

BPB Complaint No. C2-01233

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 14 August 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, 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) 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);
 - (c) 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
 - (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 Bricklaying and Blocklaying – Structural Masonry; Veneer Licence issued 1 December 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).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|------------------|
| Chris Preston | Chair(Presiding) |
| Richard Merrifield | Deputy Chair |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |

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[6] The matter was considered by the Board in Auckland on 16 March 2015 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:

Alastair Dumbleton	Counsel for the Registrar
Sarah Romanos	Board Secretary
[Omitted]	Respondent
[Omitted]	Complainant
Ron Pynenburg	Special Adviser to the Board (by telephone)

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 1 December 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] On 21 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 that does not comply with a building consent (s 317(1)(d) of the Act); and
- (b) 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).

[12] The Board requested a Special Adviser be appointed to prepare a report. Ron Pynenburg's report dated 25 February 2016 was received and circulated to the Respondent and Complainant.

[13] On 1 March 2016 at 10 a.m. a pre-hearing teleconference was convened by Chris Preston. 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 1.p.m.

[15] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.

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- [16] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [17] The matter before the Board related to the substitution of a product that was detailed on the consented plans for another comparable product without first obtaining a variation to the consent and the failure to provide a record of work following the completion of restricted building work.

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 Board was provided with a number of documents prior to the hearing which it entered into evidence and took into account.
- [20] The Special Adviser confirmed his report and stated the product substitution (Supercrete for the specified Hebel product and their associated finishing systems) would have been a minor variation. He would have expected the variation to be agreed to by the owner, the designer and the building consent authority prior to it being undertaken. He confirmed this process is made clear in the readily available Guidance Documentation – Minor Variations to Building Consents: Guidance on Definition, Assessment and Granting. As regards the performance of the products he noted both achieve compliance with the Building Code and both are Code Marked and are, as such acceptable to a building consent authority.

¹ [2009] 1 NZLR 1

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- [21] The Complainant questioned the Special Adviser as regards the substitutions submitting there were three substitutions; a 75 mm product for a 50 mm product, blocks for panel product and of one name brand for another. He also questioned the finishing system used and whether that would be more critical in the variation process than the underlying panel or block. The Special Adviser noted the substituted supercoat product is a Code Marked product which meets Building Code compliance requirements.
- [22] The Complainant confirmed the Respondent was engaged directly by him. There were other trades on site including Reliant Residential who were doing carpentry work.
- [23] The Respondent gave evidence that he saw no difference between the products and that he often uses Supercrete when Hebel is not available from his supplier. He stated he did not see Hebel on the drawings till after he had sourced the product but he stated he had originally suggested Hebel as a product. He stated he spoke to the project manager for the builder, Reliant Residential, who said a substitution would be okay.
- [24] The Respondent also stated he spoke to a council inspector prior to undertaking the work and that the inspector said it would be alright. He did not produce any corroborating evidence to substantiate his claims that he had spoken to the project manager or the building consent authority. Overall he did not think it was a major issue and it had always been normal trade practice in the past to just change one comparable product for another. He did note that the new building environment required more documentation and process.
- [25] The Respondent accepted the he would, in the future, go to the council before he made any product substitutions.
- [26] The Complainant stated the Respondent had the plans well in advance of the work commencing.
- [27] An Auckland Council site meeting note dated 14 October 2014 was included in the documents provided to the Board. This noted a requirement for a record of work from the Respondent and the noncompliance of the works due to the approved detail not having been followed and the requirement for a designer to submit new detail showing how the changes would achieve compliance.
- [28] The Complainant advised the record of work had recently been provided via [omitted]. It simply stated block work.
- [29] The Respondent stated he gave the record of work to Reliant Builders on or about 19 November 2014. He stated he had not provided it to the owner or to Auckland Council.

Board's Conclusion and Reasoning

Contrary to a Consent

- [30] 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 must be submitted as a variation to the consent before any further work can be undertaken.

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- [31] An exception is made for minor variations as defined in s 45A of the Act. Work can continue if the variation is considered to be minor in nature and guidance is provided as to the process to be used when dealing with what might be a minor variation. The required documentation is then submitted at a later stage and often as a mop up at the end of the job.
- [32] Key to this minor variation process is obtaining agreement with the owner and then consulting with the designer and the building consent authority. The rationale for these latter steps is to ensure that the variation is actually minor before work is undertaken and that the variation will still meet Building Code and will not adversely affect other parts of the building work.
- [33] Put quite simply the minor variation has to be agreed to by all the key parties prior to it being undertaken, not once it has already been done.
- [34] The Board accepts the Special Adviser's opinion that the variation was minor and that it would have met Building Code requirements.
- [35] The Board does not accept the Respondent's evidence that he advised the builder's project manager and checked with an Auckland Council inspector prior to making the product substitution. Even if he did check with the project manager he was engaged directly by the Complainant and as such the project manager could not be considered to have been the Owner's agent. As such he should have obtained the Owner's express agreement.
- [36] As regards the inspector the Respondent has not provided any evidence to substantiate his claim he checked with him prior to substituting the product and his evidence is in direct contradiction to the Auckland Council site note produced.
- [37] Having found that the Respondent did not undertake the necessary steps to process a minor variation the Board finds that the Respondent, in substituting one product for another, has not built in accordance with the building consent as, at the time, there was no minor variation in place to allow for the change.

Record of Work

- [38] 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.
- [39] 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.
- [40] 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.
- [41] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in s 88(1) simply states "on completion of the restricted building work ...". The Board found in C2-01170 that completion will

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

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have occurred where it is clear the licensed building practitioner will not be able to carry out any further restricted building work on a site.

- [42] The Board accepts the Respondent provided a record of work in November 2014. It was not, however provided to the owner and the territorial authority but to the builder. The Respondent was not employed by the builder and as such it cannot be argued that the builder was acting as the owner's agent. Accordingly the record of work provisions in the Act have not been complied with.

Board Decision

- [43] The Board has decided that Respondent has:
- (a) 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
 - (b) 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.

Disciplinary Penalties

- [44] 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 Actⁱ.
- [45] 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.
- [46] 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.
- [47] 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.
- [48] 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.*³
- [49] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁴:

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

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.

- [50] The High Court in *Patel v Complaints Assessment Committee*⁵ 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.

- [51] In all the circumstances of the case the Board considers a fine of \$1,000 to be the appropriate penalty.

Costs

- [52] 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."

- [53] 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*⁶ 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."

- [54] The judgment in *Macdonald v Professional Conduct Committee*⁷ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*⁸ where the judgment

⁴ [1992] 1 NZLR 720 at p 724

⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

⁶ HC, Wellington, AP23/94, 14 September 1995

⁷ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁸ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

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referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [55] In *Collie v Nursing Counsel of New Zealand*⁹ 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.

- [56] The Board considers the sum of \$1,000 to be a fair and reasonable contribution toward the costs of, and incidental to, the Board inquiry.

Publication of Name

- [57] 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.
- [58] 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.

- [59] 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.
- [60] The Board does not consider any further publication is required.

Penalty, Costs and Publication Decision

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

Penalty: Pursuant to s 318(1)(f) of the Act, 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 \$1,000 (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 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.

⁹ [2001] NZAR 74

Submissions on Penalty Costs and Publication

- [62] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 2 May 2016.
- [63] If no submissions are received then this decision will become final.
- [64] 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

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

Signed and dated this 11th day of April 2016



Chris Preston
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.