

BPB Complaint No. C2-01304

IN THE MATTER OF

Under the Building Act 2004 (the Act)

An inquiry by the Building Practitioners' Board
under section 315 of the Act

AGAINST

Thomas Clegg, Licensed Building Practitioner
No. BP 115256

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The matter before the Building Practitioners' Board (the Board) is a Board led inquiry into the conduct of Thomas Clegg, Licensed Building Practitioner (the Respondent).
- [2] The inquiry arose out of a resolution made by the Board following a hearing held into the conduct of another licensed building practitioner¹.
- [3] The matter being investigated is whether 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); and
 - (b) has breached s 314B of the Act (s 317(1)(h) of the Act).
- [4] The Respondent is a Licensed Building Practitioner with a Design Licence (area of Practice 2) issued 17 May 2012.
- [5] 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).
- [6] The following Board Members were present at the hearing:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
- [7] The matter was considered by the Board in Wellington on 13 July 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [8] The following other persons were also present during the course of the hearing:

¹ Board Decision dated 31 August 2015.

C2-01304

Greg La Hood	Counsel for the Registrar
Gemma Lawson	Board Secretary
Thomas Clegg [Omitted]	Respondent Witness for the Respondent
Hans De Vries	Building Control Officer, Masterton District Council
Ron Pynenburg	Special Adviser to the Board

Members of the public were not present.

- [9] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [10] On 25 February 2016 the Registrar of the Board prepared a report in accordance with reg 19 and 20 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the inquiry. It included a report from Ron Pynenburg as Special Adviser to the Board.
- [11] On 24 March 2016 the Board considered the Registrar's report and in accordance with reg 22 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);
 - (b) has breached s 314B of the Act (s 317(1)(h) of the Act); and
 - (a) 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).
- [12] On 30 June 2016 a pre-hearing teleconference was convened by Chris Preston, Board Chair. 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.

Function of Disciplinary Action

- [13] The common understanding of the purposes of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom².
- [14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*³:

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

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

C2-01304

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.

- [15] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

- [16] The hearing commenced at 9.15am.
- [17] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [18] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Inquiry

- [19] The Board’s inquiry arose out of a complaint hearing into the conduct of another licensed building practitioner⁴. Following that complaint the Board resolved to initiate an inquiry under reg 18 into the Respondent’s conduct as it relates to [omitted]⁵.
- [20] The Board identified the following conduct as matters that would be inquired into:
- (a) the circumstances surrounding a natural hazard notice relating to the land including whether the Respondent should have engaged a geotechnical engineer;
 - (b) the appropriateness of the Respondent performing a penetrometer test and the competence of the test;
 - (c) the veracity of a producer statement – Balustrade System Engineering Design (PS1) provided with the building consent documentation;
 - (d) the design of a deck; and
 - (e) the general competence of the plans and specifications submitted for the building consent.

Evidence

- [21] 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*⁶ where Justice McGrath in the Supreme Court of New Zealand stated:

⁴ Complaint Decision C2-01134 dated 31 August 2015

⁵ Board Resolution dated 13 October 2015

⁶ [2009] 1 NZLR 1

[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.

- [22] The Respondent was engaged by the owner to design a residential dwelling at Castlepoint. The site had sloping contours. A geotechnical report prepared for the Balfour subdivision resource consent application had identified a natural hazard at the parcel of land under application for subdivision. The Council in granting the subdivision approval imposed special conditions including that “*all dwellings to have specifically designed foundations*”.
- [23] The Respondent was somewhat familiar with the location stating that he visited from time to time as he liked the area. He completed a site visit prior to undertaking the design with the owner at which time they took some spot levels. He then proceeded to design the residence and to submit the plans and specification for a consent which was granted. A subsequent amendment to the consent was sought to change the cladding.
- [24] The Respondent provided a written response to the inquiry on 14 December 2015 in which he stated:
- (a) his role was to complete drawings and documents for the owner to lodge for a consent and to assist the owner through the consenting process;
 - (b) he assisted the owner to complete levels to do a contour plan;
 - (c) his view was that the builder was not able to understand the drawings and made poor decisions and executed the build poorly; and
 - (d) he did not have a supervision role for the build but did visit the site a few times.
- [25] The Respondent provided a further response on 23 December 2015 in which he noted:
- (a) he did the penetrometer tests with the owner and gave the results to a local engineer who confirmed good ground;
 - (b) he had not seen the title or letter notifying a land hazard;
 - (c) he had used the PS1 for the past few years and adds the address and date;

