Before the Building Practitioners Board
At Auckland

BPB Complaint No. C2-01392

Under the Building Act 2004 (the Act)

IN THE MATTER OF	A complaint to the Building Practitioners' Board under section 315 of the Act
AGAINST	Zahid Ali, Licensed Building Practitioner No. BP 107647

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 14 April 2016 in respect of Zahid Ali, Licensed Building Practitioner (the Respondent).

[2] The complaint alleged the Respondent has, 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) 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).

[3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 1 July 2011.

[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:

Richard Merrifield	Deputy Chair (Presiding)	Licensed in Carpentry and Site Area of Practice 2
Brian Nightingale	Board Member	Registered Quantity Surveyor and Registered Construction Manager
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer

[6] The matter was considered by the Board in Auckland on 2 November 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
Zahid Ali	Respondent
Umarji Moahmmed	Respondent's Legal Representative
[Omitted]	Complainant
William Hursthouse	Technical Assessor
[Omitted]	Witness

Members of the public were not present.

[8] The Respondent brought a witness with him but did not call that witness to give 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 8 August 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 William Hursthouse as a Technical Assessor.

[12] On 1 September 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 17 October 2016 a pre-hearing teleconference was convened by Mel Orange. 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 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 Kingdom[1].

[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] In *McLanahan and Tan v The New Zealand Registered Architects Board*[3] Collins J. noted that:

> *" the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[17] The same applies as regards the disciplinary provisions in the Building Act.

[18] 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

[19] The hearing commenced at 9.45 a.m.

[20] At the hearing the Board was assisted by Counsel for the Registrar who provided a Summary and Opening which was read into the record.

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

Substance of the Complaint

[22] The Complainant alleged that the Respondent, amongst other things:

(a) did not carry out the building work to his satisfaction;

(b) completed building work of poor quality;

(c) did not align or position trusses correctly;

(d) anchor ties were missing; and

(e) stringers for a pergola were incorrectly positioned.

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[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
[3] [2016] HZHC 2276 at para 164

[23] It was also alleged that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

[24] 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*[4] 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.*

[25] The Complainant engaged [Omitted] trading as [Omitted] to carry out extensions and renovations to his home. [Omitted] who is not licensed, subcontracted the Respondent to carry out the building work including restricted building work for the project.

[26] The Respondent provided an initial response to the complaint by way of his Legal Representative. He noted:

(a) his client's contract was with [Omitted] who supplied the materials;

(b) the work complained of was completed by an unlicensed builder in the employ of [Omitted];

(c) the Respondent was re-engaged to rectify the faulty work; and

(d) payment issues had interceded.

[27] At the hearing it was established that the Respondent was the initial licensed building practitioner on site; other persons were involved in installing weatherboards at the instigation of the main contractor (stated to be [Omitted] under the supervision of [Omitted]) when work was not progressing to the Complainant's satisfaction. The Respondent came back after the intervening builder's involvement to continue with

[4] [2009] 1 NZLR 1

the building work. The Respondent redid the work of the intervening builder as the weatherboards installed by [Omitted] did not align.

[28] The Complainant gave evidence as to the impact the delays and issues with the building work had on him and his family with work being incomplete over winter. The day before the hearing the Complainant provided some 144 pages of additional evidence, most of which were copies of text messages between himself and various other persons involved in the build. These had not been provided to the Respondent. The Board, having reviewed them prior to the hearing, considered them to be of limited relevance to the matters before the Board and found that it would be prejudicial to the Respondent for them to be admitted.

[29] The Complainant, who was in residence during the build, also gave evidence as to the extent of the building work undertaken by the Respondent. He stated this included supervision of foundations noting that they were dug by a subcontractor, installing framing and trusses including the construction of framing, installing weatherboards and the organising of council inspections. He was questioned as to his involvement in the project. He stated that whilst he worked at Bunnings he only had limited building knowledge and did not provide materials. He arranged and instructed the designer who completed the plans and specifications.

