

Before the Building Practitioners Board

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| | BPB Complaint No. CB25950 |
| Licensed Building Practitioner: | Andrew Oughton (the Respondent) |
| Licence Number: | BP 129076 |
| 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

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Oamaru |
| Hearing Type: | In Person |
| Hearing Dates: | 11 January and 28 February 2023 |
| Decision Date: | 6 March 2023 |
| Board Members Present: | |
| | Mr M Orange, Chair, Barrister (Presiding) |
| | Mr D Fabish, LBP, Carpentry and Site AoP 2 |
| | 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 of the Board’s Decision

[1] The Respondent has not committed a disciplinary offence. The Board made its decision on the basis that the Respondent followed the directions of an authorised Building Control Officer.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

[3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, AS

¹ Section 341 of the Act.

² The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

DETAILED in the Building Inspection Report of [OMITTED], [OMITTED] dated 16 April 2021 and the Addendum dated 11 August 2021 (Documents 2.1.22 and 2.1.54, Pages 47 and 79 of the Board's file on CB25936);

- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, AS DETAILED in the above-named report and Addendum with particular focus on:
- I. Changes made to the longrun corrugated iron cladding system, from direct fixed to a cavity system, including the changes to the associated flashings, facings and installation of window and door units;
 - II. Changes made to the natural stone veneer installation, including the construction of the cavity system, installation and position of weep holes/vent perpend, and changes to flashing details;
 - III. Installation of the longrun corrugated iron roofing and associated roof flashings; and
 - IV. Failure to ensure the appropriate amendments and/or minor variations to the building consent have been applied for and approved; and
- (c) breached section 314B of the Act contrary to section 317(1)(h) of the Act IN THAT, he may have carried out design work for which he is not licensed and therefore not competent to carry out in respect of the on-site changes to cladding systems and construction details in the approved building consent.

Function of Disciplinary Action

[4] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[5] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁵ Collins J. noted that:

"... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

[6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... 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.

[7] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct breaches the Code of Ethics for Licensed Building Practitioners⁷ (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[8] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

[9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Consolidation

[11] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

- [12] The Board sought agreement for consolidation of this matter with complaint numbers CB25936 and CB25951. The consent of all those involved was forthcoming. The matters were consolidated.

Procedure

- [13] An initial hearing was held on 11 January 2023. At the hearing, the Board heard extensive evidence about the involvement of [OMITTED], a Building Control Officer, with the Mckenzie District Council. The Board decided that, prior to it making a decision, it would be appropriate to receive evidence from Mr [OMITTED]. The hearing was adjourned to 28 February 2023 when the Board received his evidence.

Evidence

- [14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁸. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [15] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [16] In addition to the documentary evidence before the Board heard evidence at the hearing from:

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|----------------|----------------------------|
| Andrew Oughton | Respondent in this matter |
| [OMITTED] | Respondent in CB25936 |
| [OMITTED] | Respondent in CB25951 |
| [OMITTED] | Complainant in all matters |
| [OMITTED] | Report writer |
| [OMITTED] | Designer |
| [OMITTED] | Carpenter |
| [OMITTED] | Labourer |
| [OMITTED] | Building Control Officer |

Background

- [17] Mr [OMITTED] was engaged, by way of his business [OMITTED] Limited, to carry out a new residential build for the Complainant. The design for the build was developed by Mr [OMITTED] who was contracted by the Complainant. Mr [OMITTED] did not

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

provide observation or management services during the build but did have some engagement with Mr [OMITTED] and Mr Oughton during the build, including providing documentation for a change of roofing.

- [18] Mr [OMITTED] was the project manager. He did not carry out or supervise building work. Rather, he engaged Andrew Oughton to carry out and supervise the work as a subcontractor. The Respondent also contracted [OMITTED] and [OMITTED] as on-site labour to assist Mr Oughton. A copy of the building consent was kept on-site in a storage container to which all subcontractors had access.
- [19] Mr [OMITTED] arranged materials, in conjunction with Mr Oughton, liaised with the Complainant and arranged sub-trades, other than those that the Complainant arranged. Mr Oughton called for the Building Consent Authority (BCA) inspections and liaised with Mr [OMITTED], the designer. Mr [OMITTED], who carried out stone masonry cladding work, did not have any interactions with the BCA.
- [20] A Code Compliance Certificate for the build was issued on 9 February 2018.
- [21] Following completion and the issue of the Code Compliance Certificate, the Complainant raised various issues with the build and, in particular, with leaks that were occurring. A report from [OMITTED] of [OMITTED] was obtained by the Complainant.⁹ That report raised various issues, which the Board resolved to further investigate at the hearing. They were:
- (a) changes made to the longrun corrugated iron cladding system, from direct fixed to a cavity system, including the changes to the associated flashings, facings and installation of window and door units;
 - (b) changes made to the natural stone veneer installation, including the construction of the cavity system, installation and position of weep holes/vent perpend, and changes to flashing details;
 - (c) installation of the longrun corrugated iron roofing and associated roof flashings; and
 - (d) failure to ensure the appropriate amendments and/or minor variations to the building consent have been applied for and approved.

