

Before the Building Practitioners Board

	BPB Complaint No. CB26318
Licensed Building Practitioner:	Feng Wu (the Respondent)
Licence Number:	BP129165
Licence(s) Held:	Carpentry and Site AoP 1

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 Date:	3 April 2024
Decision Date:	10 April 2024

Board Members Present:

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

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 Board investigated the Respondent’s conduct based on a series of failed inspections, which indicated that there may have been a pattern of failed inspections and/or inadequate supervision and that work that differed from the building consent may have been carried out without changes to the consent being sought or approved.
- [2] The evidence received at the hearing painted a different picture than in the complaint and the response to it. The conduct was not as serious as it first seemed. As such, the Board did not make any disciplinary findings. However, the Board did note some substandard conduct, and it cautions the Respondent. He needs to take his supervision duties and his responsibilities regarding Building Consents more seriously in the future.

The Charges

- [3] 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

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.

- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, 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) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out design work in relation to fire safety systems that he was not competent to do.
- [5] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, the Board would be:
- (a) inquiring into issues raised in building inspections and whether there was a pattern of failed inspections and/or inadequate supervision with particular attention to the following inspections:
 - 29 September 2021;
 - 11 October 2021;
 - 13 April 2022;
 - 17 November 2022;
 - 18 November 2022; and
 - 12 December 2022.
 - (b) inquiring into whether the correct Building Consent and/or resource consent change processes were used prior to the related building work being carried out for changes to fire safety systems and for changes to a deck.

Evidence

- [6] 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.
- [7] The Respondent's company was engaged to carry out a renovation of an existing dwelling under a building consent. The Respondent was the supervising Licensed Building Practitioner. The build was complex.

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.

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

Negligence or Incompetence

[8] 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 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?

[9] 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

The conduct under investigation

[10] The building inspections that the Board gave notice that it would investigate, in the main, raised issues with the building work not being as per the consented plans in that changes had been made. The main exception was reinforcing steel, which, at a Foundation Inspection, was noted as a fail. The work had been undertaken by a subcontractor, but the Respondent accepted that he was the supervising Licensed Building Practitioner. The inspection noted:

Reinforcing is not per plan, sizes and missing stirrups etc

P2 piles not as per plan, plan stated hd16s, but all have hd12.

Do not pour these footings as works are not as per consented plans

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”

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.

- [11] The Respondent accepted that the reinforcing was not compliant, and he described the standard of work as careless. He accepted that the work was not ready for an inspection.
- [12] There were also notations in Inspections that the wrong Gib Fyreline had been used (10mm, not 13mm) and a different flooring material had been installed (a single layer of particleboard, not two layers of James Hardie Secura as consented). The Respondent accepted responsibility for the error that had been made regarding the Gib Fyreline but submitted that the flooring was changed due to supply issues and that only one of the two required layers had been installed at the time of the related inspection, making it partially complete work. The Board also heard evidence that, in terms of the floor's fire rating, the Fire Engineering specifications were not product-specific.
- [13] There was also a note in the Foundation Inspection that footing heights were not as per the plan. A pattern emerged over the course of the building work of notations being made in Inspection reports that the building work varied from what had been consented, and that changes to the Building Consent had to be obtained. It was these changes that the Board was investigating.
- [14] The Building Consent had been developed based on assumptions as regards the pre-existing structural elements. As the project progressed, the underlying structure that was exposed differed, and changes to the construction methodology were necessary.
- [15] The Building Inspections variously recorded that input from the Designer and Engineer was needed prior to building work progressing and that consent changes had to be made. When the Board reviewed the Building Inspections prior to the hearing, there was no indication that the Respondent had been consulting or that consent changes were being sought. At the hearing, the Board received evidence that he had consulted with and been issued instructions from one or the other of the Designer or the Engineer, who were being paid by the Complainant, prior to on-site changes being made. The Respondent was given an opportunity to submit the instructions he had received during the build. He provided them, and they confirmed that he had not acted in isolation of them.

Has the conduct fallen below an acceptable standard?

Foundation Steel, Gib Fyreline and Flooring

- [16] The Board accepted that the flooring was partially complete work and that it may have been made compliant when it was completed. With respect to the manner in which the structural steel in the foundations was installed and the use of incorrect Gib Fyreline, the Board finds that the Respondent's supervision fell below an acceptable standard.

