

Before the Building Practitioners Board

	BPB Complaint No. CB25708
Licensed Building Practitioner:	Weida Lin (the Respondent)
Licence Number:	BP 108930
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry, Veneer; Foundations – Concrete or timber pile foundation, Walls and concrete slab on-ground

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 and Decision Date:	25 August 2022
Board Members Present:	

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

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.

Disciplinary Finding:

The Respondent **has not** committed disciplinary offences under sections 317(1)(b),(d) or 317(1)(da)(ii) of the Act.

Contents

Summary of the Board’s Decision	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Board’s Conclusion and Reasoning	7

Summary of the Board’s Decision

- [1] The Board found that the Respondent has not carried out or supervised building work in a negligent or incompetent manner or in a manner that was contrary to a building consent on the basis that the conduct complained about:
- (a) in respect of the initial work, was not established on the evidence before the Board to be causative of the issue that arose; and
 - (b) in respect of the remedial work, was not serious enough to warrant a disciplinary outcome.
- [2] The Respondent has not committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

The Charges

- [3] 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], Auckland. 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 (s317(1)(b) of the Act), IN THAT, he may have :
 - i. placed the foundation for the dwelling in the wrong place; and/or
 - ii. set out the foundation for the dwelling incorrectly; and/or
 - iii. carried out remedial repairs to a foundation in an unacceptable manner.
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s317(1)(d) of the Act), IN THAT, he may have:

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- i. placed the foundation for the dwelling in the wrong place; and/or
 - ii. set out the foundation for the dwelling incorrectly; and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

[4] 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.

[5] 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.”

[6] In a similar vein, the Board’s investigation and hearing process is 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.

[7] 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

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

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

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [8] The above commentary on the limitations of the disciplinary process are 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

- [9] 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.
- [10] 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

- [11] 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 relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [12] 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.
- [13] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- (a) The Respondent
 - (b) [OMITTED], the Complainant
 - (c) [OMITTED], [OMITTED], Site Manager
 - (d) [OMITTED], Licensed Building Practitioner, Carpentry (BP[OMITTED])
 - (e) [OMITTED], [OMITTED], Engineer
 - (f) Timothy Griffiths, Auckland Council, Building Consent Officer
- [14] An Interpreter attended the hearing and assisted the Board and the Respondent.

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

- [15] The Complainant alleged that the *“foundation dimension for garage side wall is smaller by 35mm compare to the drawing. This resulted in framing overhang for greater than 30mm, and the Engineer examined this to be unacceptable. The garage footing was asked to be repaired, and reinspected. When repair detail was issued, the repair work was carried out not up to standard at all, that the Engineer has asked for the concrete edge to be cut off again for a second time repair work.”* (Document 2.1.8, Page 20 of the Board’s file).
- [16] The Auckland Council Building Consent officer gave evidence based on the inspection reports of 30 November 2020, 9 December 2020 and 11 December 2020. He attended the site for the December inspection only.
- [17] On 30 November 2020, the Council inspection report (Document 4.3, Page 106 of the Board’s file) notes-
- 1. Framing overhang near garage more than 30mm. Needs to be fixed, Engineer to give solution.*
 - 2. Framing bottom plate 30mm inside the edge near garage. Needs to be fixed. Engineer to give solution.*
- [18] The Council Building Consent officer attended an inspection on 9 December 2020 (Document 4.3, Page 113 of the Board’s file) and noted –
- Item 9...is the main issue as it appears the slab may not be set out in accordance to the consented plans/or the consented plan is incorrect relative to the existing house. the previously provided surveyor cert/plan does not refer to set out to existing house...*
- 9. Designer/ Surveyor to confirm boundary distance. Now its 2020mm from framing to existing dwelling. After cladding it would be less than 2m from wall cladding. Needs confirmation.*
- this has not been carried out*
- this could lead to an amendment/planning/resource consent issues if the slab is not per consent.*
- [19] The Building Consent officer called for a surveyor’s report, and this was submitted on 11 December 2020. (Documents 4.3 and 9, Pages 118 and 863 of the Board’s file).
- [20] The witnesses agreed that the issue did not extend along the full length of the garage. The Complainant estimated it ran for 1-2 metres, but the Respondent was of the view that it was for about half a metre only.
- [21] Reference was made to the ground floor dimension plan (Document 4.4, Page 472 of the Board’s file) to identify the areas in which the issue had occurred.
- [22] The Respondent gave evidence that the issue had been caused by the placement of the frames and had not been caused by any error in the foundation set out or

placement. He said the setting of frames inside of the concrete edge on the right-hand side of the entrance pushed this measurement from 2800mm to 2823 to 2831mm, and this then had a cumulative effect along that side, resulting in the overhang at the garage's bottom right-hand corner.

