

Before the Building Practitioners Board

	BPB Complaint No. CB25899
Licensed Building Practitioner:	Barry Trass (the Respondent)
Licence Number:	BP 101917
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	Whangarei
Hearing Type:	In Person
Hearing and Decision Date:	15 December 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

J Browne for the Respondent

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 a disciplinary offence.

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Summary of the Board’s Decision

- [1] The Respondent did not carry out or supervise building work in a negligent or incompetent manner or in a manner that was contrary to a building consent.

The Board

- [2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

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 Regulations² 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; 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.

¹ Section 341 of the Act.

² The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- [4] The Board gave notice that, in further investigating the above, the Board would be inquiring into:
- (a) the quality and compliance of the piles installed for foundations and the cladding that was installed;
 - (b) whether required inspections were called for or were called for in a timely manner; and/or
 - (c) the process used for changes to the building consent as regards the cladding.
- [5] Further, the Board gave notice that it would be further investigating the Respondent's role in the above, noting that he had identified another Licensed Building Practitioner as the responsible person for the issues under investigation.

Function of Disciplinary Action

- [6] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [7] 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*,⁵ 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."*
- [8] 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 persons⁶:

... 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [9] 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.
- [10] 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

- [11] 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.
- [12] 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.

Consolidation

- [13] The Board may, under Regulation 13, consolidate two or more matters into one hearing but only if the matters are, in the opinion of the Board, about substantially the same subject matter and any complainants and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [14] The Board sought agreement for consolidation of this matter with Board Inquiry matter CB25993 which arose out of this complaint. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [16] 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

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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.

- [17] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Barry Trass	Respondent
[OMITTED]	Respondent in CB25993
[OMITTED]	Complainant
[OMITTED]	Complainant
[OMITTED]	Witness for the Respondent
[OMITTED]	Former Building Control Officer
[OMITTED]	Engineer
[OMITTED]	Engineering Technician
[OMITTED]	Engineer
Brian Cook	Building Control Officer, Whangarei District Council
Mark Sowry	Building Control Officer, Whangarei District Council

- [18] The Respondent's company, Homeworld Design and Build Limited (Homeworld), a volume builder building some 50-60 homes per annum with an office staff that managed client builds, was engaged to construct a new residential dwelling for the Complainants. Homeworld's staff, which included design, quantity surveyor and project management staff, developed the design, submitted the building consent and managed the construction process. Homeworld contracted [OMITTED], a Licensed Building Practitioner with a Carpentry Licence, to carry out the carpentry aspects of the build. Mr [OMITTED] took instructions from a Homeworld project manager ([OMITTED], Licensed Building Practitioner, Carpentry), who interfaced with the Complainants. The Complainants, in turn, were informed that they were not allowed to engage directly with Mr [OMITTED].

- [19] The Complainants had previously built with Homeworld and were complimentary about that build. During this build, however, issues of concern to the Complainants arose. Those that the Board decided to further investigate were the installation of foundation poles, which were alleged to be out of plumb, and issues with the cladding, which it was alleged had not been installed in accordance with the manufacturer's instructions. The Complainant's lodged a complaint with the Board about those and other issues. The Respondent, when replying to the complaint, stated that Mr [OMITTED] was the Licensed Building Practitioner responsible for the building work complained about. As a result, the Board resolved to initiate a Board Inquiry into Mr [OMITTED]'s conduct.

- [20] Mr [OMITTED]'s licence was, for a short period of the build (17 April 2019 to 20 May 2019), suspended and, as a result, he was not a Licensed Building Practitioner due to the provisions of section 297 of the Act.⁸ Mr [OMITTED] was aware of the suspension, which he stated was a result of his not being able to meet compulsory skills maintenance requirements. During the period when Mr [OMITTED]'s licence was suspended, he was not authorised to carry out or supervise restricted building work.⁹ The evidence, however, established that the restricted building work that was complained about was not completed during the period of the suspension as the poles were installed on or about 3 April 2019, and the concrete to secure them was poured on 4 April 2019, prior to the suspension, and the cladding was carried out after the suspension was complete.
- [21] The Respondent's evidence was that he was not involved in the building work. His staff looked after the contract and the build without his direct engagement.
- [22] Contractual issues with the Complainants were eventually resolved with Homeworld purchasing the dwelling and on-selling it to Ms [OMITTED], an employee and shareholder of Homeworld. Ms [OMITTED] noted that a Code Compliance Certificate has not yet been issued but is being worked toward.

