Before the Building Practitioners Board
At Auckland

BPB Complaint No. C2-01180

Under the Building Act 2004 (the Act)

IN THE MATTER OF	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 IN RESPECT OF PENALTY, COSTS AND PUBLICATION OF NAME

Introduction

[1] This decision arises out of a decision by the Building Practitioners Board ("the Board") where the Board 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] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 23 August 2012.

[3] The Board 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 Complaints Procedures.

[4] The Board heard the complaint on 1 December 2015 in Auckland. The Board Members present for the hearing were:

Richard Merrifield	Deputy Chair
Mel Orange	Board Member
Dianne Johnson	Board Member
Catherine Taylor	Board Member

[5] The Board's decision was issued on 21 December 2015. The Board invited the Respondent to make written submissions on the matter of possible disciplinary penalties and payment of costs.

[6] On 20 January 2016, the Board received the Respondent's submissions and it has considered those and made the following decision.

Penalty

[7] 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[i].

[8] 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*.[1]

[9] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]*:*

> *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.*

[10] The High Court in *Patel v Complaints Assessment Committee*[3] 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 punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[11] The Board has proceeded with its decision on penalty on the basis of the above principles.

[12] The Respondent has submitted that he has now taken steps to ensure the failings that occurred will not happen again, he has removed a staff member whose skill levels were not acceptable and has arranged with the Complainant to address the issues which led to the complaint at his cost. He has also advised that the personal issues which were distracting him at the time have been dealt with and he has learnt from the ordeal.

[13] The Board has made enquiries with the Complainant to ascertain whether the remedial work has been completed. The response received was that the work is underway.

[14] Inquiries were also made of the Respondent as regards the employees he stated were in his employ to ascertain whether they were apprentices or not. He advised they had both recently commenced apprenticeships details of which were not provided.

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

[2] [1992] 1 NZLR 720 at p 724

[3] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[15] The Board's view is that suspension for a period of six months would be an appropriate penalty given the level of negligence identified. The Respondent has submitted that a censure or fine would be appropriate.

[16] The Board also notes that whilst the remedial work has been commenced, it is not a Board disciplinary function to ascertain whether the work has been carried out as suggested or to the appropriate standards and/or whether the defects complained of have been rectified. The Board has taken the Respondent's actions in undertaking the remedial work into account when considering this decision.

[17] Notwithstanding the submissions and the matters above the Board still considers a period of suspension is warranted.

Costs

[18] 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."

[19] 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* [4] 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."*

[20] The judgment in *Macdonald v Professional Conduct Committee*[5] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[6] where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

[21] In *Collie v Nursing Council of New Zealand*[7] 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.*

[4] HC, Wellington, AP23/94, 14 September 1995
[5] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[6] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[7] [2001] NZAR 74

[22] The Board has proceeded with its decision on costs on the basis of the above principles.

[23] The Board notes that the Respondent has been cooperative in regard to the Board's inquiry. This and the Respondent's financial position are appropriate matters to be considered in mitigation.

[24] Under all the circumstances, Board has reduced the order for costs and the sum of $2,000 is considered to be a reasonable amount toward the costs of and incidental to the Board's inquiry.

Publication of Name

[25] 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 as is required by the Act. This ensures members of the public are able to enquire into the licensed person's recent disciplinary history.

[26] 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.*

[27] 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.

[28] Having taken into account the circumstances of the case and the mitigation presented, the Board does not find it necessary to further publish the Respondent's name or to specifically identify him in other publications.

Board's Decision

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

Penalty:	**Pursuant to s 318(1)(b) of the Act the Respondents license is suspended for a period of six months from 3 March 2016 . The BPB directs the Registrar to record the suspension in the register.**
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 s 301(1)(iii) of the Act.** **In terms of s 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.**

Right of Appeal

[30] The Respondent has a right to appeal the Board decisions under s 330(2) of the Act[ii].

Signed and dated this 3rd day of March 2016



Richard Merrifield
Presiding Member

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[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.