

Before the Building Practitioners Board

	BPB Complaint No. CB25459
Licensed Building Practitioner:	Johnny Brittain (the Respondent)
Licence Number:	BP 133435
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	7 July 2021

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

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.

Disciplinary Finding:

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

Contents

Summary of the Board’s Decision	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Board’s Conclusion and Reasoning	5
Negligence and/or Incompetence	6
Contrary to a Building Consent.....	7
Record of Work.....	8

Summary of the Board’s Decision

[1] The Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act on the basis that the Respondent’s conduct did not meet the threshold required for a disciplinary finding to be made.

The Charges

- [2] The hearing resulted from a complaint about 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 contrary to section 317(1)(b) of the Act, IN THAT:
 - (i) the manner in which profiles were installed and set out may not have been in accordance with industry standards or competed to an acceptable standard; and
 - (ii) changes made to the consented pile plan may not have been in accordance with industry standards or competed to an acceptable standard; and
 - (iii) demolition work, temporary propping work and foundation work may have been carried out in manner that contravened health and safety at work legislative requirements; and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN

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

THAT, an amendment or minor variation to the Building Consent may have been required for three new piles that were installed; 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

Function of Disciplinary Action

- [3] 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.

- [4] 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.”

- [5] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [7] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings. The Complainant elected not to attend the hearing.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [11] 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.
- [12] In addition to the documentary evidence before the Board it heard evidence at the hearing from the Respondent.
- [13] The Respondent outlined his building experience. He noted that no issues about the building work were raised with him during the build and that he had not been afforded an opportunity to address any of the issues.
- [14] The Respondent outlined his process for setting up profiles and, in a response to a question about potential damage to weatherboards when profiles were removed, he stated that the nails were steel and would be easy to remove. The Respondent further stated that the structures that the profiles were attached to, such as fences

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

and, were solid and stable. He noted that he would have fixed any damage to weatherboards if any damage had resulted when profiles were removed.

- [15] With regard to additional piles, the Respondent outlined that, after he had started to prepare for foundations work, he considered the existing subfloor structure was inadequate and that additional piles and structural timber were required to provide additional support for the existing structure and point loads transferred from the proposed internal alterations above. The Respondent stated that, prior to undertaking any work relating to additional piles and structural support, he consulted with the owner and the engineer during a site visit. Email correspondence from the engineer provided to the Board confirmed that a specific engineer design had been developed.
- [16] The Respondent did carry out some preparation work prior to him obtaining the engineer's design in that holes for new piles were prepared. The new holes were prepared on the basis of the design that had been provided by the engineer for consented building work and NZS:3604. The Respondent stated he would have had the pile holes checked by the engineer prior to any piles being installed. The Respondent left the process for obtaining a minor variation or an amendment to the building consent to the owner and the engineer. He did not follow up on whether any form of minor variation or amendment had been granted. The Respondent's involvement in the building work came to an end prior to him installing any of the proposed new structural elements or pouring any of the new piles.
- [17] The Respondent noted that the existing spans were oversized, with many of the point load just landing on sub-floor jack framed walls that spanned over the concrete piles. The Respondent also noted his observation that many of the existing piles were not embedded very deep into the existing ground, and that he used an extra LVL as part of the propping under point loads. The Respondent stated that when he did his temporary propping, he placed these within a close proximity to existing piles and bearers to take the point loads, that he placed temporary support bearers underneath and near piles and expressed his opinion that the new support he proposed provided was an improvement on the pre-existing structural support.
- [18] The Respondent accepted that he had not installed a hazard board on site. He stated that he had updated his health and safety practices.
- [19] With regard to a record of work, the Respondent carried out preparatory work but did not carry out or supervise the installation of any restricted building work as his involvement in the project ceased prior to it being carried out or supervised.

Board's Conclusion and Reasoning

- [20] 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);

- (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); or
- (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 not** be disciplined.

Negligence and/or Incompetence

- [21] The Board's finding that the Respondent has not carried out or supervised building work in a negligent or incompetent manner has been made on the basis that the conduct was not sufficiently serious enough to warrant disciplinary action.
- [22] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [23] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*,⁹ it was stated as "*an inability to do the job*".
- [24] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [25] 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 Act¹¹. 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

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹².

- [26] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³, 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.

- [27] Again, in *Pillai v Messiter (No 2)*¹⁴ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [28] On the basis of the above decisions, the Board has decided that whilst there was some evidence of building work that may not have been completed to an acceptable standard, the matters raised did not reach the required seriousness threshold. In particular, the Board noted that the issues with regard to the profiles were minor in nature and that the building work on the structural elements of the build had not progressed beyond preparation work. The Board also considered that the propping used was adequate and that the failure to install a safety board was a minor failing.

Contrary to a Building Consent

- [29] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued.
- [30] 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.
- [31] 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 sought.

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ [2001] NZAR 74

¹⁴ (1989) 16 NSWLR 197 (CA) at 200

- [32] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.
- [33] In the present matter, the Board was satisfied that the Respondent consulted correctly and that changes to the construction methodology were being developed. The Board has also noted that the new work had not been undertaken. As such, the Board has found that building work was not carried out contrary to the building consent. Had the building work progressed further, then the Board's finding may have been different.
- [34] The Respondent should note, for the future, that when changes are made to a building consent, he should ensure that the correct building consent change processes have been completed prior to the building work being undertaken. This includes ensuring that the appropriate persons are engaged, such as engineers and designers. Furthermore, he should note that if an amendment is required, no further building work can take place on any building elements until such time as the amendment is granted.

Record of Work

- [35] 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 work¹⁵.
- [36] 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.
- [37] 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 and, as was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁶, "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [38] The Respondent carried out preparatory work. He did not install any new building elements. In this respect, the restricted building work is defined by the Building (Definition of Restricted Building Work) Order 2011 was passed to establish restricted building work. Clause 5 of the Order stipulates:

¹⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

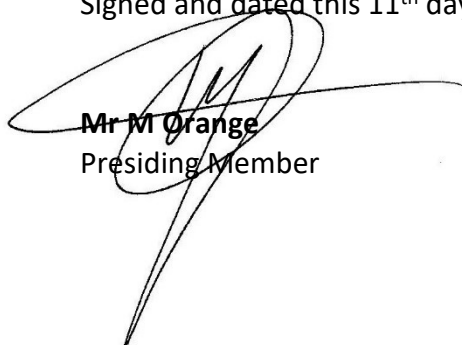
¹⁶ [2018] NZHC 1662 at para 50

- 5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
 - (2) *This clause applies to building work that is—*
 - (a) *the construction or alteration of—*
 - (i) *the primary structure of a house or a small-to-medium apartment building; or*
 - (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
 - (b) *of a kind described in subclause (3); and*
 - (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
 - (3) *The kinds of building work referred to in subclause (2)(b) are—*
 - (a) *bricklaying or blocklaying work;*
 - (b) *carpentry work;*
 - (c) *external plastering work;*
 - (d) *foundations work;*
 - (e) *roofing work.*

[39] Given the definition and the fact that the Respondent only carried out preparatory work, the Board finds that he did not carry out or supervise any restricted building work and that, accordingly, he did not have to provide a record of work.

[40] The Respondent should note that, in circumstances where he has carried out or supervised restricted building work, and a contract comes to a premature end, he is required to provide a record of work without delay. The reason is that completion will have been deemed to have occurred as he will not be able to carry out or supervise any further restricted building work. The Respondent should also note that a record of work can stipulate what was completed as well as what was not completed. As such, it can afford a degree of future protection.

Signed and dated this 11th day of August 2021


Mr M Orange
Presiding Member