

## Before the Building Practitioners Board

	BPB Complaint No. CB26093
Licensed Building Practitioner:	Ramon Dale (the Respondent)
Licence Number:	BP125788
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing and Decision Date:	14 April 2023
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

#### 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 under section 317(1)(b) of the Act.

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## Summary

- [1] The Respondent reclad various elevations of an existing dwelling using clause 1(2) of Schedule 1 of the Act. A Certificate of Acceptance was then sought for the work on the basis that it may not have been exempt from the requirement to have a building consent. A report on the work concluded that the work did not meet current Building Code requirements. A complaint was made by the Council as a result.
- [2] The question for the Board was whether the Respondent had been negligent by not ensuring a consent was obtained for the reclad prior to it being undertaken. The Board decided that whilst the Respondent should have obtained a consent for some, but not all, of the work he carried out, he had not been negligent because the departure from an acceptable standard was not serious enough. In making that decision, the Board took into account that he had completed some due diligence prior to undertaking the work, the amount of work that required a consent was limited, and he had taken a responsible approach once the need for a consent was brought to his attention.

## 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.<sup>1</sup>
- [4] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], have carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, in that, the Respondent may have failed to ensure that a building consent was in place for building work prior to it being carried out or supervised by him.

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<sup>1</sup> 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.

<sup>2</sup> 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.

- [5] The Board gave notice that in further investigating the above allegation, it would be inquiring into whether clause 1 of Schedule 1 of the Act applied, the interrelationship of those provisions with sections 42A and 112 of the Act, and the matters set out in a report prepared by [OMITTED].

### Evidence

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. 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.

### Negligence or Incompetence

- [7] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> 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*<sup>5</sup> test of negligence.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

### Has the Respondent departed from an acceptable standard of conduct?

- [8] The Board's considerations relate to a possible failure to obtain a building consent for recladding work which may have required a building consent. The Respondent was engaged to do the work by the owners of the property with whom he retains a good relationship. He had done work for them over a number of years. The Respondent was replacing existing single-glazed window units in the direct fixed plastered Hardies fibre cement board cladding with new double-glazed window units. As part of the replacement of the window units, the related elevations were reclad with Hardies linea weatherboards. Those elevations made up approximately

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>4</sup> *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.

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> 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)

<sup>7</sup> 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"

<sup>8</sup> *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".

25% of the claddings, with the remainder being clad with bricks. The reclad used a direct fix methodology in some places and a cavity system in others.

- [9] Prior to the Respondent undertaking the work, he reviewed Ministry of Business Innovation and Employment Guidance<sup>9</sup> on what work could be undertaken without a building consent under Schedule 1 of the Building Act, and consulted with colleagues. He formed the opinion that a building consent was not required. In coming to that decision, he took into consideration that there was no evidence of any product or system failure. The Respondent did seek a building consent for other work that he undertook for the owners at or about the same time.
- [10] Sometime after the Respondent had completed the work, the owners decided to sell the property. To assist, the Respondent sought building reports on the work that had been completed. Those reports indicated that a building consent might have been required for the recladding work. A decision was made to seek a Certificate of Acceptance for that work. Mr [OMITTED] produced a report which concluded that a Certificate of Acceptance work should not be granted as the work did not comply with current Building Code requirements. The recladding work was then redone under a building consent at the Respondent's cost, and the Respondent accepted that he should have obtained a building consent.
- [11] Having been made aware of the recladding work, the Council decided to make a complaint to the Board about the Respondent's conduct because it considered Schedule 1 exemptions did not apply and because the building work did not meet current Building Code requirements.
- [12] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.<sup>10</sup> 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 undertaken<sup>11</sup> and that the consented work is then assessed against the consent issued through scheduled inspections.<sup>12</sup> In *Tan v Auckland Council*<sup>13</sup> 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.*

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<sup>9</sup> Issued under section 176 of the Act.

<sup>10</sup> Refer sections 40, 41 and 42A of the Act.

<sup>11</sup> Section 49 of the Act.

<sup>12</sup> Section 222 of the Act.

<sup>13</sup> [2015] NZHC 3299 [18 December 2015]

- [13] 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.
- [14] Looking at the evidence, the Respondent did make an assessment. He obtained and reviewed guidance documentation on exemptions to a building consent that are available under Schedule 1 of the Act, and he made inquiries with colleagues. He considered that clause 1(2) of Schedule 1 applied in that the building work to be undertaken was the “replacement of a building product or an assembly”. There are, however, limitations to its application. The replacement must be a comparable building product or assembly, and it must be in the same position. On that basis, the direct fix replacement cladding could have fallen within clause 1(2) of Schedule 1 even though the direct fix cladding that was installed may not have met current Building Code requirements as section 112 of the Act may have applied.
- [15] Section 112 of the Act, in simple terms, stipulates that building work on an existing building does not have to bring the building up to current Building Code requirements. It is enough that it continues to comply to the extent that it complied prior to the building work being undertaken. As such, whilst the current Building Code may have required that the cladding be installed on a cavity, the Building Code at the time the dwelling was constructed (1995-1996) did not. As such, replacement direct fix cladding may have been acceptable.
- [16] Regarding the recladding installed on a cavity, it replaced direct fix cladding, so a building consent was probably required as it was neither comparable nor in the same position. In failing to obtain a building consent for that aspect of the work, or the Respondent was negligent. The question for the Board, however, was whether that transgression was sufficiently serious enough to warrant a disciplinary finding.

Was the conduct serious enough?

- [17] The imposition of a sanction for professional negligence requires that the conduct falls seriously short of what is considered to be acceptable conduct. In this instance, the Respondent reviewed guidance documentation, consulted others, and then made an assessment. After the Respondent was informed of the need for a building consent, he took the required action of obtaining a building consent and redoing the work at his own cost. Further, the Respondent did seek a building consent for other work, which shows he did have regard for the consenting process.
- [18] In addition to the above, the provisions of Schedule 1 are open to interpretation. They have been the subject of litigation and determinations under the Act as a result. Consequently, deciding whether Schedule 1 does or does not apply is not always straightforward.

- [19] Given the above factors, the Board decided that the departure from an acceptable standard was serious enough to warrant a disciplinary outcome. The Respondent is, however, cautioned that, in the future, care should be taken when considering whether exemptions might apply. The Respondent should consider seeking written professional advice or consulting the Council and getting written confirmation that an exemption does apply.

Has the Respondent been negligent or incompetent?

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

Signed and dated this 24<sup>th</sup> day of April 2023

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

**M Orange**  
Presiding Member