Before the Building Practitioners Board

	BPB Complaint No. CB25107
Licensed Building Practitioner:	Dion South (the Respondent)
Licence Number:	BP 113121
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	Tauranga
Hearing Type:	In Person
Hearing Date:	31 October 2019
Decision Date:	27 November 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
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 disciplinary offences under sections 317(1)(b), 317(1)(d) and section 317(1)(da)(ii) 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);

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and

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

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] 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

Evidentiary Requirements

[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.

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

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

Dion South	Respondent
[Omitted]	Complainant
[Omitted]	Technical Assessor to the Board

[8] Included in the documentary evidence was an adjudication issued under the Constructions Contracts Act 2002 (CCA). Section 68 of the CCA provides that evidence and documents in relation to an adjudication are confidential but that the parties to it can agree to confidentiality being waived. In *Concrete Structures (NZ) Ltd v Inframax Construction Ltd* H[6], Lang J opined that the words "any document created for the purposes of an adjudication" in section 68(1)(a) of the CCA are sufficiently wide to include the determination itself. Given this the consent of the parties to the Board receiving the adjudication was sought. The parties agreed.

Background

[9] The Respondent was engaged to carry out an extensive renovation to a residential dwelling under a building consent. A one-page contract with two pages of pricing schedules dated 23 March 2015 between his company South Development Limited and the Complainant was entered into. The provisions of Part 4A of the Act or the Building (Residential Consumer Rights and Remedies) Regulations 2014 were not met. Those provisions require mandatory pre-contract disclosure and minimum contractual terms. Terms that were provided in the Respondent's contract included:

(a) a fixed completion time frame of 16 weeks with work starting on 30 March 2015;

(b) payment in three instalments on presentation of invoices;

(c) payment for subcontractors as the subcontractors invoiced;

(d) a guaranteed fixed price for the work contained in Schedule 1 of the agreement of $331,192.20 (inclusive of GST); and

(e) an estimate for the work contained in Schedule 2 of the agreement of $40,832.35 (inclusive of GST).

[10] The Respondent was not aware, at the time, of the provisions of Part 4A of the Act or of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

[11] The contract included a clause to the effect that the client agreed not to make any changes that would increase the fixed price but that if changes were made the client would cover the difference. The contract did not provide for any process for variations to be dealt with.

[6] High Court, Hamilton CIV-2010-419-909

[12] The building work started on time. It did not progress as planned or in accordance with the fixed time frame for completion, which would have been on or before 17 July 2015. The Respondent stopped working on the build on 30 September 2015 at which time the work was not complete. A dispute followed.

[13] On 10 November 2011 the Respondent, through his company, issued a notice of intention to suspend work under the Construction Contracts Act 2002. An Adjudication under that Act followed in August 2017. The Adjudicator held that there was no entitlement to suspend the works for alleged non-payment of invoices. The finding was endorsed in High Court proceedings[7]. The High Court also noted that it is an implied term in fixed price construction contracts that the contractor will carry out and complete all work necessary for the completion of the scope of works[8] and that the implied term had been breached.

[14] The Adjudication ordered completion of the works. The Respondent did not complete any further building work. In April 2017 the Complainant cancelled the contract. The High Court held that the cancellation was valid[9].

Relevant Facts

[15] The Respondent issued weekly invoices and required payment on a weekly basis. The Respondent gave evidence that weekly invoice and payments had been agreed with the Complainant and that the contract had only been created and provided as a fixed price contract so as to allow the Complainant to obtain finance. His evidence was that the true intention was for the building work to be invoiced and paid for on a charge up basis. In essence he considered the fixed price was only an estimate. The Complainant's evidence was that the written contract reflected their agreement and that he paid weekly invoices as he felt he had no other option if he wanted the building work to progress as the Respondent had threatened to walk off the job if he was not paid weekly.

[16] The Respondent was questioned as to how he arrived at the fixed price. He stated he obtained estimated the price based of the plans and obtained pricing from subcontractors and suppliers, that there were no margins on pricing he had obtained and that whilst the price was tight, he was confident that he could have delivered for that price. The Respondent was not able to produce any documentation to substantiate his pricing methodology such as the subcontractor or suppler pricing.

[17] The Respondent stated it was the first time he had done a large job on a fixed price basis. He had done one other small job as a fixed price. His normal practice was to carry out renovation work on the basis of an estimate. He noted that he was old fashioned and liked to do things on a handshake.

