Before the Building Practitioners Board

	BPB Complaint No. 25152
Licensed Building Practitioner:	Mark Hanson (the Respondent)
Licence Number:	BP 130700
Licence(s) Held:	Carpentry

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:	19 November 2019
Decision Date:	6 January 2020

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Allan Knowsley for the Respondent, Barrister and Solicitor, Rainey Collins Lawyers

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) and 317(1)(d) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) 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);

(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); and

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

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 maintained in order to protect clients, the profession and the broader community."*

[4] In a similar vein the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

> *… the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It*

[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
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

> *includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[5] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

[6] The above commentary on the limitations of the disciplinary process are important to note in this case as the Board received a high volume of evidence and the complaint raised a number of allegations that did not meet the seriousness threshold. As such the Board’s inquiries, and this decision, focused on and deal with the serious conduct complained about.

Inquiry Process

[7] The investigation procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges and it decides what evidence is required at a hearing to assist it in its investigations. In this respect the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

[9] In the present matter the Complainant was not summonsed to give evidence. She did, however, attend and provided an opening statement. The statement noted the impact of the Respondent’s conduct on her and her family, her desire to protect members of the public who were looking to build from the Respondent and on the Respondent’s conduct following the termination of his services. The Complainant also expressed her dissatisfaction with the complaint process set out in the Act and Complaint Regulations and with the Board’s investigation and processes. The Complainant elected not to remain following the delivery of her statement.

Evidence

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

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

Mark Hanson	Respondent
John Rennie	Technical Assessor appointed by the Board
[Omitted]	Design LBP, [Omitted]
[Omitted]	Engineer, [Omitted]
Meng Xu	Building Control Officer, Hutt City Council

[12] The Board also received further written submissions from both the Complainant and the Respondent.

Admissibility of propensity evidence

[13] The Complainant's further written submissions included new evidence. The evidence contained statements from other persons who had engaged the Respondent to carry out building work. The Board considered it to be propensity evidence. Under section 40(2) of the Evidence Act 2006 propensity evidence is admissible. There are, however, rules about admissibility. Those rules differ for civil and criminal proceedings. In this respect the proceedings before the Board are disciplinary and, in that respect, more aligned to the rules that relate to criminal matters and as such the applicable rules have been applied.

[14] Under section 43 of the Evidence Act admissibility is governed by questions of whether the probative value of the evidence outweighs the risk that it may have an unfairly prejudicial effect. In this instance the Board decided that it would not consider the propensity evidence on the basis that it may have had a prejudicial effect, it was not sworn testimony and the Respondent did not have an adequate opportunity to respond to or counter it.

Background

[15] The building project to which the complaint related was an alteration and extension to an existing residential dwelling. The Complainant, the owner of the dwelling, engaged a Licensed Building Practitioner with Design AOP 1 Licence[7] to develop a design and obtain a building consent. A building consent was issued on 26 April

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

[7] The Designer is currently the holder of a Design AOP 2 Licence but was, at the time the design was carried out, the holder of a Design AOP 1 Licence

2018. The design and works involved the formation of a new family room, bedroom, entrance and the integration of an existing, recently built, double garage.

[16] The Respondent was engaged by the Respondent's company InsideOut Building and Renovation Limited to carry out the building work. The Respondent was the only licensed building practitioner on site carrying out carpentry work. He was assisted by staff. The Respondent started on site on 1 June 2018. The last building work that he carried out or supervised was on 7 January 2019 and on 13 January 2019 his services were terminated by the Complainant. The Respondent was trespassed from the site on 19 February 2019. The consented building work was not complete as at the date of termination. The Complainant engaged a different building contractor to complete the project.

[17] Following the termination of the Respondent's services a dispute arose and the Complainant laid a complaint with the Board.

<u>Technical Assessors Report</u>

[18] The Board has the option, when carrying out its investigations, of seeking the opinion of an expert. In this instance it sought a report from John Rennie who provided the Board with a report.

[19] It is important to note that the Technical Assessor is independent. They are appointed by the Board, not by the persons who are involved in the complaint. As such the Board tend to place a greater deal of weight on a Technical Assessors findings and opinions.

