

Before the Building Practitioners Board

	BPB Complaint No. CB24274
Licensed Building Practitioner:	Karen Knight (the Respondent)
Licence Number:	BP 125934
Licence(s) Held:	Design AOP 2

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	30 April 2019
Decision Date:	9 May 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2

Appearances:

Andrew Wedekind, Barrister and Solicitor, for the Respondent

Procedure:

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

Board Decision:

The Respondent **has not** committed a disciplinary offence.

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Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) 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.”

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

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

- [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.

Consolidation

- [5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [6] The Board sought agreement for consolidation of this matter with complaint number CB24632. The consent of all those involved was given. The two matters were consolidated.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.
- [8] 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.
- [9] In addition to a considerable volume of documentary evidence before the Board it heard evidence at the hearing from the Respondent, the Complainants and the licensed building practitioner who carried out the building work (the Carpenter)⁶. It also received submissions from Counsel for the Respondent.
- [10] The Complainants engaged the Respondent to redesign aspects of an alteration and extension to their residential dwelling. Prior to the Respondent’s engagement the Complainants had contracted an architect to develop a design and obtain a building consent for that design. Notwithstanding the issue of a consent the Complainants decided to redesign aspects of the dwelling so as to reduce the build cost. The Respondent’s engagement included obtaining an amendment to the original building consent. An Engagement Letter dated 14 March 2018 issued by the Respondent was accepted by the Complainants. It set out terms and conditions of the engagement and stipulated the scope as:

Alteration to the design of the Project by [Omitted]. The design by [Omitted] has been granted Resource Consent and Building Consent. Any subsequent

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

⁶ The licensed building practitioner was the subject of the complaint in CB24632

alterations by us will most likely be Amendments to the existing building consent, and may possibly alter the resource consent.

Alterations to the plans will cover these broad tasks:

- *Resource Consent
Preparation of drawings and reports sufficient to obtain a modification to the Resource Consent, if required.*
- *Working Drawings/Developed Design
Development and expansion of the altered design to a stage from which working drawings and specification can be prepared. This stage also includes any design reports, and the co-ordination of schematic designs of engineering and other specialist services provided by consultants.*
- *Contract Documentation
This stage includes the preparation of working drawings and specification based on the approved developed design alterations sufficient to obtain a Building Consent - most likely a Building Consent Amendment - and sufficient for construction.*
- *Contract Administration and Site Observation
We will not be engaged for Contract Administration and Site Observation.*

We will not be required to undertake or arrange other work, and will not be required to complete other work started or to ensure that you or others complete it

[11] The Letter of Engagement did not specify the design brief for the change to the building consent. The Respondent and the Complainant differed as to the nature and extent of the changes to be designed by the Respondent. The Complainants considered the engagement was to:

- (a) simplify the basement design (primarily to remove the over-engineered steel structure, square up the basement corner in order to add a small windowed bathroom and enlarge one door);
- (b) simplify the roof above the kitchen and living room (primarily to remove the over-engineered steel structure and two steps); and
- (c) extend the floor plate of the dining room and living room wall and place on standard foundations.

[12] The Board was provided with a large volume of emails between the Respondent and the Complainant which discussed the extent and nature of the changes to the original building consent. The emails showed that there were differing perspectives

as to the extent of the design brief. The Respondent's correspondence became more verbose as the relationship deteriorated. The Complainants raised, as part of their complaint, that the Respondent was charging for what they perceived was unnecessary and self-serving correspondence which did not reflect their verbal interactions with her and that she would not engage with the Carpenter whom they considered had valuable design input to offer.

- [13] The building work commenced on the basis of the original consent granted. The building work that was subsequently carried out by the Carpenter included building work that related to the proposed building consent amendment.
- [14] The contractual relationship between the Complainants and the Respondent came to an end prior to the amendment to the building consent being granted. A third designer was engaged to complete the building consent amendment which was, following the engagement of the third designer, issued. The building consent amendment was, in the main, based on the amended design developed by the Respondent.
- [15] The Complainant and the Respondent differed as to why the relationship came to an end. The Complainant's perspective was that the Respondent would not follow instructions, was straying outside of the design brief, was overcharging, was not providing value and was being unprofessional in her dealings with them. The Respondent had not, at the time the contractual relationship came to an end, filed the amended building consent.
- [16] The Respondent stated the reason for not being able to file the amendment was that required engineering design detail had not been provided to her by the engineer. She noted she had emailed the engineer but that he had not responded. The Carpenter gave evidence that he had not experienced any difficulties contacting the engineer who had attended site when required.
- [17] The Respondent's position as regards the termination of services was that she had not been paid for all of her work and that she did not want to be associated with building work that was being carried out without the amendment to the building consent having been issued. The Respondent raised her concerns about the building work with the Council (as the building consent authority) and made a complaint to the Board about the Carpenter⁷.
- [18] In support of their complaint the Complainants provided the Board with copies of correspondence with the Respondent. The Respondent, in turn, provided the Board with extensive documentation and correspondence between her and the Complainants⁸. At the hearing the Respondent accepted that in some of her correspondence with the Complainant toward the end of the contractual relationship was intemperate but that at this time the relationship was strained.

⁷ Complaint CB24632

⁸ The Respondent's response ran to 549 pages of correspondence and documentation

Board's Conclusion and Reasoning

[19] The Board has decided that the Respondent **has not**:

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

and should not be disciplined.