C2-01304

- (d) the 100mm by 100mm posts specified for a deck were consistent with the barrier design submitted;
- (e) if the deck was higher than 3 metres then the ground would either be built up or the posts confirmed by an engineer;
- (f) the datum used for set out was the manhole lid in the street as per the site plan;
- (g) his process normally used with builds is that the builder confirms their understanding of the plans and specifications with him prior to starting;
- (h) that he does CAD drawings but considers hand drawn plans are acceptable; and
- (i) he has numerous satisfied builder customers.

[26] Ron Pynenburg provided a report to the Board dated 22 February 2016. He reviewed the documentation and provided his expert opinion which included the following:

- (a) there was no reason why the carrying out of a penetrometer test should be limited to a geotechnical engineer;
- (b) the penetrometer test recordings had not been taken down to the required depths and he had not followed the procedures outlined in NZS 3604 at any of the locations and as such had not shown competence in the test;
- (c) the Respondent had not carried out sufficient penetrometer test recordings to satisfy the requirements of NZS 3604 and therefore was incorrect to determine that good ground had been found, regardless of the existing or otherwise of natural hazards;
- (d) that the PS1 was not acceptable as it had not been reviewed by the author;
- (e) the competencies required to make the amendments the Respondent made to NZS 3604 detail in relation to the deck balustrade are those of a structural engineer and beyond those expected of the Respondent;
- (f) the details for the deck were inadequate and or incorrect. Several examples were included and he noted that the Respondent should have ground levels at the points where the maximum heights in NZS 3604 might have been exceeded to ensure NZS 3604 could be used;
- (g) that hand drawn plans can be acceptable but those of the Respondent were not of an acceptable quality, did not contain sufficient detail and were not easy to interpret;
- (h) an overall assessment that the plans were not buildable as there was too much uncertainty as to what was required to be built and that the plans and specifications should not have been consented.

[27] At the hearing the Special Adviser confirmed his report and answered questions. The Respondent did not challenge the report findings.

[28] The Respondent presented written submissions, spoke to them and answered questions. His submissions included:

- (a) details on how he went about the penetrometer test including his interactions with an engineer on how to carry out the test and his provisions of the results to the engineer for comment;

C2-01304

- (b) a note that the hazard notice on the title was entered after the building consent was lodged;
- (c) due to a lack of available information and his not being advised by those that ought to have known he was not aware of the requirement for an engineer to design the foundation but that he would have engaged one if he had known;
- (d) he did not test for lateral movement as it was not mentioned by the engineer he discussed the tests with;
- (e) acceptance that he altered the Engineer's PS1 and a statement that it would not have affected the integrity of the overall system;
- (f) that the deck design followed NZS 3604 and that levels were not taken on the tallest area of the deck and a note that if the levels were over 3 metres and outside of NZS 3604 then the ground could be built up or an engineer engaged; and
- (g) a submission as regards the suitability of hand drawn plans, the simplicity of the design and that a competent builder would have been able interpret the plans without the need to spell them out.

[29] Hans De Vries produced relevant documents from the council file including site notes detailing issues with the pile depths and ground load bearing capacity issues. A requirement for engineer tests and engineered designs was noted. They also noted the acceptance of an alternative of using a specialist pile company, Darlington Drilling, to complete the work. There were also notes on issues with the deck and the dwelling being out of alignment. Mr De Vries gave evidence that he considered the measurements on the plans were inadequate and that siting the house correctly would have been difficult given the imprecise details provided.

[30] The Respondent was questioned on his due diligence process prior to developing the plans. It was noted by Mr De Vries that the details as regards the natural hazard would have been supplied with a Land Information Memorandum and provided in a Project Information Memorandum (PIM). The Board file included the cover sheet for a PIM issued 6 May 2014 but not the PIM itself. The Respondent advised that he did not go to the Council or inspect Council files relating to the land and was not provided with any information as regards the natural hazard by the owner. He relied on what was provided to him and he used the subdivision plan given to him by the owner to determine dimensions.

