

BPB Complaint No. C2-01401

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

Feroz Ali, Licensed Building Practitioner No. BP 118539

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 28 April 2016 in respect of Feroz Ali, Licensed Building Practitioner (the Respondent).
- [2] The complainant 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) 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) 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 6 July 2012. The Respondent's licence was cancelled on 7 May 2015 under s 319 of the Act as a result of his failure to pay fines imposed under s 318 of the Act within the statutory timeframe.
- [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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| Richard Merrifield | Deputy Chair
(Presiding) | Licensed in Carpentry and Site Area
of Practice 2 |
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C2-01401

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| | 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 |
| | Bob Monteith | Board Member | Licensed in Carpentry and Site Area of Practice 2 |
- [6] The matter was considered by the Board in Auckland on 26 January 2017 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 |
| | [Omitted] | Complainant, Licensed Building Practitioner Design |
- [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 19 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.
- [11] On 15 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 or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (c) 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
 - (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [12] On 14 October 2016 the Board resolved to appoint a Technical Assessor to assist the Board and prepare a report. On 16 October 2016 William Hursthouse provided his report. This was circulated to the Respondent and Complainant.

C2-01401

- [13] On 20 January 2017 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present and the hearing procedures were explained. His attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [14] The common understanding of the purposes of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom¹.
- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:
- Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*
- [16] 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 1.15.
- [20] The hearing was scheduled to commence at 1 p.m. The Respondent had been sent notices to this effect and had been summonsed as a witness. The summons included the hearing details. He had also been advised of the time and place of the hearing at the pre-hearing conference. He had emailed the secretariat on 20 January 2017 that he would be attending.
- [21] On the day of the hearing the Board Secretary attempted to contact him by telephone and text. No contact was made. The Board delayed the commencement of the

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

C2-01401

hearing to allow the Respondent time to appear. The Board proceeded in his absence.

- [22] The Board noted that the Respondent is currently unlawfully in New Zealand and is facing deportation by operation of the Immigration Act 2015⁴.
- [23] The Complainant was sworn in, his evidence was presented and he answered questions from the Board.

Substance of the Complaint

- [24] The complaint allegations relevant to the inquiry by the Board were that the Respondent:
- (a) used second hand timber in the construction of the dwelling which was not consistent with the consented plans and specifications;
 - (b) made the trusses himself whereas the consented plans and specifications required manufacture by an authorised fabricator and he did not have the trusses he made certified by an engineer to show they met building code requirements; and
 - (c) took full payment for the intended work but did not complete it.
- [25] An allegation was also made that the Respondent had failed to provide a record of work on completion of restricted building work.

Evidence

- [26] 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

⁴ Refer *Feroz Ali v Minister of Immigration* [2015] HZHC 1794

⁵ [2009] 1 NZLR 1

C2-01401

satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [27] The Complainant, a licensed building practitioner with a design licence, had developed the consented plans for a project his sister was undertaking. The Project was a small extension to an existing dwelling. He did not provide project administration but kept an eye on the project. He noted that the consented plans required that the trusses be manufactured and supplied by Wiri Timber.
- [28] His evidence was that the project progressed well until the point where the trusses were made on site by the Respondent and the roof was put on. The building consent authority (BCA) approved the trusses but the Complainant raised issues with the BCA as regards the Respondent having made them on site. The BCA then required an engineer's certificate to satisfy them of the compliance of the trusses. This was not provided by the Respondent and has still not been provided.
- [29] The Complainant noted that after this point in the project the Respondent did not return to site notwithstanding that he had been paid the full contract sum. The work was completed by other contractors. Sub-contractors who had worked for the Respondent were approaching the owner for payment of their invoices despite the Respondent having been paid these sums as part of his accounts.
- [30] The Respondent did not provide any form of response to the complaint.
- [31] The Board obtained an opinion from the Special Adviser as regards the trusses. He laid out quite clearly that unless the Respondent was an accredited fabricator, and there was no evidence that he was, that he had stepped well outside of his area of expertise in constructing them. He made reference to NZS3604:2011 clause 10.2.2.1 which the consented plans and specifications incorporated and which sets out that trusses must be manufactured by an accredited manufacturer.

Boards Conclusion and Reasoning

Negligence and Incompetence

- [32] 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*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.

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

C2-01401

- [33] 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.

- [34] There were two matters of concern, the use of second hand timber and the manufacture of trusses. The former is disconcerting but the latter is a far more serious matter and the Board finds that the Respondent has been negligent in undertaking their manufacture without any engineering input.
- [35] The Board's reasoning is that the correct manufacture of trusses is essential to the structural integrity of a dwelling. It may well be that they were manufactured in such a way that they met the requirements of the Building Code but in the absence of evidence to attest to this they pose a risk. Moreover if the Respondent was going to use an alternative manufacturing method to that which was consented then the appropriate steps to have taken would have been to ensure this was acceptable to the owner, the designer and the building consent authority and to consult an engineer during the manufacture to ensure the way they were built was compliant.

Contrary to a Building Consent

- [36] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [37] In *Tan v Auckland Council*⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [38] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [39] As set out above, the Respondent did not take any steps before, during or after the construction of the trusses to ensure they met the requirements of the building code and took no steps to obtain the necessary building consent variation. It was only as a result of the intervention of the Complainant that the departure from the consent

⁷ [2001] NZAR 74

⁸ [2015] NZHC 3299 [18 December 2015]

C2-01401

came to light. But for that, the Respondent would not have taken any steps as regards the variation to the consent and still has not taken any. In such circumstances the Board finds that the Respondent has carried out building work contrary to a building consent and thus has committed a disciplinary offence under s 317(1)(d) of the Act.