Negligence and/or Incompetence – Design Work

[20] The Board's considerations as regards negligence and/or incompetence were in respect of the Respondents design work. The Board did not receive evidence that the Respondent's designs were negligent or incompetent. Rather the allegations were that the Respondent's design processes and interactions with the Complaints were negligent and/or incompetent. At its core the matter before the Board was about client communication. In this respect, whilst the Board considered the Respondent could have done better it did not consider that the behaviour had reached the seriousness threshold required to impose a disciplinary sanction.

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

3 Design work declared to be building work

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

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

[23] Turning to negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁹ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

- [24] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into, in this case a licensed building practitioner with a design licence. This is described as the *Bolam*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.
- [25] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*¹² it was stated as “*an inability to do the job*”.
- [26] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. 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.
- [27] 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 Act¹⁴. 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 practitioner¹⁵.
- [28] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
- (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹² *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁵ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (iii) *people who use a building can escape from the building if it is on fire; and*
- (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

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

[30] The Board also notes, as regards the allegations that were before the Board, that the competencies a licensed designer is expected to be able to demonstrate in order to obtain a licence are set out in Schedule 1 of the Licensed Building Practitioners Rules 2007. Those competencies include, for a Design AOP 2 Licence and relevant to the matters before the Board:

Competency 3: Establish design briefs and scope of work and prepare preliminary design

3.2.1 Work with client to establish an agreed brief and scope.

3.2.6 Present information to client on timelines and costs.

Competency 4: Develop design and produce construction drawings and documentation

4.2.3 Coordinate and integrate specialist design inputs as required.

4.2.5 Update clients on timelines and costs.

[31] To the extent that the above competencies form part of the design licensing framework the Board considers that it can further investigate the conduct complained about.

[32] The Board noted that the design brief and scope was not clear or definitive. Whilst an agreement was entered into between the parties by way of a Letter of Engagement the design brief and what was expected in the way of design changes had not been detailed. The perceptions as to the services to be provided and what was to be delivered diverged and the communications between the parties broke down. The eventual designs were not delivered but were able to be used by the third designer. The Respondent's position was that her design only required provision of engineering design details and payment. The Respondent was unable to obtain a response from the engineer in order to finish. The Carpenter was.

[33] The inability of the Respondent to communicate with the engineer when others could was, in the Board's view, indicative of her approach to interacting with others

involved in the project. The correspondence before the Board showed that the Respondent relied on email over other forms of communication and that she tended toward using her emails as a means of justifying her actions and position. Whilst those positions may or may not have been valid the point is that she focused on the distractions rather than on the design brief.

- [34] In respect of the design brief this was not clearly established and managed. Rather it tended to evolve and change to the point where it was not clear to the Board what the actual extent of the design brief was. The Board's perception was that there was extensive design brief creep and, with it, escalating cost.
- [35] In short, the Board considered that the Respondent did not meet expected standards as regards working with the client to establish an agreed brief and scope, or in presenting information to the client on timelines and costs, or in coordinating and integrating specialist design inputs. To this extent 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.
- [36] Notwithstanding this finding the Board decided that the Respondent's conduct was not sufficiently serious enough to warrant a disciplinary outcome.
- [37] In this respect it has applied the findings in *Collie v Nursing Council of New Zealand*¹⁶ where the Court 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.*
- [38] The Board found that the conduct noted, whilst not acceptable, did not fall seriously short of what is expected a licensed building practitioner.

Disrepute

- [39] 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 C2-01111¹⁷ and discussed the legal principles that apply.
- [40] The Act does not provide guidance as what sort of conduct brings, or is likely to bring, the regime into disrepute. The Oxford Dictionary defines disrepute as "the

¹⁶ [2001] NZAR 74

¹⁷ Board decision dated 2 July 2015.

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

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

[41] 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 convictions²¹;
- honest mistakes without deliberate wrongdoing²²;
- provision of false undertakings²³; and
- conduct resulting in an unethical financial gain²⁴.

[42] 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.

[43] The conduct complained about that may have come within the scope of disrepute was the Respondent's invoicing and the tenor or her communications when the contractual relationship deteriorated.

[44] The Board has found in previous complaints that gross overcharging could amount to disrepute. In Board Decision C2-01312 the Board found that the Respondent's charges were double the charges estimated by a quantity surveyor for the work. The Board also noted that the respondent in that case was not able to substantiate his charges and that there were unacceptable errors in his invoicing.

[45] The conduct in this case was not of that nature. The Respondent led evidence from an expert that the charges were reasonable. There was no evidence that the charges were grossly excessive.

¹⁸ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁹ [2012] NZCA 401

²⁰ [2012] NZAR 1071 page 1072

²¹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²² *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²³ *Slack, Re* [2012] NZLCDT 40

²⁴ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [46] The Board also found in *Davies* [2018] BPB 1883 that correspondence that was abusive and offensive had brought the regime into disrepute. In that case a commercial dispute had been managed poorly and the respondent had resorted to personal attacks of a vile nature.
- [47] Again, the conduct in the present case is not to that level. There has been a commercial dispute and the language used has, as was conceded, been intemperate it has not, however, degenerated to the point where a finding of disrepute should be made. In this respect the Board notes that, as with negligence the Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

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

Signed and dated this 9th day of May 2019



Richard Merrifield
Presiding Member