

Before the Building Practitioners Board

	BPB Complaint No. C2-01647
Licensed Building Practitioner:	Laszlo Imre (the Respondent)
Licence Number:	BP 117379
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 October 2017
Decision Date:	17 November 2017
Board Members Present:	Chris Preston (Presiding) Mel Orange Robin Dunlop Bob Monteith
Appearances by:	Alden Ho for the Respondent, Martelli McKegg

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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
 - (c) 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
 - (d) breached section 314B(b) of the Act (s 317(1)(h) 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.

Background to the Complaint

- [5] The Board received a complaint from [Omitted] (the Complainants) about the conduct of the Respondent who had been engaged to carry out building work on an alteration to the Complainants’ home. They made a number of allegations including that:
- (a) temporary propping was inadequate creating safety concerns;
 - (b) aspects of the building work did not comply with the building consent; and
 - (c) building work had been completed in a negligent manner.

Evidence

- [6] 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.
- [7] Prior to the hearing the Board received submissions that various documents associated with an adjudication under the Construction Contracts Act 2002 (CCA) between the Complainants and the Respondent should or should not be admissible. The submissions related to provisions of section 68 of the CCA which stipulates that “any statement, admission, or document created or made for the purposes of an adjudication; and any information (whether written or oral) that, for the purposes of the adjudication, is disclosed in the course of the adjudication” is confidential.
- [8] The Board noted that confidentiality does not, of itself, make evidence inadmissible. In that respect section 69 of the Evidence Act 2006 provides for a discretion as to the admissibility of confidential information and directions as to matters that should be taken into consideration. The Board also noted that an adjudication under the CCA is not a judicial proceeding and little weight can therefore be given to any determination made under it outside of the proceedings themselves.

⁴ [2016] HZHC 2276 at para 164

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

- [9] On the basis of the above and on reviewing the documentation and its relevance to the matters under consideration the Board ruled that the documentation would not be admitted as it was of limited value and/or relevance to the hearing and/or there were other non-confidential means through which the evidence could be adduced. Two Board Minutes were issued in respect of the CCA evidence.
- [10] As part of the complaint and response the Board received a large volume of documentary evidence. Prior to the hearing both the Complainants and Counsel for the Respondent filed submissions and additional documentation. At the commencement of the hearing the Presiding Member advised that the Board had reviewed all the documentation and submissions placed before it. He further advised that the Board's jurisdiction and process is inquisitorial, not adversarial, and that the focus of the inquiry would be on:
- (a) temporary propping;
 - (b) the processes associated with design changes to a foundation;
 - (c) whether design work had been carried out; and
 - (d) general workmanship issues raised by a subsequent builder.
- [11] The Board heard evidence at the hearing from:
- | | |
|-------------|--|
| Laszlo Imre | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Complainant |
| [Omitted] | Engineer, [Omitted] |
| [Omitted] | Licensed Building Practitioner, Carpentry |
| Jock Hyde | Auckland City Council, Building Control Surveyor |
| Paul Culf | Auckland City Council, Building Control Surveyor |
| [Omitted] | Licensed Building Practitioner, Design, witness for the Respondent |
- [12] The Board was asked to summons [Omitted] on behalf of the Respondent. A summons was issued but was not able to be served. The Board had also indicated that it would call evidence from [Omitted] by phone but it decided, once other evidence had been heard, that his evidence was not required.
- [13] The Complainants provided an opening in which they outlined that the complaint had been made as they did not want others to experience what they have and that

the public needed to be protected from the types of behaviours the Respondent had displayed. They noted that the Respondent had left an unskilled staff member on site to carry out what was a complicated build and that the Respondent had only provided remote supervision. They considered their safety had been compromised by the manner in which propping of the dwelling had been done.

[14] Counsel for the Respondent also made an opening statement. He submitted that it was a simple dispute in relation to a complex renovation that evolved over time and that unforeseen issues arose that had to be addressed.

