

BPB Complaint No. C2-01329

IN THE MATTER OF

AGAINST

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

Kevin Keen, Licensed Building Practitioner
No. BP 127263

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 22 December 2015 in respect of Kevin Keen, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent had, in relation to building work at [omitted] Christchurch:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 13 June 2014.
- [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) |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in Christchurch on 31 August 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

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[7] The following other persons were also present during the course of the hearing:

Terri Thompson	Counsel for the Registrar
Sarah Romanos	Board Secretary
Kevin Keen	Respondent
Richard Reid	Representative for the Respondent
[Omitted]	Complainant
Warren Nevill	Special Adviser to the Board
[Omitted]	Witness
[Omitted]	Witness for the Respondent

Members of the public were not present.

[8] The Respondent had advised that he would have legal representation at the hearing. The legal representative subsequently advised that he would not appear but that Mr Reid would act as the Respondent's representative. It was noted that Mr Reid was originally to be a witness for the Respondent and it was confirmed that he would only be acting as a representative and would not be giving evidence.

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

Board Procedure

[10] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[11] On 6 May 2016 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. It included a report from Warren Nevill as Special Adviser to the Board.

[12] On 26 May 2016 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 in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (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).

[13] On 15 August 2016 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.

Function of Disciplinary Action

[14] 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 Kingdom¹.

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

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[16] 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

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

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

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

Substance of the Complaint

[20] The allegations made by the Complainant included that the Respondent:

- (a) did not understand the critical need for ensuring adequate support and accurate setting out of the formwork and placed boxing on both slabs out of line and out of level, which were clearly visible;
- (b) requests were made for additional supports and for levels to be checked which were ignored;
- (c) the formwork was incorrectly placed and was not sufficiently supported with both vertical and horizontal faces incorrectly positioned out of level.

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

² [1992] 1 NZLR 720 at p 724

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- (d) the structural nibs that carry the brickwork cladding were not vibrated to give a solid bearing and were incorrectly positioned on the slab;
- (e) a survey of the slab using a calibrated laser level found the levels were out by up to 32mm;
- (f) the levels and external face of the entire slab required remedial works due to the negligent and incompetent work carried out and supervised by the Respondent; and
- (g) a record of work was not provided on completion of restricted building work.

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*³ 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.

- [22] The complaint related to the construction of two blocks of residential units. The Complainant was an employee of Maxim Homes (Ashburton) Limited (Maxim) who were contracted to build the units. Maxim in turn contracted MS Structures Limited (formerly MS Happen Limited) to undertake the construction of the foundations. The Complainant alleged various issues with regard to the foundations as outlined in paragraph [20].
- [23] The Respondent, by way of his employer’s general manager, provided a response to the complaint. Included in it was a submission that a confidential settlement agreement had been reached in relation to matters contained in the complaint and that as such the Complainant was restrained from making a complaint. The Respondent also outlined that:

³ [2009] 1 NZLR 1

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- (a) the respondent made no representations to the complainant as to the capability and expertise to both design and construct the foundations;
 - (b) the Respondent was already aware of the need for more pegs; the works were incomplete and it was always intended that additional supports would be installed. The pegs were on site at the time of the comments and were installed prior to the pouring of the concrete;
 - (c) at no time prior to the concrete pour did [omitted] comment on the need to check the levels. The Respondent effected the statutory requirement for a Location Certificate by the project surveyor and at the time of carrying this out they also checked the levels on the formwork. The surveyor commented to the respondent it's within 5mm, close enough;
 - (d) he denied that at the time of pouring the concrete the formwork was out of line and/or out of level. The standard procedure of MSH is to "form the level of the formwork to be, of the order of, 20mm above the finished floor level and the concrete placer then finishes the floor to a level determined by a laser level. This placement methodology is a standard building practice;
 - (e) all the works were set out to the backset profiles erected by the project Surveyor. Prior to the pour of the concrete [omitted] made a comment to the respondent to the effect of "the slab on this side is 15mm too long ... but what's 15mm between friends". The Respondent checked the set-out and states it was set to the Surveyor's profiles;
 - (f) Maxim failed to provide adequate resources to install their J Bars for the precast concrete wall panels and holding down their bolts. They requested the concrete pour be re-scheduled again but this was not agreed to;
 - (g) the structural nibs referred to in the complaint are rebates in the edge of the slab. These were installed correctly. [Omitted] placed timbers on the rebate formwork to align and attach the J Bars and also hold down the bolt plates. The respondent advised [omitted] that the bolts and starter plates should be secured in place by fixing it to the reinforcing steel. [Omitted] responded with "it will be right, we will do it properly"; and
 - (h) the Respondent also advised [omitted] "not to place holding bolts set-out timbers on the formwork but to also fix them to the reinforcement". This advice was rejected by [omitted]. As a result of this the loading of the timber on the rebate formwork dropped and upon fixing the timber to the formwork he also bent the formwork into the centre of the slab.
- [24] A detailed response regarding the photos provided with the complaint was also provided.
- [25] The Board's focus was on a list of alleged deficiencies which were identified by the Special Adviser at page 7 of his report.
- [26] The Respondent's Representative made an opening submissions. His submissions noted:
- (a) the case law holds that a lack of care or skill in this context must be serious for the section to apply. The threshold of 'seriousness' is a high one;
 - (b) in respect of the specifics of negligence or incompetence under s 317(1)(b) he submitted:

