**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**REVIEW AND REGULATION LIST** VCAT REFERENCE NO. Z465/2014 & Z471/2014

## CATCHWORDS

*Building Act 1993* – Section 179(2) – Section 181 - Penalty and costs – factors to consider.

VCAT REFERENCE NO. Z465/2014

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| **APPLICANT** | Fiona O'Hehir |
| **RESPONDENT** | Building Practitioners Board |

VCAT REFERENCE NO. Z471/2014

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| **APPLICANT** | John Vosti |
| **RESPONDENT** | Building Practitioners Board |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member Eric Riegler |
| **HEARING TYPE** | Hearing |
| **DATES OF HEARING** | 3 December 2014 |
| **DATE OF ORDER** | 5 February 2015 |
| **CITATION** | O'Hehir v Building Practitioners Board (Review and Regulation) [2015] VCAT 113 |

## ORDERS

1. The *penalty* decision of the Building Practitioners Board dated 30 May 2013 made under s 179(2) of the *Building Act 1993* is set aside and substituted with the following decision:
   (a) The Applicant (in Z471/2014) is reprimanded.
   (b) The Applicant (in Z471/2014) is fined $4,000.
2. The *costs* decision of the Building Practitioners Board dated 30 May 2013 that the Applicant (in Z471/2014) pay the total costs incidental to the Inquiry in the sum of $3,000 is affirmed.
3. The costs of this review proceeding are reserved with liberty to apply, provided such liberty is exercised on or before 27 February 2015.

Senior Member Eric Riegler
**Presiding Member**

**APPEARANCES - Z465/2014:**

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| For the Applicant | Mr D King, solicitor |
| For the Respondent | Mr A Woods of counsel |

**APPEARANCES - Z471/2014:**

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| For the Applicant | Mr D Pumpa of counsel |
| For the Respondent | Mr A Woods of counsel |

## REASONS

### INTRODUCTION

1. The Applicant in proceeding Z471/2014 is a building practitioner registered under the *Building Act 1993* (**'the Act'**) in the category of Building Inspector (unlimited) (**'the Practitioner'**). His registration permits him to undertake inspection of building work (including domestic building work), as required under Part 4 of the Act.

2. Typically, registered building inspectors are employed or engaged by municipal or private building surveyors to assist them in carrying out their functions under the Act. In particular, under Part 4 of the Act, building surveyors are required to inspect building work, the subject of any building permit issued by them. Under the *Building Regulations 2006* (**'the Regulations'**), the inspection of such building work must be undertaken at certain notification stages. Regulation 901 of the Regulations states that the mandatory notification stages are:

   (a) prior to placing a footing;

   (b) prior to pouring and in situ reinforced concrete member;

   (c) completion of framework; and

   (d) final, upon completion of all building work.

3. On 14 August 2007, *Nicholson Wright*, private building surveyors, issued a building permit for the construction of a domestic dwelling located in Donvale (**'the Donvale Property'**). The Practitioner was retained by *Nicholson Wright* to carry out an inspection of the Donvale Property upon *completion of framework* and upon *completion of all building work*.

4. In or around 2012, the Applicant in proceeding Z465/2014, being the current owner of the Donvale Property (**'the Owner'**) discovered defects in the construction of the Donvale Property. Further investigation revealed that some of those defects could have been identified at either the inspection of the building works upon *completion of the framework* or upon *completion of all the building work*. However, those defects were either not identified or were inadequately acted upon by the Practitioner, with the result that the building works progressed without rectification. This led to a chain of events which has culminated in the Donvale Property now requiring significant remedial work at great cost to the current Owner.

5. As a result, the Owner requested the BPB to conduct an inquiry, which she was permitted to do under s 178(1)(d) of the Act. Consequently, the Practitioner's professional conduct was investigated by the BPB and an inquiry was conducted on 26 February 2013.

6. At the inquiry, the BPB considered two *Allegations* concerning the Practitioner's professional conduct connected with his inspection of Donvale Property:

> **Allegation 1 - ground for inquiry - paragraph 179 (1) (b)**
>
> That on or about 6 December 2007 in relation to building work at … Donvale, being the construction of the dwelling, you failed to carry out your work as a building practitioner in a competent manner and to a professional standard and therefore failed to comply with regulation 1502 (a) of the Building Regulations 2006 in that, in your capacity as an inspector appointed by the relevant building surveyor to carry out inspections, you carried out and approved the frame inspection when there were defects and deficiencies in the building work which should have been rectified prior to the frame being approved.
>
> Particulars
>
> The defects and deficiencies are set out in paragraphs 3.3 (i), (ii), (iv), (v), (vi), (viii), and (ix) of the Technical Assessment Report of Rob Fenton dated 6 April 2013.

7. Allegation 2 was expressed in similar terms to Allegation 1, save and except that the conduct related to the final inspection and the particulars made reference to paragraphs 3.3(iv), (v) and (viii) of the Technical Assessment Report of Rob Fenton dated 6 April 2013.

8. At the BPB inquiry, the Practitioner contested both *Allegations*. On 21 March 2013, the BPB found both *Allegations* proven. As a result, the BPB determined that:

   (a) the Practitioner's registration was to be suspended for three months; and

   (b) the Practitioner was to pay $3,000 towards the BPB's costs of the inquiry.

## THIS PROCEEDING

9. Under s 182A(1) of the Act, a person to whom the decision of the BPB applies, may apply to the Tribunal for a review of that decision. Similarly, under s 182A(3) of the Act, a person who requested the BPB to conduct an inquiry may also apply to the Tribunal for a review of that decision. Once vested with jurisdiction, the Tribunal hears any such review by way of a hearing *de novo*.[1] Accordingly, an applicant or the BPB are entitled to rely upon additional material at the review hearing that was not available or otherwise before the BPB in the original inquiry.

[1] See further *Shi v Migration Agents Registrations Authority* (2008) 235 CLR 287 at [247] per Kiefel J; and *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 335 per Smithers J.