Poles

- [23] Mr [OMITTED] did the set out for the holes, and a digger was contracted to auger them. Mr [OMITTED] noted that the conditions were difficult, with rain causing mud and making the site slippery, that there were no issues with the diameter of the holes, but that it was difficult to keep them plumb. Added to this, he stated that the length of the poles (8 metres) and depth of the holes (3 metres) made their installation difficult.
- [24] Various engineers were engaged to review the installation of the poles at the request of the respondent, and the Whangarei District Council.
- [25] On 3 September 2019, [OMITTED] Limited provided advice to Homeworld, having carried out a survey. They noted:

It was found that that majority of the 250 SED poles were generally sloping in a downslope direction at 20-45mm/m with a single pile at 81mm.

And

⁸ **S 297 Effect of licensing suspension**

(1) A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.

(2) At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).

⁹ **S 84 Licensed building practitioner must carry out or supervise restricted building work**

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.

The rotations observed are not large enough to significantly influence the demand on the poles. As the poles have been sized based on bracing requirements, we have no concerns regarding the gravity load carrying capacity.

- [26] On 4 October 2019, [OMITTED] provided further advice supported by calculations. Again, they noted:

From the above comment we consider that the long term deflections due to the poles being out of plumb will be very minor and are of no structural concern.

- [27] The two opinions were provided by [OMITTED], Engineering Technician, BE(Civil)(Hons) and [OMITTED], Chartered Professional Engineer, BE (Civil), CPEng, IntPE(NZ), CMEngNZ.

- [28] On 1 November 2019, Mr [OMITTED], a former Building Control Officer, reviewed the [OMITTED] opinions for the Whangarei District Council. He noted the building consent required compliance with clause B1 of the Building Code and that the consent specifically noted the builder was to “ensure the work is level, plumb and true to line and face”. Mr [OMITTED] stated:

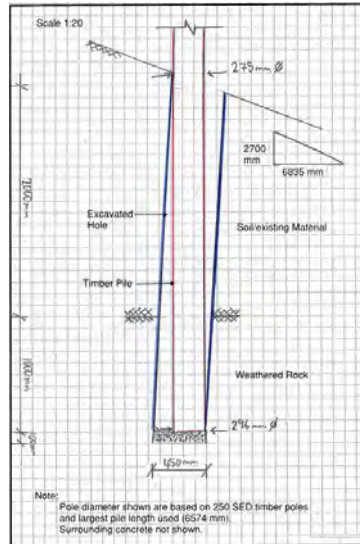
These items must be addressed by a suitably qualified Engineer in order to confirm the building has been constructed in accordance with the Approved Plans, Specification and associated documents ...

- [29] On 9 June 2020, a further report was completed by [OMITTED] and [OMITTED] of [OMITTED]. It took the [OMITTED] opinions into account. It noted:

Seventeen of the twenty piles exceed the allowable construction tolerance. They are in the order of 5 times as much as recommended. It should be noted that a defect does not necessarily mean that it does not comply with the Building Code.

- [30] The report also noted:

With the pile hole dug with at a slight angle, the contractor would have sought to straighten the pole as much as possible. This was likely attempted by placing the toe of timber pole flat against the downhill side of the hole, and the top end leaning hard against the back of the hole. This type of placement is illustrated in Figure 2, and an example at the top is shown in Photo 7 in Appendix A.



