Board's decision was issued on 5 March 2015. The Board invited the Respondent to make written submissions on the matter of possible disciplinary penalties and payment of costs.

- 1.6 By letter dated 17 March 2015, the Board received the Respondent's submissions on penalty, publication of name and costs. 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. 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 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."*<sup>1</sup>
- 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 made detailed submissions. The majority of those submissions, however, amounted to a resubmission of the reasons the Respondent advanced at the substantive hearing as to why he should not have been disciplined. Those submissions were rejected at the hearing and their resubmission points toward the Respondent not accepting the decision of the Board and to his not taking

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

responsibility for his actions. The Respondent can Appeal the Board's Decision if he disagrees with it. Accordingly the only weight the Board can give to those parts of his penalty submissions is where they raise matters which relate to mitigation. To that extent that they do they have been taken into consideration.

- 2.5 The Respondent did provide, in the concluding paragraphs of his submissions, details of this financial position and the costs and losses incurred as a result of the complaint. Those submissions have also been taken into account in determining the appropriate penalty.
- 2.6 The Board found, during the hearing and again in the submissions received on penalty, that the Respondent held a cavalier attitude toward compliance matters. That he is still not accepting responsibility for his failure to build in accordance with the consent is disconcerting. As was pointed out in the Board's decision the process of issuing a building consent and the inspection process ensures independent verification that the Code has been complied with and the works will meet required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large.
- 2.7 Given these factors the Board considers a period of suspension is the appropriate penalty as it recognises the seriousness of the matters and the aggravating features outlined above.
- 2.8 The Board notes the Respondent has been the subject of a previous Board disciplinary decision but has not taken this into account in coming to its decision as the conduct in the present case predated the Board's decision on the other matter and as such it is not relevant to 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 has provided information as to his financial position although this was a mixture of company liabilities and personal liabilities. Nevertheless this has been taken into consideration.
- 3.3 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>2</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."*

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<sup>2</sup> HC, Wellington, AP23/94, 14 September 1995

- 3.4 The judgment in *Macdonald v Professional Conduct Committee*<sup>3</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>4</sup> where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.
- 3.5 In all the circumstances, the Board has reduced the order for costs.

#### **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.
- 4.2 The Board considers that further publication is required in order to protect the public and to give effect to the order for suspension. As such the Board directs that the Board's decision is to be published in Code Words.

#### **5 Board's Decision**

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

##### **Penalty:**

**Pursuant to s 318(1)(b) of the Building Act 2004, the Respondent's licence is to be suspended for a period of 12 months.**

##### **Costs:**

**Pursuant to section 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 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, the Registrar will publicly notify the Board's action in Code Words.**

Signed and dated this day of 8 April 2015



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**David Clark**  
Presiding Member

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<sup>3</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>4</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

**Advice Note: Extract 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.