

Before the Building Practitioners Board

	BPB Complaint No. CB25997
Licensed Building Practitioner:	Daniel McClellan (the Respondent)
Licence Number:	BP137152
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	Wellington
Hearing Type:	In Person
Hearing Date:	8 August 2023
Decision Date:	21 August 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

Appearances:

L Castle and M Sotutu, Darroch Forrest Lawyers, 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.

Contents

Summary	2
The Charges	2
Evidence	3
Negligence or Incompetence	4
Has the Respondent departed from an acceptable standard of conduct?	4
<i>Building Consent Issues</i>	5
<i>Building Work Issues</i>	8

Summary

- [1] The Respondent was an employee of an unlicensed contractor who had control of the site and building work. The employer was also a joint venture owner of the property. The Respondent had some involvement in building work that required a building consent and in work that was not completed to an acceptable standard. Notwithstanding, the Board decided that he had not committed a disciplinary offence as, with respect to the requirement for a building consent, his role was peripheral to that of his employer, and in the context of the power imbalance between an employer, the conduct did not reach the threshold for disciplinary action to be taken. In terms of the substandard building work, it was not restricted building work, so it did not have to be carried out or supervised by a Licensed Building Practitioner, the Respondent's involvement was minimal, and what he did do did was not serious enough to warrant disciplinary action.

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 carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.
- [4] The matters that the Board gave notice that it would further investigate at the hearing were:

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.

- (a) the issues identified in the Notice to Fix from Kapiti Coast District Council dated 11 April 2022, in that, the Respondent may have failed to ensure that a building consent was in place for building work that required one, and/or
- (b) that the Respondent may have completed building work which did not meet Building Code requirements in respect of structural stability, fire protection and egress from the building, including as regards a raised timber deck.

Evidence

- [5] 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.
- [6] The Board received evidence prior to the hearing and at the hearing. It did not accept or admit some of the evidence that the Complainant sought to introduce on the basis that it was not relevant to the matters that the Board had resolved to investigate.⁴ The Complainant also submitted further evidence after the conclusion of the hearing. It was not in response to a Board direction and was not taken into consideration, as it would have been a breach of the principles of natural justice to do so.⁵
- [7] The complaint arose out of a failed joint venture between the Complainant's and Mr Michael Williams' respective entities. The joint venture has been the subject of litigation and court orders that are outside of the scope of the Board's jurisdiction and investigations.
- [8] The joint venture related to the purchase of an old building with the intention of converting it into useable spaces. Solid NZ Limited⁶ was to undertake the building work to convert the building, and it was that work that the Board resolved to investigate. Mr Williams was the sole shareholder and director of Solid NZ who employed the Respondent. Mr Williams, was, in effect, the Respondent's employer. Mr Williams was knowledgeable and experienced in building work but had chosen not to become licensed when the Licensed Building Practitioner regime was introduced. The Respondent was the only Licensed Building Practitioner in Mr Williams' employ.

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

⁴ The Complainant raised other allegations and made other complaints that were not pursued on the basis that regulation 9 of the Complaints Regulations applied.

⁵ Section 283 of the Act stipulates that the Board "*must comply with the principles of natural justice*" and with the Complaints Regulations. The principles of natural justice require that hearings are conducted in a manner that ensures that a respondent is given a fair opportunity to be heard, to contradict the evidence and that the decision-making process is conducted fairly, transparently and in good faith. In terms of a fair hearing, a respondent should be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. Allowing evidence from the Complainant to be admitted after the hearing had concluded would not have given the Respondent an opportunity to contradict it.

⁶ Solid NZ Limited was placed into liquidation on 23 February 2023 by a special shareholder resolution

Negligence or Incompetence

[9] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁷ 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*⁸ test of negligence.⁹ 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.¹⁰ 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.¹¹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [10] 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 Code¹² and any building consent issued.¹³ The test is an objective one.¹⁴
- [11] The question for the Board was the extent to which the Respondent was responsible for the building work that was under investigation.
- [12] Under the Licensed Building Practitioner regime, building work that is restricted is that which is carried out or supervised under a building consent on the primary structure or external moisture management system of a residential building. In short, if a building consent is not in place, regardless of the type or nature of the building work, it is not restricted, and a person does not have to be licensed to carry out or supervise it. This applies even if a building consent should have been obtained for the building work. That said, the Board can consider whether a Licensed Building Practitioner has been negligent if they knew or ought to have known that a building consent was required but carried out the building work regardless.

⁷ *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.

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ 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)

¹⁰ 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”

¹¹ *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”.

¹² Section 17 of the Building Act 2004

¹³ Section 40(1) of the Building Act 2004

¹⁴ *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.

- [13] Looking at the building work that was undertaken, the Respondent and Mr Williams described it as, firstly, exploratory work in anticipation of completing a design and engineering specifications and obtaining a building consent and, secondly, the completion of work that could be undertaken without a building consent under Schedule 1 of the Act.
- [14] Whilst both the Respondent and Mr Williams were involved in the building work to greater or lesser degrees (Solid NZ had up to six persons working on-site), it was clear to the Board that Mr Williams was the person who was directing and controlling the work that was being undertaken and that the Respondent was not involved in all of the work that was carried out.

Building Consent Issues

- [15] The Board's Notice of Proceeding, as regards the requirement for a building consent, related to a Notice to Fix issued by the Kapiti Coast District Council. It noted:

On 6 April 2022 a Council officer inspected the above property. Building work, namely Structural removals, alterations & substantial structural replacements, alterations to an intertenancy fire wall, complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties, deck structure over 1.5M high, without a building consent.

