

BPB Complaint No. C2-01373

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

Mohammed Khan, Licensed Building
Practitioner No. BP 119672

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The matter before the Building Practitioners' Board (the Board) is a Board led inquiry¹ into the conduct of Mohammed Khan, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] Auckland carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Design Area of Practice 1 Licence issued 9 November 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|----------------|-------------------|
| Chris Preston | Chair (Presiding) |
| Dianne Johnson | Board Member |
| Robin Dunlop | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in Auckland on 21 September 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:
- | | |
|---------------|-----------------|
| Sarah Romanos | Board Secretary |
| Mohammed Khan | Respondent |

¹ Pursuant to a Board Resolution dated 26 February 2016.

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Taufil Omar	Respondent's legal representative
[Omitted]	Witness, Remedial Builder
[Omitted]	Witness, [omitted]
[Omitted]	Witness, [omitted] by telephone
[Omitted]	Witness, [omitted] available by telephone but not required
Willian Hursthouse	Special Adviser to the Board available by telephone but not required

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] On 26 February 2016 when the Board was considering a complaint against a different practitioner undertaking different building work for this same project it resolved to initiate an inquiry into the conduct of the designer and asked the Registrar to prepare a report in accordance with reg 18 of the Regulations.
- [10] On 13 June 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 complaint. The report included information which had been discovered during the investigation of the original complaint including a special advisor report prepared by William Hursthouse.
- [11] On 14 July 2014 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [12] On 2 September 2016 a pre-hearing teleconference was convened by Board Member Mel Orange. The Respondent was 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 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

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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 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 has jurisdiction only 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 10:10 am.

[17] The Board was assisted at the hearing by the Board secretary reading into evidence the written opening statement that had been prepared and circulated by Alastair Dumbleton, the Counsel for the Registrar.

[18] The Board was assisted in the presentation of the case by Persons giving evidence who were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[19] The building work that is the subject of this Board Inquiry is in relation to the repositioning of a single storey Victorian villa from another location onto new engineered foundations on a steep site in Auckland.

[20] There is a history of issues with this building project. Some of these became known to the Board when the owner lodged complaint C2-01230⁴ about the work of the licensed building practitioner carpenter who had been engaged to undertake remedial work to the foundations and the subfloor of the villa.

[21] The Board in reviewing the Registrar’s Report for complaint C2-01230 resolved to initiate an inquiry into the conduct of the designer.

[22] There was a discrepancy between the size of the villa and the layout of the new foundations. The two did not match and the villa could not be located onto the foundations until remedial works were engineered and implemented.

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

⁴ Complaint C2-01230 did not proceed to a hearing under reg 9 of the Regulations.

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Evidence

- [23] 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*⁵ 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.

- [24] There is no dispute that the overall length of the villa did not correspond to the dimension used by the engineer in designing the foundations and by the carpenter in setting out the foundations. The difference was accepted to be about 800mm but no one was able to confirm how long the building actually is. The figure shown on the building consent documents, which were drawn by the Respondent, is consistent across all the architectural and engineering drawings being 19.620 metres.
- [25] It was the Respondent’s evidence that he had been engaged by the original builders [omitted] to prepare the documentation for and lodging of the building consent application. He worked with [omitted] who undertook the design of the foundations and other structural components. He had responded to requests for information from the Council during the consenting process but had no contract to undertake site monitoring once work commenced. He was called to site on one occasion to provide design input with regard to a retaining wall but knew nothing about the issues with the locating of the villa or that there were issues with the dimensions until the inquiry was initiated by the Board.
- [26] At the hearing the Respondent stated that he had not been the first designer engaged at this project. Another designer had been involved in preparing documentation for the application for resource consent, and it was this first designer who had prepared the layout plan for the villa. The Respondent had relied on this drawing in preparing his own existing floor and demolition plans.