[7] *Lee v Dion South and South Development Limited* CIV-2017-404-2194, [2019] NZHC 646 at para [11]
[8] Section 362I of the Building Act 2004.
[9] *Lee v Dion South and South Development Limited* CIV-2017-404-2194, [2019] NZHC 646 at para [13]

[18] The Board questioned the Respondent as to how delays and variations were dealt with. He stated that there were weekly, if not daily, on site conversations with the Complainant and that such matters were discussed, and that the Complainant would have been aware of the changes and delays from his invoicing.

[19] The Respondent stated that significant delays in the build were caused by constant, almost daily, changes to the build. He noted, in particular, changes to the roof structure whereby existing noncompliant trusses installed as part of a recent alteration, were changed for new trusses. The inspection records from the building consent authority indicated that those changes took place at around or soon after the fixed term was over.

[20] The Respondent was questioned as to the process that he used to deal with the change to the building consent in respect of the trusses. He noted that they were designed by the truss manufacturer who supplied them but that there was no specific or documented engagement with either the designer or engineer to the project. No amendments or minor variations were filed with the building consent authority. He considered the changes were "like for like" under Clause 1 Schedule 1 of the Act. He did not keep any documented records of the changes. The Complainant gave evidence that the change was made on the Respondent's recommendation and on the basis that it would be easier and cheaper.

[21] The Respondent also pointed to cladding which involved installation of three different profiles of vertical ship lapped cladding. He stated he had not noted the requirement when estimating time to complete and that this added a significant amount of time to the build. The cladding was carried out after the fixed time period had expired.

[22] The Board questioned the Respondent as to the sequencing methodology that he used. The Complainant had raised a concern that retaining walls and foundations were completed in three stages as opposed to one stage as was the original intention. The Complainant considered that this caused delays and hindered machine access to the rear of the site. The Respondent stated his methodology was to work from the back of the house out to the front and that his methodology would not have delayed the work. He also stated that there was still enough room to access the back of the site with a small machine to complete retaining walls.

[23] The Complainant brought proceedings in the High Court to recover sums they claimed were owed[10]. The Court costs to complete of $418,840.04[11]. The Court also allowed other losses, damages and costs. The Complainant claimed that, as at the cancellation of the contract he had paid more than the full amount of the contract price.

[10] *Lee v Dion South and South Development Limited* CIV-2017-404-2194, [2019] NZHC 646

[11] Ibid at para [28]

[24] The Board engaged a Technical Assessor to review the cost to complete. The Technical Assessors report noted:

> *Based on the documents provided by* [Omitted]*, invoices to the value of $335,356.91 (incl. GST) were issued by South Developments limited. The last invoice of $ 51,162.09 (incl. GST) has not been paid by* [Omitted]*.*
>
> *Therefore, we can deduce that the paid to date sum is $ 284,194.82 (incl. GST).*
>
> *South Developments failed to provide clear written documentation of the changes between the tender circumstances and the circumstances discovered on site. The variations should have been priced and provided to* [Omitted]*. The delays that these variations caused should have been communicated to* [Omitted]*and the impact on the tender programme and the cost for the additional construction labour should have been provided. Even if this would have only been estimates.*
>
> *We are satisfied that South Developments limited did not overcharge on this project. Without preparing a condition report with a schedule of cost we could not assess the cost of the completion works, only $227,013.33 of the original sum has been expended by South developments. That leaves a value of $ 145,011.22 (incl. GST) of the original sum.*
>
> *It is also reasonable to point out that the information provided showed that the last claim of $51,162.09 (incl. GST), issued and included within the calculations of the final claimed sums has not been paid.*
>
> *That increases the "remaining sum of the original contract" to $196, 173.31(incl. GST), This sum is less than the alternate builder's price of $277,208(incl. GST). We have not seen this price or what it includes. We cannot evaluate if any additional works have been included within the costs that South developments have liability for and cannot comment on the reasonableness of the sum.*

[25] With regard to a record of work the Respondent stated that, as the work had not been completed, he did not have to provide a record of work. He also stated that the record of work was on the mantel piece at his home.

[26] The Respondent submitted that during the build, which was the second job that he had done for the Complainant, that he had a good relationship with the Complainant and that the relationship only deteriorated when the Complainant could no longer afford to continue with the build. The Respondent stated he was being made a scapegoat for the Complaint's money problems and that he has lost everything as a result. He submitted text messages which is stated supported his submission. He considered that protections needed to be put in place to protect builders.

