

Before the Building Practitioners Board

	BPB Complaint No. CB25272
Licensed Building Practitioner:	Matthew Thomson (the Respondent)
Licence Number:	BP 105756
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	Wellington
Hearing Type:	In Person
Hearing Date:	12 February 2020
Decision Date:	10 March 2020

Board Members Present:

Mel Orange, Legal Member, Deputy Chair (Presiding)
Richard Merrifield, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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	3
Inquiry Process	3
Evidence	4
Board’s Conclusion and Reasoning	6
Negligence and/or Incompetence and Contrary to a Consent.....	6
Record of Work.....	6

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 contrary to section 317(1)(b) of the Act, in that:
 - the foundation was not level;
 - the foundation failed an inspection as a result of noncompliant work;
 - brackets were not fastened into the concrete correctly;
 - foundation bolts did not have enough thread showing; and
 - corrosion occurred to building materials;
 - (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 foundation was not level;
 - the foundation failed an inspection as a result of noncompliant work;
 - brackets were not fastened into the concrete correctly;
 - foundation bolts did not have enough thread showing; and
 - corrosion occurred to building materials;
 - (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) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, a record of work may not have been provided within a reasonable period of time from completion of restricted building work.

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

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] 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.

[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 are important to note as, on the basis of it, the Board 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

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

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 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. The hearing is not a review of all of the available evidence.
- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------------|------------------|
| Matthew Thomson | Respondent |
| <i>[Omitted]</i> | Complainant |
| <i>[Omitted]</i> | <i>[Omitted]</i> |
- [12] The complaint related to the construction of a *[Omitted]* residential dwelling for the Complainant.
- [13] The complainant owned a residential lot. He carried out some initial site preparation in 1997 but did not proceed with a build. In September 2017 the Complainant signed an agreement with *[Omitted]* for the construction of a home on the site. A building consent was issued. Post the lodgement but prior to the issue of the building consent and prior to any building work being carried out, *[Omitted]* took over the *[Omitted]* franchise that had contracted to carry out the build.
- [14] The Respondent had been contracted by *[Omitted]* to provide services for the build. The intention was that he would be engaged to carry out the installation of a mezzanine floor and a deck. He was, however, engaged earlier on in the project to supervise the construction of the foundation by *[Omitted]* staff.
- [15] The Respondent did not carry out any building work. He did attend the site three or four times to check the work that had been carried out by *[Omitted]* staff. When he

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

last attended the site the building work was ready for a building consent authority inspection in anticipation of a concrete floor being poured.

- [16] The Engineer to the contract attended the site with *[Omitted]* on 7 August 2018 to check the foundations. A Site Visit Record was issued with remedial actions noted. Those actions were to be completed prior to the concrete pour taking place. The Respondent was not provided with the Site Visit Record and was not made aware of it. The building consent authority noted, on the same day, that the pour could proceed provided that the remedial items were attended to and that a further inspection was not required provided that photographs of the completed remedial items were taken and provided.
- [17] The pour proceeded. *[Omitted]* contracted a concrete placer to carry out the pour. Neither *[Omitted]* nor the Respondent was aware that the placing of the concrete was restricted building work. *[Omitted]* did not know if the concrete placers were licensed. The Respondent did not attend the concrete pour. He considered that he had not been engaged to supervise it and that his involvement had ceased pending the construction of the mezzanine floor.
- [18] *[Omitted]* also noted that at the time of the build, which was the first residential build undertaken by the franchise, that he was unaware that the building work was restricted building work that had to be carried out or supervised by a licensed building practitioner.
- [19] The Complainant noted issues with the levels of the concrete floor. He provided evidence of variances in the finished floor level. He also noted issues with obtaining building consent authority approval of the foundation which required the issue of a PS4. This has since been issued and approval given.
- [20] Subsequent to the concrete floor being poured the build continued with the erection of frames. The issues noted in the disciplinary charges were raised by the Complainant. Those issues were confirmed by *[Omitted]* who noted that the frames that had been erected have been deconstructed and building work is about to recommence. The Respondent gave evidence that his involvement had ceased prior to the pour. *[Omitted]* gave evidence that the Respondent may well be engaged to carry out further restricted building work on the project, as per his original engagement, as it progresses.
- [21] With regard to his record of work the Respondent stated that he would be providing one for all of his restricted building work once all of that work had been completed.

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);
- (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); 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.

[23] The reasons for the Board's decisions follow.

Negligence and/or Incompetence and Contrary to a Consent

[24] The Board accepted that there were issues with the concrete floor and with the framing that was constructed. What it had to determine was whether the Respondent was the supervising licensed building practitioner of that building work.

[25] The Board accepted that the Respondent supervised the building work up until the point where it was ready for the concrete floor to be poured but that he did not carry out or supervise any of the building work thereafter. There were some minor matters to be rectified prior to the pour occurring. Those matters were not serious enough to warrant disciplinary action⁷. The serious issues came about post the Respondent's involvement. As such the Board finds that he was not the responsible licensed building practitioner.

Record of Work

[26] 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 work⁸.

[27] 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-

⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74:

[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.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

- [28] 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*⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [29] As to when completion will have occurred is a question of fact in each case.
- [30] In the present case the Board accepted that the Respondent’s restricted building work had not been completed. There was a very real possibility that he would be returning to carry out further restricted building work. As such the requirement to provide a record of work had not yet occurred. On this basis the Board finds that he has not committed the disciplinary offence.

Signed and dated this 10th day of March 2020

A handwritten signature in black ink, appearing to be 'Mel Orange', written in a cursive style.

Mel Orange
Presiding Member

⁹ [2018] NZHC 1662 at para 50