

Before the Building Practitioners Board

	BPB Complaint No. CB25389
Licensed Building Practitioner:	Robert Light (the Respondent)
Licence Number:	BP 112756
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:	30 June 2020
Decision Date:	13 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
David Fabish, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer

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
Inquiry Process	3
Evidence	3
Board’s Conclusion and Reasoning	5
Negligence and/or Incompetence	6
Contrary to a Building Consent	7

Introduction

- [1] The hearing resulted from a complaint about 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 contrary to section 317(1)(b) of the Act, IN THAT, the foundation for the dwelling constructed by, or under the supervision of the Respondent, may not have met quality and/or compliance requirements; and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, the Respondent may not have used the consented foundation hard fill material when constructing the foundation.

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:

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

“... 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] In a similar vein, the Board’s investigation and hearing process are not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... 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.

- [5] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.
- [6] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [7] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[10] 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.

[11] In addition to the documentary evidence before the Board, the Board heard evidence at the hearing from:

Robert Light	Respondent
<i>[Omitted]</i>	<i>[Omitted]</i> , Industry Representative for the Respondent
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	<i>[Omitted]</i>
Mike Rowe	Building Consent Officer

[12] The complaint raised the following allegations:

1. that AP65, not AP40 as specified, had been used as a hard fill under the concrete floor;
2. the foundations may, in various locations, have been higher than 600mm and may have required a specified engineered design;
3. the foundation ring boxing was inadequate resulting in bulging which required remediation; and
4. the ring foundation concrete was not vibrated and was bony in consistency with unacceptable voids.

[13] The Respondent was a contractor to a group house builder. He was the onsite licensed building practitioner. Aspects of the build, including the placing of hard fill, were subcontracted.

[14] The Board questioned the witnesses present as regards each issue.

Hardfill

[15] The Complainant provided photographs of the fill material. His evidence was that only AP65 was used in the foundation. The Board sought and received invoices for hard fill material. Invoices for AP65 and AP40 were provided. *[Omitted]*, who placed the fill, gave evidence that both AP65 and AP40 was used in 150-200mm layers and that a large volume of AP65 was used on the driveway which was why there were greater volumes of it supplied. Mr Rowe, who inspected the fill, was satisfied with it, and provided his opinion that evidence of AP65 on the surface may have arisen from

disruption of material when piping was installed after compaction. *[Omitted]* gave evidence that the degree of compaction of the two materials was the same. The Complainant disagreed.

Ring Foundation Height

- [16] The Complainant provided his own measured ring foundation heights from the ground to the top of the concrete floor on the outside perimeter. He submitted that once a scrape of the site was taken into account, the internal heights would be greater than 600mm. The Complainant's measurements included the concrete floor. There was one area where the ring may have been above 600mm once the floor height of 90mm was taken off the measurements provided. The Respondent stated that the ring foundation was just on the limit. Mr Rowe stated the ring foundation had been inspected and that the Council did not have any issues with it.

Bulging

- [17] The Respondent gave evidence as to how he constructed the boxing. He noted that it was difficult to get pegs to penetrate the ground. He did not consider installing extra lateral support. He said the pour was done in two lots to reduce the pressure on the boxing and that it was not vibrated as this would have caused more pressure. The Complainant provided evidence of different foundation methodologies in the same area which had more lateral support. The Respondent was not able to answer a question as regards when vibration of concrete should be carried out.
- [18] Mr Rowe stated the Council did not have an issue with the concrete being laid in two pours.
- [19] The Complainant provided a report which noted that, in one specific area, the ring foundation had to be shaved back on a 45-degree angle to allow for the installation of the brick cladding.

Bony Concrete

- [20] The Board reviewed photographs of bony concrete with voids. The Respondent submitted it was not aesthetically good but that it was compliant. The Complainant provided an engineer's report, which included scanning results to ascertain steel cover. The report did not identify any issues. The Complainant noted that not all of the ring foundation was scanned.
- [21] The Council with satisfied with the compliance of the ring foundation.

Board's Conclusion and Reasoning

- [22] 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); or
 - (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 and/or Incompetence

- [23] Turning to the remaining issues the Board finds that whilst there was some evidence of negligent behaviour, it was not serious enough to warrant a disciplinary outcome.
- [24] 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.*
- [25] 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.
- [26] 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*¹⁰ it was stated as “*an inability to do the job*”.
- [27] 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.
- [28] 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 Act¹². 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.

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)

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

- [29] 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.

- [30] With regard to the allegation that the foundation was filled with AP65 the Board found that both materials were used but that the matter was not serious enough to warrant a disciplinary outcome. There was clear evidence of AP40 being supplied. The person who supplied and installed the material stated both AP65 and AP40 was used. The Council was satisfied with the fill. The consent required AP40, but the evidence received was that AP65 was also used and that it was an acceptable and adequate fill. As such the Board finds that both materials were used but that the matter was not serious enough to warrant a disciplinary outcome. On this basis that Board finds that the allegation has not been made out.
- [31] The Board also decided, as regards to the remaining allegations, that whilst there were aspects which were not completed to an acceptable standard, the conduct was not sufficiently serious enough to warrant a disciplinary outcome.
- [32] The Board noted that the Respondent, in answering questions, did not consider he was responsible for subcontracted work. He should note, as a licensed building practitioner, he is responsible for all restricted building work that is completed under his supervision. This includes the work of subcontractors who are not licensed building practitioners. The work can be subcontracted - responsibility for its quality and compliance, from a licensing and disciplinary perspective, cannot be.
- [33] As noted earlier, the Respondent should take care to ensure that all of the restricted building work that is carried out under his supervision meets compliance requirements. The Respondent should also undertake personal development to bring his level of knowledge around vibration of concrete up to date.

Contrary to a Building Consent

- [34] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued.
- [35] The Board did not receive any evidence of any failings to build in accordance with the building consent. As such, the disciplinary offence under section 317(1)(d) has not been committed.

¹⁴ [2001] NZAR 74

Signed and dated this 24th day of July 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style with a horizontal line underlining the name.

Chris Preston
Presiding Member