

Before the Building Practitioners Board

	BPB Complaint No. CB25057
Licensed Building Practitioner:	Anthony Williamson (the Respondent)
Licence Number:	BP 115422
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:	24 July 2019
Decision Date:	13 August 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Jordan Grimmer – Barristers, Shortland Chambers

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);
 - (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
 - (c) 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.

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

- [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.”

- [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 unless they reach the threshold for disrepute.

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] 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.
- [7] The Respondent was engaged to construct a new residential dwelling by way of his company A.W. Builders Limited. The construction involved substantial preparatory ground and retaining work.
- [8] Construction commenced with excavation and building levels being established. The Complainant raised issues with the methodology used and the costs associated with the removal of excess materials. The Complainant also noted issues with the building work completed by the Respondent, changes to the consented plans that were made during the build and a number of contractual issues that fell outside of the Board’s jurisdiction with the exception of an allegation of overcharging.
- [9] The specific issues the Board inquired about were in relation to the method of cut and fill used, changes to consented retaining wall, the method of construction of a retaining wall, tanking of retaining walls and a change to gable portals.

⁴ [2016] HZHC 2276 at para 164

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

Cut and Fill

- [10] The Complainants stated the contracted and approved method for establishing building levels was to reuse excavated materials from an upper level platform to raise the level of the lower level platform. The actual method used was to cart removed materials from the upper level off site and to use compacted metal to raise the lower level.
- [11] The ground works were completed on a cost recovery basis. The Respondent stated that this was a more economic method given the moisture content of the clay and that he had consulted with the Complainant prior to changing the method. He also submitted the geotechnical report allowed for either reused clay or compacted metal as did the consented specifications.
- [12] The Complainant maintained that no consent to the change was given except for the use of metal under the foundations. The Complainant also alleged that the methodology used increased costs and that the Respondent had been fraudulent as regards the charges levied.
- [13] The Board was provided with a Producer Statement – PS4 – Construction Review at the hearing from a Geotechnical Engineer in respect of ground works.

Retaining Wall Changes

- [14] The issue related to a change from the consented plans to the finished height of a retaining wall noted as R1 on the consented plans. A design error with regard to ground levels and finished heights of retaining walls (R1 at 2.3 metres and R3 which intersected at 3.5 metres) meant that a design change was required so that retaining walls would align.
- [15] The Complainants stated that they were not consulted about the change. The Respondent gave evidence that he had consulted with [Omitted], the Engineer to the project and the architect. [Omitted] confirmed that he had been consulted and that he had completed a redesign prior to the wall being constructed. Emails in the Board's bundle of documents confirmed this. The correspondence also noted that [Omitted] referred the minor variation back to the architect to file. The Complainant stated that the architect was not contracted to provide any project monitoring or observations.
- [16] A council record of inspection dated 15 November 2017 noted the requirements for a minor variation due to the wall exceeding the height specified in the engineer's table. Approval was given for construction to continue. An inspection record of 20 December 2018 noted that a PS1 for design for the wall was still required. [Omitted] provided a copy of the PS1 to the Board at the hearing. The Complainants stated that a minor variation that had been applied for in respect of the change was yet to be approved.

- [17] The Board was also provided with a copy of email correspondence between the Complainants and the Respondent in April 2018 which set out a number of changes that required minor variations. The Complainants instructed the Respondent that he was not to engage directly with the architect. It was at this stage of the project that the contractual relationship between the parties deteriorated with the Complainants asserting they were not consulted or aware of the changes that were being made and that it was not clear to them why changes were made.
- [18] There was also an allegation that the sequencing was incorrect in that the engineer's drawings implied that the requirement was to fill and cut prior to the retaining walls being constructed whereas the actual sequence was to construct the walls and then backfill them. It was noted that as a result of concrete block and wooden retaining walls intersecting, and the construction methods required that backfilling may have been the only practicable method.

Tanking

- [19] The tanking used differed from that which was specified with a torch on membrane being used instead of the consented stick on membrane and that this was on the list of minor variation changes. The Complainant stated that the membrane was not taken all the way to the base of concrete walls on garden retaining walls. Water tightness was not a requirement for the walls in question. An inspection on 24 January 2018 passed the water proofing membranes.

Gable Portals

- [20] A council inspection on 20 December 2018 noted that a minor variation was required for gable portals noting that there was no detail in the consented plans. The Respondent stated that he consulted the engineer prior to undertaking the work. A Site Inspection/Instruction dated 4 May 2018 from the engineer provided written detail of the instructions issued.

Board's Conclusion and Reasoning

- [21] 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
 - (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.
- [22] The reasons for the Board's decisions follows.

Cut and Fill

- [23] The Board considered that the issues with regard to cut and fill were predominately contractual in nature. The Board did not find any evidence that the Respondent had carried out the work in a negligent or incompetent manner or in a manner that was contrary to the building consent.
- [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. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [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*⁸ it was stated as “an inability to do the job”.
- [26] Neither test was satisfied. The Board was also satisfied that the methodology used was not contrary to the building consent.
- [27] The Board’s further investigations as regards disrepute related to allegations of overcharging with respect to the cut and fill. The Act does not provide guidance as to the definition of “disrepute” but the Oxford Dictionary defines it as “the state of being held in low esteem by the public”⁹ and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁰ 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.*¹¹
- [28] The Courts have also 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.*

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

⁹ 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

¹⁰ [2012] NZCA 401

¹¹ [2012] NZAR 1071 page 1072

- [29] Based on the above tests the Board found that there was insufficient evidence before it that would warrant a finding of disrepute.

Retaining Wall Changes, Tanking and Gable Portals

- [30] The Board's concerns over the building work on the above items related to the processes used to manage changes to the consented plans. A failure to adhere to required processes can be grounds for a finding of negligence. It may also result in a finding that building work has been carried out contrary to a building consent.
- [31] Ordinarily, 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. There was no evidence that any of the changes were amendments and as such the minor variation process would have applied.
- [32] The process for a minor variation is not as onerous as that required for an amendment to a building consent. Notwithstanding a building consent authority retains a discretion to refuse a minor variation¹² and to aid the process of applying for a minor variation most building consent authorities have a minor variation application form.
- [33] 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 sought¹³.
- [34] In the case before the Board there were contractual and communication issues that impacted on the processes. There were multiple persons involved in consenting including the Respondent, the engineer and the architect. The evidence before the Board was that the Respondent was dealing with the engineer with regard to the changes. This was appropriate given that it was issues with the engineer's drawings that had to be dealt with.
- [35] There was also evidence before the Board that the engineer was consulted prior to work being carried out and that the work complied with the revised instructions from the engineer. There was also evidence that the council as the building consent authority was aware of the changes although the awareness was most likely after

¹² Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

¹³ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

the work was carried out. The council did not take issue with the work but did require minor variations for the changes to the retaining walls and the gable portals.

- [36] The process broke down in respect of the architect being instructed to deal with minor variations. Ordinarily, where a designer or architect is involved in a project they would manage and file a minor variation. That does not mean that others are not able to file them but, in this instance, there was evidence that there was an expectation that the architect would be instructed to deal with the changes.
- [37] Given these factors the Board has decided that the Respondent's conduct has not fallen below what is considered to be an acceptable standard.
- [38] The Respondent is, however, cautioned that in future he would be well served to ensure that the building consent authority has approved minor variations prior to them being carried out.

Signed and dated this 13 day of August 2019

A handwritten signature in black ink, appearing to read 'Richard Merrifield', written in a cursive style.

Richard Merrifield
Presiding Member