

Before the Building Practitioners Board

	BPB Complaint No. C2-01813
Licensed Building Practitioner:	Nicholas Cross (the Respondent)
Licence Number:	BP 125867
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:	25 September 2018
Decision Date:	29 October 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
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.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	5
Negligence and/or Incompetence	6
Contrary to a Building Consent.....	8

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] 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------------|--|
| Nicolas Cross | Respondent |
| [Omitted] | Complainant |
| Warren Batchelor | Technical Assessor |
| [Omitted] | Witness, [Omitted – Company 1] by phone |
| [Omitted] | Witness, report writer for [Omitted – Company 2] |
| [Omitted] | Witness, engineer |
| [Omitted] | Witness, concrete placer |
- [8] The Complainant engaged Latham Construction 2004 Limited (“Latham Construction”) to carry out the construction of a new dwelling. The Respondent is a director of Latham Construction.
- [9] The work commenced with foundations being constructed. The Respondent gave evidence that the foundation building work was carried out by [Omitted – Company 3], a sub-contractor to Latham Construction. [Omitted], who designed the dwelling and completed the engineering designs, provided engineering observation services for the construction of the foundations. He stated that he observed the steel placement and instructed that edge bars be cranked down but did not issue any site notes or instructions. He stated he may have made some notes in his diary which he did not produce. [Omitted] provided a PS4 Producer Statement – Construction Review which covered the concrete speed-floor.
- [10] [Omitted] of [Omitted – Company 3] who placed the concrete gave evidence. He claimed to be a licensed building practitioner but no records of his being licensed

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

were found on the Register of Building Practitioners. He stated the pour proceeded without incident and that the reinforcing looked “mint”. He stated he was working under the supervision of [Omitted] who provided a PS3 Producer Statement Construction for the foundations and that [Omitted] is a licensed building practitioner. There are no records of [Omitted] being licensed on the Register of Building Practitioners.

- [11] The Respondent provided a record of work in which he stated that he supervised the foundations. He made no checks as to whether the other persons who carried out the foundations were licensed.
- [12] Issues with the foundation were raised by the Complainant who obtained a report from [Omitted – Company 1] who carried out a scan of the foundations to ascertain the placement of reinforcing. It noted a lack of concrete cover for steel mesh in various places and areas of honeycombing. [Omitted] completed a remedial plan for one area where cover of the steel mesh was inadequate and for a void around a beam. The remedial work was carried out by new building contractors.
- [13] The building work continued past the foundations until a dispute arose with Latham Construction near the end of 2016 when building work ceased. [Omitted – Company 2] took over the building work. [Omitted], an employee of [Omitted – Company 2], prepared a transition report outlining the current state of the project. Various issues were noted. At the hearing [Omitted] outlined his qualifications and experience, which was limited.
- [14] Issues noted in the transition report included incomplete building work and building work that differed to that set out in the consented plans. In particular it was noted that the front entrance varied from the consented design.
- [15] [Omitted] gave evidence that he was dealing with the consent changes. He considered that the changes were all minor variations and that, whilst he knew the Auckland Council has a minor variation form and process, he was going to deal with it at a later date.
- [16] The Board obtained an opinion on the allegations from the Technical Assessor. His report noted:

Based on my desktop review I consider the transition report prepared by [Omitted] provides inadequate specific information to enable a definitive assessment of compliance or otherwise with the NZ Building Code or the approved consent documentation.

I consider the investigation report prepared by [Omitted – Company 1] provides adequate evidence of non-compliant construction of the first-floor concrete slab relating to durability (Clause B2 of the NZ Building Code). The specific items I consider non-compliant relate to:

- *lack of adequate concrete cover to the slab reinforcing (top cover and bottom cover)*
- *areas of inadequate concrete compaction.*

In relation to the exterior concrete block walls I consider there is inadequate definitive evidence of non-compliant work.

Review of the property file has not identified any site reports from the engineer for inspections of the works as part of their obligations for construction monitoring as required in the building consent conditions. There is however a Producer Statement – Construction Review (PS4) issued on 23rd February 2017 by [Omitted] (CPEng) specifically for the “Piled foundations, blockwork, structural beams, supports, and concrete speedfloor” in respect to clauses B1 & B2 of the Building Code.

There is also a Producer Statement - Construction (PS3) from [Omitted] of [Omitted – Company 3] for the suspended composite concrete floor in speedfloor, however this document is undated and unsigned.

Both the Engineer ([Omitted]) and the Auckland Council building inspector have approved the suspended floor as suitable for placing concrete. In my opinion it is not unreasonable for Mr Cross to rely (at least in part) on the advice received from the engineer and building inspectors in relation to their inspections and approvals.

Whether these inspections & approvals relieve Mr Cross of his ultimate responsibility as the LBP for the project is outside my area of expertise and for others to decide.

- [17] The Board also heard evidence as regards the waterproofing of a wall that the Complainant stated was leaking. She gave evidence that the work was not complete and that a required flashing had not been installed.

Board’s Conclusion and Reasoning

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

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

- [19] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.

- [20] 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.
- [21] 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*".
- [22] The New Zealand Courts have stated that 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.
- [23] 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 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.
- [24] 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—*

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

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

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

- (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.*

[25] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[26] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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] The Board noted that there were issues with the foundations and that the Respondent was the supervising licensed building practitioner. However, the Board found that, on the evidence before it, the issues noted were not sufficiently serious enough to warrant a disciplinary outcome. In coming to its decision the Board has noted the opinion of the Technical Assessor and the evidence of [Omitted] who provided a producer statement with regard to the steel placement and the foundations.

[28] With regard to the other issues identified the Board also found that there was insufficient evidence on which to make a finding that the building work was not completed to an acceptable standard.

[29] However the Board does caution the Respondent as regards his supervision processes. It was noted that there was no process to check whether subcontractors being used were licensed or not. With regard to the foundations there was an over-reliance on the subcontractors as opposed to the Respondent actually supervising.

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

Contrary to a Building Consent

[30] 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. Any departure from the 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. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[31] In *Tan v Auckland Council*¹⁶ 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.

[32] 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.

[33] There was clear evidence before the Board that building work had been completed that was not in accordance with the building consent. The changes to the entry most likely required an amendment to the building consent as they impacted on structure and weathertightness issues.

[34] The Board heard evidence, however, that [Omitted], the designer and engineer to the build, had instructed the changes and was dealing with consent matters. Given [Omitted]'s role in the project the Board considers it was reasonable for the Respondent to act on his instructions. On this basis the Board finds that the Respondent has not committed a disciplinary offence.

Signed and dated this 29th day of October 2018


Chris Preston
Presiding Member

¹⁶ [2015] NZHC 3299 [18 December 2015]