Formwork

- i. the Respondent's work or the work supervised by him suffered from deficiencies. That the formwork, expected to be adequate, was not adequately supported and this has never been. As a result, the concrete forced the formwork to move and some of the sides of the slab set unevenly. Without any contact with the complainant, MSH immediately initiated remedial works at MSH's cost; and
- ii. the formwork was not incorrectly placed, or placed out of level. Following standard industry practice, it was installed to a higher level than required for the floor level, and the concrete was poured to a level indicated by a laser level;

Founding Surface for Structural Steel

- i. the Respondent denied the work was carried out negligently or incompetently. Whilst it is admitted that the underlying surface was left with a rough finish after the slab remediation works were done, this did not affect the structural integrity of the framework in any way, nor did it cause the finished product to suffer aesthetically;
- ii. standard industry practice is to obtain the appropriate position of the steel column base plates using metal shims inserted between the base plate and the concrete. 1 A number of shims may be used to achieve the required level (20mm above the slab). The voids are then filled with dry pack grout. The steel base plates never connect directly with the concrete slab;
- iii. accordingly, any roughness in the founding surface is rendered immaterial: the shims keep the base plate in the desired position regardless of the surface, and the grout fills in the gaps obscuring any remaining roughness from view; and
- iv. in the present case, the above methodology was followed and resulted in a finished product no different to that which would have been achieved had the concrete been flat;
- v. in addition, the template fixing for the base plates was installed by Maxim (against the advice of MSH) to the perimeter formwork. The standard industry practice is to fix the holding down bolts to the reinforcing cages, free of timber templates. If timber templates are to be used, then proofing holes should be drilled in the template to allow the concrete underneath to escape and show that the void had been filled. Any issues in connection to this are not the fault of the Respondent;

Concrete Floor Levels

- i. it was admitted that the floor levels were out of tolerance. However, this defect was rectified by the use of floor levelling compound applied to the slab at MSH's expense;
- ii. it was part of the settlement reached between Maxim and MSH; and
- iii. it is not uncommon in practice for a contractor to have to return to site and remedy any issue;

General Surface Finish

- i. the Respondent denied the allegations as to the general finish of the concrete work, and says that any defects have been rectified or otherwise compensated for, are of no importance given that the building is now complete and has been granted a code compliance certificate, or are not due to any lack of care or ability or skill on the Respondent's part;
 - ii. the finish on the rebates have not adversely affected the veneer cladding in any way. The cladding has been installed plumb, and meets the building code;
 - iii. alleged defects in the composition of the concrete are not connected with the respondent's work or supervision. Where the finish appears to have a higher concentration of aggregate (which is not honeycombing), this is due to uneven distribution of aggregate during the mixing process, and has nothing to do with the Respondent's care or skill.
 - (c) as regards the allegation that building work had been carried out contrary to a building consent under s 317(1)(d) the Respondent accepted there was a consent, where it fell short of compliance with the building consent, those works were rectified so that they did comply and the building works (all of, not just those he was involved with) are now complete and a code compliance certificate has been issued; and
 - (d) the Respondent denies that a record of work was requested 4 or 5 times. No indication of a request was evident until 3 May 2016, well after this complaint was lodged.
- [27] Evidence was heard from the person who placed the concrete. He outlined how he had considerable experience in the industry and how had previously been a licensed building practitioner but was not licensed at the time the work was carried out. He advised that they used a laser to determine levels and how the formwork was 20mm higher than the finished level. He did not know why the final floor levels were out. He confirmed the Respondent was on site when the concrete was placed.
- [28] The Respondent gave evidence confirming the matters contained in the submissions. He gave evidence that they constructed the floor in accordance with the plans MHS developed and confirmed that those drawings formed part of the consented drawings. He also gave evidence that he was on site during the pour directing traffic and concrete trucks. He was not sure why the concrete had slumped or why the formwork had bulged.
- [29] Evidence was heard as to a general lack of coordination and communication between the lead contractor and the subcontractor for whom the Respondent worked. Each was relying on the quality of the work of the other.
- [30] As regards the record of work the Respondent stated one was provided within 7 days of a demand being made by Maxim's lawyers. A record of work dated 9 May 2016 was part of the documentation before the Board.

Board's Conclusion and Reasoning

Negligence

- [31] 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*⁴. 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.

- [32] The Board accepts the submission made that the required threshold is high. It has considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁵ 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.

