

Before the Building Practitioners Board
At Auckland

BPB Complaint No. C2-01368
And C2-01369

IN THE MATTER OF

Under the Building Act 2004 (the Act)

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

AGAINST

Trevor Murdie, Licensed Building Practitioner No. BP 100379 – The First Respondent (Complaint C2-01369)

AND

Edward Nelson, Licensed Building Practitioner No. BP 115475 – The Second Respondent (Complaint C2-01368)

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The Complainant lodged a complaint with the Building Practitioners' Board (the Board) on 7 March 2016 in respect of Trevor Murdie, Licensed Building Practitioner (the First Respondent) and Edward Nelson, Licensed Building Practitioner (the Second Respondent).

The complaint alleged the Respondents have, in relation to building work at [omitted]:

- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (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
- (c) 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).

- [2] The First Respondent is a Licensed Building Practitioner with Carpentry and Site Area of Practice 2 Licences issued 17 September 2008.

- [3] The Second Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 31 March 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:
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|-------------------|------------------|
| Chris Preston | Chair(Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
- [6] The matter was considered by the Board in Auckland on 5 October 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|--------------------|---|
| Gemma Lawson | Board Secretary |
| Trevor Murdie | First Respondent |
| Edward Nelson | Second Respondent |
| William Hursthouse | Technical Assessor for the Board (by phone) |
| John Potter | Witness for the First Respondent |

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 28 June 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations for the First Respondent.
- [11] On 18 July 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations for the Second Respondent.
- [12] The purpose of the above reports is to assist the Board to decide whether it wishes to proceed with the complaint. The report included information obtained by a Technical Assessor, William Hursthouse, appointed to assist with the investigation.
- [13] On 4 August 2016 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the First Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) 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).

- [14] On 4 August 2016 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Second Respondent 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).
- [15] On 1 September 2016 separate pre-hearing teleconferences were convened by Board Chair Chris Preston. The respective Respondents were present, the hearing procedures were explained and each Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [16] The common understanding of the purpose 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.
- [17] 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.*
- [18] 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

- [19] The hearing commenced at 09.35 a.m.
- [20] With the consent of both Respondents at the hearing the two matters were consolidated and heard together.
- [21] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

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

- [22] A summary and opening provided by Counsel for the Registrar was read into the record.

Substance of the Complaint

- [23] The allegations in respect of the First Respondent in respect of negligence and or incompetence were set out in a technical assessment completed by William Hursthouse. Identified issues included:

- (a) missing weatherboards;
- (b) portico posts with incorrect treatment;
- (c) no exterior paint on small areas of weatherboards of associated trim;
- (d) plate not covering hole for a shower fixture;
- (e) slumping of a water storage tank;
- (f) missing vanity mirrors;
- (g) installation of downpipes;
- (h) no vermin proofing in small areas of cladding;
- (i) scribes between bricks and weatherboards too small;
- (j) lack of fixings to support bar on window joinery to a deck;
- (k) head flashings over joinery to weatherboard cladding;
- (l) window and cladding junction in brick cladding not sealed; and
- (m) flashing between two windows loose and not sealed.

- [24] The Complainant also alleged that both the Respondents had failed to provide a record of work on completion of restricted building work.

Evidence

- [25] 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

³ [2009] 1 NZLR 1

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.

- [26] At the hearing the evidence as regards records of work with respect to both Respondents was received prior to dealing with the negligence or incompetence matters in relation to the First Respondent.

