

Before the Building Practitioners Board

BPB Complaint No. 26345

Licensed Building Practitioner: Christopher Neil Cox (the Respondent)

Licence Number: BP134455

Licence(s) Held: Foundations – Concrete or timber pile foundation

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: 25 October 2024

Board Members Present:

- Mr M Orange, Chair, Barrister (Presiding)
- Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
- Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Appearances:

J Dawson 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

- [1] The Respondent’s company was subcontracted to move a residential dwelling onto the new pile foundations that it was to construct. The building consent issued required that the house be situated on higher piles than had been allowed for in the contract. The Respondent entered into a direct contract with the owner to carry out the additional work. The pile foundation was constructed, and the house was moved onto the piles. The Respondent’s work then came to an end as a result of a commercial dispute, and a complaint about his work was made.
- [2] When the complaint was made, photographs that accompanied it showed non-compliant building work. There was also evidence that a required building consent inspection had not been carried out. At the hearing, it was ascertained that the work shown in the photographs was not the Respondent’s building work. Accordingly, the Board found that the Respondent had not committed any disciplinary offences with respect to it. With regard to the failure to obtain a building consent inspection, the Board found that whilst the evidence substantiated the allegation, the conduct was not serious enough to warrant a disciplinary finding under either section 317(1)(b) or (d) of the Act.

- [3] The Board also investigated whether the Respondent had failed to provide a record of work on completion of restricted building work as required by section 88(1) of the Act. On that matter, the Board decided that completion had occurred when the Respondent was informed that a complaint had been made about him and that a record of work had been provided within a reasonable period thereafter.

The Charges

- [4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a Complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at , 111 Clark Road, RD 1, Ngaruawahia, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act; 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 or supervise, or has carried out 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.
- [6] In further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the quality and compliance of sub-floor piles and framing, including:
- (a) sub-floor connections to braced piles;
 - (b) connections between piles and bearers and whether all bearers were supported by piles;
 - (c) connections between bearers and joists and whether all joists were supported by bearers;
 - (d) the packing of piles;
 - (e) the vertical tolerance of piles; and

¹ 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

(f) whether all of the required building consent inspections were called for, noting that there is no record of a “pre-floor building” inspection having occurred.

[7] The Board also noted that its investigations would focus on the photographs of the building work on pages 163 to 193 of the Board’s file.

Evidence

[8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.

[9] The Respondent’s company was subcontracted to move a dwelling to a rural site and to construct a piled foundation for the dwelling to be moved onto. Once placed onto the new foundations, the Respondent’s company would connect the dwelling to the piles.

[10] The work was undertaken under a building consent. The construction of the foundations and the connections between the dwelling and the foundations were restricted building work (work on the primary structure of a residential dwelling) and had to be carried out or supervised by a Licensed Building Practitioner (LBP). The Respondent was that LBP.

[11] The work was completed in stages. One-half of the dwelling was moved to the site on 13 December 2022. A building consent was issued on 15 May 2023. The building consent required that the dwelling be placed on piles higher than those allowed for in the contract with the main contractor. The Respondent provided a price for the additional work, and he contracted directly for it.

[12] Building work started on about 4 July 2023, when the second half of the house was delivered to site, and progressed through until 19 July 2023, when work ceased as a result of a commercial dispute. Thereafter, there followed a period of interactions between the Complainant’s and the Respondent’s lawyers with respect to the matters under dispute.

[13] The Complainant made a complaint to the Board about the quality and compliance of the building work on 2 August 2023. When the complaint was made, the Respondent had not provided a record of work for the restricted building work that he had carried out or supervised.

[14] The complaint was accompanied by photographs of the work complained about. The Respondent’s response to the complaint did not directly address the issues raised in the complaint or identified in the photographs. At the hearing, the Respondent produced date and time-stamped photographs taken on 19 July 2023 when the dwelling had been placed on the piles. Those photographs showed the

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

state of the building work when the Respondent's engagement on the site came to an end. The Respondent also gave evidence that when he left the site, the dwelling had been temporarily connected to the piles with bugle screws. The Respondent also stated that he had not been given the opportunity to complete the house-to-pile connections.

- [15] A witness present at the hearing gave evidence that after the Respondent's involvement had ceased, he had completed the connections between the dwelling and the piles and installed the timber braces. The Board accepted that the work complained about and shown in the photographs was not the Respondent's work.
- [16] The Board was also investigating a failure to obtain a required Building Consent Authority (BCA) inspection. The approved building consent stated that the following inspection was required:
- Excavation, Siting and Foundation (prior to pouring concrete) – Owner/builder to locate boundary pegs prior to Council carrying out a foundation inspection.*
- [17] The building work progressed without the above inspection, and an email dated 29 August 2023 from the BCA noted an alert regarding a lack of inspections. The Respondent gave evidence that he had a geotechnical engineer check the pile holes and piles prior to concrete being poured for them and that a producer statement had been provided by the engineer. The Respondent stated that he was operating under the understanding that by having an engineer observe the work, the BCA inspection had been waived.
- [18] On 27 September 2023, a record of work was completed by the Respondent and was sent to the Complainant (the owner). A copy was not sent to the Territorial Authority.

