

Before the Building Practitioners Board

	BPB Complaint No. CB26058
Licensed Building Practitioner:	Daniel Morton (the Respondent)
Licence Number:	BP135524
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	Board Inquiry
Hearing Location	Blenheim
Hearing Type:	In Person
Hearing and Decision Date:	30 March 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, LBP, Design AoP 2
	Ms J Clark, Barrister and Solicitor, Legal Member

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 disciplinary offences under section 317(1)(b) or (d) of the Act.

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Summary

- [1] The Respondent was engaged to renovate an existing kitchen, laundry, and bathroom areas. When he began work, he discovered borer and rot, which then required the demolition of the lean-to laundry and back porch area of the existing structure. The rebuild needed an amendment to the building consent and a resource consent. The Board was concerned that the Respondent had continued working on the project before the amendment to the building consent was granted. The Board investigated that issue and decided the Respondent had not committed a disciplinary offence.
- [2] The decision was on the basis that the Council had given its express approval to the Respondent carrying on with the work irrespective of the amendment to the building consent not having been granted. There was a small window of time where the Respondent may have continued work prior to the Council giving its approval. The Board found that the Respondent had departed from an acceptable standard of conduct in that respect but that the departure was not serious enough for the Board to make a disciplinary finding.

Preliminary matter

- [3] At the hearing, the Board became aware that the Complainant no longer wished to proceed with the complaint and had advised of that by email dated 20 October 2022. The Board resolved to continue with this investigation as a Board Inquiry¹.

¹ The disciplinary process and the Board's jurisdiction under the Act are inquisitorial. It does not rely on a complainant to present or prosecute a case against a respondent. Regulation 17 of the Complaints Regulations states that if a complainant does not wish to proceed with a complaint, then the Board may proceed with its investigations by way of a Board Inquiry.

The Charges

- [4] 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.²
- [5] In this matter, the disciplinary charges the Board resolved to further investigate³ were that the Respondent may, in relation to building work at 10 Howick Road, Blenheim, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317 (1)(b) of the Act; and
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [6] In further investigating the above, the Board gave notice that it would be inquiring into whether the Respondent carried out or supervised building work that required an amendment to the building consent and/or the granting of a resource consent prior to the associated building work being carried out.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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

- [8] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ 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*⁶ test of negligence.⁷

² 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.

³ 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.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ *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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ 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)

- [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.⁸
- [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.⁹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [11] 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 Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²
- [12] The Respondent began renovating the kitchen, laundry, and bathroom areas of the original Complainant's house in mid to late January 2022. He discovered rot and borer in the existing lean-to laundry and back porch area and advised the homeowner that these raised issues of structural integrity and required an amendment to the building consent. The homeowner recalled a discussion about the borer but could not recall talking about the amendment.
- [13] The Respondent said that he spoke to the Council about the need for an amendment to the building consent, engaged the architectural designers to do the drawings, and obtained soil tests from the Engineer. The Engineer's soil test report is dated 3 February 2022, and the designers agreed that they were engaged in the first week of February. The Council also agreed that they were consulted by the Respondent.
- [14] The designer, Mr [OMITTED], gave evidence that after being instructed, he went on site and saw that the existing lean-to structure had been demolished, but no new building work had taken place.
- [15] The Respondent said that he discussed the situation with the Council and was given approval to continue with the work prior to the amendment being granted. He said that there were concerns over the weathertightness of the house by leaving it exposed waiting for the amendment to be granted.

⁸ 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"

⁹ *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".

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

- [16] On 16 February 2022, Paul [OMITTED] of the Marlborough District Council did the subfloor inspection. He stated on the inspection report¹³ and again in evidence at the hearing that he was happy for work to proceed before the amendment was granted.
- [17] Mr [OMITTED] was given a foundation and floor framing plan for the amendment from the Respondent at this inspection, which Mr [OMITTED] had provided to the Respondent. (Document 4.3, Page 507 of the Board's file)
- [18] [OMITTED], retired Marlborough District Council Building officer, supported Mr [OMITTED]'s decision to allow the work to continue and said that the Council had a discretion in these cases.
- [19] The resource consent issue was activated by the lodging of the amended building consent application on 11 May 2023. The demolished lean-to roof was raised and rebuilt as a continuation of the house's pitched roof. The amended roof plan created an encroachment issue for the neighbouring property. The resource consent application was lodged by Mr [OMITTED] on 26 May 2023, on the homeowner's instruction.
- [20] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.¹⁴
- [21] The Respondent's conduct in continuing to work before the amendment was granted was contrary to the Building Act requirements and the Board would ordinarily uphold the ground of discipline. However, in this case, the Respondent is the beneficiary of the Council's approval for the building work to continue, and the Board has applied the defence of "officially induced error".¹⁵ As such, the period under consideration is limited to approximately a two-week period. The question then is whether the conduct was serious enough to warrant a disciplinary finding.

Was the conduct serious enough

- [22] Based on court decisions,¹⁶ the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.

¹³ Subfloor framing inspection on 16 March 2023 (Document 4.3, Page 504 of the Board's file).

¹⁴ Section 45(4) of the Act

¹⁵ *Wilson v Auckland City Council (No 1)* [2007] NZAR 705 (HC) and *Tipple and Gun City Limited v Police* (1994) 11 CRNZ 132

¹⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74; *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA) at 200

[23] The Board finds that there may have been a small window of time before the 16 February 2023 inspection where work was undertaken by the Respondent. This was prior to the Council approving the continuation of work in the absence of an amended building consent. The Respondent had instructed the designer and an engineer prior to commencing. The Board holds that the conduct, in the specific circumstances, did not reach the seriousness threshold.

Has the Respondent been negligent or incompetent

[24] The Respondent has not carried out or supervised building work in a negligent or incompetent manner and has not committed a disciplinary offence under section 317(1)(b) of the Act.

[25] The Board reminds the Respondent that the requirements of the Building Act are clear. Building work must stop until an amended building consent is issued. There are risks of continuing to build before an amended building consent is granted, as the work is done, and the amendment may not be granted. He is cautioned for the future.

Contrary to a Building Consent

[26] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent.

[27] Unlike negligence, contrary to a building consent is a form of strict liability offence. The Board does not have to find that the departure was deliberate or a result of negligent conduct.¹⁷ 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.¹⁸ If it does not, then a disciplinary finding cannot be made.

[28] The Board finds that the Respondent did carry out supervised building work which was not in accordance with the building consent because changes were made prior to an amendment being granted. However, as with the findings under section 317(1)(b) of the Act, and on the basis of the Council's approval of the Respondent's actions, the Board finds that the conduct has not fallen seriously short of expected standards. The charge, therefore, does not meet the seriousness threshold and the Respondent has not committed a disciplinary offence under section 317(1)(d) of the Act.

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *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".

Signed and dated this 19th day of April 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.*