Record of Work – Second Respondent

- [27] The Second Respondent clarified the restricted building work that he carried out and/or supervised. He stated that he did building work on the foundations, supervised the install of plasterboard bracing and did some cladding work including scribes around two windows. He further stated that his involvement as regards carpentry work came to an end when the Complainant demanded that he remove the First Respondent, who was subcontracted to provide the carpentry labour, from the job. At this stage he agreed to reduce the total contract sum by the amount of labour remaining to complete the job and for the Complainant to directly engage her own carpenter. He noted that some restricted building working was still to be complete being small amounts of cladding work.
- [28] The Second Respondent also gave evidence that between the First Respondent being removed from the job, which was on or about 23 October 2015, and his providing a record of work he was in discussions with the Complainant and a representative she had engaged, to resolve contractual issues. Those discussions included the provision of a record of work and they broke down on or about 23 February 2016. The complaint was made on 7 March 2016. The Second Respondent then provided a record of work dated 31 March 2016 to the territorial authority and to the owner by post on the same day. The owner’s complaint noted she had not received it.
- [29] The Second Respondent also noted that his normal practice is to deal with all compliance and other documentation at the end of a job when assisting the owner to apply for a Code of Compliance Certificate. In this instance he stated that the owner did it without his assistance or involvement.

Record of Work – First Respondent

- [30] The First Respondent also noted that he has provided a record of work since receiving notification of the complaint. His record of work was dated 9 April 2016 and it was received by the owner on or about 4 May 2016.
- [31] The First Respondent stated his involvement in the work came to an end on or about 23 October 2015. His normal practice was to provide the record of work to the head contractor when documentation was put together for a Code of Compliance Certificate. On this occasion he was concerned that he would be providing a record of work for restricted building work that was not complete and he was mindful of his

future liabilities should he provide one. He was also waiting to see what was required of him by the head contractor (the Second Respondent). When asked why he had not provided a record of work for what he had done he stated that he was not aware at the time that he could do a partial record of work and that he had not made any enquiries in this respect.

- [32] In questioning the First Respondent stated that he had not made any enquiries of the Second Respondent as regards the provision of his record of work until after he was notified of the complaint. He also accepted that he had been asked for a record of work by the Complainant but denied he had used the words complained about and said that it was at about the same time as the complaint was made. He stated he had not withheld his record of work because he was disgruntled as set out in the Complaint but because he was unsure as to what he should do.

Negligence and Incompetence – First Respondent Only

- [33] The Technical Assessor was phoned. His report and findings were worked through with each of the Respondents being asked to provide evidence on each possible issue. The evidence the Board heard was that:
- (a) missing weatherboards: incomplete work at the time the carpentry aspect of the contract came to an end;
 - (b) portico posts with incorrect treatment: metal posts were not installed by the First Respondent. The Second Respondent installed the metal posts but not the wood trim which is at issue;
 - (c) no exterior paint on small areas of weatherboards of associated trim: the weatherboards were pre-primed and installed on the north side of the building. It was accepted that areas are missing paint but the Second Respondent stated the work was carried out by an employee of his. The First Respondent confirmed he did not carry out the work at issue;
 - (d) plate not covering hole for a shower fixture: the work was done by a tiler who was engaged directly by the owner;
 - (e) slumping of a water storage tank: First Respondent did not do any work on this, Second Respondent formed the pad but did not install the tank;
 - (f) missing vanity mirrors: incomplete work at the time the carpentry aspect of the contract came to an end;
 - (g) installation of downpipes: incomplete work at the time the carpentry aspect of the contract came to an end;
 - (h) no vermin proofing in small areas of cladding: the First Respondent accepted that he had missed this and that it was an error. The vermin proofing was missed in areas where weatherboard and brick cladding met. The Technical Assessor noted that whilst the matter had had a serious impact on the owner, from a building work perspective it was a minor issue which was easily remedied. The First Respondent noted there was no detail on how it was to be done on the consented plans and that the building inspector also missed it and that it was not easy to see that it had not been done;
 - (i) scribes between bricks and weatherboards too small: the supplied scribes were installed. The Technical Assessor noted a scribe would have had to been made to fit the area, as standard ones would not have been large enough. The First Respondent stated he installed what was supplied;

