

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01184 [omitted]

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]

COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainants] lodged a complaint with the Building Practitioners' Board (the Board) on 28 April 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (a) Installed windows without flashings;
 - (b) In doing so damaged the exterior ply;
 - (c) Failed to install the interior plywood linings in the manner wanted by the complainants;
 - (d) Failed to build to the plans; and
 - (e) Carried out work that he was not instructed to do.
- [3] The Respondent is a Licensed Building Practitioner with Carpentry and Site Area of Practice 2 Licences issued 23 June 2011.
- [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:
- | | |
|-------------------|------------------|
| Mel Orange | Presiding Member |
| Brian Nightingale | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in [omitted] on 18 February 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:
- | | |
|--------------|---------------------------|
| Greg La Hood | Counsel for the Registrar |
|--------------|---------------------------|

C2-01184

Sarah Romanos	Board Secretary
[Omitted]	Respondent
[Omitted] [Omitted]	Complainant Complainant
Graeme Calvert	Special Adviser to the Board
[Omitted]	Witness

No members of the public were 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 10 November 2015 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] The Registrar’s report included a report from the Special Advisor, Graeme Calvert, dated 22 June 2015.
- [12] On 3 December 2015 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 or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (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).
- [13] On 15 January 2016 at 9.00 am, a pre-hearing teleconference was convened by Chris Preston, chairman of the Board. 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 confirmed.

The Hearing

- [14] The hearing commenced at 10.30 am.
- [15] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [16] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [17] That in relation to building work at [omitted], the respondent has:
- a. Installed windows without flashings;
 - b. In doing so damaged the exterior ply;

C2-01184

- c. Failed to installed the interior plywood linings in the manner wanted by the complainants;
- d. Failed to build to the plans;
- e. Carried out work that he was not instructed to do.

Evidence

[18] 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.

[19] The complainants advised that they engaged the Respondent to carry out the renovation work to an existing shed. This work was to include the construction of a habitable area at one end of the shed which contained a sleep out and bathroom on the ground floor and two bedrooms and storage areas on a new mezzanine floor.

[20] In carrying out this work, the Respondent:

- a. Installed new windows without the required head flashings.
- b. Whilst installing the windows, damaged the existing exterior plywood linings.
- c. Installed the interior plywood linings with negative joints contrary to what they wanted, as demonstrated in a picture provided by the complainants. The Complainants allege that this picture showed the plywood being but jointed and the Respondent has installed the plywood with negative joints.

¹ [2009] 1 NZLR 1

C2-01184

- d. Relocated a tub onto the reverse side of a wall from what was designed without instruction to do so.
- e. Proceed to line a cupboard without instruction to do so and in doing so tinkered with the existing plumbing pipes resulting in a flood.
- f. Used second grade plywood for some of the linings.

[21] The Special Adviser provided evidence:

- a. Noting variances in the construction to the building consent documentation. These variances included:
 - i. One extra room on the first floor;
 - ii. An extra window in the exterior wall at first floor level; and
 - iii. One less window in the exterior wall at ground level;
- b. Noting construction that is not in accordance with normal practices, the building code, New Zealand Standards and technical literature, being:
 - i. Some door openings sizes had been increased by ripping down the trimmer studs;
 - ii. Ceiling battens being inadequately fixed and lacking packing where required;
 - iii. A lintel being cut short; and
 - iv. Insulation being crammed into the wall and ceiling cavities with large gaps folds in the same. Off cuts scraps of insulation being used in some areas to fill voids.

In response to questioning from the Respondent, the Special Adviser confirmed that these were minor and easily remedied.

- c. That there was a combination of both butt jointing and negative joints used to install the interior plywood.

[22] The Special Adviser was unable to observe the issues with the installation of the exterior windows as further work had already been carried out on them.