[15] Dealing with the issues noted above in paragraph [10] the Board heard the following additional evidence:

Propping

[16] The existing dwelling was propped whilst construction underneath it was carried out. The Complainants remained in residence while the work was completed. The allegations with regard to the propping being inadequate arose as a result of a draft report from [Omitted] which noted:

Comments & Issues

More than half of the upper storey is supported by the props underneath, which is ok for vertical loads but not for lateral loads. In case of EQ, it could be fatal.

[17] [Omitted] gave evidence that the above statement was part of a draft report and was made by a junior engineer working under supervision. He noted that the report should not have been released without it being reviewed by him. The revised report that he had reviewed and which was authorised for release described the issue as follows:

Comments & Issues

More than half of the upper storey is supported by the props underneath. Additional propping is required in some locations where existing supports have been removed. Temporary lateral bracing to resist wind and earthquake loads appears to be inadequate.

Action Required

While the Contractor is responsible for temporary propping and bracing, KR recommends that additional propping and bracing is added to the lower level.

[18] [Omitted] noted that he and the junior engineer had not attended the site for the purpose of assessing the adequacy of the propping. They had not assessed the load paths or carried out any calculations with regard to the temporary props or existing structural elements with regard to structural integrity. He described the comments

made as “belts and braces” and that they were cautionary statements made without proof or calculations.

- [19] The Respondent stated that additional lateral supports were installed following the issue of the report and that bracing was being moved as work progressed to allow access to areas of the site. He stated that he had assessed propping requirements on the basis of experience in carrying out that type of work and that he had extensive experience in it.
- [20] The Complainant provided additional photographs of the building site post the issue of the Kirk Roberts report which they stated showed a continued lack of lateral support. The Respondent submitted that the photos did not show all of the structural elements that were in place. It was also noted that lateral bracing can be provided in different ways and that whilst photographs showed some of the props were not laterally braced the bracing could come from other building elements or from other installed lateral bracing.

Foundation Design Changes and Design Work

- [21] Evidence was heard that a change from the consented design and methodology for the construction of a foundation was required as a result of a sewer line being discovered when the foundations were being prepared. A shutter poured foundation was substituted with a foundation constructed with blockwork. The change was dealt with as a minor variation on the basis that the revised method came within the provisions of NZS 3604 and did not require specific design. The revised design was prepared by [Omitted] who also prepared and submitted a minor variation for it. He gave evidence that he discussed the matter with the building consent authority and that the minor variation was approved prior to the building work being carried out.
- [22] The Building Control Surveyors from the Auckland Council gave evidence that the comments under “Fail Comments” in the IFO – Foundation Checklist contained within the documentation were not, in fact, fail comments. They noted that the variation had been processed and passed. They stated that their tablet based system populated comments into the fail field even if they were not related to a fail.

Workmanship

- [23] The Complainant had provided a list of issues as part of the compliant which was compiled by the second builder engaged on the project [Omitted]. The list noted:

Weatherboards too short at corners

Soakers – incomplete cover (only 2mm)

Barge boards joined out of 3 pieces, when should have been one piece

All door frames twisted

Off centre cellar doorway

Stairwell wall not square

Post not in place to support staircase beam

[24] [Omitted] gave evidence that he thought the items were minor or of an aesthetic nature and he noted that the work was not complete.

[25] With regard to each of the items the Board heard evidence as follows:

Weatherboards and Soakers – the Respondent stated the soakers were temporary and that boxed corners were going to be installed as part of finishing work. The consented plans showed boxed corners.

Barge Board – this was described as aesthetic and evidence was given that it would not have affected weathertightness and would have been mostly covered once work was complete.

Twisted Door Frames – the Respondent noted that adjustments should have been made and [Omitted] stated the adjustments should have occurred prior to linings going on.

Off Centre Doorway – the Respondent stated this was incomplete work.

Wall not square – the Respondent stated they had to marry up existing building elements and that he would have used a capping and a scribe to hide the issue when finishing work was carried out.