[31] The Respondent also gave evidence as regards the penetrometer test he undertook noting that it was the first time he had carried one out and he did it as he knew the Council was asking for them at every site. He spent time with an engineer learning how to do the test and he followed the instructions given. He accepted in questioning that the engineer did not know the specifics of what was being tested, was not supervising the test and whilst he had seen the test results he had not seen the subsequent design or indeed been informed of the subdivision location.

[32] In terms of land contours the Respondent stated he took spot levels only and did not create a contour plan, may not have taken a level where the deck exceeded three metres and he did not realise there was a drop off at that point.

[33] As regards the producer statement he stated that the system being certified had not changed and he thought it was okay to reuse the statement. He accepted that he should not have used it and that he had not made any queries to ensure the

C2-01304

statements in it were true or that the original author was prepared to make the statement.

- [34] The Respondent accepted that it was unwise to alter NZS 3604 detail and that he had submitted the plans for a building consent on the basis that there was no specific design when there were actual elements of specific design. He stated he did not have any quality control process or peer review process.
- [35] Overall the Respondent accepted he could have done better and had learnt from the event. He submitted computer aided design (CAD) plans as an example of his current practices and competence.
- [36] The Respondent called [Omitted] who gave evidence as to his experience working with the Respondent stating that he was good with clients, had a practical approach, spent time going over the plans prior to the start of jobs, was available for queries and he had not had any issues with his plans.

Boards Conclusion and Reasoning

- [37] There are three charges for consideration. As regards each the Board has considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ 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.

Negligence

- [38] 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*⁸. 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.

- [39] There were several aspects of the Respondent's conduct that would fall within the ambit of negligence and or incompetence. These were:

- (a) the lack of due diligence prior to undertaking the design;

⁷ [2001] NZAR 74

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

C2-01304

- (b) the carrying out of the penetrometer test and the use of the results obtained;
- (c) the design of the deck; and
- (d) the detail on dimensions and set out; and
- (e) the general quality and completeness of the design, plans and specifications.

[40] The Board has found that with respect to each of the above items the Respondent has, on the basis of the tests in *Beattie*, been negligent and has shown himself to be incompetent. The Board has made this finding on the basis of the number of failings and the seriousness and implications of those failings.

[41] The Board notes the comments of the Respondent that he ensures the builder understands the plans and specifications prior to work commencing. Whilst this practice may clear up issues, a designer's plans should be able to stand by themselves, should not require clarification, and should document how the building work is to be undertaken so that code compliance is achieved. The Board has also consistently conveyed in previous decisions the message that it is not appropriate for licensed building practitioner designers to use the building consent process as a peer review or quality assurance mechanism and/or rely on the building consent authority to pick up any anomalies in the design documents.

Section 314B of the Act – Misrepresentation

[42] Misrepresentation is not defined in the Act so it bears the meaning it has at common law. A misrepresentation is a representation which is false. A representation is a statement which relates to a matter of present or past fact, not one which relates to the future⁹. It is not a statement of opinion¹⁰ or puffery¹¹. A misrepresentation may be express or implied, and may be inferred from acts or conduct as much as from words.

[43] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(a) a misrepresentation must be in relation to the licensed building practitioner's competence as that competence relates to the licensing regime under the Act. The Licensed Building Practitioners Rules 2007 (the Rules) sets out the licence class competencies in schedule 1 and the Board must consider any representations in light of those defined competencies. It is not, however, limited by those competencies as they are designed to assist the Registrar in determining whether or not a person meets the minimum required standards to be licensed. They are not an exhaustive list of all competencies expected of a licensed person.

[44] In terms of s 314B(b) competency has a wider ambit and can be read as also pertaining to the common dictionary definition of "the ability to do something successfully or efficiently"¹². Accordingly a licensed building practitioner who holds a class of licence for the building work he or she is undertaking who is not able to successfully or efficiently complete the building or design work may be working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build.

⁹ *Ware v Johnson* [1984] 2 NZLR 518 at 537

¹⁰ *David v TFAC Ltd* [2009] NZCA 44

¹¹ *Dimmock v Hallett* (1866) 2 Ch App 21

¹² Oxford Dictionary

C2-01304

- [45] The charges under s 317(1)(h) relate to the Respondent carrying out work outside of his competence in that he undertook building work that should have been carried out by an engineer. The Respondent has not held himself out as being competent in that profession and as such s 314B(a) does not apply. The Board finds, however, that he has carried out building work outside of his competence and as such s 314B(b) applies.
- [46] The Respondent, in determining that the ground bearing capacity was adequate (as opposed to carrying out the tests themselves) and in carrying out specific design by amending the provisions of an Acceptable Solution in relation to decks, has gone beyond the competence of a designer and into that of an engineer. Accordingly the Respondent is found to have breached s 317(1)(h) of the Act.