[31] Mr [OMITTED] gave evidence that the scenario depicted above was what occurred on site. No consideration was given to broadening the holes to allow for greater adjustment of the poles in them.

[32] The [OMITTED] report concluded:

7 Conclusions

All of the piles lean downhill. Most of them have a tilt that is many times greater than normally accepted tolerances. People may notice this and it may be considered as a loss of amenity under the Building Code. The excavation for the water tank is within a zone that adversely affects the performance of two of the piles.

8 Recommendations

It is recommended that a methodology be prepared by a Chartered Professional Engineer to undertake the following:

1. *A certain percentage of the piles be made vertical, this should include Pile 7.*

[33] The next review was completed by [OMITTED] and Chartered Professional Engineer of [OMITTED]. His undated opinion was a peer review of the [OMITTED] opinions. He stated:

To conclude, I have reviewed the letters and accompanying calculations provided by [OMITTED] and am satisfied that both the calculations and opinions offered are in accordance with sound engineering practice and judgement.

I am further satisfied that the pole eccentricities as measured by [OMITTED], and the further development of these eccentricities due to reasonable

overload or creep, will have no long or short term adverse effects on the performance of the dwelling. The pole stresses arising from the measured and expected eccentricities are within the allowable pole capacities as set out in NZS 3604.

In summary I am satisfied that the subfloor as constructed is and will be in accordance with the clauses B1.3.1, B1.3.2, of the Building Act. That is, the house will maintain its structural integrity and amenity throughout it's 50 year design life.

- [34] On 13 November 2019, the Council wrote to Homeworld noting various issues, including those with regard to foundation poles. The letter stated:

The foundation piles/poles as a product, are not considered to be defective.

However the installation, plumbness and alignment of the foundation piles/poles, are not of an adequate standard and do not meet the requirements of the NZ Building Code. Neither are they in accordance with the approved building consent and plans. Instructions were also given from Council's building inspector to ensure these elements were plumb and braced appropriately, but these have not been followed.

This element needs to be assessed and, if necessary, rectified. These issues will need to be addressed to the satisfaction of Council in a further engineering report.

- [35] The correspondence set out the requirements for the engineering report, and on 28 September 2020, [OMITTED] provided the report that had been sought. It stated:

Making the piles vertical is not a practical option as it would not be possible to excavate new foundations without prior removal of the dwelling. To avoid excavating new foundations, the current poles could be cut off and made vertical with a spliced member. However, this would sacrifice moment continuity of the piles, worsening the situation.

Therefore, to provide the dwelling occupier with peace of mind concerning the out of plumb piles, and at Homeworlds request, [OMITTED] suggests that additional timber braces be installed. These should be fixed from the base of the middle pile row to the top of the front pile row as shown on the attached sketch and be detailed as per NZS3604 pile braces. Note that the proposed layout includes the reversal of the existing brace to Pile 7. The braces will provide restraint to the top of the poles, thus limiting the possibility of movement.

- [36] [OMITTED] provided updated plans that reflected the changes, and on 25 February 2021, the amended building consent plans were approved by the Building Consent Authority (Whangarei District Council). The Council file included all of the above-mentioned reviews and opinions.

[37] On 8 July 2021, the Whangarei District Council wrote to the Complainants. With regard to foundation poles, the letter stated:

3. *Council has previously advised that on the basis of engineering advise it has received (which you have seen), that the poles are structurally sound, and compliant with the Building Code in that regard. That position has not changed.*

[38] The Complainants were still dissatisfied. They made a complaint to the Board on 30 November 2021.

[39] Mr [OMITTED], at the hearing, accepted that he should have sought advice or taken action, including contacting the engineer when issues were experienced with the installation of the foundation poles.