[20] In this instance the Technical Assessor's report succinctly summarised the key aspects of the building work that the Board needed to investigate and focus on.

[21] The Technical Assessor was critical of the design developed for the project by [Omitted] of [Omitted]. He noted:

> *We are of the opinion that quality and completeness of the design, and the level to which the plans have been prepared, falls below a reasonable standard expected to allow a competent builder to carry out the works required. The initial consented plans appear not to have been based on a full measure-up to enable the as-built locations of the house and garage to be depicted properly. This necessitated a measure-up to be done following the pouring of the floor slab which subsequently resulted in amended drawings being issued.*

[22] The Technical Assessor went on to note issues with amended drawings including a failure to consider the proximity of the eaves in relation to the boundary and the need for a fire-rated wall if built as designed; a continued failure to note the correct eave dimensions; a failure to consider the design of entrance steps on the consented design; the remedial details provided for concrete steps lacked robustness; and the

failure to identify the inadequacy of a garage lintel to support trusses when rotating a roof structure.

[23] The Technical Assessor noted various issues the Respondent's building work including:

(a) sequencing of construction;

(b) failure to call for Council inspections;

(c) working from un-consented plans;

(d) eaves projection incorrect;

(e) trusses not adequately supported;

(f) general installation of roof structure inadequate;

(g) incorrect weatherboard installation;

(h) garage wall cladding material changed;

(i) entrance steps not planned for construction in concrete;

(j) failure to install door sill flashings, and general poor workmanship during installation of sliding doors

(k) inadequate foundation support below external door;

(l) roof cladding installed incorrectly; and

(m) garage door lintel undersized.

[24] The Board's inquiries focused on the items raised in the Technical Assessor's report that reached the seriousness threshold and the findings made by him.

[25] The Board has also only focused on the building work carried out or supervised by the Respondent. A fundamental principal of the licensed building practitioner regime is that each licensed person is responsible and accountable for their own work. As such the Board cannot generally inquire, in respect of one licensed building practitioner into the work carried out by another licensed building practitioner. This applies as regards roof cladding installed by another licensed person.

<u>Sequencing and working from un-consented plans</u>

[26] Sequencing and working from unconsented plans were related issues. Both related to failures to ensure amendments and/or minor variations to the building consent were dealt with in a timely manner. In this respect the Technical Assessor's opinion was that the Respondent was the project manager and, as such, notwithstanding that there were design and engineer professionals engaged, the Respondent still carried some of the responsibility to ensure building work was not carried out prior to changes to the building consent being dealt with.

[27] The evidence was that changes were required to the building consent to accommodate design issues including that the house and existing garage did not align as shown on the plans and incorrect eave overhangs with flow on impacts on trusses. Changes to the type of cladding on the west wall of the garage were also made without the change being consented.

[28] Whilst the Respondent had plans on site which had been developed by the appropriate persons and he was working from those plans they had not been assessed or approved by the Council.

[29] At the hearing the Respondent accepted that he should have been working from consented plans and not unconsented amended designs.

Failure to call inspections

[30] The building consent issued specified the number and type of building inspections that were to be called. Siting and foundation inspections that were stipulated were not called for.

[31] The consent stipulated that an inspection was required once boundary markers had been identified or a surveyor had installed markers. The Respondent stated he did not identify any boundary markers or get a survey done prior to starting the building work. He believed it was not required as recent consented building work had been carried out on the site. A pre-wrap inspection identified possible issues with the building set-out in relation to the boundary, and that the consented plans did not reflect the as-built position of the original house and garage.

[32] An engineer's inspection was called for prior to the foundation being poured. An engineer's inspection was a requirement of the consent. The engineer's Site Inspection Report passed the work and noted the instructions as:

> *Approved to pour footings on completion of the above, provided the Local Authority has carried out any inspections they require.*

[33] The Respondent's position was that he thought an inspection was not required if an engineer had inspected it. The Council witness confirmed that a Council inspection was still required.

[34] On 12 December 2018, when changes to the building consent were sought the Council placed a stop work notice on the building work until such time as a survey was completed and a PS1 and PS4 from an engineer was provided to cover the missed foundation inspection.