10. Section 51(2) of the *Victorian Civil and Administrative Tribunal Act 1998* provides:

> (2) In determining a proceeding for review of a decision the Tribunal may, by order -
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> (a) affirm the decision under review;
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> (b) vary the decision under review;
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> (c) set aside the decision under review and make another decision in substitution for it; or
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> (d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

11. The present proceeding comprises two separate applications; namely, an application for review lodged by the Practitioner and an application for review lodged by the Owner. Neither application seeks to impugn the BPB's finding that the Allegations were proven but rather, each application seeks a review of the BPB's decision regarding *penalty*. In that regard, the Practitioner contends that the determination of the BPB to suspend his registration and find him liable to pay the BPB's costs was too severe, having regard to the nature of his conduct and the period when the conduct occurred. On the other hand, the Owner contends that the decision to suspend the Practitioner's registration for three months and pay only a fraction of the BPB's total costs of conducting the inquiry was too lenient. She submits that the period of suspension should be no less than six months and the Practitioner should be ordered to pay all of the BPB's costs of the inquiry, which amount to over $12,000.

## THE BPB'S FINDINGS ON CONDUCT

12. The particulars to *Allegation 1* and *Allegation 2* are set out in detail in a building inspection report prepared by Rob Fenton of *Fenton Partners Pty Ltd Consulting Engineers and Project Managers* dated 6 April 2013 (**'the Fenton Report'**). There are nine specific items mentioned in that report, which criticise the Practitioner's professional conduct. Seven of those items were found proven by the BPB. As mentioned above, those findings are not contested by either the Practitioner or the Owner in this review proceeding. The items found proven are summarised in the Fenton Report as follows:

> 3.3 **Was the building inspector correct in approving the frame and final inspections?**
>
> The Frame has defects and deficiencies which the building inspector should have noticed and which should have been rectified prior to the frame being approved. These include the following:
>
> ..

…

(ii) Several upper floor steel posts which support roof loads are not located over lower floor posts, but are bearing on all plates between studs. They are therefore not adequately supported.

(iii) The timbers [which] were used for the floor joists and bearers of the large deck are not in accordance with the structural drawings, and are not of a type suitable for exposed external use.

(iv) The timber balustrade post at the south-west corner of the large deck does not have adequate connection at the base.

(v) At the time the builder finished his works, it appears that there was natural rock directly against the bottom approx 600 mm of the lower floor east wall. This wall is an unprotected fibre cement clad stud wall, and the batter on the east side of the wall was sloping down towards the wall. This situation would not comply with the BCA as it is a situation which results in rain run off running down the wall and into the sub floor space under the wall…

(vi) The cantilevered steel outrigger which supports the fascia beam above the east side of the large deck was welded to the L7 steel channel lintel but should been welded directly to the C1 steel post.

(vii) The E-Joists of the upper floor do not have end blocking and midspan blocking.

(viii) The rendered lightweight wall cladding did not have control joints.

…

13. Of the above items, Items 3.3(iv), (v) and (viii) related to the Practitioner's conduct in failing to either identify or act upon deficiencies in the building work when he conducted his final inspection, while the remaining items related to a failure to identify or act upon deficiencies in the building work when he conducted his inspection of the building works upon completion of the framework.

14. Mr Pumpa of counsel, who appeared on behalf of the Practitioner, pointed to various extracts of the transcript of the evidence given by the Practitioner during the course of the BPB inquiry and of the BPB's *Reasons for Decision* dated 21 March 2014 to explain why the Practitioner had failed to adequately deal with some of those items. He submitted that the Tribunal should have regard to those matters in considering what decision it should make concerning penalty.

15. What follows are what I consider to be the salient factors of the BPB's findings and of the evidence given during the course of the inquiry,

concerning the conduct of the Practitioner. I have set out these salient factors by reference to the items described in the Fenton Report. In considering these factors, I have also had regard to the report of Mr Peter Haworth, the consulting engineer engaged by the Owner. His report also discusses deficiencies in the construction of the Donvale Property and failings in the inspection process conducted by the Practitioner.

16. I note, however, that neither Mr Haworth or Mr Fenton were called to give evidence in this proceeding. The parties submitted that I should, nevertheless, have regard to their reports, insofar as I considered it relevant to understand the technical aspects of the Practitioner's failings found proven and the seriousness of such failings.

## Item 3.3(ii) - Inadequate support of roof loads

17. This item related to inadequate support of roof loads. The Practitioner's evidence was that he had identified deficiencies in the frame concerning the support of roof loads but had given oral instructions to carpenters working on site to undertake remedial measures. At the inquiry, the Practitioner stated:

> At the time when I picked up the load paths that were blocked the specific instruction was to double block or block under the load paths, and the blocking was to be two pieces of stud material laminated together nailed up under the top plate and nailed to the two side studs. This, as I said - as Mr Fenton says, this is relatively common; you see this very often with girder trusses or point loads coming down where the builder has not put a stud under the load. And rather than allow the top plate to carry that load you put the block in simply to spread the load onto the two studs. Now, when I gave the instructions one of the young carpenters started work on the load paths, already started doing it before I finished, so I had no - honestly had no doubt that they would continue on and finish of all the blocking. And the system in the office at that time was - based around that principle. If it something relatively minor, not something that is going to make the frame fall down, if it something relatively minor you issue the instruction and let the builder get on with it.[2]

18. Mr Pumpa submitted that the Practitioner had correctly identified deficiencies in the frame but had adopted inappropriate procedures, albeit commonly practised at the time, in order to deal with the deficiencies. According to Mr Pumpa, the *Reasons for Decision* illustrate that the Practitioner is now aware that his conduct is no longer appropriate:

> … The Board asked the Practitioner given that the blocking had not been installed in the location identified with the Fenton report, what was his view now regarding his inspection practices? The Practitioner responded:

[2] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 17.