- [16] The starting point, as regards building consents, is that all building work must also be carried out under a building consent¹⁵ unless an exemption can be established.¹⁶ The burden of establishing that an exemption applies lies with the person seeking to rely on it. The main exemptions are those set out in Schedule 1 of the Act.¹⁷
- [17] Issuing a building consent and subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3. In *Tan v Auckland Council*¹⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

¹⁵ Section 40 of the Act

¹⁶ Section 41 of the Act

¹⁷ As provided for in section 42A of the Act

¹⁸ [2015] NZHC 3299 [18 December 2015]

- [18] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act. Justice Brewer noted:

[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.

- [19] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [20] The Respondent called an expert witness who provided an opinion on which aspects of the building work required a building consent. The opinion was well-reasoned and was of assistance to the Board in its deliberations. The opinion noted that aspects of the building work did require a building consent. The opinion concluded:

50. *I am of the opinion that some of the work undertaken should have had building consent before being undertaken to the extent that it was. This work includes the construction of the new wall between the residential and the commercial parts of the building. It also includes some structural alterations to the walls and roof, in particular in the commercial part of the building.*

51. *The escalation of work once exploratory investigations were carried out, in particular with older building such as this, is not unusual. It would have been best practice to consult with the local Council before proceeding further that those investigations, however I am not surprised that an LBP does not have an in-depth knowledge of Schedule 1 exemptions.*

- [21] The Board generally agreed with the opinion. The question for the Board was the extent to which the Respondent was engaged in the building work that required a building consent and his role with respect to it. The Board also considered whether the extent of the exploratory work was reasonable in the circumstances.

- [22] Counsel for the Respondent provided a table summarising the Respondent's involvement in the work and its classification:

Building Works	Respondent Involved
Chimney demolition	No
Firewall demolition	No
Acoustic wall	Yes
Internal walls	Yes
French doors	Yes
Deck	Yes
Toilet demolition	No
Internal walls – demolition	No
Internal walls – construction	Yes
Ceiling Joists	Yes

- [23] There was clear evidence that building work was carried out that did require a building consent and acceptance by the Respondent and his expert that this was the case. As noted, the question for the Board was the extent to which the Respondent was engaged in that work and the degree of responsibility that he must, from a disciplinary perspective, be held accountable for. In this respect, the Board needs to be satisfied that the Respondent's conduct meets the threshold for it to take disciplinary action as set out in paragraph [9] above as outlined in *Collie v Nursing Council of New Zealand*,¹⁹ and in *Pillai v Messiter (No 2)*,²⁰ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, where 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.

¹⁹ [2001] NZAR 74

²⁰ (1989) 16 NSWLR 197 (CA) at 200

- [24] The Board questioned the witnesses present as regards the extent of the Respondent's involvement. The Respondent accepted that he did carry out building work as outlined in the table above but did not see himself as the person making decisions regarding what work was being done and how. Further, he did not consider that he was supervising others, and it is noted that as it was not restricted building work, there was no requirement for a Licensed Building Practitioner to supervise. The Complainant gave evidence that the Respondent took a greater role in the building work than that which he was accepting.
- [25] The Respondent identified Mr Williams as the person in charge of the work and decisions and the person who was supervising others. Mr Williams accepted that this was the case. In questioning Mr Williams, it was clear to the Board that he was the person who was taking responsibility for what was being done and how it was to be done and that he had the knowledge and experience to undertake that role.
- [26] Taking the differing roles into consideration and noting the power imbalance between an employer (Mr Williams) and an employee (the Respondent), the Board decided that whilst the Respondent should have been aware of the need to obtain a building consent for some of the work that was undertaken, his role in it was such that his conduct did not reach the disciplinary threshold. In making this decision, the Board notes that the recently introduced Code of Ethics for Licensed Building Practitioners recognises the differing roles of Licensed Building Practitioners. It distinguishes between those that are employed versus those that are employers or are self-employed and places greater duties on the latter, and acknowledges that the former may be acting under the direction of an employer.²¹ Whilst Mr Williams is not a Licensed Building Practitioner and this is not a Code of Ethics matter, the intention and reasoning behind the differentiation in the Code is applicable.

Building Work Issues

- [27] The same finding applies as regards the building work issues. Whilst all building work must comply with the Building Code,²² and there was evidence that some of the work may not have been completed to that standard or that temporary work may not have been structurally safe, the extent of the Respondent's involvement and his role as an employee has resulted in the Board finding that even though the Respondent's conduct fell below an expected standard, the conduct was not serious enough to warrant disciplinary action. The majority of the work was undertaken by his employer, Mr Williams, who was experienced and knowledgeable in building.
- [28] The Respondent is, however, cautioned that in the future, if he is involved in work that he considers to be substandard or which requires a building consent, he should intervene and take action. The Board considers that he is now on notice, and he should note that any future infractions may not be dealt with in the same manner.

²¹ Refer clause 3 (Application) of the Building (Code of Ethics for Licensed Building Practitioners) Order 2021

²² Section 17 of the Act

- [29] Finally, the Board considered that the person that was responsible for the matters under investigation was Mr Williams. However, the Board does not have any jurisdiction over him, so it cannot make any findings as regarding his role.

Signed and dated this 15th day of September 2023



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.*