Before the Building Practitioners Board

	BPB Complaint No. CB24082
Licensed Building Practitioner:	Campbell Senior (the Respondent)
Licence Number:	BP 112492
Licence(s) Held:	Design AOP 2 and Site AOP 2

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	21 May 2019
Decision Date:	26 June 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Nikki McGill, Solicitor, Integra Law Limited, for the Respondent

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(d) of the Act.

Contents

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

(b) 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).

Function of Disciplinary Action

[2] 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 in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

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

[4] The Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Background to the Complaint

[5] Prior to the hearing the Board received an application for an adjournment and a request that the Board direct that a Summary Report submitted by the Complainant for the hearing be ruled as inadmissible. Counsel also noted that reference had been made in the Registrar's opening to a previous decision by the Board under the Act and submitted reference to it should be removed.

[6] A prehearing ruling was made that the hearing would focus on the allegations as set out in the Complaint and that evidence will not be received nor taken on any new allegations. A direction was issued the further submissions could be made at the hearing with regard to the Registrar's opening.

[7] The above was reaffirmed at the hearing. The Board noted that it would only receive and take into consideration evidence and allegations that the Respondent had been given fair notice of. Witnesses appearing were advised of the same.

[8] The Board also noted, as regards the reference to an earlier decision made by the Board, that whilst a perception of bias can arise where Board Members who sat on an earlier case about a licensed building practitioner then appear on a further matter involving the same practitioner that is not necessarily a ground for recusal. The Board notes that the Chief District Court Judge, Judge Doogue, has stated:

> *"The mere fact a judge earlier in the same case, or in the previous case, has commented adversely on a party or a witness or has found the evidence of a party or a witness to be unreliable, would not be found to be a sustainable objection to that judge presiding," she says.*

[9] Judge Doogue referred to the Court of Appeal case *R v Cullen [1992] NZLR 577,* which stated:

> *"It is inevitable that defendants will appear more than once before the same judge, and the fact that something discreditable to the defendant happens on*

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[3] [1992] 1 NZLR 720 at p 724

[4] [2016] HZHC 2276 at para 164

> *one occasion does not make it inappropriate for the same judge to deal with another matter in the future. Judges are well able to put such things out of their minds, just as juries are expected to do from time to time with proper direction".*

[10] The Board advised those appearing that it would consider the matter on its own merits and without reference to or consideration of any previous matters relating to the Respondent that have come before the Board.

Evidence

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[12] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

[13] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Grant Senior	Respondent
[Omitted]	Complainants
[Omitted]	Engineer
[Omitted]	Licensed Building Practitioner

[14] The Respondent designed a dwelling for the Complainants. The design utilised structural insulated panels (SIP) as a construction material and method. The Respondent's business Thermawise Homes Limited undertook to complete the construction of the dwelling. A building consent was issued on 16 January 2017 on the basis of the Respondent's design. Construction commenced on 16 April 2017.

[15] During the build a decision was made to substitute timber framing for steel framing. An amendment to the building consent was prepared and filed by the Respondent. It was dated 24 June 2017 and was submitted on 20 July 2017.

[16] On 2 August 2017 the Building Consent Authority (BCA) issued a Request for Further Information (RFI). The RFI was not responded to. Reminders were sent by the BCA that a response had not been received on 25 August 2017 and 25 January 2018. The BCA cancelled the amendment request on 3 April 2018.

[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[17] The Respondent stated that he was very busy at the time and that there were constant changes to the design. His intention was to deal with the changes at the end of the build by way of as built designs and that as he had engineering oversight of what was being done on site and provided he was able to produce PS1 and PS4 documents for the changes, he stated the changes would have been accepted as being compliant. An email from the Respondent to the BCA giving responses to the RFI on 21 April 2018 also stated:

> *Apologies for this very slow response to your RFI dated 2 August 21017.*
>
> *The reason for this we continued to have further minor changes called for by the owner through the process of the job.*
>
> *At every stage we have had inspections done by either council inspectors of* [Omitted] *engineers.*