> "it doesn't work. And perhaps no matter how minor the fault with the frame it should not be approved, period, and reinspected". [3]

19. I further note that in the *Inspection Report* prepared by the Practitioner and submitted to the private building surveyor, the Practitioner has stated:

> Please monitor all the load paths and ensure that blocking is installed to all the load paths.

## Item 3.3(iii) - Deck frame timbers

20. This item concerns the alteration in the construction of the deck frame and in particular, the timber is used to construct that frame. According to the evidence given by the Practitioner at the inquiry:

> … if the change doesn't have any remote chance of complying with standards, the requirements of the standards, then of course it would not be approved. But where it does comply with the standard, then it becomes a variation or an amendment to the permit documentation. So you go back to the RBS you say, "All right, they've decided to use this system and not that system, if that's not in accordance with the drawings they need to send you in the amended drawings or it least certification from the engineer."[4]

21. Despite the evidence given by the Practitioner at the inquiry, the departure from the design was not noted on his *Inspection Report* and there is no evidence to suggest that any amendment to the design drawings was ever effected. It is common ground that as a consequence of using different type of timber for the deck frame, some of the timber frame structure has become damaged through exposure to the weather, requiring replacement.

## Item 3.3(iv) - Timber balustrade post

22. This item relates to a timber balustrade post at the south west corner of the large deck which Mr Fenton found was inadequately supported. According to the Practitioner, he did identify potential problems with the connection of the balustrade post. His evidence given at the inquiry was:

> It was never - it was originally designed as a one of these see-through type balustrades because the original owner didn't want the capping rail interfering with their view, and I said "No, you can't do that, it's not going to hold; you've got x number of wires and the amount of tension you're going to need on those wires will snap the posts and pull any post off the wall." So he was told, "Yes, you've got to change it and make it work. Capping rail, extra spaces to reduce spam, thus reducing the tension. The stand-alone post has got to be adequately affixed to the wall. You've got to use something decent to hold the thing onto the wall." And when I did the final I checked the wires and they were reasonably tight. I didn't have a tension meter but they were certainly tight. And there was absolutely no

[3] *Reasons for Decision* at paragraph 1.4 (d).
[4] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 22.

> gap, no movement on that end post. So having checked that I presumed of course that he's done the right fittings. I don't know what else I could have done. I couldn't pull the thing apart and check. I did everything that I thought…[5]

23. Again, there is no mention of any potential problem concerning the balustrade or the post in the Practitioner's *Inspection Report*. According to Mr Pumpa, it was a common work practice at the time to simply give an oral direction and rely upon assurances from the builder that the direction would be complied with. He submitted that it was not usual at the relevant time to re-check whether there had been compliance or to issue a written direction, notwithstanding the requirement to do so under the Act. That submission was consistent with the Practitioner's evidence given during the inquiry.

### Item 3.3(v) Rock against the lower floor east wall

24. This issue was the subject of extensive expert evidence given by both Mr Fenton and Mr Haworth at the BPB inquiry. The issue is of some significance because the failure by the builder to install sub-surface drains or adequate drainage resulted in water entering the sub-floor, causing considerable damage to the Donvale Property.

25. The finding of the BPB was that at the time of inspecting the building works at *framework stage*, it was incumbent upon the Practitioner to have been satisfied that sub-surface drainage had been laid along the lower floor east wall, given the practical difficulties of laying drains after the wall cladding had been installed. This was because there was limited space between that wall and the adjoining rock face batter.

26. According to Mr Pumpa, the fault directed at the Practitioner focused on him not being satisfied that subsurface drainage had been installed. He referred to the Practitioner's oral evidence given during the inquiry:

> … With the drains it's my understanding that subsurface drains, including agi drains, have to be installed by the plumber … But I was always under the impression that subsurface drainage was included in the plumbing certificate. And from memory - and I can't - I have to find it - but from memory there was supposed to be an agi drain behind that - in front of that batter. Now, if it wasn't installed then I wouldn't even know about it until something happened, which has obviously happened. The plumbing certificate was duly issued, all drains, plumbing being carried out and certified by the plumber. I'm at a loss as to how I can be expected to see drainage and be a drainage inspector; I'm not. I'm not qualified, I don't - have the authority to do that. As I said at the time of my frame inspection, it was clear, clear and clean. There was no - no reason for me to expect that a bucketload of water was going to come down and wash everything under the floor and up against the wall. By the time the frame was finished

[5]Transcript of Inquiry proceeding conducted on 26 February 2014 at page 28.

> and the final inspection was done you'd expect the drains to be in, connected and working, and then you'd rely on the plumbing certificate for that, which was duly requested and duly provided. So if you look at the plumbing certificate it says "Subsurface drainage", it says "Stormwater." It's sort of looking, it's saying inspectors got to try and second-guess the plumber and everyone.[6]

27. At the inquiry, Mr Fenton stated:

> … Well, I think in this case – I mean Mr Vosti is correct in one sense there, but I think in this case it was like a special circumstance. Like what Mr Vosti, I think, is saying is if you had like a formal framing inspection, a final inspection, and there had been various agi-drains specified, and if you have a plumber who'd sort of provide certificates if they'd all been installed you would accept that. But in this case because it's an unusual situation; you've actually got like this exposed batter right up against the wall and extending up above the bottom of the wall, its actually, it's not like a normal drainage situation, it's actually – it's an unusual situation and it's one I think that just leaves the building very vulnerable.[7]

28. Mr Haworth also gave oral evidence during the course of the inquiry. He opined that it was incumbent upon an inspector to be satisfied that the sub-surface drainage had been installed between the batter and the wall, particularly because its installation was critical to the performance of the dwelling and was impossible to install after the wall cladding had been erected:

> … the back of the wall was close to the - very close to the slope - sloping rock face, because it was a rock face at the bottom with another layer of cladding it would be impossible, in my opinion, to put it in afterwards, because you couldn't excavate the rock in a very narrow space.[8]

29. Mr Haworth also gave evidence that it should not be assumed that the sub-surface drainage was to be installed by the plumber responsible for other aspects of drainage. He opined that it was probably the builder who would have laid that section of agricultural drain.