[27] The Complainant countered with a submission that the Respondent was not building in accordance with the agreed contractual terms and that the Respondent was simply seeking to expend all of the Complainants funds as quickly as he could.

Board's Conclusion and Reasoning

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

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

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

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

and should be disciplined.

[29] The Board has 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).

[30] The reasons for the Board's decision follow.

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

[31] The potential negligence, in this instance, related to the Respondent contractual processes including those for pricing the building work, estimating time to complete and for dealing with variations. In essence it was not the carpentry carried out by the Respondent that the Board was inquiring into, but the contractual processes used. In this respect the question for the Board is whether the Respondent's processes can come within the definition of "building work" as defined by the Act as section 317(1)(b) relates to carrying out or supervising "building work".

[32] The term "building work" is defined term in s 7 of the Act as follows:

> *building work —*
> *(a) means work—*
> *(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*
> *(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*
> *(b) includes sitework; and*
> *(c) 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; and*

> (d) *in Part 4, and the definition in this section of "supervise", also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.*

[33] The phrase "for, or in connection with" in the definition connotes a wide range of matters that could be brought into play and conceivably the processes and systems used by a licensed building practitioner to manage the construction, alteration, demolition or removal of a building.

[1] The Board, in interpreting the phrase, is required to do so in such a way as to give effect to the purpose of Parliament[12]. The purposive approach was described in the Supreme Court case of *Allied Concrete Ltd v Meltzer*:[13]

> *The Court's task is to ascertain the meaning of the provisions from their language, read in context, and the statute's purpose informed by any relevant background material.*

[34] The Board may, if necessary, in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 Purposes of the Act, section 14E Responsibilities of the Builder, section 282A Purposes of Licensing Building Practitioners and Part 4A Consumer Rights and Remedies in Relation to Residential Building Work are relevant.

[35] The provisions, other than Part 4A, use similar references to the systems and process used to achieve the resulting object of building work and of its compliance with a building consent and the building code.

[36] Part 4A, however, introduces contractual and other provisions that must be adhered to in respect of residential building work. Section 362A sets out:

> ***362A Outline of this Part***
> *This Part protects consumers (referred to in this Part as clients) in relation to residential building work by—*
> (a) *requiring certain information to be provided before a residential building contract is entered into; and*
> (b) *prescribing minimum requirements for residential building contracts over a certain value; and*
> (c) *implying warranties into residential building contracts; and*
> (d) *providing remedies for breach of the implied warranties; and*
> (e) *requiring defective building work under a residential building contract to be remedied if notified within 1 year of completion; and*
> (f) *requiring certain information and documentation to be provided on completion of building work under a residential building contract.]*

[12] Refer s 5 of the Interpretation Act 1999
[13] [2015] NZSC 7 at (55]

[37] In addition to Part 4A of the Act the Building (Residential Consumer Rights and Remedies) Regulations 2014 were introduced. Those regulations include specific detail and requirements for disclosure and checklists as well as prescribed contractual clauses.

[38] The Respondent did not provide the required disclosure. His contract did not meet all of the requirements for a residential building contract. In particular it did not deal with how variations were to be dealt with. In such cases default terms apply.

[39] Section 362I creates implied warranties for residential building work. It includes provisions that states:

> ***362I Implied warranties for building work in relation to household units***
>
> *(1) In every contract to which this section applies, the following warranties about building work to be carried out under the contract are implied and are taken to form part of the contract:*
>
> *(d) that the building work will—*
>
> *(i) be carried out with reasonable care and skill; and*
>
> *(ii) be completed by the date (or within the period) specified in the contract or, if no date or period is specified, within a reasonable time:*
>
> *(2) Subsection (1) has effect despite any provision to the contrary in any contract or agreement, and despite any provision of any other enactment or rule of law.*

[40] The Respondent breached the above implied terms which cannot be contracted out of.