[18] Notwithstanding the request for an amendment to change from timber to steel framing not having been granted, the build continued and steel framing was installed. Evidence was provided that as of 25 July 2017 the steel framing was being installed. No inspections of the steel framing were called for or carried out. The Respondent stated no inspection was called for, as he was advised by a BCA inspector that one was not required as the frames were steel and moisture content would not be an issue. No evidence to support this was provided. No producer statements were submitted. [Omitted] stated that a lot of investigative work would be required before they could be produced including that evidence would be required of the connections used between the framing and the other building elements. To achieve this, invasive investigation would be required to ascertain whether those connections were compliant.

[19] The Respondent submitted that the BCA was aware of the change to steel framing on site, that it did not stop the work from continuing even though an amendment for the change had not been granted and that he relied on the BCA in this respect. The Respondent gave evidence that he was given verbal on site assurances that the changes were acceptable but was not able to point to any documentation that substantiated those assurances.

[20] Other changes made during the progress of the build included a change in the layouts of bedrooms and bathrooms, a change to the type Traydec floor used over the garage to create more head height and a change in design and direction of stairs from the garage to the residence (including cutting into the Traydec floor above to create further head room for the stairs), a change from particle flooring board to plywood flooring and changes to window placement and the deletion of one window from the garage.

[21] The change to the stairs was necessary as the design only allowed for 3 rises over 1.2 metres in height making each rise 350mm. This compared to another flight of stairs that had a height of 1.51 metres and 10 rises of 150mm. Even with the change to the

stair's alterations to the Traydec floor above the garage had to be made to accommodate them and an irregular tread rise resulted, which is contrary to the building code.

[22] A cut out of 500mm by 1200mm was made in the Traydec floor. [Omitted] gave evidence that the Traydec floor that was cut into had two-way support and the support was most likely still adequate notwithstanding the cut. He considered what had been done was not acceptable but was not dangerous. He considered issues created by the cut out could be remediated and that the durability of the floor had not been compromised. It was noted that the change was included in the building consent amendment that had been submitted but that no supporting documents or calculation had been provided with it.

[23] The Complainants gave evidence that the change to the head height of the garage came about as a result of the Respondent calculating the height by reference to the number of concrete blocks required to achieve a 2.4 metre head height. This method did not, however, take into account the depth of a Traydec or flooring elements resulting in a lowered head height. A different Traydeck product was therefore used with Tradec 80 being substituted for Traydec 300. The Respondent stated he consulted with an engineer who worked for [Omitted] and stated the change would be acceptable and that he had provided calculations and a redesign for it. The Respondent accepted in questioning that the change should have been made by way of an amendment to the building consent and that no such application had been made.

[24] The Complainants also raised various issues with the build. These were more fully detailed in a report obtained by the Complainants from [Omitted] (the Building Report). The Respondent did not carry out building work (other than design work) but did provide coordination and oversight of the build as the main contractor. The restricted building work[6], including the foundation, was carried out by [Omitted]. [Omitted] was not licensed when the foundations were completed. The Respondent submitted that he only needed to be licensed when he completed a record of work, not when he carried out the work and that he was not aware that [Omitted]'s licence had been suspended. [Omitted] was licensed when framing was installed.

[25] The Respondent accepted that there were various items of the build as identified in the Building Report that were not trade standard or that required attention but submitted that they had been attended to, were incomplete or would have been attended to as part of completion.

[26] One of the issues raised related to seepage of moisture into the garage. The Respondent, in relation to tanking that had been completed on one face of the garage, stated that he had not realised that an authorised applicator needed to install the product used (shelterseal).

[6] As a result of advice by the Ministry of Business Innovation and Employment the Respondent considered that only very limited aspects of the build were restricted building work.

[27] The Complainants also raised issues with the misalignment of SIPs panels. The Respondent stated that the panels were installed to achieve an efficient use of materials, not to accommodate for aesthetics.