- (j) lack of fixings to support bar on window joinery to a deck: the First Respondent explained his install methodology which was to install it after the window had been installed and he stated he would have installed further fixings as part of his site check at the end of the job which did not occur as a result of his being dismissed. He stated he often installs them with temporary fixing so as to ensure they are not lost and then finishes off the fixing at the end. At the time he was under time pressure to get numerous tasks completed. He noted the deck was not installed when he left the job. The Technical Assessor noted it was an easy matter to fix although it is harder now that another builder has installed a deck in the same area;
 - (k) head flashings over joinery to weatherboard cladding: the Technical Assessor gave evidence that whilst the work may not have met the specifics of E2AS1 it did meet the performance requirements of the Building Code especially as there was a wide soffit. The First Respondent confirmed that stop ends were in place and were siliconed in;
 - (l) window and cladding junction in brick cladding not sealed: this was noted in the response to the complaint as incomplete work which should have been dealt with by the bricklayer and this explanation was accepted by the Technical Assessor; and
 - (m) flashing between two windows loose and not sealed: the First Respondent explained the methodology used including the installation of a super course of bricks behind the junction. The Technical Assessor advised that if this was the method used then the work would meet the performance requirements of the Building Code.
- [34] Mr John Potter gave character evidence for the First Respondent. He stated his evidence had not been solicited by the First Respondent but that he had attended of his own accord when he heard that he was facing a disciplinary hearing. He outlined his considerable experience in the building industry noting that he has been a building inspector for the past 20 years and presently works as a part time supervisor and auditor of building inspectors. He stated he had known him in a professional capacity for some 16 years. He provided a glowing reference as to the First Respondent's character and professional capability and competence.
- [35] The First Respondent also produced two character references and provided an opening submission in which he noted a 40 year career in building, his pride in his work and his embarrassment at having had a complaint made against him. He noted he has learnt from the experience, is upskilling as regards his administration and will ensure he is not complained about again.

Boards Conclusion and Reasoning

Record of Work – First and Second Respondents

- [36] 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 work⁴.
- [37] 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

⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

- [38] The Board discussed issues with regard to records of work in its decision C2-01170⁵ 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, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.

The First Respondent

- [39] The First Respondent gave evidence that he did not withhold the record of work. He did, however, delay its provision and this was due to inadvertence and a change in processes because of his involvement in the project coming to a premature end.
- [40] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply state “on completion of the restricted building work ...”. In the present case the Board needs to consider when completion actually occurred.
- [41] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, occur as was the case here. The Respondent’s involvement came to a premature end on or about 23 October 2015 and it was clear from that point on that the Respondent would not be carrying out any further restricted building work.
- [42] In such circumstances, even though the intended work has not been completed, the Respondent’s restricted building work under the building consent has, in effect, been completed as he would not be able to carry out any further restricted building work. A record of work was, therefore, due at or soon after 25 October 2015 and as it was not provided till May 2016 the elements of the disciplinary offence have been made out.
- [43] In this respect it must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [44] It must also be noted that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. A claim that the licensed building practitioner was not asked for a record of work will not be a defence. They must act of their own accord and not wait for others to remind them of their obligations.
- [45] Section 317(1)(da)(ii) of the Act does provide for a defence of the licensed 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. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.

⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [46] The First Respondent has not put forward any reasons other than inadvertence and a change in process due to the contract coming to an early end. The Board does not consider that these constitute good reasons and the Board notes that licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.
- [47] On this basis the First Respondent is found to have committed a disciplinary charge under s 317(1)(da)(ii) of the Act.