[23] The Witness confirmed that he:

- a. Was the building inspector responsible for the job and had carried out the site inspections on behalf of the [omitted] District Council (The building consent authority).
- b. Considered the changes made on site as minor which would normally be picked up prior to issue of a Code of Compliance.
- c. Did not discuss the changes with the Complainant or the Respondent prior to discovering them during a site inspection.

C2-01184

- d. That during an inspection he had noted that some of the external plywood appeared to have stress fractures, in which case it would have been required to be replaced.
- e. That the building consent authority has no record of the change in internal linings from Gib board to plywood.

[24] On questioning from the Board the Witness advised:

- a. There was no record in the building consent authority file of the changes being discussed with anyone in Council.
- b. That he would normally expect such changes to be discussed before carrying out.
- c. That the Act holds the building owner responsible for the building consent and that this would include notification of changes to the same.

[25] The Respondent responded to the allegations as follows:

- a. That he left site on 24 March 2015 to complete another job and whilst away from site received an email from the Complainants not to return to site until the contractual issues had been resolved. He was unable to finish the works and that, if he had been, he would have remedied the lintel, door jambs, and ceiling battens prior to lining.
- b. That the window flashings were not installed as he was waiting on the complainants to decide on whether or not they were going to replace the exterior plywood. The Respondent explained that if he had installed the flashings and the decision was made later to replace the plywood there was a high possibility that the flashings would be damaged during the replacement.
- c. That the change to the room layouts and installation of the additional window was carried out at the request of the complainants and following discussions with building consent authority and directed the Board to the papers where he had drawn up the changes for recording in the consent documentation.
- d. The alteration to the door opening sizes was due to a late change to slim line jambs.
- e. That he had discussed the relocation of the tub and lining of the cupboard with the Complainants although these had not been confirmed in writing.
- f. Regarding the issues with the installation of the insulation as raised by the Special Adviser:
 - i. The insulation had been subsequently removed.
 - ii. The insulation off cuts and scraps were additional insulation installed in the line of the wall girts and in effect, additional to the required insulation.

C2-01184

- g. That the picture of the interior linings provided by the Complainants to demonstrate how they wanted the plywood installed, showed negative joints.
- h. That the shed side of the internal wall separating the renovations from the remainder of the shed was lined with plywood of a similar grade to the other linings in the area. No second hand plywood was used.
- i. That he discussed the changes to the building consent documentation with someone in the building consent authority planning office but did not have any record of this, nor remember who.

Board's Conclusion and Reasoning

Contrary to a Consent

[26] 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.

[27] In *Tan v Auckland Council*² 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.

[28] The same applies to the ongoing verification of building work. A failure to notify the building consent authority 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 persons and property at risk of harm.

[29] The Board considers that there has been work carried out that is not in accordance with the building consent and notes:

- a. The Respondent provided unsubstantiated evidence to the Board that he had discussed the proposed changes with building consent authority but was unable to provide a date or name for this discussion.
- b. The building consent authority on the other hand advises it has no documented evidence of such a discussion in its job file and that it has a process for recording such enquiries.

[30] Section 45A of the Act deals with minor variations to a consent. In particular subsection 45A(1) clarifies that a minor variation to a building consent is not required to be made in the prescribed form. Subsection 45A(3) states that:

A building consent authority that grants a minor variation-
(a) Must record the minor variation in writing: but

² [2015] NZHC 3299 [18 December 2015]

C2-01184

(b) Is not required to issue an amended building consent.

- [31] The Act does not clarify when the variation is to be recorded.
- [32] The Department of Building and Housing has issued guidance on how to deal with minor variations to building consents³. The Board notes that this document advises that;

“All proposed minor variations need to be communicated to the BCA before the building work is undertaken”⁴

- [33] The Board notes the evidence of the Witness that these changes were considered minor and were later accepted by the building consent authority. On this basis the Board considers the Respondent has not carried out work contrary to the building consent. It does, however, bring into question whether the Respondent has been negligent or incompetent in not checking the variation with the building consent authority prior to proceeding.