Disrepute

- [47] Turning to the third disciplinary charge of disrepute the provision is similar to that in legislation governing other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents.
- [48] The Board gave full consideration to the legal principles as regards disrepute in Board Decision C2-01111¹³ noting that the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁴ the Court of Appeal held that:
- ... the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹⁵
- [49] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions¹⁶;
 - honest mistakes without deliberate wrongdoing¹⁷;
 - provision of false undertakings¹⁸; and
 - conduct resulting in an unethical financial gain¹⁹.
- [50] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.
- [51] In the present case there are two aspects of the Respondent's conduct which could be considered to have brought the regime under the Act into disrepute. The first is

¹³ Board Decision dated 2 July 2015

¹⁴ [2012] NZCA 401

¹⁵ [2012] NZAR 1071 page 1072

¹⁶ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁷ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁸ *Slack, Re* [2012] NZLCDT 40

¹⁹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

C2-01304

the provision of the false or misleading producer statement. The second is the act of falsifying the producer statement itself.

- [52] With regard to the provision of a false or misleading producer statement the Board notes that the legal profession provision of a false undertaking was found by the Lawyers and Conveyancers Disciplinary Tribunal to have brought the profession into disrepute²⁰. In the case the Tribunal stated:

Undertakings have to be given accurately and complied with meticulously, and Mr Slack's conduct in not turning his mind (as he described it) to the precise form of his undertaking is serious negligence, and without doubt adversely affects the profession's reputation. The profession relies on undertakings to facilitate its day to day activities, so conduct which undermines the value of an undertaking is an important issue.

- [53] It is worth noting, prior to considering the statements made in the producer statement before the Board, that whilst producer statements are no longer a prescribed document under the Building Act they are still a commonly used document in the building industry and a great deal of reliance is placed on them to verify compliance and ultimately building safety and performance and compliance with the Building Code.

- [54] It is also to be noted that the provision of producer statements is considered to be building work as defined in the Act. In *Kwak v Park*²¹, an appeal to the High Court from a Weathertight Homes Tribunal decision Woolford J stated:

[50] ... the completion of producer statements is work, which can be defined as exertion or effort directed to produce or accomplish something. There is no logical reason why the ordinary meaning of work should not apply or the definition be restricted to physical work. Second, the work of completing a producer statement is in connection with the construction of a building, just as much as the physical work of applying a waterproof membrane.

- [55] Justice Woolford went on to comment at paragraph [53] of his judgment that:

It would be anomalous if the definition of building work was interpreted to exclude the completion of producer statements, which, in my view, are just as much building work as design and certification.

- [56] The Board notes that the Respondent did not take any steps to ensure the veracity of the producer statement prior to his submitting it as part of the building consent documentation. He simply took a producer statement that had previously been provided to him by its original author and modified it to cover the current job. He did not know nor enquire whether the system being certified had changed in any way or whether the statements made in it were still true or even whether the original author was still authorised to make such statements. Ultimately it was not actually the statement of the person who was purporting to make it and as such it could not safely be relied on.

- [57] Given these factors the Board considers the producer statement was, in essence, a false or misleading document and that to provide such an important document in the way that it was is something that could bring the regime under the Act into disrepute.

²⁰ *Slack, Re* [2012] NZLCDT 40

²¹ [2016] NZHC 530

C2-01304

[58] The second aspect of disrepute is the actual act of falsifying the document. The Board considers the Respondent's conduct was tantamount to fraud. In C2-01111 the Board was considering the conduct of a licensed building practitioner who had been convicted under the Resource Management Act and considered the conduct came within the provisions of s 317(1)(i). In this inquiry the Respondent has not been charged with nor convicted of any criminal behaviour. He has, nevertheless knowingly falsified a document and to do so he has engaged in conduct that is likely to bring the regime into disrepute.

