

Before the Building Practitioners Board

	BPB Complaint No. CB26072
Licensed Building Practitioner:	Shaoqing Han (the Respondent)
Licence Number:	BP 130819
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding, Shingle or Slate Roof, Metal Tile Roof

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 and Decision Date:	8 March 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Ms K Reynolds, Construction Manager
	Mr G Anderson, 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.

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Summary

- [1] A complaint was made about noise from a roof when the wind was strong, as well as other quality and compliance issues. The Complainant provided expert reports. The experts were not able to determine the cause of the noise. One report did note the quality and compliance issues complained about. The Board investigated those issues and decided that whilst the Respondent had departed from an acceptable standard of conduct, the departure was not serious enough for the Board to make a disciplinary finding.

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], Auckland, have carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.
- [4] The complaint was made after the Complainant purchased a unit from a developer. The unit was one of five. After the purchase, the Complainant raised issues with noise from the roof in high wind conditions. The Complainant commissioned reports from Mr [OMITTED] and Mr [OMITTED]. Neither person was able to identify the cause of the noise but did point to factors which they considered may have been a cause or contributor. Mr [OMITTED]'s report raised other quality and compliance issues with the roof. Those issues formed the basis of the Board's inquiry into the Respondent's conduct.

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.

Negligence or Incompetence

- [5] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,³ 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*⁴ test of negligence.⁵ 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.⁶ 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.⁷ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [6] When considering what an acceptable standard is, the Board consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁸ and any building consent issued⁹. The test is an objective one.¹⁰
- [7] The building work involved the installation of a new roof on a block of five units. The Respondent was engaged by the developer and had worked for him on previous projects. The roofing and underlay products installed differed from those that were stipulated in the Building Consent. The changes were directed by the developer as cost-saving measures. The changes were not recorded by the Council as minor variations. The Respondent was warned that minor variations should be applied for and granted before such changes are made.
- [8] There were matters that were raised in the [OMITTED] reports that fell below an acceptable standard. They were: a failure to cut back underlay; overdriven roofing screws, which may have compromised their weathertightness seal; the use of rivets in place of roofing screws; overuse of sealant on the exterior of flashings and joints; lapping of sheets of roofing iron; and loose spouting brackets.

Was the conduct serious enough?

- [9] The most serious item was the lapping of one section of roofing iron. The sheets supplied were too short. The Respondent's staff, rather than obtaining replacement

³ *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.

⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁵ 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)

⁶ 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"

⁷ *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".

⁸ Section 17 of the Building Act 2004

⁹ Section 40(1) of the Building Act 2004

¹⁰ *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.

sheets, used short laps to make the length. The Respondent agreed that what was done was not acceptable. After the issue was brought to his attention, he returned and replaced the sheets.

- [10] The other matters noted in the reports were not as serious. The number of overdriven screws and pot rivets was not excessive, the spouting brackets were installed by a subcontractor and were rectified, and the silicone, whilst unsightly, did not compromise the roof's performance. It was also established that silicone had been correctly installed under flashings and on joints between materials as per compliance requirements. Further, silicone that had been applied under spouting was done after a Code Compliance Certificate was issued to try and alleviate the roof noise that was being complained about. Again, the silicone did not compromise the compliance of the roof.

Has the Respondent been negligent or incompetent?

- [11] The Board noted that there were aspects of the roof installation that had not been completed to an acceptable standard. However, it decided that the conduct did not reach the threshold for a disciplinary finding to be made. Therefore, the finding is that the Respondent has not carried out or supervised building work in a negligent or incompetent manner.

Signed and dated this 3rd day of May 2023



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.*