- [33] The Board notes there were areas which were accepted as being in error such as the bulging in the formwork and the uneven floor levels. The Respondent has submitted that as these matters have been settled between the parties the Board is precluded from dealing with them. The Board does not accept this.
- [34] Firstly any agreement to not make a complaint is not enforceable and has no bearing on the Board. A contract cannot remove a statutory right to make a complaint and any issues between the contractual parties as regards this provision is a matter between them.
- [35] The Respondent has also submitted that the issues have been identified and rectified and as such disciplinary action is not warranted. The Board accepts that issues can arise during a build and it does not always follow that a licensed building practitioner has been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right first time and not to have to rely on having to rectify problems after the fact.
- [36] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:

⁴ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁵ [2001] NZAR 74

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- (a) the extent of the error, omission or noncompliance;
 - (b) whether failings by the Respondent in their planning and execution of the building work have contributed to the issue arising or not; and
 - (c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.
- [37] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioners attention it is more likely a disciplinary outcome will follow but the Board will take into account the overall circumstances leading up to and after the issue occurring into account.
- [38] The level of issues, especially in relation to the bugling of the formwork, the floor levels and the foundation surface, were significant and were not the sort of work expected of a licensed building practitioner. Considerable remedial work was required to rectify these issues which should not have occurred in the first place. The remediation undertaken will, however, be considered in terms of mitigation.
- [39] The Board also notes that it heard evidence as to a general lack of coordination and oversight of the building work. Both the main contractor and the Respondent contributed to this. The Respondent should have taken more care with the supervision of the foundation work and in coordinating with the main contractor.
- [40] In all the circumstances the Board finds that the Respondent has been negligent and the Board considers the matters to be sufficiently serious enough to warrant disciplinary action.

Contrary to a Consent

- [41] 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.
- [42] In *Tan v Auckland Council*⁶ 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.*
- [43] The same applies to the ongoing verification of building work. A failure to notify the Council 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 person and property at risk of harm.
- [44] In this case while there may have been some matters which were not technically to the consent the Board did not consider they were serious enough to warrant disciplinary action.

⁶ [2015] NZHC 3299 [18 December 2015]

Record of Work

- [45] 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 territorial authority on completion of restricted building work⁷.
- [46] 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.
- [47] The Board discussed issues with regard to records of work in its decision C2-01170⁸ 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.
- [48] 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 ...”. As such it is open to the Board to interpret how soon after actual completion. It does not state on demand or request.
- [49] On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as “immediately on completion” or “as soon as reasonably practicable”. Given this and taking into consideration the requirement to give effect to the purpose of Parliament⁹ the Board considers the use of the words “on completion” denotes a short time thereafter.
- [50] A degree of reasonableness has to be applied to this interpretation. Differing circumstances may result in longer or shorter timeframes.
- [51] In this instance there was a significant delay and the record was only provided on one being demanded. As stated above the Act does not require a demand. The obligation is to provide one whether it is asked for or not. A licensed building practitioner must act of their own accord and not wait for others to remind them of their obligations.
- [52] Given the above the Respondent is found to have not provided a record of work on completion of restricted building work as per the requirements of the Act.
- [53] Section s 317(1)(da)(ii) of the Act does, however, provide for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. No good reason other than a lack of a demand for a record of work has been put forward.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁹ Section 5 of the Interpretation Act 1999

Board Decision

[54] The Board has decided that Respondent has:

- (a) carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide 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.

[55] The Board has also decided that the Respondent has not carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act).

Disciplinary Penalties

[56] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.

[57] 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.

[58] 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.

[59] The Respondent submitted that in the event that the Board considers the respondent's conduct to have breached any of the relevant subsections of ss 317 and/or 88, the respondent respectfully submits that the work done and payments made by virtue of the settlement agreement ought to constitute sufficient penalty, should any penalty be deemed appropriate. By the same token, any contribution towards costs would be, with respect, unduly punitive.

[60] 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.

[61] As stated earlier 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.

[62] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁰ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

- [63] In all the circumstances and taking into consideration the mitigation heard the Board finds that a fine of \$2,000 is the appropriate penalty. This is consistent with fines ordered for similar matters.

Costs

- [64] 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.”

- [65] 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*¹¹ 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.”

- [66] The judgment in *Macdonald v Professional Conduct Committee*¹² confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹³ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [67] In *Collie v Nursing Council of New Zealand*¹⁴ 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.

- [68] The Board finds that the sum of \$1,500 is an appropriate sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

¹¹ HC, Wellington, AP23/94, 14 September 1995

¹² HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹³ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁴ [2001] NZAR 74

Publication of Name

- [69] 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.
- [70] 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.*
- [71] 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.
- [72] The Board does not consider any further publication is required in this instance.

Penalty, Costs and Publication Decision

- [73] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.
- Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (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 and him being named in this decision.

Submissions on Penalty Costs and Publication

- [74] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 25 October 2016.
- [75] If no submissions are received then this decision will become final.
- [76] 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

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

Signed and dated this 4th day of October 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.*