[30] William Hursthouse the Technical Assessor gave evidence and spoke to his report which included his qualifications and experience. Mr Hursthouse, who was accepted by the Board as an expert, had carried out a site visit and reviewed the complaint documentation. Included with his report was an email communication from the Respondent dated 13 June 2016 in which he stated:

> *Yes, we prepared the floor but it was poured by* [Omitted]'s *sub contractors. The wooden framing downstairs, I did most of it on the new extension but inside the old house,* [Omitted] *and* [Omitted] *did most of it themselves. We installed the roof trusses. We reinstalled most of the weatherboards but nothing arounds his old garage.*

[31] He summarised his findings in a table which formed the focus of the Board's inquiries. He noted five main areas of non-compliance which he summarised. They were:

	Non-compliance	**Building Code Provision**	**Analysis of noncompliance with regulatory or performance requirements**	**Implications**
1	Weatherboards packed out on all elevations so they overhang the brick veneer (by varying amounts)	E2 External Moisture B2 Durability	The consented plans show the weatherboards above the brick back at the frame line, with a flashing over the bricks below. They have been installed packed out beyond the bricks. Apart from the fact that what has been built is quite different to what was	While the change is essentially aesthetic, the end result is some unprotected framing

	Non-compliance	Building Code Provision	Analysis of noncompliance with regulatory or performance requirements	Implications
			consented, the 52 mm variation seen in photos *weatherboard 12 – 14* is well outside the relevant tolerances (10 mm) in Table 2.1 NZS 3604:2011. The consented plans state on page A01 "proposed floor plan" that "*All construction to comply with NZS3604, a copy of NZS3604, E2/AS1 and BRANZ Weathertightness Volume 1 is to be kept on site at all times.*"	
2	Gable end truss at West (street) end supported on cantilevered joists, not top plate as shown on the consented plans.	B1 Structure	The consented plans and truss layout plan both show the gable end truss seated above the top plate. While the gable end truss at the East end is above the top plate, with the weatherboards attached to packed out framing beyond, the gable end truss at the road (West) end is not.	The "as built" changes to the consented plans (the gable end truss being supported on ceiling rafters) by the BCA who may accept what has been done as a minor variation, or may require some independent assessment, for example by an engineer.
3	Inadequate vermin proofing	E2 External Moisture B2 Durability	The photos show the inadequate vermin proofing and unsupported bottom weatherboard. Both E2 and B2 refer to vermin proofing, with the Acceptable Solution to E2 providing details. The plans refer to BRANZ Weathertightness Volume 1. These details show a wedge shaped packer	In the absence of adequate vermin proofing, vermin are more likely to get in and build nests. The unsupported bottom weatherboard will be more prone to thermally induced movement.

	Non-compliance	Building Code Provision	Analysis of noncompliance with regulatory or performance requirements	Implications
			running horizontally along the bottom, to support the last weatherboard. I did not see this on site, the bottom of the last weatherboard appeared unsupported.	
4	Inadequate studs, gable end, East	B1 Structure	East end gable studs outside Table 8.4 in NZS3604:2011. Also see 8.5.1.1(b). the smallest stud in this table for 600 centres is 90 x 35, the studs used are only 67 x 35.	Possibly an engineer might calculate that the lighter studs are adequate, perhaps if more frequently connected to the truss.
5	Inadequate treatment of studs, gable end, East	B1 Structure B2 Durability	The 67 x35 strapping used as studs to the gable at the east end appears to be untreated. If so, this is outside NSZ3602:2003 which requires H1.2 treatment for this situation.	It is an assumption (by the Technical Assessor) that the strapping is untreated, it is not a proven fact.

[32] With respect to the packing out of one of the gable end roof trusses the Technical Assessor noted that the original design relied on the load being transferred down the wall framing underneath the truss. The way it was installed the load was transferred onto ceiling beams.

[33] It was discussed whether this and other design changes would have been minor variations under s 45A of the Act. The Technical Assessor noted the procedures that would normally be used when considering design changes including engaging with the designer and the building consent authority as regards the change to assess whether it was minor or not before it was carried out and he noted the risk of undertaking changes without such an assessment including that it could be rejected as being minor by the building consent authority or that the end product could be non-compliant.

[34] The Technical Assessor gave his opinion that the change to the gable end truss would probably not have fallen within the provisions of s 45A as a minor variation as it could have structural implications and have required engineering input. He also gave his opinion that the building consent authority had erred when it gave a building inspection pass to the change. He also considered remediation would not be overly

difficult and it did not pose an immediate danger as it was a light weight roof that was being supported.

[35] The Board questioned the Complainant as regards the decision to change the design in relation to the weatherboards and trusses. He stated it was not his decision but he was going to instruct the designer to complete some minor variations. Neither the Complainant nor the Respondent could refer to any written instructions as regards the change. The designer was not instructed. Evidence was heard that the change was brought about to allow for the change in alignment of the bricks and weatherboards by way of bringing the weatherboards out to beyond the line of the bricks. It was unclear who made or directed this decision.