The Second Respondent

- [48] The same legal principles set out above as regards the second Respondent. He carried out restricted building work and, on its completion, he was required to provide a record of work to the owner and the territorial authority.
- [49] The time lines as regards the Second Respondent differ. His involvement continued into late February. At that point discussions broke down and a record of work was then provided. There was a gap of approximately one month between the end of the contractual relationship and the provision of the record of work and about two weeks between the end of discussions and the complaint being made. The question for the Board was whether there was an unreasonable delay.
- [50] Other jurisdictions such as those under the Plumbers, Gasfitters and Drainlayers Act 2006 and the Electricity Act 1992 stipulate definitive time frames for the completion and provision of certification documentation by practitioners. The Building Act does not. Both s 88(1) and 317(1)(da)(ii) simply state “on completion”.
- [51] In C2-01170⁶ the Board held that a record of work must be provided within a short period of completion but also noted that a degree of reasonableness has to be applied and differing circumstances may result in longer or shorter timeframes.
- [52] Looking at the delay and the reasons for it the Board notes that the Respondent had been in discussions with the Complainant’s representative and that those discussions included the provision of documentation. When they came to an end, a complaint was made soon thereafter.
- [53] A matter for the Board to consider is when, as regards the provision of the record of work, time stopped running: at the point where the complaint was made or when the record of work was provided.
- [54] In this respect the Board needs to look at the matter as two distinct periods. The first is from the completion of the contract to the complaint. The second is the complaint until the provision of the record of work. The Board’s reasoning is that in circumstances such as the present where a complaint is made soon after completion a licensed building practitioner needs to be allowed a period within which to consider their position, seek advice and respond to the complaint. If there are no good reasons for not providing a record of work then one will have to be provided and if this is not done then the second period of delay will be taken into account by the Board when considering the matter.
- [55] Looking at the complaint against the Second Respondent, the Board considers that neither period of delay was unreasonable. As such it finds that a record of work has

⁶ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

been provided as per the requirements of the Act and the Respondent has not committed a disciplinary offence.

Negligence – First Respondent Only

- [56] 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*⁷. 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.

- [57] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁸ 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.

- [58] From the documentation before the Board and the evidence heard, the matters which the Board considers may come within the ground of discipline under s 317(1)(b) of the Act were:

- (a) no vermin proofing in small areas of cladding; and
- (b) lack of fixings to support bar on window joinery to a deck.

- [59] The other items complained of or noted in the Technical Assessor's report were either not the work of the First Respondent, were incomplete, or met the performance requirements of the Building code.

- [60] The items that were non-compliant were considered by the Board to be minor in nature although the impact of the vermin proofing on the Complainant is acknowledged. From the perspective of the conduct of the First Respondent neither matter is one that the Board considered exhibited a serious lack of care judged by the standards reasonably expected of licensed building practitioners or that exhibited a serious lack of competence. This being the case the First Respondent has not committed a disciplinary offence under s 317(1)(b) of the Act.

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁸ [2001] NZAR 74

Board Decision

First Respondent

- [61] The Board has decided that the First Respondent 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.
- [62] The Board has also decided that the First Respondent has not carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

Second Respondent

- [63] The Board has decided that the Second Respondent has not 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).

Disciplinary Penalties – First Respondent Only

- [64] 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 Act⁹.
- [65] 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.
- [66] 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.
- [67] 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.
- [68] As stated earlier the purpose 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.
- [69] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁹ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

⁹ 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.

- [70] The Board notes that the Respondent normally provides records of work as a matter of course and is upskilling in administrative practices as a result of this event.
- [71] In all the circumstances of the case and taking into account the mitigation presented the Board finds that a censure is appropriate. The Respondent should note that the Board's normal starting point for a record of work matter is a fine of \$1,000 but this has been reduced to a censure on the basis of the mitigation heard.

Costs – First Respondent Only

- [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*¹⁰ 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."

- [74] The judgment in *Macdonald v Professional Conduct Committee*¹¹ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*¹² where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- [75] In *Collie v Nursing Council of New Zealand*¹³ 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

¹⁰ HC, Wellington, AP23/94, 14 September 1995

¹¹ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹² High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹³ [2001] NZAR 74

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

- [76] The Board notes the matter was dealt with on the papers. Ordinarily costs for a hearing would be in the order of \$1,000 to \$2,000 but the Board has reduced this to \$500 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board. This is the amount normally ordered by the Board when a record of work matter is heard on the papers.

Publication of Name

- [77] 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.
- [78] 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.

- [79] 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.
- [80] The Board does not consider any further publication is required.

Penalty, Costs and Publication Decision – First Respondent Only

- [81] For the reasons set out above, the Board directs that, as regards the First Respondent only:

Penalty: Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$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 – First Respondent Only

- [82] The Board invites the First Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business at **4pm on 23 November 2016**.
- [83] If no submissions are received then this decision will become final.

- [84] 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 – First Respondent Only

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

Signed and dated this 1st day of November 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.*