- [23] Turning to the repair work undertaken by the Respondent. The first proposal from the Respondent was a plaster skim coat. The Engineer stated that this was not an acceptable proposal as it was not strong enough and would not give sustained protection.
- [24] The Engineer provided details for the remedial work, which involved adding on concrete and implanting steel reinforcing to strengthen it. The Respondent undertook the repair work and by his own evidence, this was not done in accordance with the Engineer's details. He explained this by saying he began the work on "*approximate instructions from the Site Manager*". Ms Yu, the Site Manager, denied this.
- [25] The Respondent's remedial work was unacceptable to the Engineer and was redone by the Respondent in accordance with the Engineer's design. This work is recorded as complete in the 15 January 2021 Council inspection report (Document 43., Page 132 of the Board's file).
- [26] Addressing the provision of a record of work, the Respondent said he gave it to the Complainant "*a long time ago*". He pointed to a screenshot of the record of work being sent to the Complainant on 1 April 2021. (Document 2.5.4, Page 53 of the Board's file). The Complainant stated that she did not dispute that date.
- [27] The Respondent advised that his last day on site was after Christmas 2020, but he agreed it was before 15 January 2021, when the concrete remedial work was complete. This is evidenced by the Council inspection of that date which includes a photograph of the completed work. (Document 4.3, Page 133 of the Board's file).
- [28] The Site Manager stated that she had asked the Respondent for the record of work prior to its provision on 1 April 2021 but was unable to advise when that was. The Complainant advised that she emailed the Respondent on 3 February 2021, requesting the record of work be provided that week. The complaint was also submitted on 3 February 2021 and advised to the Respondent on 12 February 2021. (Documents 2.1.1 and 2.4, Pages 13 and 47 of the Board's file).
- [29] The Council file was obtained on 4 June 2021. It did not contain a record of work from the Respondent.

Board's Conclusion and Reasoning

[30] 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); or
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)

and **should not** be disciplined.

Negligence/incompetence - foundation set out/ placement

[31] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*, where Justice McGrath in the Supreme Court of New Zealand stated:

“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.

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, including the survey plan, supported a conclusion that the issue of the dwelling being too close to the boundary was due to due to the proposed cladding

intruding into the boundary set-back. Further, the overhang of the framing at the right-hand bottom edge of the garage was as a result of the placement of the framing.

- [33] The evidence before the Board did not support that the Respondent had either placed the foundation for the dwelling in the wrong place and/or set out the foundation for the dwelling incorrectly, noting the surveyor had set out the foundation and provided a siting/set-out certificate.

Negligence/incompetence – remedial work

- [34] 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.

- [35] 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.

- [36] 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”.

- [37] The New Zealand Courts have stated that an 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 or, in other words, whether the conduct was serious enough.

- [38] In terms of seriousness in *Collie v Nursing Council of New Zealand*,¹² 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

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 [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[39] In *Pillai v Messiter (No 2)*¹³ the Court of Appeal stated:

... 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.

[40] The Board has concerns with how the Respondent carried out the remedial work and in particular, commencing that work prior to receiving the Engineer's instructions. The Board cautions the Respondent to, in the future, await instructions from an Engineer or Architect and to ensure the Council has approved the change before starting work, even if it is a minor variation.

[41] However, the matters before the Board were, on the basis of the evidence heard at the hearing, not sufficiently serious enough to warrant the Board taking disciplinary action against the Respondent.

Contrary to building consent – foundation set out/ placement

[42] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued.

[43] In this instance, the Board has found that the evidence does not support a finding that the Respondent placed the foundation for the dwelling in the wrong place and/or set out the foundation for the dwelling incorrectly.

[44] Accordingly, the disciplinary offence of carrying out work contrary to a building consent has not been committed.

Record of Work

[45] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁴.

[46] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[47] The Board discussed issues with regard to records of work in its decision C2-01170¹⁵ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be

¹³ (1989) 16 NSWLR 197 (CA) at 200

¹⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [48] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [49] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁶ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [50] As to when completion will have occurred is a question of fact in each case. In most situations, issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion.
- [51] In the present case, the Respondent completed his work, by his own evidence and the Council inspection report dated 15 January 2021, no later than 15 January 2021.
- [52] The Complainant filed this complaint on 3 February 2021. The Respondent was advised of the complaint on 12 February 2021 and provided a record of work to the Complainant on 1 April 2021. The Complainant did not dispute this was the date she received the record of work.
- [53] The Respondent provided the record of work within about two and a half months of completion. The Board considers this to be on the very edge of an acceptable time frame post-completion for the provision of the record of work. The Board notes that the complaint was made only a matter of weeks after the completion of the Respondent’s work and before there could have been any criticism of him not having provided it at that point.
- [54] On this basis, the Board finds that the record of work was provided on completion as required, and the disciplinary offence has not been committed.
- [55] The Board notes that in this instance, there was an ongoing payment dispute. The Board cautions the Respondent, for the future, that non-payment is not an excuse which will be accepted by the Board.

¹⁶ [2018] NZHC 1662 at para 50

- [56] The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.

Signed and dated this 14th day of September 2022

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a long horizontal stroke extending to the right.

Mr M Orange
Presiding Member