

**BPB Complaint No. C2-01468**

**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**

Satish Chand, Licensed Building Practitioner  
No. BP 113469

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 1 August 2016 in respect of Satish Chand, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged that 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); and
  - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 6 March 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- |                   |                             |                                                                     |
|-------------------|-----------------------------|---------------------------------------------------------------------|
| Mel Orange        | Board Member<br>(Presiding) | Legal Member appointed under s<br>345(3) of the Act                 |
| Brian Nightingale | Board Member                | Registered Quantity Surveyor and<br>Registered Construction Manager |
| Robin Dunlop      | Board Member                | Retired Professional Engineer                                       |

- |  |              |              |                                                      |
|--|--------------|--------------|------------------------------------------------------|
|  | Bob Monteith | Board Member | Licensed in Carpentry and Site Area<br>of Practice 2 |
|--|--------------|--------------|------------------------------------------------------|
- [6] The matter was considered by the Board in Auckland on 28 February 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:
- |  |                    |                                              |
|--|--------------------|----------------------------------------------|
|  | Elizabeth Nicholls | Board Secretary                              |
|  | Satish Chand       | Respondent                                   |
|  | [omitted]          | Complainant                                  |
|  | William Hursthouse | Technical Assessor to the Board              |
|  | [omitted]          | Witness, for the Respondent, main contractor |
- [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 23 November 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 December 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); and
  - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);
- [12] The Board requested a Technical Assessor be appointed to prepare a report. William Hursthouse's report dated 24 January 2017 was received and circulated to the Respondent and Complainant.
- [13] On 20 February 2017 a pre-hearing teleconference was convened by Mel Orange. The Respondent was present, the hearing procedures were explained and his 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<sup>1</sup>.

- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>2</sup>:

*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*<sup>3</sup> 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 10.05 am.

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

## **Substance of the Complaint**

- [21] The Complainant alleged the Respondent failed to install a cavity closer, failed to install a flashing and that there was general poor and sub-standard workmanship and health and safety failings on site.
- [22] There was also an allegation that the Respondent failed to provide a record of work on completion of restricted building work.

## **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*

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

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

*Complaints Assessment Committee*<sup>4</sup> 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] The Respondent was engaged to carry out and complete the conversion of an existing garage and office into a habitable space under a building consent. The building work included restricted building work such as installing new fibre cement weatherboards and windows. The building work commenced on 3 February 2016. The Complainant alleged the Respondent’s work on site finished on 18 July 2016.
- [25] The Complainant put forward that:
- (a) when the pre-wrap inspection was carried out by Auckland Council on 23 March 2016 it was noted that a cavity closer was required. The inspection record was provided. A final inspection on 18 July 2016 recorded the cavity closer had still not been installed. That inspection was recorded as a fail. Again the record was provided as part of the complaint. The Complainant stated the Respondent was advised that a cavity closer was required but he refused to take any action with regard to it;
  - (b) a window was installed without a flashing resulting in a leak from the window into the interior of the home. This was brought to the Respondent’s attention and a flashing was installed. The Complainant alleged the workmanship associated with the rectification was substandard;
  - (c) the cladding was installed poorly as were the door frames of the wardrobes; and
  - (d) open trenches were left around the house which were a health and safety risk.
- [26] The Complainant provided photographs to support the complaint.

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<sup>4</sup> [2009] 1 NZLR 1

- [27] The Respondent provided a written response to the complaint on 7 September 2016. It stated the work was not complete, the owners were in breach of contract and tribunal action was being pursued. The specific allegations were not addressed.
- [28] The Complainant provided an email dated 24 February 2017 in which she stated that the Respondent's work was complete. The only incomplete work was painting and fixings which were not the Respondent's responsibility and she submitted that if the work was not complete why did the Respondent call for a final inspection.
- [29] The Board engaged a Technical Assessor to review the evidence provided by the Complainant. He noted:
- The photos I have referenced above show work which would not have complied with E2 at the time the photos were taken. The LBP makes the point that the work was not finished when the contract was terminated.*
- [30] He set out the following issues which showed noncompliance with clause E2 of the Building Code:
- (a) Cavity closure omitted all around the building;
  - (b) Poorly installed junction between head flashing and cladding; and
  - (c) Poorly installed junctions between adjacent weatherboards.
- [31] The Respondent was questioned as regards the three issues above. [Omitted] also gave evidence on these matters. [Omitted] was the main contractor. The Respondent worked for him as a salaried person and was the only licensed person in [omitted]'s employ and the only licensed person on site. All building work was undertaken under his supervision. [Omitted] used non New Zealand labour to carry out the work. The Respondent would visit the site about once a week and had two other jobs that he was also supervising at the same time.
- [32] With regard to the cavity closer the Respondent gave evidence that the intention was to install it at the end of the build. It was not done in sequence due to ground conditions being too muddy which would have made it difficult to install. The building consent required increased ground clearance and the cavity closer was going to be installed once the clearance was established. He stated the last two weatherboards were only tacked on to allow for later installation of the cavity closer.
- [33] He was questioned as to the sequence of the work and how they were able to install cavity battens but not cavity closers. He maintained it was due to ground conditions.
- [34] The Complainant stated ground conditions were caused by the Respondent failing to attend to field drains in a timely manner and that the remedial builder who installed the cavity closer had to completely remove the last two weatherboards in order to install it. New weatherboards had to be installed as the ones removed could not be salvaged.
- [35] The Technical Assessor noted the plans were inconsistent as regards the requirement for a cavity closer but that some method of stopping vermin entering would have been required as part of the manufacturer's installation instructions:
- If it is true that the cavity closure was left out, it is likely this would have been inconsistent with the consented plans as these almost invariably do detail a cavity closure for weatherboards installed over a drained and vented cavity. While I have not seen the consented plans so this is still conjecture, I can say*