Record of Work

- [40] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁹.
- [41] 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.
- [42] The Board discussed issues with regard to records of work in its decision C2-01170¹⁰ 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.
- [43] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.
- [44] 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 states “on completion of the restricted building work ...”.
- [45] 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 completion for the purposes of the Act and the provision of a record of work arises before the intended work has been completed.
- [46] This is what has occurred in the present case. The Respondent’s engagement has come to an end. As a result of his decision not to return and complete the building work he should have been aware that he had to then provide a record of work for the restricted building work he had completed. One has still not been provided and no good reason under s 317(1)(da)(ii) of the Act has been given.
- [47] Given the above the Board finds that the disciplinary offence has been committed.

Disrepute

- [48] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The

⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁰ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

C2-01401

Board considered the disrepute provisions in Board Decision C2-01111¹¹ and discussed the legal principles that apply.

- [49] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*¹² a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time; however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- [50] Similarly in a determination of the *Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants*¹³, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [51] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁴ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁵ the Court of Appeal held that:
- the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹⁶
- [52] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions¹⁷;
- honest mistakes without deliberate wrongdoing¹⁸;
- provision of false undertakings¹⁹; and
- conduct resulting in an unethical financial gain²⁰.

¹¹ Board decision dated 2 July 2015.

¹² [2013] NZAR 1519

¹³ 24 September 2014

¹⁴ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁵ [2012] NZCA 401

¹⁶ [2012] NZAR 1071 page 1072

¹⁷ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁸ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁹ *Slack, Re* [2012] NZLCDT 40

²⁰ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

C2-01401

- [53] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupation. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases is that unethical or unprofessional conduct can amount to disreputable conduct.
- [54] Compliance with the building code²¹ is a vital task and trusses are vital to the overall structural integrity of a building. In this respect s 3 of the Act notes:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

- [55] By ignoring the instructions contained in the building consent and undertaking the manufacture of the trusses without notifying anyone that he was doing so or obtaining engineering input, the Respondent has the potential to bring the regime into disrepute. Added to this is the Respondent's apparent unethical conduct of taking full payment without an intention to complete the building work. Whilst this latter conduct would normally be seen as a commercial matter, in this context and combined with the negligence and the building contrary to a building consent the Board considers the overall conduct of the Respondent is such that he has brought the regime into disrepute. Whilst in coming to this decision there is an element of duplication in the charges, the Board feels it is important to note the serious overall conduct of the Respondent.

Board Decision

- [56] The Board has decided that Respondent has:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

²¹ Refer s 17 of the Act which stipulates that all building work must comply with the building code.

C2-01401

- (c) 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
- (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

and should be disciplined.

Disciplinary Penalties

- [57] 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.
- [58] 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.
- [59] The Respondent has not provided any form of response to the complaint. Nor did he appear at the hearing. In such circumstances the Board has decided to proceed with making a penalty decision. 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.
- [60] 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.
- [61] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²² has 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.

- [62] In *Lochhead v Ministry of Business Innovation and Employment*²³, 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

²² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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).

- [63] The Respondent's misconduct is at the higher end of the scale. The Board also notes that he has previously been the subject of disciplinary action. The Board accepts, however, that the current offending was not carried out with the earlier offending in mind as it was not dealt with until after the current conduct occurred. As such it is not to be taken into account. The fact that the Respondent has not paid the fine and costs from the earlier matter can and will be taken into account in determining the appropriate penalty.
- [64] The Respondent's licence has already been cancelled as a result of non-payment of fines and costs. He is currently illegally in New Zealand.
- [65] In all the circumstances the Board considers a substantial fine is warranted. As the Respondent is not currently licensed, suspension or cancellation are not options that are open to the Board. A fine is the only viable penalty remaining. It is set at \$5,000 which is a high amount and this reflects the seriousness of the disciplinary offending.

Costs

- [66] 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."
- [67] 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*²⁴ 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

²⁴ HC, Wellington, AP23/94, 14 September 1995

C2-01401

where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

- [68] The judgment in *Macdonald v Professional Conduct Committee*²⁵ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*²⁶ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- [69] In *Collie v Nursing Council of New Zealand*²⁷ 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.*
- [70] The Board notes that the Respondent has not cooperated with the hearing. The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*²⁸ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent the Board does consider that the approach to the hearing by the Respondent should be taken into consideration.
- [71] On the basis of the above the Board considers the sum of \$2,000 should be paid toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication of Name

- [72] 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.
- [73] 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.*
- [74] 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.
- [75] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out

²⁵ HC, Auckland, CIV 2009-404-1516, 10 July 2009

²⁶ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

²⁷ [2001] NZAR 74

²⁸ [2011] 3 NZLR 850.

²⁹ Section 14

C2-01401

grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. In *N v Professional Conduct Committee of Medical Council*³² 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.*

[76] 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 interest³³. 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.

[77] The Board considers the circumstances of this case are such that further publication is required both to educate the profession and to inform the public. As such further publication by way of an article or articles which name the Respondent will be published at the direction of the Board.

Penalty, Costs and Publication Decision

[78] 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 \$5,000.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action.

Submissions on Penalty Costs and Publication

[79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **15th March 2017**.

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

³⁰ Refer ss 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

C2-01401

- [81] 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

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

Signed and dated this 21st day of February 2017.



Richard Merrifield
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) within any further time that the appeal authority allows on application made before or after the period expires.*