

Before the Building Practitioners Board

	BPB Complaint No. CB24186
Licensed Building Practitioner:	Kim Jerard (the Respondent)
Licence Number:	BP 123780
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	Christchurch
Hearing Type:	In Person
Hearing Date:	10 April 2019
Decision Date:	10 May 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site 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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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.”

[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.

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

Background to the Complaint

- [5] At the commencement of the hearing the Respondent's representative made a submission that as civil proceedings were underway the Board should not deal with the matter until such time as those proceedings had been determined.
- [6] The Board noted that when it made a decision to proceed to a hearing the Respondent had not provided the Board with a response to the allegations. As such it only had uncontested evidence before it. The Board further noted that the purposes of the licensing regime, which includes promoting accountability and providing consumer protection, would be defeated if Board action was delayed by civil proceedings. Moreover, the Board's jurisdiction is only with respect to a practitioner's conduct and not with regard to civil matters.

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] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------|-------------------------|
| Kim Jerard | Respondent |
| [Omitted] | Respondent's Consultant |
| [Omitted] | Complainant |
| [Omitted] | Witness, Engineer |
| [Omitted] | Witness, Engineer |
| [Omitted] | Witness, Engineer |
- [10] The Respondent's business Ezy Foundation Systems Limited was engaged to carry out repairs and releveling of the foundation of a circa 1900 dwelling with piles and a ring foundation. The Respondent provided a repair strategy developed by [Omitted]. The building work was carried out under Schedule 1 of the Act. A building consent was not required. [Omitted] of [Omitted] provided observations of the repair work and a Producer Statement PS1 Design. The Respondent did not carry out the building work but did supervise it.
- [11] The Complainant engaged [Omitted] to review the repairs. The review was based on a limited inspection and photographs. An underfloor inspection was not completed

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

for health and safety reasons. The [Omitted] report concluded that the [Omitted] repair strategy was not a valid strategy and that a full ring foundation replacement was required. The report also raised other issues including that:

- (a) stainless steel straps were not used;
- (b) packing of piles was greater than 100mm;
- (c) bolts used for connections did not penetrate the required depth;
- (d) epoxy injections were not as per the manufacturer's recommendations;
- (e) expanding foam was used to fill voids; and
- (f) floor levels exceeded tolerances.

[12] The Respondent submitted that the matter came down to a disagreement between engineers and that it was reasonable for the Respondent to rely on the repair strategy developed by his engineer. The Respondent further noted that an engineering assessment obtained by the Complainant from [Omitted] did not recommend a ring foundation replacement and that the repair strategy in it was consistent with that which was carried out.

[13] As regards specific allegation the evidence was that:

- (a) stainless steel straps – evidence was heard that there were three straps. The Respondent stated that stainless was used where required but that a couple of straps may have slipped through;
- (b) packing of piles – the Respondent stated solid packing was used and that the packing was acceptable;
- (c) bolts not penetrating – the issue related to one bolt, no measurements were taken;
- (d) epoxy injections – the Respondent gave evidence that the areas were cleaned prior to the product being injected;
- (e) expanding foam – the Respondent gave evidence that the foam was only used as a coffer to retain epoxy;
- (f) floor levels – evidence was heard that relevening was carried out but that damage to the dwelling would have occurred had the floor been completely releveled.

[14] The Respondent submitted that the building work was not completed as a result of a commercial dispute which prevented him being able to return. The Complainant disputed the intention to return.

Board's Conclusion and Reasoning

[15] 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) and should not be disciplined.

- [16] 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.*
- [17] 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.
- [18] 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*".
- [19] 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.
- [20] 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.
- [21] In this instance the Respondent sought and followed engineers' recommendations as regards the repair methodology. That was a reasonable course of action. Issues were identified with the repairs and strategy by another engineer engaged by the Complainant to undertake a review. It was a limited investigation. The Board decided, however, that, to the extent those failings may have occurred, they were not sufficiently serious enough to warrant disciplinary action. Those failings were the use of galvanised straps when stainless was required and packing in excess of 100mm. Other matters such, such as the adequacy of the repair strategy and the

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

differences of opinions between the respective engineers is a matter for the Complainant to consider. They do not reflect on the Respondent's conduct.

- [22] In respect of seriousness in *Collie v Nursing Council of New Zealand*¹³ 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.

- [23] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not departed from what the Board considers to be an accepted standard of conduct.

Signed and dated his 10th day of May 2019



Chris Preston
Presiding Member

¹³ [2001] NZAR 74