30. It is common ground that no agricultural drain was laid in that section of the works, despite the approved drawings depicting drainage in that area.

31. Mr Pumpa submitted that although the BPB's finding of unprofessional conduct was not contested, regard should be had to the fact that at the time of inspection it was commonly thought that a framework inspection meant inspecting only the frame and that other aspects of construction could be ignored. No evidence was adduced to substantiate the existence of such a commonly held belief or understanding.

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[6] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 33.
[7] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 32.
[8] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 59.

32. Mr King, the solicitor who appeared on behalf of the Owner, argued that this submission was flawed. He submitted that, on a proper reading of the Act, an inspection at the mandatory notification stage of *completion of framework* was not limited to just inspecting the frame. He said that the obligation imposed under s 34 of the Act was much wider.

33. Section 34 of the Act states:

> **34 Inspections of mandatory notification stages**
>
> On being notified that a mandatory notification stage has been completed, the relevant building surveyor must cause the building work concerned to be inspected.

34. In my view, s 34 of the Act does not limit the inspection process to an inspection of the frame only. The words *building work concerned to be inspected* mean the building work, the subject of the building permit and not simply an element of that work. Similarly, reg 901 is expressed in terms of notification stages, rather than defining what element of work is to be inspected. It simply marks <u>when</u> rather than <u>what</u> is to be inspected. That interpretation is consistent with one of the primary objects of the Act; namely, to *protect the safety and health of people who use buildings and places of public entertainment*.

35. Given the critical significance of not having adequate drainage for this particular site, I consider it was incumbent upon the Practitioner to have made further enquiries to be satisfied that sub-surface drainage had been installed in accordance with the design drawings. I do not accept Mr Pumpa's submission that the Practitioner's misunderstanding of his obligations under the Act and the Regulations constitute a mitigating circumstance.

36. As was observed by Mr Haworth and Mr Fenton, the distance between the rock face batter and the external wall of the dwelling would have made it extremely difficult, if not impossible, to lay sub-surface drainage once the external cladding had been erected. Therefore, it was not acceptable to simply assume that this element of the building process would occur sometime after the framework had been erected. The appropriate time to raise this as an issue was at or before framework stage. The building works should not have been approved at framework stage, without the Practitioner being satisfied that the sub-surface drainage had been installed. Therefore, even if it had been common practice at the time not to consider this element of construction during an inspection at framework stage, the peculiar circumstances of this case required the Practitioner to depart from any such common practice and turn his mind to the existence of sub-surface drainage at that time. The existence of any common practice not to inspect does not, in my view, diminish the severity of the Practitioner's failing, when considered in this light.

## Item 3.3(vi) Cantilevered steel outrigger

37. This element of the framework concerned the connection of a cantilevered steel outrigger which was designed to support the eaves. The steel outrigger was depicted in the design drawings as being welded to a steel post. However, it was incorrectly welded to a steel channel lintel. According to Mr Fenton, there were ramifications resulting from this incorrect construction:

> … It is quite a wide ease [sic] overhang along the back of the deck there where the doors enter the deck. About half way along it was – it's shown on the construction drawings being supported by a steel outrigger which is welded to the post, which would give a reasonably stiff result. But in effect it appears that the outrigger was welded to the channel beam which was provided to support the wall and the roof at that location. So that would give a less stiff effect. And there was a string line running along so we were able to measure how far it had sagged. And it had sagged.[9]

38. The Practitioner's evidence given at the inquiry was that he was aware of the incorrect connection but was told by the builder that the engineer had verbally authorised the change. He said that the builder still needed to obtain approval from the building surveyor in any event.

39. Regrettably, there is no mention of this incorrect construction in the *Inspection Report* prepared by the Practitioner for the building surveyor. Therefore, the building surveyor would have no way of knowing of the incorrect connection, unless the builder sought approval.

40. Mr Pumpa submitted that the Practitioner's failing in leaving it to the builder to raise the issue with the building surveyor was no longer the normal practice. Be that as it may, the failure to alert the building surveyor to this departure from the design drawings is of some concern.

## Item 3.3(vii) Blocking to E-joists

41. The floor joists used in the construction of the upper storey floor frame were known as *Wesbeam e-joists*. These joists were a prefabricated alternative to solid timber joists. The *e-joists* were required to be blocked at each end and possibly at mid-span. This was to prevent twisting under load. No blocking was installed at the time of the framework inspection. According to Mr Fenton, Australian Standard AS1684 required, as a minimum, end blocking.

42. During the inquiry, the Practitioner gave evidence that he did not believe that mid-span blocking or end blocking was necessary, given that the joists were tied together when the chipboard floor above was secured to the joists. He said:

[9] Transcript of Inquiry proceeding conducted on 26 February 2014 at page 35.

> … The main reason was that no mid-span blocking was required … the floor is a double floor; it's a chipboard floor with strip flooring on top ... There's no possibility of those e-joists twisting. No chance. The whole house would have to tear itself apart before those connections would let go. You've got connections at roughly 150 to 300 across every joist … they're connected at the bottom. For them to roll means that the whole frame is literally falling apart. And given that it lies at the end of a relatively short span, they weren't huge spans, end blocking was not considered practical. It just didn't seem - I couldn't see the reason for end blocking with the connections that are there, it's just – you've got platform on top; you've got solid connection on the bottom, and unless the platform starts to tear itself apart there is no possibility of those beams twisting or rolling. It just cannot happen. And if that does happen then our whole system is going to fall over.[10]

43. Mr Pumpa submitted that the Practitioner thought about the as-constructed frame but simply formed the wrong opinion. It was not conduct where he failed to notice non-compliance with the applicable standard.

44. Mr King submitted that it was not open for the Practitioner to have overruled an engineering design applicable to the construction of the dwelling. He argued that that conduct was more culpable than not having noticed a design deficiency during the inspection process.

45. There is force in the submission made by Mr King. The role of an inspector is to inspect for the purpose of ensuring that the as-constructed works comply with the building permit. It is not an element of that role to form an opinion as to whether it is permissible to depart from the design.

