Before the Building Practitioners Board

	BPB Complaint No. CB25112
Licensed Building Practitioner:	David Evans (the Respondent)
Licence Number:	BP 118105
Licence(s) Held:	Design 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	Tauranga
Hearing Type:	In Person
Hearing Date:	15 August 2019
Decision Date:	2 September 2019

Board Members Present:

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

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.

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 offence the Board resolved to investigate was that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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]*.*

[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*

[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] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

> *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.

Evidence

[5] 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.

[6] 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.

[7] In addition to the documentary evidence before the Board, the Board heard evidence at the hearing from the Complainant and the Respondent.

[8] The Respondent was engaged in or about July 2017 to undertake a design to replace three windows in the corner of the dwelling that leaked with a new solution as well as replacing all other windows in the dwelling with uPVC windows. The Complainant's instructions included the installation of external insulation to the brick clad dwelling.

[9] The Respondent took the initial instructions and then handed the project over to [Omitted], a staff member, to develop the design whilst he was on a three-week holiday. The staff member had qualifications and experience in design but was not licensed. The Respondent's business, Vision Design Limited, had a total of three unlicensed staff working on designs under the Respondent's supervision.

[10] The initial site measure was undertaken by [Omitted] and one other staff member. The Respondent noted that he normally conducted the site measure but was not able to do so as a result of his leave. He accepted that some required measurements may not have been taken.

[11] The design was submitted to the territorial authority as part of a building consent application on 16 February 2018. It was noted as being drawn by [Omitted] and checked by [Omited]. The consent was sought on a semi urgent basis as a result of replacement windows being ready for installation. The consent was not finalised in time for the window replacement, which was undertaken under an exemption granted by the territorial authority. It was noted that the designs used were for new construction and were not site specific.

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

[12] The Respondent gave evidence that, at the time of the building consent being submitted, there were significant personal events happening in his life that were distracting him at work and that his check was not as thorough as it should have been.

[13] The Respondent also spoke of his office quality assurance process. He stated that consent documents prepared by one staff member are checked by a second staff member before the Respondent does a final review. He noted that the normal process may have been circumvented in this instance due to the rush to get the consent filed and that the check by another staff member may not have occurred and that his own check may not have been as thorough as usual.

[14] The consent filed did not specify the installation of new insulation in the exterior walls. The Board heard evidence that the Respondent believed there was some confusion as to whether the install of external wall insulation would be done as a single install as part of the consent or progressively outside of the consent. In questioning, the Respondent was unsure as to whether a building consent was required for the install of new external insulation where it had not previously been installed.

[15] The building consent application resulted in a Request for Information (RFI) being issued on 5 March 2018 and a second RFI being issued on 12 March 2018. The second RFI dealt with some of the same items as the first RFI. The Respondent submitted that there was nothing unusual with RFIs being issued and that, of itself, did not mean he had been negligent. He also submitted that the consenting process involved a degree of negotiation with the building consent authority to reach solutions that met the building code.

[16] With regard to the RFI's that were issued the Respondent gave evidence that he did not agree with all of them and that he had instructed [Omitted] to seek clarification on certain items. The RFI's raised some fundamental design issues such as whether compliance with E2 would be achieved. [Omittied] submitted a response but did not seek clarification as instructed. The consent was not advanced to the point of it being issued.

[17] The Board questioned the Respondent with regard to various issues identified with the plans as submitted. In general, it was noted that they were reliant on standard detailing which was not suitable for the intended building work and/or the onsite existing construction methodology and that, in certain instances, the plans lacked the level of detail required for the onsite building work to be carried out.

[18] The Respondent accepted that the plans were not as accurate as they should have been. The Respondent noted that he tended to work with builders who were familiar with his designs and approach and that they knew to contact him to obtain further design details when building elements were exposed as part of deconstruction. He accepted that there were no notes to this effect on the plans and that he could not rely on only working with familiar builders.

[19] The Respondent submitted that over the past 12 months there had been a focused effort within his design practice to make sure that their designs had job specific notes and details. He accepted that he could have done better with the design to which the complaint related.