[28] The Board heard evidence that, as a result of the building work continuing without an amendment for the steel frame substitution having been granted, there are ongoing discussions with the BCA with respect to which aspects of the build can be given a code compliance certificate and which aspects will have to be covered by a certificate of acceptance. That process and the underlying questions have not yet been completed or resolved.

Counsel for the Respondent's Submissions

[29] Counsel for the Respondent provided written submissions which reiterated the matters submitted by the Respondent and summarised the various changes made to the building design as the build progressed. She noted that constant changes meant the detail for the response to the RFI was constantly out of date.

Board's Conclusion and Reasoning

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

[31] The Board has decided that the Respondent **has not** 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).

[32] The reasons for the Board's decisions are as follows.

<u>Negligence and/or Incompetence</u>

[33] The Respondent holds two licenses. A Design Area of Practice 2 Licence and a Site Area of Practice 2 Licence. The Board's considerations in respect of negligence and/or incompetence have been made with consideration to the scope of the two licenses held.

[34] The Board's finding that the Respondent has been negligent relates to four areas of conduct:

(1) carrying out building work without an amendment to a building consent being granted;

(2) a failure to deal with minor variations in an acceptable manner;

(3) a lack of reasonably expected care in the Respondent's design; and

(4) a lack of a lack of reasonably expected care in the coordination and oversight of the build.

Building Consent

[35] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[36] Building consents are granted under section 49 of the Act. A building consent can only be grated if the provisions of the Building Code will be satisfied. Section 49 provides:

> ***49 Grant of building consent***
>
> *(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[37] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

> ***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.*

[38] In *Tan v Auckland Council*[7] 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.*

[39] The same applies to the ongoing verification of building work. A failure to appropriately deal with 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.

[40] Justice Brewer in *Tan* also noted:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[41] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[42] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[7] [2015] NZHC 3299 [18 December 2015]

[43] In this respect section 45(4) of the Act states:

> *(4) An application for an amendment to a building consent must,—*
>
> *(a) in the case of a minor variation, be made in accordance with section 45A; and*
>
> *(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[44] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[45] It should also be noted that whilst a certificate of acceptance can be granted by a BCA for building work that is not carried out under a building consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

> ***96 Territorial authority may issue certificate of acceptance in certain circumstances***
>
> *(3) This section—*
>
> *(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
>
> *(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[46] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[47] The question for the Board to consider is whether the Respondent knew or ought to have known that an approved amendment to the building consent was required for the significant changes made to the build prior to them being undertaken, such as the frames being changed from timber to steel and the Traydec floor type being changed,.

[48] The Respondent holds Design AOP 2 and Site AOP 2 Licences. Both require a higher degree of knowledge and understanding of the building regulatory framework and of the consenting and building process. A person with those licences would be expected to know that building work can not progress without an amendment having been granted.

[49] The evidence before the Board was that the Respondent submitted an amendment for the framing and other included changes. Notwithstanding this, five days after its submission and prior to the amendment being considered the building work continued and the steel frames were substituted. When the amendment was considered a RFI was sent. It was not dealt with by the Respondent. Rather the building work continued.

[50] The Respondent has submitted that he did not deal with the RFI as there were continuous changes to the build. Those changes were also not dealt with in an appropriate manner. The build continued and the Respondent relied on an engineer's review of various aspects to ensure compliance. The result is that a certificate of compliance can only be issued for some of the work. A certificate of acceptance is going to have to be issued for the work that was completed without amendments being granted.

[51] Given the above, the follow-on question is whether the Respondent has been negligent or incompetent as a result. The Board has decided that he has been negligent.

[52] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[8] test of negligence which has been adopted by the New Zealand Courts[9].

[53] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[54] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purposes of the Act[11] which are outlined above. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[12].

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[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[11] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

[12] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[55] Turning to seriousness in *Collie v Nursing Council of New Zealand*[13] the Court's noted, as regards the threshold for disciplinary matters, that:

> *[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.*

[56] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

[57] In essence the Board finds that a licensed building practitioner with Design AOP 2 and Site AOP 2 Licences should have known that the building work could not continue without the amendments to the building consent sought being granted.