[35] The Technical Assessor noted:

> *The respondent being the LBP in charge of the site had responsibility to either call for or request that the claimant call for Council inspection, and in not calling for the original siting or foundation inspection the areas of non-*

> *compliance linked to the proximity of the building to the boundary were not identified until after the superstructure had been constructed.*

[36] The Respondent accepted, in his written submissions, that he should have called for a pre-pour inspection.

[37] The Respondent also submitted:

> *I will also be much more stringent about not proceeding until amended consents have actually been obtained by owners when changes are required and to getting council sign off in writing before proceeding with any further building stages.*

Eaves

[38] The designer carried out an internal but not an external measure of the house and garage or a boundary measure. Levels were not taken. He relied on plans submitted in 2015 for a previous consent. His plans did note that “boundary information has not been provided and therefore set out dimensions are indicative only” and that “all dimensions to be verified on site by contractor prior to commencing work …”.

[39] The existing eaves were 600mm wide. The consented drawings showed them as 450mm wide. A decision was made to match to existing. This, in turn, created issues with proximity to the boundary (less than 1 metre) such that a resource consent was required. It would also have triggered the need for a fire rated wall or fire engineering. The Respondent acknowledged that a resource consent would have been required which was obtained by the Complainant as was a waiver on fire rating. He noted that he raised the issues and left it to others to deal with.

[40] Whilst the eaves were design issues, they had a flow on effect to the trusses which had to be changed. It was noted that the changes to the consented plans to deal with the eaves were not made prior to the work being carried out.

Trusses

[41] The original truss design incorporated a girder thus spanning across the original building to support the new roof structure. During the build, the truss manufacturer developed a revised truss layout following a site measure. The new design required an internal bedroom wall to be load-bearing. The trusses as manufactured and supplied resulted in loads being placed on a non-load- bearing wall.

[42] The Respondent noted that the issue arose at the end of his engagement on the site and that he was going to rectify the issue to make the wall load bearing by utilising a stringer in accordance with NZS 3604. The change to the truss design was not discussed with the engineer or the designer. No changes to the building consent were sought prior to the work being carried out.

Roof structure

[43] A number of workmanship issues were identified following erection of the roof structure including incomplete fixings, inadequately installed bracing, and altered supports. Roof cladding had been installed when the issues were identified, therefore the roof structure would have been judged to have been completed by the respondent prior to engaging the roofer to install the roofing. Remedial work was required.

[44] The Respondent gave evidence that he was under pressure to get the roof on, that work was done out of sequence and that mistakes were made by the builders on site. The intention was to return to complete fixings but that did not occur due to the termination of the contract.

Incorrect install of weatherboards

[45] A decision was made to remove and install new weatherboards to the garage. This work was undertaken to ensure alignment with the cladding of the existing house that was to become integral. The weatherboards installed had differing alignment resulting in an overlap of less than 32mm. The respondent accepted this issue.

Change of Cladding

[46] The existing cladding to the east wall of the garage was shadowclad. It was changed to Hardies sheet with battens. The Respondent noted that the plans showed the existing cladding as weatherboards which was incorrect and that there was no detail on the plans to cover the cladding in that area. The work was carried out prior to the required changes to the building consent being dealt with. The cladding was not installed as per the manufacturer's installation instructions. The Respondent disputed that finding in his submissions.

Entrance steps

[47] There was differing evidence as regards the entrance steps. The owner considered they were always going to be concrete and that the Respondent knew that. The consented design did not stipulate what they were to be but implied that they would be timber as per the existing steps and landing. The Respondent's building work in the area made it difficult for concrete steps to be constructed. An engineer's design solution was required and was provided. An amendment was prepared and submitted. A different solution was actually constructed but not by the Respondent.

Windows and doors

[48] The issues were generally described as poor workmanship. Of particular note were two external doors that did not have metal sill trays or head flashings. They had to be removed and reinstalled. The work included having to clean off expanding foam used as part of the install. The Respondent described the work as temporary to provide weather protection.