⁵ [2009] 1 NZLR 1

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- [27] In response to questioning from the Board the Respondent advised that he had visited the yard where the villa was being stored and took site measurements to allow him to complete the building consent documents. In particular he was concerned to understand how the roof had been constructed and the size of the floor joists. He checked these measurements. He did not check the overall size although there was access around the villa which would have allowed him to do this.
- [28] The Respondent had no memory of the number of pieces the villa had been cut into for transportation. Other witnesses were able to confirm that the villa was cut into two pieces and that it was stored at the yard with the two pieces closely positioned.
- [29] There was much discussion about how the 800mm difference in dimensions had arisen. There was no obvious answer though the Respondent pointed out that it might have been the length of the bay extension at the front elevation or the corridor at the porch at the rear. The Respondent was provided with the drawings from the original designer by the Owner, and placed reliance on the measurements within those drawings. The Respondent did not produce those drawings in evidence but advised that he had them in his office. The Presiding member ordered that if they are to be produced they must be available to the Board by end of business on Friday 23 September 2016. The drawings were not produced.
- [30] The Respondent is strongly of the view that it was the responsibility of the builder to check the dimensions of the villa and that this was written on the drawings.
- [31] It was the evidence of the design engineer that the handwritten notes on the drawings submitted for building consent were done by staff at his firm in relation to engineered components. The notes on drawings A13, A13A and A13B about the need for site measurement of subfloor framing members are handwritten. They do not discuss the overall size. When questioned by the Board [omitted] confirmed that they had relied on the dimensions provided by the Respondent in preparing the specific design foundations for the project.
- [32] It was the evidence of both [omitted] and [omitted] that typical procurement for a relocation project is the that the removal company take responsibility for the transportation, the foundations and for the location of the relocated structure onto these foundations. The subject property has a steep slope and the engineering required for the foundations was highly specialised and outside the competencies of the removal company who only transported the villa and lowered it onto site. Both witnesses gave evidence that this made the accuracy of the drawings even more critical than many relocation projects because the house and the foundations were being assembled in isolation.
- [33] The Respondent was concerned that he had not been invited back to be part of the solution once the issue with the measurements was known. On questioning from the Board, however, he was unable to suggest anything that he might have been able to add to the resolution that was not already done, that is, the foundations were reassessed by the engineer before the villa placement was completed.

Board's Conclusion and Reasoning

- [34] 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*

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*Far North Council*⁶. 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.

[35] The Board has also 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.

[36] In questioning by the Board the Respondent stated that he had the opportunity to undertake measurements to confirm the dimensions of the villa but rather than do this he had relied on measurements taken by someone unknown to him or scaled from those person's drawings. This was despite the fact the Respondent knew, or ought to have known, that it was a difficult project, a difficult site and that the engineering was site specific.

[37] The Board found the Respondent did not give adequate consideration or attention to checking the reliability of the drawings provided to him by someone he had no professional knowledge of, that he had unrealistic expectations that quality assurance by contractors after the engineering had been completed and the building consent had been issued would be a substitute for his own quality assurance and he did not take into consideration the consequences to the project of inaccurate dimensioning. In doing so the Board finds that the Respondent's conduct has fallen below the standard reasonably expected of a licensed practitioner and, as such, he has been negligent. The Board also finds that the conduct of the Respondent is sufficiently serious to warrant a disciplinary outcome.

Board Decision

[38] The Board has decided that the Respondent has carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined.

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ [2001] NZAR 74

Disciplinary Penalties

- [39] 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.
- [40] 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.
- [41] 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.
- [42] 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.
- [43] The Board is aware that the common understanding of 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. 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.*⁸
- [44] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁹:
- 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.*
- [45] 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:
- [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*

⁸ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁹ [1992] 1 NZLR 720 at p 724

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

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punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [46] In the circumstances of the complaint the Board considers a fine of \$1,500 to be the appropriate penalty. This is consistent with fines imposed by the Board for similar disciplinary offences.

Costs

- [47] 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.”

- [48] 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.”

- [49] 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.

- [50] 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.

- [51] The Board considers that the sum of \$1,500 is a fair and reasonable contribution towards the costs and expenses incidental to the inquiry of the Board.

Publication of Name

- [52] 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.

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

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[53] 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.

[54] 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.

[55] The Board does not consider further publication is required.

Penalty, Costs and Publication Decision

[56] 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 \$1,500.

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 the Respondent being named in this decision.

Submissions on Penalty Costs and Publication

[57] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 10 November 2016.

[58] If no submissions are received then this decision will become final.

[59] 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

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

Signed and dated this 19th 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.*