[36] The Respondent gave evidence that he installed the trusses and that he did not consult with the designer as regards any of the changes or take any other steps to assess or determine whether the work would be compliant or whether it involved any more than a minor change. The truss at the other end was not stood out as they manually lifted it into place and as such were not able to step it out while fixing it in place. Instead he used treated timber to pack out the truss and provide a connection for the weatherboards. He stated that he would probably get an engineer in to assess the changes and advise on how to make them compliant.

[37] The type of timber used was discussed. Evidence was heard that whilst the timber used was not as per the specification associated with the building consent it was H1.2 treated timber and it would have met the functional requirements of the Building Code. The Respondent stated he had not read the specification and so was not aware of the specified timber.

[38] As regards the variation in the packing of weatherboards the Respondent stated the packing was done to align existing framing with new framing over a length of wall between two lines of bricks. The Respondent gave evidence that framing variations in the existing framing resulted in variations in the truss line which would, in turn, have impacted on the fascia line. The Technical Assessor gave his opinion that a plumb bob should have been used at both ends to ensure alignment between the two points. The Respondent stated they just used a level to align the weatherboards.

[39] [Omitted] gave evidence. He stated he did not have a building business but acts as a project manager which included supplying materials and arranging inspections. He provided the plans to ITM who supplied materials and he assumed they were correct. He gave his opinion that the change to the truss position and the weatherboard positioning looked better and would have performed better from a weathertightness perspective. He did not obtain a contractual variation from the client as regards the change. He stated the approach to changes to the building consent was to complete them and then get the building consent authority to inspect and that he told the Complainant to deal with the designer as regards the changes. He did not bring them to the building consent authority's attention. [Omitted] confirmed that the Respondent was removed from the job because of delays and not because of workmanship.

[40] With regard to the record of work, the Respondent submitted that the work was not complete and that the Respondent was still willing to go back and complete.

[41] The Respondent also gave evidence as to his supervision of workers on site. He had two workers one of whom had just finished his apprenticeship. They had worked for him for about five years. He stated that he carried out the work on the trusses but supervised the install of the weatherboards. He was on site regularly if not daily. At

the time he was involved in two others sites and had two other workers under his employ.

[42] [Omitted] provided written submissions to the Board which were received.

Boards Conclusion and Reasoning

Negligence or Incompetence

[43] 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*[5]. 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.*

[44] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[6] 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.*

[45] The matters pertaining to negligence were set out in the Technical Assessor's report and are summarised above in paragraph [31]. The Board heard evidence that the Respondent was involved in the building work either by way of carrying it out or of supervising it.

[46] With regard to carrying out, the Respondent was directly involved in the installation of the trusses. The workmanship was not in question. The issues were whether it complied with the building consent and the building code. The evidence was that it did not and whilst evidence was also heard that the issues could be easily remediated it would require input from a designer and/or an engineer.

[47] The Board doubts whether that input would have been sought but for the complaint being made. The building consent authority had wrongly passed the work as compliant and that was enough for the Respondent. He did not turn his mind to the implications of the changes and how compliance might be achieved as a result of them. He did not use or follow any process to determine whether the changes would

[5] Judge McElrea, DC Whangarei, CIV-2011-088-313
[6] [2001] NZAR 74

be minor under s 45 A of the Act or not. In these respects the Board finds that the Respondent has been negligent.

[48] In making the above finding the Board notes that the process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and that the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent must be submitted as a variation to the consent before any further work can be undertaken.

[49] An exception is made for minor variations as defined in s 45A of the Act. Work can continue if the variation is considered to be minor in nature and guidance is provided as to the process to be used when dealing with what might be a minor variation. The required documentation is then submitted at a later stage and often as a mop up at the end of the job.

[50] Key to this minor variation process is obtaining agreement with the owner and then consulting with the designer, an engineer if necessary and the building consent authority. The rationale for these latter steps is to ensure that the variation is actually minor before work is undertaken and that the variation will still meet the Building Code and will not adversely affect other parts of the building work.

[51] Put simply, a variation which is considered to be minor should be assessed prior to it being undertaken, not once it has already been done.

[52] In this instance the Technical Assessor considered stepping out one of the trusses was not a minor variation. As such no work should have been done until such time as the consent variation was processed by the building consent authority and granted.

[53] In proceeding in the way the Respondent has done, he has exhibited a serious lack of care judged by the standards reasonably expected of licensed building practitioners.