46. If there is a departure from the design, it is the role of the inspector to bring that to the attention of the relevant building surveyor. That was not done in this particular case. In my view, the frame should not have been approved unless there was engineering justification to dispense with any blocking of the *e-joists*.

47. The danger where an inspector approves work that departs from the design or a standard is that the inspector may not be qualified to make that decision, despite the fact that he or she believes otherwise. Although there may be instances where an inspector has the experience and knowledge to know what impact a minor change has to the overall structural integrity of a building, it is difficult to draw a line as to what is permissible and what is not. For that reason, the decision-making process, as to whether changes in design are permissible or not, is ultimately vested with the building surveyor, who is given a broad range of powers under the Act to deal with this very situation.

[10] Transcript of Inquiry proceeding conducted on 26 February 2014 at pages 40-41.

48. In my view, unilaterally approving a departure from the intended design without notifying the building surveyor is of some concern and not to be regarded as a trivial breach of the Act and the Regulations.

### Item 3.3(viii) The wall did not have control joints

49. Part of the as-constructed works comprised construction of lightweight walls which were rendered. None of those walls had control joints and as a result, cracking was occurring in a number of locations.

50. The evidence given by the Practitioner was that he did not believe control joints were required given that the building was founded on rock and the materials used to construct the lightweight walls were materials that were unlikely to expand. In addition, no control joints were depicted on the amended design drawings.

51. According to Mr Fenton, it was incumbent upon the Practitioner to have required control joints given that there was a mixture of different materials used in construction of lightweight walls. The BPB accepted the evidence of Mr Fenton on this issue and found that, in approving the building works at final inspection, the Practitioner had failed to carry out his work in a competent manner and to a professional standard in contravention of reg 1502 (a) of the Regulations - by not identifying the need for control joints.

52. Mr Pumpa submitted that although the Practitioner does not contest the findings made by the BPB on liability, the level of culpability in relation to this particular issue is low, given that the design drawings did not depict any need for control joints.

53. In my view, the issue should have been raised with the relevant building surveyor. It was not. Nevertheless, I accept that there may have been some confusion in circumstances where the design drawings did not depict control joints and for that reason, I see this breach of the Regulations as being at the lower end of culpability.

## WHAT DECISIONS CAN THE TRIBUNAL MAKE?

54. Having found that the Applicant failed to comply with the *Building Regulations 2006*, the Tribunal is vested with jurisdiction to make any of the decisions set out in s 179(2) of the Act, which largely concern the imposition of various types of sanctions. As at the time of the breach, s 179 of the Act stated, in part:

> (1) On an inquiry into the conduct of a registered building practitioner, the Building Practitioners Board [or the Tribunal on review] may make any one or more of the decisions mentioned in subsection (2) if it finds that the registered building practitioner –
>
> …
>
> (b) has failed to comply with this Act or the regulation; or…

(2) The following are the decisions which the Board [or the Tribunal on review] may make –

(a) to reprimand the person;

(b) to require the person to pay the costs of or incidental to the inquiry;

(c) to require the person to give an undertaking not to do a specified thing;

(ca) to require the person to complete a specified course of training;

(d) to impose a fine of not more than 100 penalty units unless –

(i) a charge has been filed in the Magistrates Court in respect of the matter; or

(ii) the matter has been dealt with by a court exercising its criminal jurisdiction; or

(iii) the matter has been dealt with by the issue of an infringement notice;

(e) to suspend registration for not more than 3 years;

(f) to cancel registration;

(g) to disqualify the person from being registered for a specified period of up to 3 years.

55. In my view, that the use in s 179(1) of the words *any one or more of the decisions mentioned in subsection (2)* establishes Parliament's intention, that in the making of a final order, the Tribunal may make more than one of the various decisions set out in s 179(2) of the Act. Therefore, by way of example, it is open for the Tribunal to order that a building practitioner be reprimanded and fined and required to pay the costs of the inquiry if the Tribunal considered that to be an appropriate decision to make.

## RELEVANT FACTORS TO BE CONSIDERED

### Nature of breach

56. Mr Pumpa submitted that the conduct of the Practitioner, which led to the finding that he had *failed to perform his work as a building practitioner in a competent manner and to a professional standard*[11] was not conduct which seriously offended the objectives of the Act as listed under s 4(1) of the Act.

57. Mr Pumpa submitted that the breaches did not lead to any potential safety hazard, nor did the conduct indicate that the Practitioner had not taken his role as an inspector seriously. As Mr Pumpa said, this was not a situation where the inspector had undertaken a 'drive-by inspection'. Mr Pumpa

[11] Reg. 1502 of the *Building Regulations 2006.*

argued that the Practitioner's conduct could not be described as misconduct but rather, merely failings in his work practice.

58. By contrast, Mr King argued that there were significant aspects of the Practitioner's conduct which illustrated the severity of the breach; namely:

(a) the Practitioner's failure to notify the relevant building surveyor of departures from the design drawing; and

(b) the Practitioner's willingness to allow departures from the design drawings or the applicable standards, after forming his own view that the departure would have no adverse effect on the structural integrity of the building.

59. Mr King drew my attention to the procedures for the inspection of building work under ss 34 to 37 of the Act. In particular, s 37 of the Act states:

> **37 Directions as to work**
>
> (1) After inspecting the building work, the relevant building surveyor or a person acting on behalf of the relevant building surveyor may direct the person who is in charge of carrying out the building work to carry out work so that the building work complies fully or substantially with the building permit issued in respect of the work, this Act or the building regulations, as the case requires.
>
> (2) If a person fails to comply with a direction under this section, the relevant building surveyor may cause a building notice to be issued under Part 8 or may take any other action permitted by this Act or the building regulations.
>
> (3) A direction may be given orally or in writing.
>
> (4) If a direction is given orally, the person who gave the direction must confirm it in writing without delay to the person to whom the direction was given.

