

Before the Building Practitioners Board

	BPB Complaint No. CB24632
Licensed Building Practitioner:	Charlie Bailey (the Respondent)
Licence Number:	BP 112675
Licence(s) Held:	Carpentry and Site 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:

Neil Beadle, Barrister and Solicitor, for the Respondent
Andrew Wedekind, Barrister and Solicitor, for the Complainant

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.

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 CB24274. 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] Whilst the Board had a considerable volume evidence before it in relation to the matter the facts, as they relate to the disciplinary charges before the Board, were relatively straight forward.
- [10] The Respondent was the licensed building practitioner engaged to carry out building work on an alteration and extension to an existing dwelling. The owners of the dwelling, the Complainants in CB24274, had obtained a building consent but had decided to make significant changes to the envisaged building work prior to it commencing. They engaged the designer in CB24274 (a Designer with a Design AOP 2 Licence) to design those changes and to obtain an amendment to the building consent for them. The new designer had not designed nor obtained the original building consent.
- [11] The building work on the alterations and extensions commenced prior to the amendment being granted. Aspects of the building work completed related to the amendment sought. The designer complained to the Council and to the Board about building work being carried out without the amendment having been granted. In this respect it is noted that section 89 of the Act requires that a licensed building practitioner notify a building consent authority of breaches of a building consent.

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

- [12] The building work completed by the Respondent which related to the building consent amendment sought but not yet granted was inspected by the Auckland Council as the building consent authority and was passed by them. The building work, notwithstanding it being completed in advance of the building consent amendment, was consistent with it. A code compliance certificate has subsequently been issued.

Board's Conclusion and Reasoning

- [13] 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);
- and should not be disciplined.

Negligence – Carrying out Building Work without an Amended Building Consent

- [14] The Board's considerations in relation to negligence and/or incompetence related to the Respondent carrying out building work that related to an amendment to a building consent prior to the amendment being granted. The Board found that the Respondent had been negligent in carrying out building work without a building consent amendment that had been applied for being granted. However, it decided that a disciplinary offence had not been committed as there was evidence that, in doing so, the Respondent had relied on the tacit approval of the building consent authority to do so. The Board's reasoning follows.
- [15] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [16] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

40 *Buildings not to be constructed, altered, demolished, or removed without consent*

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [17] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 Grant of building consent

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

- [18] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

3 Purposes

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*
 - (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.*

- [19] In *Tan v Auckland Council*⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

⁶ [2015] NZHC 3299 [18 December 2015]

[20] 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.

[21] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[22] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[23] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[24] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[25] In this respect section 45(4) of the Act states:

(4) An application for an amendment to a building consent must,—

(a) in the case of a minor variation, be made in accordance with section 45A; and

(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

[26] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[27] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building

consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

(3) *This section—*

- (a) *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
- (b) *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[28] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent or, in this case, an amended building consent, is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[29] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that an amendment to the building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing, been negligent or incompetent.

[30] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁷ 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.

[31] 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*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

[32] 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*

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

reasonably expected ability or skill level". In *Ali v Kumar and Others*¹⁰ it was stated as *"an inability to do the job"*.

- [33] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹¹. 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.
- [34] 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 purposes of the Act¹² which are outlined above. 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 practitioner¹³.
- [35] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁴ 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.*
- [36] It was clear from the evidence before the Board that the Respondent was aware that an amendment to the building consent was being sought for the building work that was being carried out and that it had not yet issued. The Respondent nevertheless chose to continue with the building work to which it related. On this basis the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent had departed from what the Board considers to be an accepted standard of conduct but that the conduct was not sufficiently serious enough to warrant a disciplinary outcome.
- [37] The Board must, however, also take into consideration the surrounding circumstances relating to the building work. The Board noted that whilst it was being undertaken without the necessary amendment having been granted it was done so with the knowledge and tacit consent of the building inspectors who were acting for

¹⁰ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁴ [2001] NZAR 74

the building consent authority. The question is was the Respondent entitled to rely on the tacit consent of the building consent authority.

- [38] Ignorance of the law is not a defence but ignorance based on erroneous advice from an official can be. In *Wilson v Auckland City Council (No 1)*¹⁵ the appellant, was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*¹⁶ Holland J found that where a person committed a crime believing it to be lawful on the grounds of “officially induced error” it was in the public interest as well as being just that that person should not be held criminally liable.
- [39] The Board considers the findings in *Wilson v Auckland City Council (No 1)* apply here. The Respondent was given and relied on official advice. Ordinarily the Board would find a licensed building practitioner to have been negligent where they carry out building work without a building consent or amendment to one being in place. Given the reliance, however, the Board does not consider the Respondent has, in this instance, been negligent or incompetent.
- [40] Notwithstanding the Board’s findings the Respondent should take care in the future to ensure that the building work that he carried out has the required building consents in place. Matters such as expediency of a build and client requirements should not come before the provisions of the Building Act and the fundamental requirement that requirement that all building work be carried out under and in accordance with a building consent.