[20] The Respondent closed by noting that the complaint and Board investigation had been a wake-up call and that they were focused on improving and doing a better job.

Board's Conclusion and Reasoning

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

[22] The Board's considerations as regards negligence and/or incompetence are in respect of the Respondent's design work and/or his supervision of it.

[23] 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.*

[24] 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.

[25] Turning to negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*[6] Judge McElrea noted:

> *[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.*

[26] 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, in this case a licensed building practitioner with a design license. This is

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

described as the *Bolam*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[27] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[9] it was stated as *"an inability to do the job"*.

[28] 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.

[29] 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 purpose of the Act[11]. 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].

[30] The Board notes that the purposes of the Act are:

> ***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—*
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> *(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:*

[7] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[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

(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.*

[31] 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.

[32] 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[13].

[33] In this instance the plans were substandard. They failed to deal with the instructions given by the client as they omitted insulation. The Respondent's knowledge of consenting where insulation was being installed in the exterior walls of an existing building was lacking. The design and plans also failed, in certain instances, to provide the correct detailing for the building work to be undertaken. Some aspects had not been detailed and notes and instructions to those who would carry out the building work did not require them to revert to the designer. The quality assurance process adopted in the Respondent's office failed. RFIs were not dealt with adequately and there was also an over reliance on the building consent authority to identify issues with the building consent application.

[34] In this respect the building consent authority's role is to check that the design work has been carried out in accordance with the building consent. It is not uncommon that a building consent authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. In this respect it is noted that the building consent authority's job is to grant or refuse a building consent. It is not its role nor responsibility to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.

[35] A designer should be aiming to get their design and specifications right the first time and not to rely on the building consent authority to identify compliance failings and

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

to assist them to get it right. In this respect it is also to be noted that under section 45(3) of the Act a licensed building practitioner with a design licence must submit a certificate of work with a building consent that states that the design complies with the building code:

> *(3) The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
>
> > *(a) provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
> >
> > *(b) that identifies that design work; and*
> >
> > *(c) that states—*
> >
> > > *(i) that the design work complies with the building code; or*
> > >
> > > *(ii) whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[36] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[14]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*
>
> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[37] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] the Court’s noted, as regards the threshold for disciplinary matters, that:

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[14] Hansard volume 669: Page 16053

> *[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.*

[38] The failings were serious. There was a failing of process and a failure to supervise adequately and the result was that substandard plans were submitted for a building consent. The Board accepts that there were mitigating circumstances at the time but those matters go to considerations of penalty, not to liability.

[39] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent in that he 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.

Penalty, Costs and Publication

[40] 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.

[41] 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. The Respondent also made submissions as regards penalty noting that he had dependent family members, some of whom had significant ongoing health issues and that the suspension or cancellation of his licence would severely impact him, his family and his employees.

<u>Penalty</u>

[42] 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*[16] 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.*

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[15] [2001] NZAR 74

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

[43] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[17] 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.

[44] The level of negligence was, on the scale of negligence, at a moderate level. It was not at the level where the suspension or cancellation of the Respondent's licence was warranted. Rather a fine was considered appropriate and starting point of $3,500 was adopted. The Board did not consider that there were any aggravating factors. There were mitigating factors and on the basis of those the Board has reduced the fine to $2,500.

Costs

[45] 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."

[46] 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[18].

[47] In *Collie v Nursing Council of New Zealand*[19] 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.*

[48] Based on the above the Board's costs order is that the Respondent is to pay the sum of $1,750 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of the actual costs incurred.

Publication

[49] 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[20]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

[17] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[18] *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.
[19] [2001] NZAR 74
[20] Refer sections 298, 299 and 301 of the Act

> *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.*

[50] 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.

[51] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[21]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[22]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[23]. 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*[24].

[52] 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[25]. 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.

[53] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $2,500.**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $1,750 (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 not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[55] 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.

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[21] Section 14 of the Act
[22] Refer sections 200 and 202 of the Criminal Procedure Act
[23] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[24] ibid
[25] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[56] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 24 September 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.

[57] 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

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

Signed and dated this 2 day of September 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.

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(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.