60. It is clear from the findings made by the BPB that the Practitioner has failed to understand his obligations under the Act. In my view, allowing noncompliant work to remain, on the assumption that the builder will remedy the work could lead to serious consequences, especially where the building surveyor is not notified. That conduct clearly undermines the operation of the Act by disengaging the building surveyor from what is actually occurring on site.

61. Similarly, forming a view that certain work is not required, notwithstanding that an Australian Standard requires it to be performed, again in circumstances where the building surveyor is not informed of the departure, can also lead to serious consequences.

62. In my view, s 37(1) indicates the legislature's intention to vest with the building surveyor or the inspector acting on behalf of the building surveyor, considerable responsibility to ensure compliance with the building permit and the Act. In the case of an inspector, it is not open for that person to reconsider the design documents or the applicable Australian Standard, which form part of the building permit. As I had already indicated, the role of an inspector is to require compliance with the building permit and to give directions (which must be confirmed in writing) to ensure compliance.

63. Although I accept Mr Pumpa's submission that the Partitioner's conduct may not constitute serious misconduct, that factor does not diminish the seriousness of the Practitioner's failings in relation to the inspection process conducted at the Donvale Property. I do not consider those breaches to be trivial.

## Deterrence

64. Mr King submitted that the three month suspension previously decided by the Board does not provide an effective deterrent to other building inspectors, building surveyors or building practitioners from adopting or following similar practices.

65. Mr King relied upon and referred me to a recent decision of the Tribunal in the matter of *Legal Services Commissioner v PLB*,[12] going to the issue of general deterrence. However, *PLB* was overturned by the Victorian Court of Appeal in *PLP v Legal Services Commissioner*,[13] specifically in relation to the findings made by the Tribunal concerning general deterrence. Nevertheless, the general principles set out in *PLP* at first instance were generally accepted by the appeal court. Those general principles were comprehensively discussed in *Stirling v Legal Services Commissioner*, another decision of the Victorian Court of Appeal.[14]

66. *Stirling* concerned an appeal of a decision by the Tribunal relating to the professional conduct of a legal practitioner. On the question of deterrence, the Court observed:

> Secondly, as the Tribunal is acting as a professional disciplinary tribunal, the deterrent effect is a key element in assessing an appropriate penalty. In *Quinn*, Maxwell P noted the role of both specific and general deterrence in determining an appropriate penalty in these types of proceedings:
>
> > The available sanctions are, by their nature, punitive, and the objectives of specific and general deterrence - which serve the protection of the public - depend upon the sanctions having punitive effect.[15]

[12] [2014] VCAT 793 at [97].
[13] [2014] VSCA 253.
[14] 2013] VSCA 374.
[15] Ibid at [58].

67. Mr King submitted the general deterrence is a key element in making a decision under s 179(2) of the Act. He pointed to the fact that a registered building surveyor acts as a gatekeeper to ensure compliance with the building permit, the Act and the Regulations made under that Act. An inspector is an integral part of the functions undertaken by building surveyors and a failure in the performance of their duties can lead to disastrous consequences, as the present case illustrates. Therefore, Mr King submitted that the decision of the Tribunal should send a clear message to other inspectors that they cannot escape punitive measures where they are found to have failed to comply with the Act or the Regulations.

68. In *Stirling*, reference was made to the decision of Judge Ross (as he then was) in *Brott v Legal Services Commissioner*,[16] where he held:

> The concept of general deterrence of others by the punishment of an offender is that an understanding that an offence is followed by substantial adverse consequences will prevent others from committing the offence. Related to general deterrence is the proposition that in deciding an appropriate penalty the Tribunal may have regard to the effect by which its order will have on the understanding, in the profession and amongst the public, of the standard of behaviour required of solicitors.[17]

69. Mr Woods, counsel for the BPB, submitted that the decision of the Board to suspend the Practitioner for three months represented a fair balance and encapsulated what he submitted was appropriate consideration of general and specific deterrence.

70. I accept that denunciation and general and specific deterrence are factors to be considered in determining what decision is to be made under s 179 (2) of the Act. However, they are not the only factors to be considered. A decision which is blinkered by focusing only on denunciating or providing general and specific deterrence fails to properly consider all matters relevant to the exercise of the Tribunal's discretion under s 179(2). This point was made clear in *Burgess v McGarvie (Legal Services Commissioner)*:[18]

> When the Tribunal formulates a sanction, it must take into account all relevant matters, in much the same way that a sentencing judge is required to take into account all relevant matters when synthesizing a sentence.[19]

71. In terms of specific deterrence, the Court of Appeal in *Stirling* made the following comments:

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[16] [2008] VCAT 2399.
[17] Ibid at [67].
[18] [2013] VSCA 142. cited in *Stirling* at [65].
[19] Ibid at [67].

In assessing specific deterrence, there must be an assessment as to how the penalty reflects the behaviour of the accused. In Brott, Judge Ross also noted that this factor involves:

> A consideration in relation to specific deterrence is the extent to which a practitioner displays an insight into his wrongdoing such as to demonstrate an appreciation of what has been done was wrong and must not recur.[20]

72. In my view, the Practitioner's evidence given during the course of the Board's inquiry demonstrates that, at least with some of the items described in the Fenton Report, the Practitioner understood that his conduct was unprofessional and that he had taken steps to alter that conduct.

73. Therefore, I am not persuaded that in the present case, suspension of the Practitioners registration for a period exceeding six months would deter the Practitioner from re-offending any more than suspension for three months or less.

## Lack of remorse or regret

74. Mr King submitted that the Applicant demonstrated a lack of contrition. He argued that he contested all of the Allegations raised against him in the inquiry, maintaining his position that he did not breach Regulation 1502.

75. Mr Pumpa conceded that the Practitioner did not plead guilty at the initial inquiry but the fact that he no longer challenged the findings of the Board should be taken into account. He further argued that the Board's *Reasons for Decision* illustrated that the Practitioner was remorseful and this was demonstrated by his full and frank evidence.