[41] The Board has also considered the Licensed Building Practitioners Rules 2007 (the Rules). Rule 4 states:

> ***4 Minimum standard of competence for each class of licence***
>
> *(1) The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
>
> *(2) In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[42] Within the Carpentry class of licence and relevant to the present conduct Schedule 1 Competency 3: Carry out planning and scheduling for carpentry work states:

> *3.1 Read and interpret working drawings, specifications, programme schedules and quantity lists.*
>
> *3.2 Order and coordinate material supply.*
>
> *May include but not limited to - ability to measure, calculate and estimate quantities, order and coordinate material supply.*

[43] The Board has considered the significance of the introduction of Part 4A and has decided that Parliament's intention was to extend the meaning of "building work" when it relates to residential building work so as to include the associated contractual processes. The Board also considers that the conduct in question comes within the parameters of the Rules which supports the conclusion that, in this instance, the conduct in question falls within the definition of "building work".

[44] Having made this decision, the Board needs to consider the evidence to assess whether the Respondent's conduct falls within the definitions of negligence as outlined above.

[45] 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*[14] test of negligence which has been adopted by the New Zealand Courts[15].

[46] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[16]. 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.

[47] 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[17]. 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[18].

[48] The Board notes that the purposes of Part 4A of the Act as outlined in paragraph [36] above and also the overarching purposes of the Act which include:

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

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[14] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[15] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[16] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[17] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[18] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[49] Turning to seriousness, in *Collie v Nursing Council of New Zealand*[19] 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.*

[50] The evidence before the Board was that mandatory pre-contract disclosure and checklists had not been provided. The Respondent's contract did not meet the mandatory requirements for a residential building contract. The Respondent was not aware of his obligations in respect of either requirement.

[51] One area in which the contract was particularly deficient was as regards variations. It stated the client agreed not to make any changes that would increase the fixed price but that if changes were made the client would cover the difference. Clause 3 of Schedule 3 of the Building (Residential Consumer Rights and Remedies) Regulations 2014 provides a default implied term for variations:

> ***3 Variations***
>
> *3.1 The client may ask the building contractor to carry out variations to the building work.*
>
> *3.2 If a variation requested by the client will affect either—*
>
> *(a) the quoted or estimated price for the building work; or*
>
> *(b) the due date or the estimated due date for completion of the building work,—*
>
> *the building contractor must, within 10 working days after receiving the client's variation, advise the client by notice of the matters set out in clause 3.3.*
>
> *3.3 If clause 3.2 applies, the building contractor must advise the client by notice of—*
>
> *(a) the building work that will be required to achieve the variation; and*
>
> *(b) any additional approvals or consents that will be needed; and*
>
> *(c) the effect, if any, on any existing approvals or consents for the building work; and*
>
> *(d) the effect (ie, the increase or decrease), if any, on the building contractor's quoted or estimated price for the building work; and*
>
> *(e) the effect, if any, on the due date or the estimated due date for completion of the building work.*
>
> *3.4 The client may agree to the variation either by notice or by countersigning the notice provided under clause 3.2.*

[19] [2001] NZAR 74

[52] The above, or any other process, was not followed for variations. No documentation was provided, or records kept.

[53] The Respondent breached the implied terms as regards completion. He also failed to complete the contract for the fixed contract amount or to invoice in accordance with the contract. In respect of the fixed price there was a difference in the findings of the Technical Assessor and that of the Hight Court. Notwithstanding, the processes used by the Respondent to invoice and to account for building work did not meet those expected of a licensed building practitioner. Nor did his processes and practices for keeping the Complainant informed as regards progress on the build.

[54] 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.

Contrary to a Building Consent – Building Consent Changes

[55] 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).

[56] 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.*

[57] 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.*

[58] 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

[59] In *Tan v Auckland Council*[20] 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.*

[60] 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.

[61] 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.*

[62] 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.

[63] 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.

[64] 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.

[20] [2015] NZHC 3299 [18 December 2015]

[65] 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.*

[66] 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.

[67] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority 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.*

[68] The matter under which came within the ground of discipline under section 317(1)(d) was the change to the trusses. The Respondent stated that the existing trusses were replaced with new trusses on a like for like basis under Schedule 1. This is not accepted. Firstly, the Respondent's own evidence was that the trusses were replaced as they were noncompliant. If that was the case then the new trusses could not have been like for like; they would have had to have been different, if not they too would have been noncompliant. Secondly the exemption in clause 1 of Schedule 1 only applies if the building work has met the durability requirements in the building code. The trusses had not met that requirement.

[69] The change was significant to the point where an amendment to the consent was required. Where an amendment is necessitated all building work must stop until such time as it is granted. That did not occur.

[70] The Board would also expect a licensed building practitioner to consult with and take directions from the designer and the engineer prior to proceeding with a structural change of the type he carried out. the Respondent he did not do so.