Entry foundation support

[49] As part of the works the Respondent demolished a concrete slab and built a new structure which included a new foundation bearer, new floor structure, and new flooring. The work was not part of the building consent. The Engineer noted in an email dated 6 March 2019 that what had been constructed was "creating a cantilevered action in the timber subfloor which it is not designed for". The Respondent accepted that he should have at the least engaged an engineer prior to carrying out the work as it did not fall within the ambit of an acceptable solution.

Garage door lintel

[50] The Technical Assessor's opinion was that the lintel was a design issue. The Designer stated that he had not taken a change in direction of trusses into account in his design. The Respondent stated that he did not notice the issue and that whilst he had removed door tracks he had not removed the door itself and so it was not obvious.

[51] The Technical Assessor noted:

> *The structural integrity of the lintel was not questioned during the design, and no works were noted as being necessary on the consented drawings, therefore we do not believe it was negligent for the respondent not to have queried the design or consent in this instance.*

Disrepute

[52] The Complainant included evidence in the complaint as regards disreputable behaviour. Some of the alleged matters were contractual in nature relating to the removal of a fence as part of the construction and to health and safety hazards. Others were in relation to how the Respondent behaved on site and with regard to his interactions with the Complainant and the language he used. The Respondent countered that the relationship was good until such time as the contract was terminated. After that he considered that the Complainant had tried to create issues that would come within the ground for discipline and that she had painted an extreme picture.

Board's Conclusion and Reasoning

[53] The Board has decided that the Respondent **has**:

(a) carried out or supervised building work or building inspection work in a negligent 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);

and **should** be disciplined.

[54] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[55] The reasons for the Board's decisions follows.

Negligence

[56] The finding of negligence relates to the Respondent carrying out building work prior to the required changes to the building consent being dealt with and to his failure to call for inspections.

[57] Whilst there were elements of the actual building work that was carried which fell below acceptable standards the Board has decided that those aspects of the complaint do not meet the threshold for disciplinary action.

[58] 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].

[59] The New Zealand Courts have stated that assessment of negligence 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.

[60] 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].

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

> ***3 Purposes***
> *This Act has the following purposes:*

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

> *(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.*

[62] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[63] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] 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.*

[64] As regards building consent changes the Respondent had a duty, if the building work could not be carried out in in accordance with the consented plans, to consult with the designer and/or the building consent authority to establish if the proposed change would still meet building code compliance requirements and, importantly in this case, to wait until such time as the building consent changes were dealt with prior to carrying out the associated building work.

[65] Changes can be made by way of an application for a building consent amendment or, if minor in nature, a minor variation under section 45A of the Act. In this respect section 89 of the Act states:

> ***89 Licensed building practitioner must notify building consent authority of breaches of building consent***

[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74

> *(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—*
> > *(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.*

[66] There was a designer that had been engaged on the project. The designer had been contracted by the owner, not by the Respondent. The designer had the primary responsibility to seek a minor variations or amendments to the building consent. Notwithstanding the Respondent is required, under section 40 of the Act, to build in accordance with the building consent. He has not done so. In essence he has proceeded to make changes to the building consent without ensuring that the changes were approved and would meet the requirements of the building code. In failing to do so the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.

[67] Additionally, the Respondent failed to call for required building inspections. The inspection process is a vital component of the building process. It provides independent verification that the building consent and the building code are being complied with. Circumventing that process puts the purposes of the Act at risk and the compliance of a building at risk. Again, such conduct falls seriously short of what is expected of a licensed building practitioner.

[68] 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.

<u>Contrary to a Building Consent – Building Consent Changes</u>

[69] There is a degree of duplication between the conduct and matters to be considered under section 317(1)(d) contrary to a consent and negligence under 317(1)(b) of the Act. That will be taken into consideration by the Board when considering penalty.

[70] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

[71] 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.*

[72] 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.*

[73] 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 above.

[74] In *Tan v Auckland Council*[16] 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.*

[75] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[16] [2015] NZHC 3299 [18 December 2015]

[76] 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.*

[77] 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.

[78] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[79] As noted above once a building consent has been granted any changes to it must be dealt with in the appropriate manner. It also to be noted 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.