[54] Turning to the supervision of the remaining work noted as non-compliant in C2-01143[7] the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[55] The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[56] Whilst the Respondent was present and provided supervision the fact remains that the work was non-compliant and this in itself is an indicator that he has failed in his duties as a supervisor. In this respect s 7 of the Act stipulates:

[7] Board Decision dated 14 April 2016

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[57] The Board finds that the Respondent's supervision has failed to achieve these outcomes. Given this the Board once again finds that the Respondent has been negligent.

Contrary to a Consent

[58] There was evidence of significant departures from the building consent. The building work was not, however, complete and as such a variation to the consent could be obtained. Given this and the Board's findings as regards negligence in the consent variation process, the Board does not consider it necessary to make a finding as regards s 317(1)(d) of the Act.

Record of Work

[59] 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 work[8].

[60] 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.

[61] The Board discussed issues with regard to records of work in its decision C2-01170[9] 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.

[62] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.

[63] The Respondent both carried out and supervised restricted building work. He has not provided a record of work for it. He has claimed this is because it is not yet complete.

[64] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work, only that it is to provided "on completion of the restricted building work …". The question for the Board is whether completion has occurred.

[65] 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, lead to situations where the licensed practitioner may not be able to complete the envisaged restricted building work. The Board has consistently held that in such circumstances, regardless of the reasons why the work cannot be completed, the licensed building practitioner's restricted

[8] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[9] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

building work under the building consent will, in effect, have been completed as they will not be able to carry out any further restricted building work. To require otherwise would mean that a record of work would never be due and this would defeat the reason why records of work were brought into being.

[66] Given this the Board finds that the work was, for the purposes of the Act and the record of work provisions, complete. As no record of work has been provided the elements of the offence have been made out.

[67] Finally s 317(1)(da)(ii) of the Act provides 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.

[68] No good reason, other than the non-completion of the intended work, which has been dealt with, has been put forward. .

Board Decision

[69] 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) 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.

[70] 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

[71] 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 Act[i].

[72] 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.

[73] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was details put forward by the Respondent's Legal Counsel in his submissions on the Respondent's business background and capability.

[74] 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.

[75] 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.

[76] 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:

> *[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.*

[77] In In *Lochhead v Ministry of Business Innovation and Employment*[11], an appeal from a decision of the Board, the court, in respect of penalty noted:

> *[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*
>
> *[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

[78] The Board considers the matters are at the lower end of the scale and that a fine will be sufficient penalty. It's starting point was $3,000 but it has reduced this to $2,000

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

[11] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

on the basis of the mitigation heard. This is consistent with other penalties ordered by the Board for similar matters.

Costs

[79] 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."

[80] 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* [12] 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."*

[81] The judgment in *Macdonald v Professional Conduct Committee*[13] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[14] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[82] In *Collie v Nursing Council of New Zealand*[15] 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.*

[83] The Board considers costs of $1,500 to be an appropriate contribution. This is significantly less than the 50% guideline outlined above.

Publication of Name

[84] 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 Licensed Building Practitioners' scheme as is required by the Act.

[85] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:

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[12] HC, Wellington, AP23/94, 14 September 1995
[13] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[14] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[15] [2001] NZAR 74

> *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.*

[86] 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.

[87] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[16]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[17]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[18]. In *N v Professional Conduct Committee of Medical Council*[19] the High Court pointed to the following factors:

> *The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*
>
> - *issues around the identity of other persons such as family and employers;*
> - *identity of persons involved and their privacy and the impact of publication on them; and*
> - *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[88] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[20]. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[89] The Board does not consider there are any good reasons for further publication.

Penalty, Costs and Publication Decision

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.**

[16] Section 14
[17] Refer ss 200 and 202 of the Criminal Procedure Act
[18] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[19] ibid
[20] Kewene v Professional Conduct Committee of the Dental Council - [2013] NZAR 1055

Submissions on Penalty Costs and Publication

The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 21 December 2016.

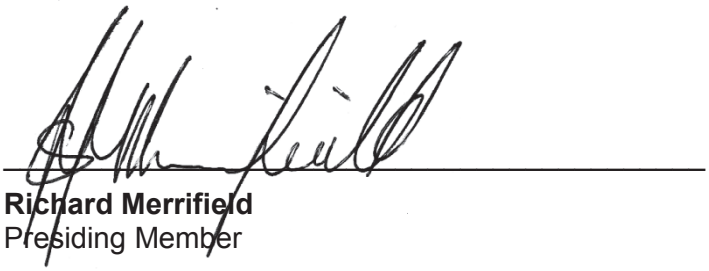
If no submissions are received then this decision will become final.

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

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

Signed and dated this 30th day of November 2016



Richard Merrifield
Presiding Member

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[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.