*categorically that it is inconsistent with the manufacturer's installation instructions, attached as Appendix C.*

- [36] With regard to the missing flashing evidence was heard that it was a head flashing over a window. The weatherboards had been installed without the flashing. It was remediated under the Respondent's supervision. The Respondent's evidence was inconsistent as regards the window. He initially stated it was an existing window that was reinstalled and that they did not have any flashings. He then accepted the evidence of the Complainant that it was a new window. The flashing was installed in-situ without removing the weatherboards. The Respondent was questioned as to how the flashing was inserted under the cavity batten. He was not able to say, stating only that the "boys did it". The Technical Assessor noted cuts in the weatherboard and general poor workmanship in the photographs.
- [37] Photographs of poor workmanship were also reviewed. These included photographs of missing joiners behind weatherboards, gaps in the cladding and fascia, incorrect fixings, misaligned weatherboards and poorly aligned and fitted soakers. The Respondent considered that the work was not complete and issues would have been attended to as part of completion. He did accept that the workers on the site had gotten things wrong and the items identified would need to be fixed.
- [38] The Complainant gave evidence that the contract was cancelled on 15 July 2016 and that she had not received a record of work. The Respondent accepted that he had carried out or supervised restricted building work including cladding, framing, installing windows and installing bracing plasterboard. He stated the work was not finished so no record of work was due. He was not able to identify any restricted building work that had not been completed.

## **Boards Conclusion and Reasoning**

### **Negligence or Incompetence**

- [39] 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*<sup>5</sup>. 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.*

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<sup>5</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

- [40] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>6</sup> 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.*

- [41] The building work disclosed in the complaint was substandard and non-compliant. The Board does not accept the reason put forward by the Respondent as to why the cavity closer was not installed. It prefers the evidence of the Complainant and notes that deconstruction of the weatherboards was required to insert the closer. This is more consistent with it being missed than with the Respondent's evidence that provision was made for its later insertion. The Board considers a competent licensed building practitioner would have installed the cavity closer in the correct sequence and that there was no acceptable reason why it could not have been given that the cavity battens and bottom course or weatherboards were able to be installed.
- [42] With respect to the window flashing the Board again finds that it was installed out of sequence. It should have been installed prior to the weatherboards being installed and the manner in which it has been remediated is most likely non-compliant. At the least the remediation has displayed poor workmanship.
- [43] As regards the remaining issues the Board considers the building work shown in the photographs displayed poor workmanship and noncompliant work. Moreover most of the issues were obvious and should have been identified on a casual inspection.
- [44] The Board does not accept the evidence that the work was not complete and that the matters complained of would have been attended to as part of completion. Items such as the missing window flashings and weatherboard joiners were items that needed to be installed in sequence. Remediation of the items complained of would have required deconstruction of building elements.
- [45] The Board accepts that issues can arise during a build and it does not always follow that a licensed building practitioner has been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right first time and not to have to rely on remediation and rectification.
- [46] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:
- (a) the extent of the error, omission or noncompliance;
  - (b) whether failings by the Respondent in their planning and execution of the building work or their supervision or lack thereof have contributed to the issue arising or not; and
  - (c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.
- [47] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioner's attention it is more likely a disciplinary outcome will follow but the Board

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<sup>6</sup> [2001] NZAR 74

will take into account the overall circumstances leading up to and after the issue occurring into account.

- [48] In the present case the Board finds that the errors and omissions were a direct result of the Respondent's failing to adequately supervise the building work. If closer attention had been paid and more direction given, then the issues would not have arisen. The Board therefore finds that the Respondent has been negligent in his supervision of the building work.
- [49] The Board considered the level of negligence was bordering on gross negligence and that the Board had occasion to question the Respondent's competence as a licensed building practitioner. The complaint did not, however, offer the Board the opportunity to fully investigate his competence and as such a finding as regards competence could not be made.