[80] Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established[17].

[81] There was clear evidence before the Board that the Respondent had carried out building work that was not in strict adherence to the building consent. Aspects of this were as a result of the consenting changes being handled by others being delayed. That is a mitigating factor, not a defence. However, with respect to the changes to the trusses and cladding, the Respondent had a primary role in the changes and he should be held accountable, from a disciplinary perspective, for that.

Disrepute

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

[83] The Act does not provide guidance as to what sort of conduct can being the regime into disrepute. The Oxford Dictionary defines disrepute as "the state of being held in

[17] *Blewman v Wilkinson* [1979] 2 NZLR 208

low esteem by the public"[18] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[19] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[20]

[84] Conduct has to be considered and determined on the facts of each case. The Board will, however, be guided by finding in other occupational regimes and past cases before it. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[21];
- honest mistakes without deliberate wrongdoing[22];
- provision of false undertakings[23]; and
- conduct resulting in an unethical financial gain[24].

[85] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

> *This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[86] The same considerations as regards seriousness noted earlier in this decision also apply and it is in on the basis of the seriousness test that the Board has decided that the Respondent has not committed the disciplinary offence.

[87] The Board did note that there were aspects of the Respondent's behaviour that were unsavoury or inappropriate and he is cautioned for the future. The conduct did not, however, reach the high threshold required for disciplinary action.

Penalty, Costs and Publication

[88] 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.

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[18] Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus,* search settings UK English, accessed 12/05/15
[19] [2012] NZCA 401
[20] [2012] NZAR 1071, page 1072
[21] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[22] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[23] *Slack, Re* [2012] NZLCDT 40
[24] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

[89] The Respondent made submissions at the hearing as regards penalty, costs and publication. The Board proceeded to make a decision.

Penalty

[90] 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*[25] 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.*

[91] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[26] 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.

[92] The Complainant's complaint and submissions outlined the impact the Respondent's conduct had on her, both financially and emotionally.

[93] The Respondent made submissions noting the impact the matter has had on him and his business which is now defunct. He noted that he is now without income and is in a financially precarious position. He submitted that had the contract continued he would have put matters right.

[94] The Board has also taken into account the contributory conduct of the designer.

[95] On the basis of the above, and taking into consideration the Board's findings, the Board has decided that a training order is the most appropriate penalty. The Respondent is to successfully complete, at his cost, remedial training focused on the consenting process within 6 months of this order.

[96] The Respondent should note that if the Respondent fails to comply with the Board's penalty order within the time frame indicated then the Board will take the alternative disciplinary action of suspending the Respondent's licence in accordance with section 318(1)(b) until the earlier of the training being satisfactorily completed or the expiry of a period of 12 months.

[25] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[26] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

[97] 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."

[98] 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[27].

[99] In *Collie v Nursing Council of New Zealand*[28] 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.*

[100] A full hearing was required. A Technical Assessor had been engaged. The costs of the investigation and hearing were substantial. Based on these facts and the above the Board's costs order is that the Respondent is to pay the sum of $3,000 toward the costs of and incidental to the Board's inquiry.

Publication

[101] 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[29]. 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.*

[102] 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.

[103] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[30]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[31]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal

[27] *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.
[28] [2001] NZAR 74
[29] Refer sections 298, 299 and 301 of the Act
[30] Section 14 of the Act
[31] Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive[32]. 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*[33].

[104] 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[34]. 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.

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

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(e) of the Building Act 2004, the Respondent is ordered to undertake a remedial training course at his costs and to the satisfaction of the Registrar within 6 months of this order. The course to be completed is the BOINZ TA001 which covers:**

- **Communicate effectively in their day-to-day work with sound listening and interpretive skills;**
- **Communicate to customers outcomes associated with the Building Act, Building Code and Building Consent Authority (BCA) requirements; and**
- **Understand and be able to communicate how these documents and their relationships are reflected in the forms, processes and requirements within the BCA;**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $3,000 (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 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.

[107] 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.

[32] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[33] ibid
[34] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 6th day of January 2020

Chris Preston
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.