Minor Variations

[58] Unlike amendments minor variations can be dealt with during the build. There is nevertheless a process that needs to be followed and the evidence before the Board was that minor variations were not being appropriately dealt with.

[59] The legal provisions set out above as regards the failure to deal with build consent amendments also applies to minor variations. More specifically though section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably it states:

> ***45A Minor variations to building consents***
>
> *(1) An application for a minor variation to a building consent—*
>
> > *(a) is not required to be made in the prescribed form; but*
> >
> > *(b) must comply with all other applicable requirements of section 45.*
>
> *(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
>
> *(3) A building consent authority that grants a minor variation—*
>
> > *(a) must record the minor variation in writing; but*
> >
> > *(b) is not required to issue an amended building consent.*

[60] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

> ***3 Minor variation defined***

[13] [2001] NZAR 74

> (1) *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
>
> (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
>
> > (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
> >
> > (b) *minor wall bracing changes:*
> >
> > (c) *a minor construction change (for example, changing the framing method used around a window):*
> >
> > (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
>
> (3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

[61] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly the BCA retains a discretion to refuse a minor variation[14]. To aid the process of applying for a minor variation most building consent authorities have a minor variation application form.

[62] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather then proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought[15].

[63] It must also be noted, as regards a licensed building practitioners' obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a BCA of an breach of a building consent:

> ***89 Licensed building practitioner must notify building consent authority of breaches of building consent***
>
> (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*

[14] Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

[15] Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

(a) the territorial authority in whose district the building is situated; and

(b) the owner.

(2) The notification must—

(a) state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and

(b) state how the building work does not so comply; and

(c) be given as soon as practicable after the licensed building practitioner forms that view.

[64] Turing to the build and the evidence before the Board the Respondent noted that there were constant and continuous changes to the consented building design. The Respondents approach was, apart from getting engineering oversight, to simply deal with them on the basis of as built changes at the end of the project. That does not accord with the above process.

[65] As with the findings in respect of the amendment to the building consent the Board finds that a licensed building practitioner with Design AOP 2 and Site AOP 2 Licences should have known that minor variations needed to be dealt with in accordance with the above and that the Respondent has been negligent in his failure to do so.

Design Work

[66] Under the definitions in the Building Act design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b) it comes within the Board's jurisdiction. In this respect the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

3 Design work declared to be building work

(1) Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.

(2) Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.

[67] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

[68] As with the previous matter the Board considers that the Respondent has been negligent as opposed to incompetent.

[69] The same tests and considerations outlined above also apply. Additionally, in respect of design work the Board also notes the provisions of section 14D of the Act which states:

> ***14D Responsibilities of designer***
>
> *(1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
>
> *(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[70] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design[16].

[71] The design failed to take into consideration how the stairs from the garage would actually work. The original design was unworkable, and it was obvious from the plans that they were unworkable. The failure resulted in significant change to the design having to be made and a Traydec floor being cut into to provide sufficient headroom for the stairs to be used. These were fundamental design failings.

[72] The Board would expect a reasonable competent designer to give such matters due consideration in the design phase prior to the design being submitted to a consent. Given this the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

[16] Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

Coordination and Oversight

[73] The Respondent did not and could not have supervised[17] the restricted building work as section 84 of the Act provides:

> *All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

[74] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (the RBW Order) stipulates that restricted building work is building work that relates to the primary structure or external moisture management system of a house or small-to-medium apartment building that is:

(a) bricklaying or blocklaying work:

(b) carpentry work:

(c) external plastering work:

(d) foundations work:

(e) roofing work.

[75] There is also a requirement, under clause 4 of the RBW Order, that a licence class for the building work above have been designated. The Building (Designation of Building Work Licensing Classes) Order 2010 (the Licensing Order) designated the licence classes. The designation for a Design Licence is the carrying out or subversion of design work. The designation for Site Licence states a licensed building practitioner with a Site License can only provide "co-ordination or oversight". As such a licensed building practitioner with a Design or Site Licence cannot carryout out any restricted building work. It also follows that, because of section 285 of the Act, they cannot supervise it either.

