

Before the Building Practitioners Board

	BPB Complaint No. C2-01809
Licensed Building Practitioner:	Gerard Lett (the Respondent)
Licence Number:	BP 115344
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	Auckland
Hearing Type:	In Person
Hearing Date:	14 August 2018
Decision Date:	27 August 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Procedure:

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

Board Decision:

The Respondent **has 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) 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).

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.

Evidence

- [5] 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.

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

Gerard Lett	Respondent
[Omitted]	Witness, [Omitted]
[Omitted]	Witness, [Omitted]
William Hursthouse	Technical Assessor

- [7] The Respondent’s company Super City Builders was engaged to carry out renovations inside of a dwelling house and to construct a new garage separate from the house. The building work was carried out under a building consent. [Omitted] had completed the design for the building consent.

- [8] The Complainant alleged:

The architect plans and measurements were wrong.

When it came to the foundation of plans the height levels did not match therefore [they] raised the foundations higher.

As the build went on we were alerted by site builders that our driveway would have to be raised a considerable amount to even attempt to park a car”.

- [9] The Complainant got a contracted quote for the driveway and was told that it was a “big, expensive problem” noting that they would have to demolish the existing driveway, raise the driveway and add retaining walls all around which would leave a sharp angle to drive into. The Complainant alleged that even if this was done there was no guarantee they could park a vehicle in the garage with ease.

- [10] The Respondent provided a written response to the Complaint. He noted, contrary to the detail in the Complaint, that:

The foundations were actually lowered by 400mm, which came at a cost to 'Supercity Builders' (as we had to add a concrete retaining wall along length of the garage). If we had not done this, the driveway would have been even steeper and come up an extra 400mm.

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

[11] The Board requested a Technical Assessor's report to assist the Board with its inquiries. William Hursthouse was appointed. The Technical Assessor noted that [Omitted] (the Designer) had informed the Technical Assessor that he had not been asked to submit an amended plan to Council for the change in the foundation design, and that, as far as the Technical Assessor could tell, this was never done. He also noted that the Designer stated he did not visit the site before preparing his amended plan and that this was contrary to the Respondent's version of events. The Designer had been engaged by the Respondent.

[12] At the hearing the Building Consent Authority (BCA) inspection records were reviewed. It was noted that the BCA had approved the change as a minor variation. The Respondent also gave evidence that he had attended site with the Designer and that he had in his employ at the time a project manager who was a former Building Inspector who noted that a minor variation was required and who ensured it was followed up with the BCA.

[13] The Technical Assessor also noted:

5.1.6 Somewhat confusingly, there is no mention of a siting check when the construction includes strip footings (rather than a "raft floor"), as this garage did; and there is nothing in any of the inspector's notes which suggests any consideration was given to a comparison of the consented site plan with what was obvious on site.

5.1.7 If there had been such a comparison, the fact that the existing driveway was both much closer to the foundations and much steeper than shown on the consented plans would have been obvious – something [Omitted] says he did identify even before the footings were poured.

[14] Evidence was also heard as regards the design. The design, as submitted, did not match ground conditions with the levels being incorrect and the driveway drawn in the wrong location. The Technical Assessor noted two obvious errors:

1) The existing concrete access driveway is actually far closer to the proposed new garage than shown on the site plan and

2) The actual slope along the South elevation (where the garage door is) is far steeper than shown on the plan.

5.2.4 These two fundamental errors unfortunately compound: what looks like a reasonable (and buildable) slope up to the new garage door on the plan is in fact far too steep if it starts from the existing concrete drive. See the annexed photos to which I have added some measurements taken on site.

Board's Conclusion and Reasoning

[15] 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); or
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)
- and should not be disciplined.

[16] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [17] The Board's concerns related to whether the development of the original plans and a change to the building consent that appeared to be more than minor had been dealt with in the appropriate manner.
- [18] The investigation was on the basis that section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Any departure from a building consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken.
- [19] The Board has found in previous decisions⁶ that a licenced person who commences or undertakes building work without a building consent or continues with building work when an amendment to the building consent is required can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁷.
- [20] The Board noted that the changes to the building consent in this instance, although substantial in nature, were accepted and processed by the BCA as a minor variation. Given this the Board decided that the Respondent had not been negligent.

Contrary to a Building Consent

- [21] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. As noted above any departure from the consent which is not minor must be submitted as an amendment to the consent before any further work can be undertaken.
- [22] In *Tan v Auckland Council*⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes

⁶ Refer for example to Board Decision C1030 dated 21 July 2014

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ [2015] NZHC 3299 [18 December 2015]

described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [23] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [24] In this instance the evidence before the Board indicated that the change to building consent may not have been appropriately dealt with at the time of the changes. The evidence received at the hearing showed that it had, in fact, been processed at or about the time of the change as a minor variation. On this basis the Board finds that the Respondent has not carried out building work contrary to a building consent.
- [25] The Board did consider that more care should be taken in future as regards the development of the design and the management of changes to it. A review of the building consent and design prior to the work being undertaken would have revealed that what was depicted differed from that which was to be built. The Licensed Building Practitioner who carried out the building work should have also ascertained, when setting out the foundation, that the levels required remediation and action should have been taken sooner to address this.

Design Issues

- [26] The Board did note that the issues at site appeared to have been caused by fallings in the design that was submitted for the building consent and with the processes used by the Designer. On this basis the Board has resolved to initiate a Board Inquiry into the Designer.

Signed and dated this 27th day of August 2018



Richard Merrifield
Presiding Member