- [17] Supervision is a defined term in the Act.¹² There are various factors that the Board needs to consider when it determines whether a Licensed Building Practitioner's supervision has met an acceptable standard. The District Court has stated, albeit in the context of the Electricity Act, that at the very least, supervision requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to the compliance of the work with the requisite regulations.¹³
- [18] There are varying types of supervision. The Ministry of Business Innovation and Employment has issued a supervision guidance document.¹⁴ It notes the different types of supervision: direct, general and remote. It also provides a matrix to assist in determining the appropriate form of supervision to be used. Generally, the greater the complexity of the work, the higher the need for direct supervision. The skill level of the person being supervised also needs to be taken into consideration.
- [19] Applying those tests, the Board decided that the Respondent had been negligent. Had he checked the structural foundation steel prior to an inspection being called, it would have been apparent to him that the work was not ready to be inspected. The same applies to the Gib Fyreline. If the Respondent had paid closer attention to the work, he would have identified that the wrong material had been installed.

Building Consent Changes

- [20] The Respondent was not the only practitioner involved in the changes. The Engineer and the Designer were also involved. As such, the Respondent was not the only person who bore responsibility for changes being made to the Building Consent. Further, he was entitled to rely on the instructions that design professionals issued. What he did not do but should have done was ensure that the Building Consent Authority was kept informed as the changes were made. Again, he did not bear the sole responsibility for this, but if he had done so, then the picture portrayed by the Inspections would have been different, and the Board's investigations may not have been necessary. At the hearing, the Respondent accepted that he could and should have done more to ensure the Building Consent Authority was informed.
- [21] As a Licensed Building Practitioner, the Respondent should have ensured that consent changes were in place or were being attended to by the appropriate persons, in this instance, the Designer or the Engineer, as the build progressed. A Licensed Building Practitioner that fails to ensure a process is being followed and

¹² Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

¹³ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁴ Practice Note: Supervision, August 2017, issued under section 175 of the Act.

that consent changes are made in a timely manner can be found to have been negligent. However, in this instance, because of the involvement of the Designer and the Engineer and the receipt of written instructions prior to the associated work being carried out, the Board has decided that the Respondent's conduct has not fallen below an acceptable standard. The Respondent is, however, cautioned as regards his future conduct. He should ensure that Building Consent changes are dealt with in a timely and appropriate manner and that if the design professionals involved in the project are not progressing matters with the Building Consent Authority, he does.

Was the conduct serious enough?

- [22] The negligence finding relates to the Respondent's supervision. As noted above, a threshold test applies in that the Board cannot make a disciplinary finding if the departure from an acceptable standard is not serious enough. In *Collie v Nursing Council of New Zealand*,¹⁵ as regards the threshold, the court stated:

[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.

- [23] In *Pillai v Messiter (No 2)*,¹⁶ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, the court 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.

- [24] Applying those tests, the Board has decided that the conduct was not serious enough. Again, the Respondent is cautioned as regards his supervision. More care needs to be taken in the future, and more attention should be paid to work that has been completed by subcontractors and those who are under the Respondent's supervision.

Has the Respondent been negligent or incompetent?

- [25] The Respondent has not breached section 317(1)(b) of the Act.

¹⁵ [2001] NZAR 74

¹⁶ (1989) 16 NSWLR 197 (CA) at 200

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.¹⁷ Once issued, the building work must be carried out in accordance with the Building Consent.¹⁸
- [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.¹⁹ 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.²⁰ If it does not, then a disciplinary finding cannot be made.
- [28] The Board has not made a disciplinary finding of negligence on the basis that the conduct was not serious enough. The same applies to building contrary to a Building Consent. Whilst there were departures in the matter, the conduct was not, in the context of the involvement of other professionals, serious enough to make a disciplinary finding.

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

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

Building Work Outside of Competence

- [30] Section 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [31] In the context of the Act and the disciplinary charge under section 317(1)(h) and 314B(b) of the Act, a Licensed Building Practitioner must only work within their individual competence. In this respect, if a Licensed Building Practitioner undertakes work outside of their licence class,²¹ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is non-compliant or is in some way deficient. It was within this context that the Board investigated the Respondent's conduct as there was evidence that, as a Licensed Carpenter, he may have carried

¹⁷ Section 49 of the Act

¹⁸ Section 40 of the Act

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²⁰ *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".

²¹ Note that to carry out Restricted Building Work outside of a Licensed Building Practitioner's licence class is a disciplinary offence under s 317(1)(c) of the Act.

out design work. The evidence received, however, established that the Respondent had relied on and acted on the advice and instructions of other professionals. As such, he has not committed a disciplinary offence.

Respondent Cautioned

[32] As noted, the Board has not made any disciplinary findings. However, the Board has noted substandard conduct, and it has cautioned the Respondent, who stated at the hearing that he had learned from the complaint and that he would change his practices. The Board hopes that this is the case and that he takes his supervision duties and responsibilities regarding Building Consents more seriously in the future.

Signed and dated this 21st day of May 2024.



Mr M Orange
Presiding Member

ⁱ 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.*