[76] As noted above a licensed building practitioner who holds a Site AOP 2 licence can provide "co-ordination and/or oversight" of the build and it is with regard to the lack of co-ordination and oversight, especially as regards the quality and compliance of the build, that the Board's finding is made.

[77] Co-ordination and oversight are not defined terms. The Licensed Building Practitioners Rules 2007 (the Rules) does, however, provide some guidance and whilst those Rules use the term supervise and supervision throughout the Board does not interpret this as the supervision of restricted building work for the reasons outlined above. For example, the Rules note the following competencies:

3.1.1 Read and interpret working drawings, specifications, schedules and quantity lists.

3.1.2 Identify need for, and seek clarification and/or additional design documentation from the Design Lead, as required.

[17] As defined by section 7 of the Act.

3.1.3 Establish a building site and manage ongoing operations.

3.1.4 Monitor construction site performance.

[78] From the above competencies it is clear that many of the issues that arose on site and which were outlined in the Building Report came within the Respondent's purview as a Site Licence holder. There were extensive quality and compliance issues that the Respondent should have been monitoring. It is not enough to simply state that matters will be rectified or attended to as part of a snag list. Practitioners should be aiming to get the work right the first time, not to rely on an ability to fix matters down the track.

Contrary to a Building Consent

[79] As noted above the Respondent cannot carry out or supervise restricted building work (other than design work). The elements of charge under section 317(1)(d) relate to carrying out or supervising. As such the Board cannot make a finding against the Respondent.

Penalty, Costs and Publication

[80] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[81] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[82] 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. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[18] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

> *[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.*

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

[83] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[19] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[84] The Board considers that the Respondent has shown a disregard for the regulatory framework within which he operates. The result is that the owners of the dwelling are left in a compromised position.

[85] The regulatory system exists for a purpose. It ensures the safety of people who use buildings and that buildings contribute to the health, physical independence, and well-being of the people who use them The Respondent's failure to work within the regulatory framework is a serious matter and signal needs to be sent to the industry that such a disregard is not to be tolerated. A penalty which deters others is warranted.

[86] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[20]. The High Court when discussing penalty stated:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[87] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[88] The Board considered cancellation, however, taking the above factors into account the Board has decided that considers that a period of suspension, instead of cancellation, is warranted - not only to punish the Respondent but also required to deter others from such conduct. Accordingly, the Board will cancel the Respondent's Design and Site licences for a period of nine (9) months. During his suspension the Respondent will be able to carry out design work under supervision.

[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[20] [2012] NZAR 481

[89] The Board also considers that a fine is warranted for the same reasons set out above. The fine is set at $3,500.

Costs

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

[91] 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[21].

[92] In *Collie v Nursing Council of New Zealand*[22] 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.*

[93] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

Publication

[94] 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[23]. The Board is also able, under section 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.*

[95] 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.

[96] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[24]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[25]. Within the disciplinary

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[21] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

[22] [2001] NZAR 74

[23] Refer sections 298, 299 and 301 of the Act

[24] Section 14 of the Act

[25] Refer sections 200 and 202 of the Criminal Procedure Act

hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[26]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[27].

[97] 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[28]. 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.

[98] Based on the above the Board will order further publication by way of an article in Code Words. The publication will focus on the lessons that others can learn from the matter. The Respondent will be named.

Section 318 Order

[99] For the reasons set out above, the Board directs that:

Penalty: **Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of nine [9] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.**

And

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $3,500.

Costs: **Pursuant to section 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 section 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, in addition to the note in the Register and the Respondent being named in this decision.

[100] The Respondent should note that the Board may, under section 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.

[26] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[27] ibid
[28] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[101] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **17 July 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. 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.

[102] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 26th day of June 2019

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.