Contrary to a Building Consent – Minor Variations

- [41] The second disciplinary charge before the Board was that the Respondent had carried out building work that did not comply with the building consent issued contrary to section 317(1)(d) of the Act. The matters pertaining to building consent amendment have been dealt with. The matter for consideration in respect of section 317(1)(d) was the substitution of a building product, namely the substitution of one damp course material in the foundations for another.
- [42] With respect to the second charge the Board decided that whilst the Respondent did not deal with what was a minor variation to the building consent in an appropriate manner the disciplinary offending was not, in this instance, sufficiently serious enough to warrant a disciplinary outcome.

¹⁵ [2007] NZAR 705 (HC)

¹⁶ (1994) 11 CRNZ 132

- [43] As noted above under section 40 of the Act all building work must be carried out in accordance with the building consent issued and once the consent has been granted any changes to it must be dealt with in the appropriate manner – either as a minor variation under section 45A of the Act or as an amendment to the building consent.
- [44] With respect to minor variations section 45A of the Act provides a more flexible approach to changes to a building consent as compared for minor variations. Notably it states:

45A Minor variations to building consents

- (1) *An application for a minor variation to a building consent—*
 - (a) *is not required to be made in the prescribed form; but*
 - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A building consent authority that grants a minor variation—*
 - (a) *must record the minor variation in writing; but*
 - (b) *is not required to issue an amended building consent.*

- [45] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

3 Minor variation defined

- (1) *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
 - (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
 - (b) *minor wall bracing changes:*
 - (c) *a minor construction change (for example, changing the framing method used around a window):*
 - (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
- (3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

- [46] On the basis of the above definition the Board considers that it is arguable that the product substitution was a minor variation. The question for the Board was whether it was dealt with by the Respondent in the correct manner.
- [47] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly the building consent authority retains a discretion to refuse a minor variation¹⁷. To aid the process of applying for a minor variation most building consent authorities have a minor variation application form.
- [48] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought¹⁸.
- [49] It must also be noted, as regards a licensed building practitioners' obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of an breach of a building consent:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

- (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
- (a) *the territorial authority in whose district the building is situated; and*
 - (b) *the owner.*
- (2) *The notification must—*
- (a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
 - (b) *state how the building work does not so comply; and*
 - (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

¹⁷ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

¹⁸ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

- [50] In *Tan v Auckland Council*¹⁹ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [51] The same applies to the ongoing verification of building work against the requirements of the building consent. A failure to notify the Council of changes to the consented documents prior to them being carried out defeats the purpose of the process.
- [52] There was no evidence before the Board that the Respondent had applied for a minor variation. Notably he had done so for at least one other minor variation²⁰ but had not done so for the product substitution. On this basis the elements of the disciplinary charge are made out.
- [53] As with other building work completed by the Respondent that did not accord with the original building consent issued the building consent authority has again not taken issue with the product substitution. The foundations were done under the observation of an engineer and a code compliance certificate has been granted. As such, whilst a required process has not been followed, the resulting work has been found to have met the requirements of the building consent²¹.
- [54] With this in mind the Board does need to consider how serious the contravention was and whether it warrants a disciplinary outcome. The seriousness test is referenced in paragraph [34] of this decision. The Board also notes that in *Pillai v Messiter (No 2)*²² 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.

- [55] Whilst negligence or incompetence are not required elements of section 317(1)(d) the Board is mindful of the overall tenor and direction of the comments the courts have made as regards seriousness and professional discipline.
- [56] In this instance the Board decided that seriousness is a matter for consideration by it in determining whether or not the Respondent has committed a disciplinary offence and it has found that the offending was not serious enough.

¹⁹ [2015] NZHC 3299 [18 December 2015]

²⁰ The Board was provided with an on-site approval of a minor variation in respect of squaring up the basement foundation

²¹ Refer section 94 for the grounds on which a code compliance certificate can be issued

²² (1989) 16 NSWLR 197 (CA) at 200

- [57] As with matters regarding the building consent amendment the Respondent is again cautioned in the future to follow the correct procedures. He is now on notice that correct procedures need to be followed and of the consequences should he fail to do so.

Signed and dated this 9TH day of May 2019

A handwritten signature in black ink, appearing to read 'R. Merrifield', is written over a faint, illegible stamp.

Richard Merrifield
Presiding Member