Board Decision

[59] The Board has decided that Respondent has:

- (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) has breached s 314B of the Act (s 317(1)(h) of the Act);
- (a) 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).

and should be disciplined.

Disciplinary Penalties

[60] 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.

[61] 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.

[62] 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. Included in this was the evidence from [Omitted], the Respondent's acknowledgement of his own learnings and the CAD design submitted.

[63] 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 are further matters which the Board should take into consideration.

[64] 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.*²²

[65] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²³:

²² *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.

- [66] The High Court in *Patel v Complaints Assessment Committee*²⁴ 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.

- [67] The Board considers the disciplinary offending in this matter to be serious and that there is a very real risk in allowing the Respondent to continue to work as a licensed building practitioner. He has been found, in relation to the inquiry, to have not only been negligent but also incompetent in respect of:

- (a) the preliminary investigation and research he undertook with regard to the Council restrictions and notices on the subdivision;
- (b) his undertaking testing to determine the soil bearing capacity;
- (c) the completeness of the land contour analysis and the consequences on the design in relation to the height of the building above ground level;
- (d) dimensioning the building on the site so that the set out position could be determined; and
- (e) in his understanding of the regulatory regime and his belief that he could amend acceptable solutions without demonstrating how compliance with the Building Code would be met.

- [68] The Respondent has also undertaken work including design work that was outside his area of expertise and amending the design of another more qualified professional and has brought the regime into disrepute which again is a very serious matter and has worked outside of his area of competence.

- [69] In all the circumstances of the case the Board considers the cancellation of the Respondent's licence is warranted and the Board orders that he not be able to reapply for a licence for a period of not less than six months. The Board orders this as the Respondent will, if he reapplies for a licence after the expiry of the six months, be given the opportunity to demonstrate his competence.

²³ [1992] 1 NZLR 720 at p 724

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

C2-01304

- [70] The Respondent has submitted two examples of his current work. A review shows the documents show an ability to work with computer software and consideration of various elements such as Building Consent Authority zoning rules, site contours and ground conditions and the need to refer separate engineering design drawings. The drawings provided, however, are lacking in construction and product installation detail and would require more work before they would be ready for submission for a building consent. Accordingly the documentation submitted does not dissuade the Board from its position that cancellation is warranted.
- [71] The Board notes that the Respondent will be able to work under supervision in the intervening period and suggests that he uses this time to upskill under the tutelage of an experienced practitioner.

Costs

- [72] 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.”
- [73] 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*²⁵ 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.”

The judgment in *Macdonald v Professional Conduct Committee*²⁶ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*²⁷ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [74] In *Collie v Nursing Council of New Zealand*²⁸ 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.

- [75] The Board considers that the amount of \$2,000 is an appropriate sum toward the costs and expenses of, and incidental to, the inquiry by the Board.

²⁵ HC, Wellington, AP23/94, 14 September 1995

²⁶ HC, Auckland, CIV 2009-404-1516, 10 July 2009

²⁷ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

²⁸ [2001] NZAR 74

C2-01304

Publication of Name

- [76] 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.
- [77] 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.*
- [78] As a general principle 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. This is in addition to the Respondent being named in this decision.
- [79] The Board considers, as a result of the cancellation of the Respondent's licence and the seriousness of the matters, that further publication is required. Publication is also important to ensure other licensed building practitioners learn from the matter. The Respondent will not, however, be named in that further publication.

Penalty, Costs and Publication Decision

- [80] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to s 318(1)(a)(i) of the Building Act 2004, the Respondent's licence is cancelled and under s 318(1)(a)(ii) the Respondent may not apply to be relicensed until the expiry of a period of six months.
- Costs:** Pursuant to s 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 section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the register and the Respondent being named in this decision, by way of publication in Code Words and on the Board's website. The Respondent will not be named in the publication.**

Submissions on Penalty Costs and Publication

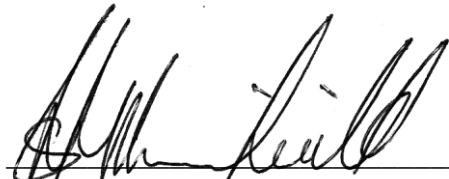
- [81] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **06 September 2016**.
- [82] If no submissions are received then this decision will become final.
- [83] If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

C2-01304

Right of Appeal

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

Signed and dated this 17th day of August 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.*