Negligence or Incompetence

- [19] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as "an inability to do the job"

the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [20] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹
- [21] As noted above, the Board accepted that the building work depicted in the photographs provided with the complaint was not work the Respondent had carried out or supervised. Accordingly, it did not further investigate those aspects of the complaint, and it finds that there has not been a breach of section 317(1)(b) of the Act in relation to those matters.
- [22] The Board did note, should the Respondent find himself in similar circumstances in the future, that he should take steps to make sure the dwelling is safe, pending the completion of the connections between the subfloor and the piles. In particular, temporary bracing should be installed, and, if the Respondent is not able to return to complete work, detailed work instructions should be issued specifying what is required to make the building safe.
- [23] What remains in respect of negligence or incompetence is the failure to obtain a required building consent inspection. The evidence before the Board established that the inspection had not been undertaken as per building consent requirements. The question for the Board is whether that failure was serious enough to warrant disciplinary action.

Was the conduct serious enough

- [24] The Board decided that the departure from an acceptable standard did not reach the threshold as outlined above. The Respondent was operating under the mistaken belief that the requirement for the inspection had been waived. Waivers of inspection requirements can be granted by a BCA, including where the work will be performed under the observation of an engineer and evidence that shows compliance is collected and made available to the BCA. An LBP should, however, only rely on a waiver where there is written evidence that one has been granted. Notwithstanding, the Board finds that the Respondent's conduct fell into the

⁸ *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".

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

category of error or inadvertence, as outlined in *Collie*.¹² The Respondent is, however, cautioned as regards future conduct. He should note that there is a strict requirement to comply with a building consent. If the consent is to be departed from, the processes provided in the Act for minor variations or amendments must be followed.

Has the Respondent been negligent or incompetent

[25] The Respondent has not carried out building work in a negligent or incompetent manner.

Contrary to a Building Consent

[26] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹³ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁴ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁵ Inspections ensure independent verification that the building consent is being complied with.

[27] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.¹⁶ The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.¹⁷ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

[28] On a strict liability basis, the failure to obtain a required inspection is a breach of section 317(1)(d) of the Act.

Was the conduct serious enough

[29] Applying the tests for seriousness, however, the Board, for the same reasons as its findings with respect to negligence or incompetence, found that the conduct was not serious enough.

¹² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

¹³ Section 49 of the Act

¹⁴ Section 40 of the Act

¹⁵ Section 222 of the Act

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁷ *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".

Has the Respondent breached section 317(1)(d) of the Act

[30] The Respondent has not breached section 317(1)(d) of the Act.

Failure to Provide a Record of Work

[31] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.¹⁸

[32] 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 work¹⁹ unless there is a good reason for it not to be provided.²⁰

Did the Respondent carry out or supervise restricted building work

[33] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the foundations of a residential dwelling, which is restricted building work because they form part of the primary structure.²¹

Was the restricted building work complete

[34] The Respondent's last date on site was 19 July 2023. He did not carry out any further restricted building work after that date. After 19 July 2023, a period of contractual dispute followed, and a complaint was made on 2 August 2023. The Respondent was informed of that complaint on 22 August 2023.

[35] The Board has stated in previous record of work decisions that where contracting parties are involved in a commercial dispute and an LBP may return and carry out further restricted building work, completion may not have occurred.

[36] The Respondent's position was that he took the notification of a complaint, which he received on 22 August 2023, as the date when he became aware that he would not be able to return and carry out any further restricted building work. The Board accepted that submission and, on the basis of it, finds that the completion date for the purposes of section 88(1) of the Act was 22 August 2023.

Has the Respondent provided a record of work

[37] The Respondent provided a record of work on 27 September 2023. The Board finds that the provision was within a reasonable period of time from the completion date.

¹⁸ Section 88(1) of the Act.

¹⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁰ Section 317(1)(da)(ii) of the Act

²¹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

[38] The Respondent is reminded that the statutory requirement is that a record of work be provided to both the owner and the Territorial Authority on completion, not one or the other.

Did the Respondent fail to provide a record of work

[39] The Respondent has not failed to provide a record of work on completion of restricted building work.

Board Decisions

[40] The Respondent has not committed any disciplinary offences.

Signed and dated this 04th day of December 2024.



M Orange
Presiding Member

Section 3 of the Act

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) people who use buildings can do so safely and without endangering their health; and*
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) people who use a building can escape from the building if it is on fire; and*
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*