[71] Given that the Respondent carried out what was essentially non consented building work the Board finds that the Respondent has committed the disciplinary offence of carrying out building work that was contrary to a building consent.

Record of Work

[72] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[21].

[73] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[74] The Board discussed issues with regard to records of work in its decision C2-01170[22] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[75] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[76] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …".

[77] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.

[78] This is what has occurred in the present case. The contractual relationship came to an end when the contract was cancelled. From that point it was clear that the Respondent would not be able to return and carry out any further restricted building work. Given these circumstances the Respondent's restricted building work had, in effect, been completed and a record of work was then due.

[79] A record of work has still not been provided. On this basis the disciplinary offence has been committed.

[21] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[22] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

[80] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons have been advanced.

Disrepute

[81] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111[23] and discussed the legal principles that apply.

[82] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*[24] a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[83] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute *of Chartered Accountants*[25], convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.

[84] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[26] 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*[27] the Court of Appeal held that:

[23] Board decision dated 2 July 2015.
[24] [2013] NZAR 1519
[25] 24 September 2014
[26] 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
[27] [2012] NZCA 401

> *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*.[28]

[85] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[29];
- honest mistakes without deliberate wrongdoing[30];
- provision of false undertakings[31]; and
- conduct resulting in an unethical financial gain[32].

[86] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[87] The conduct the Board was investigating under disrepute was the possible provision of a contract that was intentionally less than the actual costs in order to secure the work, the demand that the Respondent be paid weekly and the provision of a contract with the intention to mislead a lending institution.

[88] In various cases the Board held that licensed building practitioners have brought the regime into disrepute in respect of conduct relating to financial matters. This included, in once case knowingly providing a contract with the intention of misleading a financial institution. As noted, there were similar facts before the Board in the present case.

[89] Notwithstanding the Board has decided that there was insufficient evidence to establish that the fixed price contract was provided to mislead and that the other matters have been adequately dealt with in the Board's findings of negligence.

[90] The Board has also taken into account the threshold for disciplinary complaints of disrepute which is high and has noted that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

[28] [2012] NZAR 1071 page 1072
[29] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[30] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[31] *Slack, Re* [2012] NZLCDT 40
[32] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

> *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.*

Penalty, Costs and Publication

[91] 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.

[92] 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

[93] 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*[33] 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.*

[94] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[34] 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.

[95] The Respondent has described himself as a victim. The Board notes his losses and the impact it has had on him but considers that the events and consequences were of his own doing. He has displayed little if any understanding of the impact on the Complainant. He sees that he has done nothing wrong.

[96] The Board has upheld three grounds of discipline. The matters are serious. The Respondent has been bankrupted. His ability to pay a fine is assumed to be minimal. The Board is therefore limited in its penalty options. Suspension is considered to be the most appropriate form of penalty.

[33] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[34] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[97] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*[35] the High Court, in relation to the principles relating to suspension of a legal practitioner's licence stated:

> *[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.*

[98] This was affirmed in *Jefferies v National Standards Committee*[36] where the High Court also stated:

> *[25] I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.*
>
> *[26] And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*[37]

[99] Based on the above, and subject to further submissions from the Respondent, the Board's penalty decision is that the Respondent's licence be suspended for a period of six months.

<u>Costs</u>

[100] 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."

[101] 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[38].

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[35] [2011] 3 NZLR 850
[36] [2017] NZHC 1824
[37] *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493
[38] *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.

[102] In *Collie v Nursing Council of New Zealand*[39] 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.*

[103] Based on the above the Board's costs order is that the Respondent is to pay the sum of $3,500 toward the costs of and incidental to the Board's inquiry. This is based on the Board's scale of costs. It has not included in the costs those associated with the Technical Assessor whose report and attendance was for the benefit of the Board.

<u>Publication</u>

[104] 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[40]. 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.*

[105] 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.

[106] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[41]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[42]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[43]. 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*[44].

[107] 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[45]. 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.

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

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[39] [2001] NZAR 74
[40] Refer sections 298, 299 and 301 of the Act
[41] Section 14 of the Act
[42] Refer sections 200 and 202 of the Criminal Procedure Act
[43] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[44] ibid
[45] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[109] 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 six [6] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with 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.

[110] 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.

Submissions on Penalty, Costs and Publication

[111] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 18 December 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.

[112] 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

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

Signed and dated 27 November 2019

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.