Cladding

[40] The building consent specified ply and batten using Roseburg Cedar, a product the Complainants had selected and had sourced from overseas. When it arrived, it was assessed as being unsuitable. As an alternative, the Complainants sourced and supplied a Shadowclad product which they pre-painted prior to delivering it to site for installation. The building consent was not changed. The Respondent stated that it would have been attended to a later point in time and that the change to the consent may have been overlooked by Homeworld's quantity surveyor. The Respondent stated he did not have any involvement in the change. The Council witnesses gave evidence that the change would have required an amendment to the building consent meaning the change would have had to precede the associated building work. The building consent amendment was granted on 25 February 2021. It included an amendment for Shadowclad.

[41] The Shadow Clad product was a lap-joined product. Mr [OMITTED] gave evidence that the batten set out was the same as the set out for the consented product (battens at 600mm centres) but that he experienced some creep in the sheets as they were installed, which resulted in some issues with the nailing. Mr [OMITTED] stated that he did obtain the manufacturer's specifications off the web before he carried out the installation.

[42] Mr [OMITTED], in his letter of 1 November 2019, with regard to the cladding, noted that the building work had preceded an amendment being granted and stated that if an amendment was granted that it was unlikely that the existing cladding would be approved as it had not been installed in accordance with the manufacturer's technical literature.

[43] On 13 November 2019, the Council wrote to Homeworld noting the issues with the cladding as:

The unauthorised cladding as installed, presents a number of issues and these are noted below from the visual inspection carried out:

- *A 9mm spacer was not used at sheet joints, therefore, expansion gaps at the laps are not achieved to the product manufacturers specifications. There are many variations of the sheet joint widths.*
- *Panel or holding pins used at sheet joints, presumably to locate the sheets prior to fixing installation. These pins are on the exposed face of sheets, in the grooves etc. They have not been removed and the pin product durability is unknown for the corrosion zone?*
- *Sheet fixings closer than 23mm from the edge of the lap joint. This means that the sheet is fixed through the expansion lap – top face sheets*
- *Sheet fixings showing in the grooves at the lap joints on the bottom sheet laps. This appears to be in accordance with the manufacturers specifications in most places being 13mm minimum back from edge of the sheet and appear to be clear of the weather groove.*
- *Sheet fixings that could not be seen, seem most likely to be nailed through the weather grooves*
- *Some sheets/joints are out of vertical alignment and outside of manufacturers specifications. The horizontal flashing joint may not function as designed*
- *Shadow clad coating is not able to be confirmed particularly the lower portion and back of the product.*

It is Council's view that the cladding system has been poorly installed and does not meet the manufacturer's specifications for installation. It would be appropriate to get the product manufacturer to assess the installation and report their findings, including any need for remedial action.

- [44] Mr [OMITTED] stated that whilst he had some labourers assisting, he carried out the nailing of the sheets, that cut edges of sheets were painted with metalex, and that if he had used the wrong nails, then it would have been a mistake. Mr [OMITTED]'s involvement in the project came to an end prior to issues with the cladding being notified.
- [45] The Respondent stated that the cladding issues were rectified after Homeworld purchased the dwelling.

Board's Conclusion and Reasoning

[46] 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.

[47] The licensing regime is designed to ensure that those who are licensed and carry out or supervise building work are held to account for the quality and compliance of their work. There needs to be a connection between the building work complained about and the Licensed Building Practitioner identified in the complaint.

[48] In this matter, the Board accepted that the Respondent did not carry out or supervise any of the building work. The management of the contract and build was undertaken by Homeworld staff with no direct or indirect involvement from the Respondent. The Respondent did not give directions as regards the work or the changes made to the building consent as the work progressed and did not have any responsibility for calling for required inspections. He was, put simply, remote from it.

[49] The Respondent's involvement in the matter only arises as a result of him being a principal of the company that carried out the build. As noted earlier, the Board cannot investigate contractual matters. However, on 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022¹⁰. The conduct in this matter predated the Code. As such, it could not be considered in light of it. The Respondent should note, however, that in the future, the Code may result in the Board being able to investigate the conduct of those that have not carried out or supervised building work but have been involved in complaint matters in a more peripheral way.

Signed and dated this 19th day of January 2023



M Orange
Presiding Member

¹⁰ Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021