Negligence and Incompetence – Consent Variations

- [34] The Board has found in previous decisions⁵ that a licenced person who commences or undertakes building work without a building consent could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct can come within the provisions of s 317(1)(b) of the Act.
- [35] In this context the Board has considered what responsibility the Respondent had to check that proposed minor variations have been notified to the building consent authority prior to them being undertaken and what responsibility he had to ensure that any discussions with the building consent authority as regards the changes are appropriately recorded.
- [36] The Board’s reasoning as regards negligence in relation to building consents is based on its interpretation that obtaining a building consent falls within the definition of “building work” in the Act. The term is defined term in section 7 of the Act as follows:

building work —

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and ...

- [37] The phrase “for, or in connection with” used in the definition connotes, in the Board’s view, a wide range of matters that could be brought into play including the requirement to obtain a building consent prior to undertaking any building work. The Board considers this interpretation is consistent with the requirement to interpret terms in the Act from the text and in accordance with its purpose so as to give effect to the purpose of Parliament⁶. The Board may (if necessary), in ascertaining the meaning, consider other indications provided in the Act. In this respect the

³ Minor variations to building consents: Guidance on definition, assessment and granting February 2010.

⁴ Page 5

⁵ Refer for example to Board Decision C1030 dated 21 July 2014

⁶ Refer s 5 of the Interpretation Act 1999

C2-01184

provisions in s 3 “Purposes of the Act”⁷, s 14E “Responsibilities of the Builder”⁸ and s 282A “Purposes of Licensing Building Practitioners”⁹ have been taken into consideration.

- [38] All of these provisions use similar references to the process used to achieve the resulting object of building work and of its compliance with a building consent and the building code. On this basis the Board has formed the view that the process of obtaining a building consent is an integral part of the building process and ensuring that a building consent has been obtained naturally fits within the definition of “building work”. The words “work, for and in connection with...” (the construction process) is sufficiently wide to include acts (or omissions) of obtaining or ensuring a consent is present before work commences. In the Board’s view the interpretation fulfils what Parliament’s overall intention was, namely no person, licensed or otherwise should commence work (which requires a building consent), without first obtaining the building consent or ensuring one has been obtained.
- [39] Such a finding is also consistent with the disciplinary provisions of the Act which ensure licensed building practitioners are held to account and the public are protected from those who fail to meet the standards expected of them. If the only course of redress open was via s 40 of the Act, then the licensing provisions which ensure the public are informed when engaging licensed building practitioners including whether they have been subjected to any disciplinary matters¹⁰ would not be achieved.

⁷ Section 3 Purpose

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

⁸ S 14E Responsibilities of builder

- (1) In subsection (2), builder means any person who carries out building work, whether in trade or not.
- (2) A builder is responsible for—
 - (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;
 - (b) ensuring that building work not covered by a building consent complies with the building code.
- (3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—
 - (a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and
 - (b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

⁹ S 282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

¹⁰ S 299 of the Act – Purpose of the register and s 301 of the Act – Matters to be contained in the register

C2-01184

- [40] The Board's considers its findings are also consistent with the decision of the High Court in *Tan v Auckland Council*¹¹ where Justice Brewer stated:

In my view, making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve the s 3 goals.

- [41] The interpretation also accords with the definitions of "negligent or incompetent" under the Act provided by Judge McElrea in *Beattie v Far North Council*¹²:

[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.

[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.

- [42] Given that the Board has found that the process of obtaining a building consent is an integral part of the building process it also finds that failing to obtain one is conduct which falls below the standards expected and shows both a serious lack of care and competence.
- [43] The Board considers this to equally apply to a Respondent's obligation to notify, check and record proposed minor variations with the building consent authority. Such processes are just as important in the consenting process and it is noted that a licensed person exposes themselves, and their client, to a high level of risk if they do not make such queries as what is proposed as a minor variation may not be accepted as such or may not meet building code requirements.
- [44] The Board notes the Respondent stated he contacted the building consent authority with regard to consent variations prior to undertaking them but the Board accepts the Witness evidence that there is a process in place for recoding contact of this type and that there was nothing on the consent file to indicate any contact had been made.
- [45] On this basis the Board finds that the Respondent has been negligent and this finding is made irrespective of the fact that the variations, in the end, turned out to be acceptable. It is the process of obtaining prior consent and the risks of not doing so that are of importance, not the eventual outcome.