Post – the Respondent stated that the post was not structural as he had installed a structural beam that did away with the requirement for a structural post. He provided engineering calculations in support of the assertion. He did not submit the change as a minor variation. The Respondent stated that he had ordered the post but had not installed it as he did not want it to be damaged whilst other building work was ongoing. [Omitted] noted that the ceiling had been lined and there was no indication that a structural post was no longer required. The Complainants stated they had not been informed of the change.

[26] The Complainants sought to introduce new allegations which were based on final inspection notes from the Auckland Council filed as part of the Complainant's hearing submissions. The Board advised that consideration of new allegations would be prejudicial to the Respondent and would breach his rights to natural justice in that he had not been given adequate notice of the allegations and had not been able to prepare and respond to them. The new or further allegations were not considered.

Board's Conclusion and Reasoning

[27] 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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
 - (c) 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
 - (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act)
- and should not be disciplined.

[28] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[29] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁶. Judge McElrea provided guidance on the interpretation of those terms:

[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.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[30] The matters which related to negligence and/or incompetence relate to propping and workmanship. With regard to the propping the Board finds that there is insufficient evidence on which to make a finding. In terms of workmanship it finds that whilst there were matters which were below standard the Board finds that they do not meet the seriousness threshold for disciplinary action. The Board's reasoning for each follows.

Propping

[31] The evidential standards are noted above in paragraph [6]. The relevant authority is *Z v Dental Complaints Assessment Committee*⁷ where Justice McGrath in the Supreme Court of New Zealand stated:

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

⁷ [2009] 1 NZLR 1

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [32] The evidence before the Board indicated that there may have been issues. It did not, however, establish to the standard noted above that the property did not have adequate lateral support. The engineer’s statements about lateral supports, whilst carrying some weight, were cautionary and based on observations, not on calculations.
- [33] Whilst a disciplinary finding has not been made the Board does, however, consider that the Respondent should take care in future when carrying out such work with the adequacy of propping, especially where persons continue to reside in the dwelling. The Board considers it would be advisable in such circumstances to have a suitably qualified person carry out an independent assessment and/or verification of the adequacy of the propping.

Workmanship

- [34] With regard to workmanship issues the Board notes that items were not complete and or were minor in nature. It considers that aspects such as twisted doors could have been done to a higher and more acceptable standard but that the failings are not serious enough to warrant a disciplinary outcome. In this respect the Board has considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁸ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by

⁸ [2001] NZAR 74

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.

[35] In *Pillai v Messiter (No 2)*⁹ the Court of Appeal put it as:

... 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.

[36] On the basis of the above authorities the Board considers the conduct was not what could be described as serious negligence or a deliberate departure from accepted standards.

Not Licensed to Carry Out or Supervise Restricted Building Work

[37] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[38] The Respondent is a licensed building practitioner with Carpentry and Site Licences.

[39] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. A design licence is required for design work.

[40] The issues with regard to the charge of carrying out restricted building work that the Respondent was not licensed to carry out related to whether he had designed a revised foundation. The evidence before the Board was that the design was completed by the designer who was appropriately licensed. As such the alleged disciplinary offence has not been committed.

Contrary to a Building Consent

[41] 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.

[42] The building work that might have come within the provisions of section 317(1)(d) was the change to the foundation design and the installation of a structural beam. The change to the foundation was done under an approved minor variation. The

⁹ (1989) 16 NSWLR 197 (CA) at 200

installation of a structural beam was not. No process was used by the Respondent to make the change. The Respondent's failure to follow a process has put the building consent process at risk and as such the Respondent is admonished. The Board does not, however, consider that the conduct has reached the threshold outlined above for disciplinary action.

Outside of Competence

- [43] This charge relates to, and is an alternative to, the charge under section 317(1)(c) as regards design work. Having made the decision under 317(1)(c) that the Respondent did not carry out design work the same finding must necessarily follow with regard to the charge under section 317(1)(h). The Respondent has not carried out work outside of this competence.

Signed and dated this 17th day of November 2017

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style.

Chris Preston
Presiding Member