

Before the Building Practitioners Board

	BPB Complaint No. CB26298
Licensed Building Practitioner (LBP):	Hayden Simpson (the Respondent)
Licence Number:	BP107260
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	Hokitika
Hearing Type:	In Person
Hearing Date:	13 March 2024
Decision Date:	18 March 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr G Anderson, 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 Respondent has not committed a disciplinary offence. Multiple allegations were being investigated. The first related to a failure to ensure a Building Consent was in place for building work before it was undertaken. The Board found that whilst the building work did require a Building Consent, and the Respondent should have ensured one was in place, the conduct, in the context of the matter, was not serious enough to warrant a disciplinary finding. The remaining allegations were not upheld.

The Charges

- [2] 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
- [3] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, in respect of the remedial issues identified in the Certificate of Acceptance documentation at pages 97 to 132 of the Board File, and that he may have failed to:
 - i. consider whether the building work required a Building Consent or resource consent;

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.

- ii. test or consider if testing was necessary, for asbestos in the existing building;
 - iii. have regard to a Council requirement to stop work on the project; and/or
 - iv. have regard to appropriate health and safety measures for the protection of the public during the building work as, by way of example, shown on page 128 of the Board's File.
- (b) breached section 314B of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have undertaken design work in relation to the addition and renovation of the café, that was not within his competence to carry out.

Evidence

- [4] 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.
- [5] The Respondent was contracted to build a 63m² deck adjoining a café in a remote region of the West Coast. The deck did not require a Building Consent as it came within the deck exemption in clause 24 of Schedule 1 of the Building Act. The scope of the building work expanded. The owner of the café stated he always intended to build a back wall and roof structure over the deck to create an outdoor dining area. The Respondent stated he was not aware, when he started building the deck, that the intention was to build a rear wall and roof. The rear wall and roof structure may have taken the building work outside of the scope of the exemptions in Schedule 1, meaning that a Building Consent may have been required because the total area of the building work exceeded 30m². The following photograph shows the work.



- [6] As part of the build, an interconnecting bi-folding door was installed to connect the café to the deck area. Again, the café owner stated it was part of the overall plan. The Respondent stated that, when he was made aware of the plan to install the door, he advised the café owner that a Building Consent would be required for it.

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

The door is shown below. The door spanned the area between the two windows shown above and replaced them.



- [7] Neither aspect of the building work was consented. A Certificate of Acceptance (CoA) was issued for the building work on 24 October 2023.

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 Act¹ as well as the requirement that all building work must

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”.

comply with the Building Code⁹ and any Building Consent issued.¹⁰ The test is an objective one.¹¹

- [10] At issue in the matter was whether the Respondent knew or ought to have known that a Building Consent and/or Resource Consent was required prior to the building work being undertaken and whether he had been negligent for proceeding with the building work without one being in place.
- [11] The Board also investigated specific aspects of the build, including whether a stop work notice was complied with.

Building and Resource Consent

- [12] Neither the café owner nor the Respondent turned their mind to whether a Resource Consent may have been required. As matters transpired, one was not, and on that basis, no further consideration of the question is required. The Respondent is reminded that potential Resource Consent issues should be kept in mind when undertaking building work.
- [13] The construction of the deck, wall and roof structure required a Building Consent because the size of the structure was greater than that which can be built under clauses 17 and 17A of Schedule 1 of the Act.
- [14] The Respondent stated that he had been advised by the café owner that the owner had asked the Westland District Council whether a Building Consent was required for the structure and that he had been told one was not needed. The Respondent relied on that advice and acted on it. He did not make any inquiries of his own or research the question. The café owner gave evidence that the advice was verbal and that it came from a Building Control Officer (BCO). No written confirmation of the advice was sought or received. The Board also heard evidence that, in the region, receiving verbal advice from BCOs was common.
- [15] The Building Consent Authority (BCA) considered that a Building Consent was required for the bi-folding doors because their installation required structural changes to the building. The Respondent stated that he advised the owner of the need for a Building Consent. He had sought advice from a Design Licensed Building Practitioner on the size of the lintel that was needed for the installation of the door. The building work progressed notwithstanding the Respondent's belief that a Building Consent was needed.
- [16] Clause 8 of Schedule 1 provides an exemption for exterior doorways. It states:

8 *Windows and exterior doorways in existing dwellings and outbuildings*

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.

Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys, except,—

- (a) in the case of replacement, if the window or doorway being replaced has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
- (b) if the building work modifies or affects any specified system.*

- [17] The clause has two limitations. There was no evidence that either applied in that there were no durability issues or that there were any specified systems. As such, the work could have come within the exemption clause.
- [18] The installation of the bi-folding doors required the installation of a lintel to support the structure above it. That work could have come within clause 1 of Schedule 1, which covers general repair, maintenance and replacement of a building product or an assembly. There is, however, an exclusion to the clause in that it cannot be used if the replacement is of a building product or assembly that contributes to the building's structural behaviour or fire-safety properties. The inclusion of the lintel meant that a Building Consent was required, at least for that part of the work.
- [19] The Building Act requires that all building work be carried out under a Building Consent unless an exemption available under the Act applies.¹² The burden is on the person carrying out the work to establish that an exemption applies. The Building Consent process is important as it ensures that the proposed building work is assessed by a Territorial Authority (Council) for compliance with the Building Code prior to it being undertaken¹³ and that the consented work is then assessed against the consent issued through scheduled inspections.¹⁴ In *Tan v Auckland Council*,¹⁵ the High Court noted that if a person fails to obtain a Building Consent, that deprives a Council of its ability to check any proposed building work. The Court also held:

[37] ... those with oversight (of the Building Consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [20] The Respondent falls into the category of a person who was in the best position to ensure unconsented work did not occur. As such, he had a duty to assess whether a Building Consent was required prior to the building work being undertaken.

