

BPB Complaint No. C2-01119

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

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

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 10 September 2014 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent had, in relation to building work at [omitted]:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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 a certificate of work about any plans and specifications required to accompany the building consent application (s 317(1)(da)(i) 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) has 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 Foundations, Area of Practice Concrete or Timber Pile Foundation and Walls and Concrete Slab on Ground, Licence issued 27 June 2012 and Site Area of Practice 2 Licence issued on 3 February 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).

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[5] The following Board Members were present at the hearing:

Richard Merrifield	Deputy Chair (Presiding)
Mel Orange	Board Member
Dianne Johnson	Board Member
Bob Monteith	Board Member

[6] The matter was considered by the Board in Wellington on 29 March 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] Gemma Lawson, Board Secretary was also present during the course of the hearing. 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 19 October 2015 the Registrar of the Board prepared a revised 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. The original report submitted to the Board had been referred back to the Registrar on 2 April 2015. The Registrar's revised report took into account additional submissions made by the Complainant and the Respondent.

[11] On 26 November 2015 the Board considered the Registrar's revised report and directed that an addendum to it be prepared considering whether a disciplinary ground under s 317(1)(b) should also be considered by the Board.

[12] On 28 January 2016 the Board received the addendum and considered the Registrar's report. In accordance with reg 10 it resolved to proceed with the complaint that the Respondent 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).

[13] On 14 February 2016 an email was received from the Respondent confirming that he consented to the hearing being held on the papers.

The Hearing

[14] The hearing commenced at 10 a.m.

[15] The documents before the Board were admitted into evidence.

Substance of the Complaint

[16] The complaint related to a failure to provide a record of work to the owner on the completion of restricted building work.

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Evidence

- [17] 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*¹ 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.

- [18] The Respondent’s company [omitted], was contracted to build a home for the Complainant.
- [19] Building work, including restricted building work, took place between April and December 2013.
- [20] The restricted building work included foundation work which was alleged to have been carried out or supervised by the Respondent. The Respondent’s legal representative submitted, by way of a letter, that a record of work was not required for the foundation work as certification of it had been done by other persons.
- [21] The Board notes that a building consent authority Application for Code Compliance Certificate identifies the Respondent as the licensed building practitioner who carried out or supervised the “concrete floor slab” and also as the person who carried out “foundation work”.
- [22] Correspondence from the legal representative dated 12 January 2015 to the Registrar noted records of work were provided on 7 October 2014 and further information (unspecified) was also provided on 19 November 2014.

Board’s Conclusion and Reasoning

- [23] 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 building consent authority on completion of restricted building work.

¹ [2009] 1 NZLR 1

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- [24] 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.
- [25] The Board discussed issues with regard to records of work in its decision C2-01170² 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, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [26] A record of work is a mandatory statutory requirement whenever restricted building work³ under a building consent is carried out by a licensed building practitioner (other than as an owner-builder).
- [27] Each and every licensed building practitioner who supervises or carries out restricted building work must provide a record of work. The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out or supervised.
- [28] The Respondent has submitted that as others had signed off his work a record of work from him was not required. Signing off work for compliance purposes such as where a producer statement is provided and records of work are different matters. As such the Board does not accept this submission.
- [29] There was no question in the case before it as to whether the work was complete or not. There was a significant delay after completing the restricted building work in providing the record of work. These elements of the disciplinary offence have been satisfied.
- [30] The Act provides for a defence of the licenced 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.
- [31] The Respondent has not put forward any form of good reason other than a commercial dispute. 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.

Board Decision

- [32] The Board has decided that Respondent 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.

² *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

³ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

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Disciplinary Penalties

- [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 Act¹.
- [34] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [35] 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.
- [36] 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 a further matters which the Board should take into consideration.
- [37] 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.*⁴

- [38] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁵:

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.

- [39] The *High Court in Patel v Complaints Assessment Committee*⁶ 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

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [40] Having taken into consideration the above matters the Board has decided that a fine of \$1,000 is the appropriate penalty.

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 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*⁷ 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*⁸ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*⁹ 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*¹⁰ 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 has decided that costs of an incidental to the Board’s inquiry of \$1,000 is appropriate but it has reduced this sum to \$750 on the basis that the Respondent agreed to the matter being heard on the papers.

Publication of Name

- [46] 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 Licenced Building Practitioners’ scheme as is required by the Act.

⁷ HC, Wellington, AP23/94, 14 September 1995

⁸ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁹ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁰ [2001] NZAR 74

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- [47] 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.

- [48] 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.

- [49] The Board does not consider further publication is warranted. .

Penalty, Costs and Publication Decision

- [50] 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.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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.

Submissions on Penalty Costs and Publication

- [51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **20 May 2016**.

- [52] If no submissions are received then this decision will become final.

- [53] 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

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

Signed and dated this 29th day of April 2016



Richard Merrifield
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.*