76. In my view, it cannot be said that the Practitioner demonstrated a complete lack of contrition. The transcript of the Board's inquiry reveals that the Practitioner understood that the majority of work practices employed by him in 2007 were inappropriate. Moreover, the transcript indicates that the Practitioner acknowledged that his failings in 2007 and 2008 have partly led to disastrous consequences for the Owner.

## Protection of the reputation of the profession

77. Mr King submitted that a short period of suspension would undermine public confidence that building surveyors and building inspectors are adequately monitored and indiscretions are detected and appropriately dealt with. He argued that a short period of suspension would undermine public confidence in this important consumer protection legislation.

78. I fail to understand how not suspending a building practitioner's registration would undermine the public's confidence that building inspectors are adequately monitored and indiscretions detected. The fact

[20] *Legal Services Commissioner v Mathew Stirling* [2013] VSCA 374 at [60].

that an investigation is carried out and an inquiry conducted demonstrates that, in this particular case, the Practitioner's conduct was monitored and his indiscretion detected, irrespective of whatever sanction is ultimately decided.

79. Nevertheless, I accept that a sanction which is too lenient could have the effect of undermining public confidence. However, that should not be the sole driving factor in determining an appropriate decision under s 179(2) of the Act.

## Prior finding

80. It is common ground that the Practitioner has previously been found guilty of breaching Reg 1502(2), following another inquiry conducted in 2012 concerning an unrelated building project. However, I note that the behaviour of the subject of that previous inquiry occurred in 2010, which postdates the conduct the subject of this inquiry.

81. According to Mr Woods, the fact that findings were made in the 2012 inquiry predate findings made in this inquiry mean that those prior adverse findings can be taken into account on the question of penalty.

82. By contrast, Mr Pumpa submitted that the 2012 inquiry cannot be taken into account, given that the conduct in question occurred after the conduct, the subject of this inquiry.

83. Mr Woods drew my attention to the *Victorian Sentencing Manual*. He submitted that subsequent convictions could be taken into account in sentencing criminal convictions. However, he was unclear whether the same applied to disciplinary proceedings.

84. In my view, previous findings can be taken into account even if the behaviour post-dates the inquiry. However, I consider that very little, if any; weight can be placed upon a previous finding, when the conduct post-dates the inquiry. In particular, that unusual scenario makes it difficult to accept that the practitioner has 'reoffended' in a strict sense. This is because it is not a situation where a practitioner repeats unprofessional conduct after having previously been before the Board on the same or similar allegations. In the latter case, I consider the repeated behaviour as being more culpable because the practitioner has already been sanctioned but has either ignored or failed to learn from his or her mistake.

85. That cannot be said in the present case. Here, the Practitioner had not been before the Board or sanctioned prior to the conduct, the subject of this inquiry. In those circumstances, I do not accept that the 'prior finding' is a material factor to be considered in exercising my discretion under s 179(2) of the Act.

## Impact on Owner

86. Mr King submitted that the incompetent inspections carried out by the Practitioner have taken a serious toll on the Owner. He said that the Owner is unable to occupy the Donvale Property and has had to find alternative accommodation as a result of damage to the sub-floor frame.

87. I accept that the Owner has suffered significantly as a result of problems associated with water entering the sub-floor space and as a result of sub-floor timbers failing. However, based on the evidence before me, it is difficult to conclude that the Practitioner is solely responsible. As I understand the background facts, a significant amount of soil was placed against the lower floor east wall by the original owner sometime after the builder had completed its work and certainly after the Practitioner had carried out his final inspection. To what extent that impacted subsequent events is unknown. Moreover, the Board accepted the Practitioner's evidence that at the time of his inspections, there was sufficient clearance under the sub-floor timbers. The Board accepted that the current condition of the sub-floor, which has some joists and bearers sitting directly on natural ground, was not the condition of the sub-floor at the time of the Practitioner's inspections.

88. The catastrophic events which have led to the Owner's loss and damage are difficult to reconcile solely with the unprofessional conduct of the Practitioner. Although some consideration must be given to the consequences of the Practitioner's unprofessional conduct, I do not consider that this factor should be given too much weight, given that difficulty.

## Mitigating or other factors

89. Mr Pumpa submitted that that the Tribunal may take into account mitigating circumstances to reduce the severity of the decision that would otherwise be imposed.

### Delay

90. In that regard, Mr Pumpa pointed to the fact that the conduct, the subject of this review hearing, occurred approximately seven years ago.

91. In *R v Merrett & Ors*,[21] Maxwell P stated:

> The relevance of delay lies rather in the effect which the lapse of time - however caused - has on the accused. Delay constitutes a powerful mitigating factor. In particular, it focuses attention on issues of rehabilitation and fairness. As the Court of Criminal Appeal of Western Australia said in 1983 in *Duncan v R*:
>
> > … where, prior to sentence, there has been a lengthy process of rehabilitation and the evidence did not indicate a need to protect society

[21] (2007) 14 VR 292.

> from the applicant, the punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of the rehabilitation.
>
> … The very fact of a long delay in bringing the matter to court which led the applicant to have this matter hanging over his head for nearly 4 years is rightly prayed in aid on his behalf.
>
> As Vincent A.J.A. pointed out in *R v Schwabegger*, a legitimate sense of unfairness can develop when the criminal justice process proceeds in what can be perceived as too leisurely fashion…[22]

92. In the present case, the delay in initiating the original inquiry occurred because the defects were latent and did not become apparent until after the Owner took possession of the Donvale Property in 2011. Further destructive investigation then revealed the full extent of the damage to the Donvale Property, prompting an investigation by the Board and subsequent inquiry.

93. In my view, it cannot be said that the delay in investigating the Owner's complaint and conducting the inquiry is attributable to the Board. As is often the case in building disputes, defects sometimes take time before becoming apparent.

94. Nevertheless, the fact that the Practitioner's conduct occurred in 2007 and 2008 is relevant, especially in circumstances where the Practitioner has indicated that he has learnt from the experience and does not currently adopt the procedures that he had adopted in 2007 - 2008.