¹² Refer sections 40, 41 and 42A of the Act.

¹³ Section 49 of the Act.

¹⁴ Section 222 of the Act.

¹⁵ [2015] NZHC 3299 [18 December 2015]

- [21] A Building Consent may not have been required for the bi-folding doors. A Building Consent was required for the deck, walls and roof structure that was built. There was evidence that reliance was placed on advice received from a BCO.
- [22] Ignorance of the law is not a defence, but ignorance based on erroneous advice from an official can be. In *Wilson v Auckland City Council (No 1)*,¹⁶ the Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law and in *Tipple and Gun City Limited v Police*,¹⁷ Holland J found that where a person committed a crime believing it to be lawful on the grounds of “officially induced error”, it was in the public interest as well as being just that that person should not be held criminally liable.
- [23] The current matter falls short of the defence being available to the Respondent as it was second-hand advice, and he should, as a Licensed Building Practitioner, have undertaken his own due diligence. He did not, and for that reason, the Board finds that his conduct fell below that expected of a Licensed Building Practitioner and that he has conducted himself in a negligent manner. The reliance on advice is, however, a matter to be taken into consideration with regard to the seriousness of the conduct and the threshold required for the Board to make a disciplinary finding.
- [24] In *Collie v Nursing Council of New Zealand*,¹⁸ the Court stated, as regards the threshold for disciplinary matters:
- [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.*
- [25] In *Pillai v Messiter (No 2)*,¹⁹ 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.*
- [26] Applying those tests, the Board has decided that a disciplinary finding with regard to the Building Consent allegations should not be made.
- [27] The Respondent is, however, cautioned to take care in future when carrying out building work that does not have a Building Consent. Now that the Respondent is aware of the need to undertake his own investigations into whether a Building Consent is required, future infractions may reach the threshold for disciplinary action.

¹⁶ [2007] NZAR 705 (HC)

¹⁷ (1994) 11 CRNZ 132

¹⁸ [2001] NZAR 74

¹⁹ (1989) 16 NSWLR 197 (CA) at 200

Asbestos

- [28] The existing building cladding was of an age and type where it may have contained asbestos. The Respondent stated that he was familiar with how to identify asbestos and with the required processes to deal with it.
- [29] The work on areas of the building where asbestos may have been present was undertaken when the Respondent was not on site by his staff. Those staff members were also aware of how to identify and deal with asbestos. The Respondent did not know what, if any, precautions were taken by his staff. The BCA did not raise any issues with asbestos, and no asbestos was actually identified in any of the building materials.

Health and Safety

- [30] The site was not secured from access by the public. A perimeter boundary was in place, and a physical barrier between the interior parts of the café where customers had access and the work area was created with café furniture. The Respondent stated that site health and safety boards were erected and that no tools, equipment or hazardous materials were left on site when workers were not present. The café owner lived next to the café, which was in a rural, sparsely populated location. Mobile scaffolding was used when work was carried out at height. The BCA did not raise any health and safety issues.
- [31] The Board found that whilst the Respondent could have done better regarding health and safety procedures, especially regarding site access, the Respondent has not conducted himself negligently or incompetently. He is warned that more care needs to be taken in the future, and he should note that just because a job is in a remote location, health and safety systems and processes should not be relaxed.

Stop Work

- [32] With regard to the Stop Work Notice, whilst a BCA file note recorded an on-site verbal instruction on 19 December 2022 to stop work, no formal notices were issued. A Certificate of Acceptance (CoA) had been applied for prior to 19 December 2022. As part of that process, the BCA had identified remedial work that needed to be undertaken for a CoA to be granted.
- [33] On 19 June 2023, the CoA application was refused. A Notice of Fix (NTF) was issued on 20 June 2023. The NTF recorded that either a CoA had to be applied for or the unconsented building work had to be removed. On 24 October 2024, a CoA was granted. No further building work was completed in the period between the refusal and the granting of a CoA.
- [34] Because a formal Stop Work Notice was not issued and, because the work that occurred after an oral instruction was given was to try and achieve a CoA that was being sought, the Board finds that the Respondent has not conducted himself in a negligent or incompetent manner.

Has the Respondent been negligent or incompetent?

- [35] The Respondent **has not** been negligent or incompetent.

Outside of Competence

- [36] The allegation was that the Respondent had worked outside of his personal competence by undertaking design work. The disciplinary charge arose because the Respondent, who holds a Carpentry Licence, did not have a design provided to him for the building work that he undertook. On that basis, the question for the Board was how was the design developed, and was it a competent design?
- [37] Looking at the bi-folding doors, there was evidence that the Respondent had sought and received design details from a Design Licensed Building Practitioner. That matter does not, therefore, require any further consideration.
- [38] Turning to the deck, wall and roof structure, the Respondent stated that he based the design on NZS 3604, which is an acceptable solution for compliance with the Building Code with one exception. The exception was the rafters used, which were overspanned for NZS 3604. He stated that he obtained and used a Mitex design solution. He provided evidence to substantiate the claim. The engineer who provided calculations for the CoA application recommended minor additional building work. At that stage, the build was incomplete, and the Respondent stated that the remainder of the build was completed per the engineer's instructions.
- [39] The structure and building work were not complex, and the Respondent sought professional advice as regards more complex elements. On that basis, the Board finds that the Respondent **has not** carried out design work outside of his competence.

Signed and dated this 26th day of March 2024



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.*