### **Record of Work**

- [50] 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 work<sup>7</sup>.
- [51] 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.
- [52] The Board discussed issues with regard to records of work in its decision C2-01170<sup>8</sup> 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.
- [53] 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).
- [54] 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 ...". 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 disrupt this normal flow.
- [55] In the present situation the contract was cancelled in or about July 2016. A record of work has not yet been provided. The Respondent has stated this is because the building work has not been completed. No evidence as to what restricted building work had to be finished was received. As such on the basis that all of the restricted building work had been completed the Board finds that a record of work was due when the contract was brought to an end.
- [56] Even if there was restricted building work to be completed a record of work was still due on the cancellation of the contract. The reason for this is that even though the intended work has not been completed the licensed building practitioner will not be

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<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015



able to return to finish any more work. His work has therefore, technically, been completed. To find otherwise would mean that a record of work would never be due and there would be no record of who did what in the way of restricted building work which would defeat the purposes of the legislative provisions.

- [57] In effect when the point in time arises where a licensed building practitioner is not able to carry out any further restricted building work a record of work will be due. This point in time was July 2016 and as a record of work has still not been provided the disciplinary offence has been committed.
- [58] Section 317(1)(da)(ii) of the Act does provide for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case is decided by the Board on its own merits but the threshold for a good reason is high.
- [59] No good reason has been put forward other than non-completion which has been dealt with. This being the case the Board finds that the Respondent has failed to provide a record of work.

### **Board Decision**

- [60] 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); and
  - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);
- and should be disciplined.

### **Disciplinary Penalties**

- [61] 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<sup>i</sup>.
- [62] 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.
- [63] 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.
- [64] 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.

- [65] 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.
- [66] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>9</sup> 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.*
- [67] In *Lochhead v Ministry of Business Innovation and Employment*<sup>10</sup>, 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).*
- [68] The Board noted the level of negligence was high and as such the level of offending is considered to be serious. A commensurate penalty is required.
- [69] The Board also notes the continued refusal to provide a record. It considers this is an aggravating feature. Accordingly, a more rather than less, severe penalty is warranted.
- [70] The Board initially considered suspension or cancellation of the Respondent's licence. The level of negligence in his supervision gave rise to this consideration.

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<sup>9</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>10</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

Had the Board made a finding that he had also been incompetent it would have ordered a suspension or cancellation. As it has not, a fine will be sufficient penalty. The Board therefore considers a fine of \$2,000 is appropriate and this is in line with other similar cases.

- [71] The continued non-provision of the record of work is another matter. With respect to it the Board has decided it will suspend the Respondent's licence until such time as evidence is provided to the Registrar that he has provided a record of work to both the home owner and the territorial authority. If the record of work is provided prior to the Board's penalty decision being finalised then there will be no requirement to implement this aspect of the decision.

## Costs

- [72] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

- [73] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>11</sup> included the following:

*"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."*

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

- [75] In *Collie v Nursing Council of New Zealand*<sup>14</sup> 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.*

- [76] The Respondent was not overly cooperative when the Registrar's report was developed in that he provided a scant response. A Technical Assessor's report was also required which added to the costs of the hearing. Given these factors, costs of

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<sup>11</sup> HC, Wellington, AP23/94, 14 September 1995

<sup>12</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>13</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>14</sup> [2001] NZAR 74

\$1,500 is considered to be appropriate. This is consistent with costs ordered for similar cases and is less than the 50% guideline.

### Publication of Name

- [77] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act.
- [78] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:
- In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*
- [79] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [80] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>15</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>16</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>17</sup>. In *N v Professional Conduct Committee of Medical Council*<sup>18</sup> 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.*
- [81] 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<sup>19</sup>. 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.
- [82] The Board does not consider that any further publication is required.

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<sup>15</sup> Section 14

<sup>16</sup> Refer ss 200 and 202 of the Criminal Procedure Act

<sup>17</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>18</sup> *ibid*

<sup>19</sup> *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

## Penalty, Costs and Publication Decision

[83] 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.

Pursuant to s 318(1)(b) of the Act, the Respondent's licence is suspended until the earlier of the Respondent providing a record of work as required under s 88 of the Act to the satisfaction of the Registrar or the expiry of a period of 12 months and the Registrar is directed to record the suspension in the register of Licensed Building Practitioners.

**Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the register and him being named in this decision.

## Submissions on Penalty Costs and Publication

[84] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 13 April 2017.

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

[86] 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.

## Non Payment of Fines or Costs

[87] The Respondent should take note that the Board may, under s 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid. Section 319 provides:

### **319 Non-payment of fines or costs**

*If money payable by a person under section 318(1)(f) or (4) remains unpaid for 60 days or more after the date of the order, the Board may—*

*(a) cancel the person's [licensing] and direct the Registrar to remove the person's name from the register; or*

*(b) suspend the person's [licensing] until the person pays the money and, if he or she does not do so within 12 months, cancel his or her*

*[licensing] and direct the Registrar to remove his or her name from the register.*

## **Right of Appeal**

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

Signed and dated this 21<sup>st</sup> day of March 2017.



**Mel Orange**  
Presiding Member

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### <sup>i</sup> **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."*

### <sup>ii</sup> **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.*