¹¹ [2015] NZHC 3299 [18 December 2015] at paragraph 35

¹² Judge McElrea, DC Whangarei, CIV-2011-088-313

Negligence or Incompetence – Building Work

[46] 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*¹³. 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.

[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.

[47] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*¹⁴ 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.

[48] The Board considers:

- a. The action of the Respondent in sealing the airgap between the window and the framing before the exterior linings and window flashings have been completed as not being consistent with normal trade practice.
- b. The method of altering the door opening sizes and the installation of the lintel and particularly that the work was left incomplete, to be remedied at a later date, to be at risk of not being completed at all and not consistent with good trade practice. The Board notes the Respondent gave evidence that this work was not complete.
- c. There was insufficient evidence to establish conclusively the jointing requirements for the plywood linings.
- d. The Respondent has been tardy in his paperwork and record keeping in that;
 - i. The Contract has not been executed in accordance with the Act, nor in manner that clearly defines the client's requirements;
 - ii. He has failed to get written confirmation of changes and variations which have subsequently led to the contractual dispute;
 - iii. He has proceeded with work which is at variance to the building consent documentation (albeit considered minor and later accepted by Council) without clear records of the Councils agreement to the same.

¹³ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁴ [2001] NZAR 74

C2-01184

And that a more diligent attention to this may have avoided the confusion with respect to the Complainants expectations.

- [49] The Board notes that the above issues demonstrate elements of both negligence and or incompetence by the Respondent.
- [50] In past decisions the Board has considered that a cumulative number of negligent and incompetent actions may elevate the actions of the Respondent to a level that meets the threshold for “*serious lack of care*” as referred to by Judge McElrea.
- [51] Notwithstanding a number of minor instances the Board, in considering the evidence, is not satisfied that such a level has been demonstrated in this case.

Board Decision

- [52] The Board has decided that Respondent **has** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and **should be** disciplined.
- [53] The Board has decided that Respondent **has not** 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) and **should not be** disciplined.

Disciplinary Penalties

- [54] 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.
- [55] 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.*¹⁵

- [56] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*¹⁶:

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.

- [57] The *High Court in Patel v Complaints Assessment Committee*¹⁷ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

¹⁵ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹⁶ [1992] 1 NZLR 720 at p 724

[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.

- [58] The Board will consider the question of penalty on the basis of the above principles and it invites the Respondent to make written submissions on the matter of possible disciplinary penalties. Such submissions may include any mitigating matters the Respondent considers the Board should take into consideration together with information on the Respondent's personal and financial circumstances.

Costs

- [59] 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."

- [60] 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*¹⁸ 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."

- [61] The judgment in *Macdonald v Professional Conduct Committee*¹⁹ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*²⁰ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [62] In *Collie v Nursing Council of New Zealand*²¹ 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

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁸ HC, Wellington, AP23/94, 14 September 1995

¹⁹ HC, Auckland, CIV 2009-404-1516, 10 July 2009

²⁰ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

²¹ [2001] NZAR 74

C2-01184

level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.

- [63] The Board will consider the question of costs on the basis of the above principles and it invites the Respondent to make written submissions.

Publication of Name

- [64] 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.
- [65] 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.

- [66] 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.
- [67] The Board will consider the question of publication on the basis of the above principles and it invites the Respondent to make written submissions.

Submissions

- [68] If the Respondent wishes to make written submissions in relation to penalty, costs and publication then the submissions are to be received by the board by 18 March 2016.

Right of Appeal

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

Signed and dated this 3rd day of March 2016



Mel Orange
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.*