**Financial consequences of suspension**

95. Mr Pumpa submitted that the financial consequences of suspending the Practitioner's registration were far-reaching. In particular, he submitted that the Practitioner was the sole breadwinner, presently supporting his partner who was unable to work due to medical reasons. Mr Pumpa said that the Practitioner had fixed financial liabilities that would not be able to be met if his registration was suspended. Mr Pumpa outlined those financial liabilities as:

    (a) a mortgage liability of $1,000 per fortnight;

    (b) vehicle expenses of $450-$500 per fortnight

    (c) food expenses of $150 per fortnight

    (d) phone Internet expenses and $40 per fortnight; and

    (e) medical expenses for his partner of $40-$50 per fortnight.

96. Mr Pumpa submitted that a suspension of his registration would have an enormous impact on the Practitioner's earning capacity for a number of reasons. First, it would mean that he is unable to earn income during the

[22] Ibid at 400 (footnotes omitted).

period of suspension. Second, it would mean that many of the private building surveyors with which he contracts would look elsewhere during his period of suspension. Third, it is likely that the Practitioner will have difficulty in re-establishing business relationships after the suspension has ended. This is because new ties will have been established between building surveyors and the inspectors engaged to replace the Practitioner. In that sense, a suspension, even for a short period of time, would have lasting detrimental effects.

97. Mr Pumpa submitted that the financial consequences of the inquiry, including this review hearing, have been significant. He argued that these costs, of themselves, constitute a significant deterrence.

98. Mr King argued that the evidence given by the Practitioner going to the issue of his financial circumstances is limited and very little weight should be attributed to the submissions made by Mr Pumpa. He said it was open for the Practitioner to have given direct evidence on this issue but has chosen not to do so. In those circumstances, he submitted that it was open for the Tribunal to infer that his evidence on this issue may not have assisted his case.

## FINAL ANALYSIS

99. In my view, suspending the Practitioner's registration is not warranted in this particular case. I have formed this view despite submissions made by Mr King that a review of previous decisions made by the BPB indicates that other building practitioners have often been suspended for breaches of the Act. I accept that parity with comparable cases is desirable. However, each case needs to be assessed on its own unique facts and without being appraised of the facts which have previously given rise to the imposition of a suspension or cancellation of registration, it is difficult to draw any direct comparison. Therefore, those prior determinations are of little assistance.

100. I have taken into consideration the fact that the Practitioner has indicated that his current work practice is different to what it was in 2007.[23] I further accept that the Practitioner has learnt from his mistakes and that suspending his registration would lead to a disposition that is too harsh. In my view, reprimanding the Practitioner and imposing a penalty of $4,000 adequately reflects the requirements of general and specific deterrence, having regard to the objectives of the Act. By contrast, suspending the Practitioner's registration, even for a lesser period of time, is likely to lead to significant commercial ramifications, which would survive well past the period of suspension.

[23] Transcript of Inquiry proceeding conducted on 26 February 2014 at pages 22, 36 and 37.

101. I note that in *Peek v Medical Board of Victoria*,[24] Marks J noted that a reprimand should not be regarded as a trivial penalty. In a judgment substituting a reprimand for the tribunal's six month suspension, his Honour stated:

> I have mentioned that the Board referred to a reprimand as trivialising a serious lapse in professional standards. I am not able to agree with the Board that a reprimand is a trivial penalty. It may be inappropriate or inadequate in many circumstances, but a reprimand, to a professional person, has the potential for serious adverse implications.[25]

## Costs

### Costs of the inquiry

102. As to the costs of and incidental to the inquiry, I am of the view that the determination of the BPB should stand undisturbed. In that respect, I note that the BPB has not sought to increase the amount that it previously determined was payable by the Practitioner.

103. On the other hand, Mr King submitted that the Practitioner should be ordered to pay all of the BPB's costs of the inquiry, which have been assessed as $12,013.85.

104. Mr Woods referred to *John Noce v The Building Practitioners Board* [26] in submitting that the BPB (and the Tribunal on review) has a broad discretion regarding costs. In *Noce*, Pagone J observed:

> [20] … The power in s 179(2)(b) of the *Building Act 1993* (Vic) to require a person to pay costs is not dependent on the Board having to produce invoices or any of the other documents which Mr John Noce's solicitors demanded. Nor is the power dependent upon the notion of "reasonableness" applicable to the incurrence of costs in litigation. No doubt costs incurred need to be reasonably incurred in the broad sense in which reasonableness is used in the context of judicial review that no more special meaning of the word "reasonable" is incorporated into the provision such as may be found in relation to the award of costs by a court as between parties to a dispute.

105. The notion that the BPB has a broad discretion in requiring a party to pay the costs of and incidental to an inquiry was not challenged by Mr King. Mr King did not contend that the BPB did not have power to award only a portion or percentage of the total costs of and incidental to the inquiry. His submission focused on the punitive aspect of the BPB's decision on costs. He contended that the amount determined was too lenient.

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[24] [1994] VSC 7.
[25] Ibid at [6].
[26] [2013] VSC 13.

106. As highlighted in *Noce* , the imposition of an order for costs relating to the inquiry forms part of the suite of sanctions contemplated under s 179(2) of the Act. In that sense, such an order for costs differs from costs which may be ordered pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

107. In the present case, I am of the view that the BPB's decision to require the Practitioner to pay approximately one quarter of the total costs of the inquiry ($3,000) is an appropriate sanction when weighed together with the imposition of a $4,000 fine and a reprimand, having regard to the nature of the misconduct, deterrence, and the other mitigating factors discussed above.

**Costs of review hearing**

108. Apart from the Owner, neither the BPB nor the Practitioner addressed me on the question of the costs of this review hearing. Accordingly, I decline to make any order in relation to the costs of this review hearing at this stage but will give the parties liberty to apply should they wish to agitate this point further.

**SENIOR MEMBER E RIEGLER**