Longrun corrugated iron cladding system

- [22] The roofing was installed by Mr Oughton. The plans called for a direct fix cladding. Mr [OMITTED] and Mr Oughton, in consultation with Mr [OMITTED], who was, at the time, a Building Control Officer (BCO) at the McKenzie District Council and the BCO who carried out the on-site inspections, considered that a cavity system should be used as it was a better system. Mr [OMITTED] and Mr Oughton gave evidence that Mr [OMITTED] did not require any form of consent change to be processed prior

⁹ Mr Milson's report set out his qualifications and experience which included a Design AoP Licence and New Zealand Institute of Building Surveyors membership.

to the associated building work being carried out. They stated that the work was carried out in accordance with the provisions of E2/AS1. They did not consult with Mr [OMITTED], the designer. The work was subsequently inspected and passed by the BCA. The change was not noted on any of the BCA inspection notices.

[23] Mr [OMITTED]'s report noted:

The Colorsteel cladding has not been installed as per the consented documents, however, the change to a cavity system is likely to be an improvement of what was specified, provided that the required back-flashings have been installed under the windows to channel unplanned water ingress back out to the exterior at the base of the cladding.

[24] Mr [OMITTED]'s report also raised other quality issues with the wall cladding, which were noted as being poorly finished.

Natural stone veneer installation

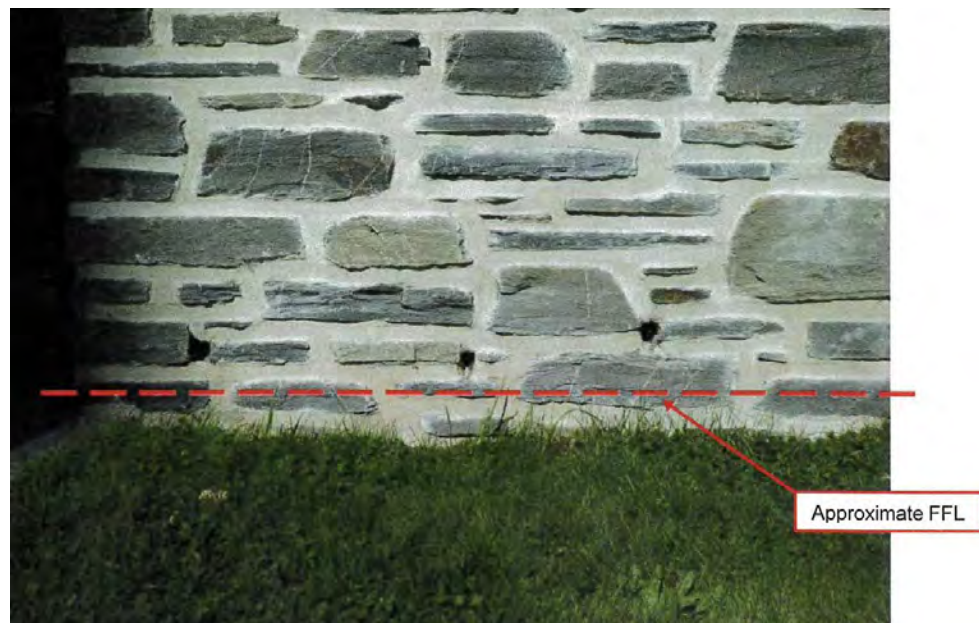
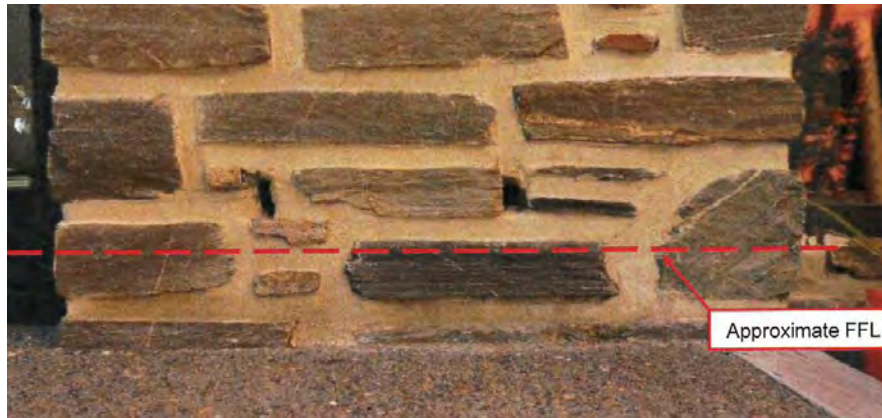
[25] Mr [OMITTED] provided opinions on the stone cladding based on photographs he reviewed as well as from his inspection of the completed work. His report noted:

Following our visual inspection we conclude that there is evidence that the building is still leaking around the dining room west window, therefore the building is not meeting the mandatory provisions of the NZBC. The stone cladding has not been built in accordance with the consented documents, in that the joinery head and sill flashings have been omitted. The jambs have not been constructed in accordance with the consented detail, however, destructive investigation is required to identify if a suitable alternative flashing system has been used at the jambs. The weep holes have been incorrectly placed either at FFL or above, instead of at the bottom of the cavity as they should be.

[26] The building was consented as a dry cavity system. Mr [OMITTED] and Mr Oughton gave evidence that Mr [OMITTED], the BCO assigned to the build, directed that the build could not be carried out in the manner that was consented, including with how the cladding was finished around windows. Mr [OMITTED] stipulated that a different methodology be used, and a solution was arrived at in consultation with him. Mr [OMITTED]'s directions and that methodology were not recorded in writing or reflected in any of the building inspection reports. Mr [OMITTED] was not consulted about the change.

[27] Mr [OMITTED] stated that the consented method to finish the cladding around the windows was not one that he had seen before.

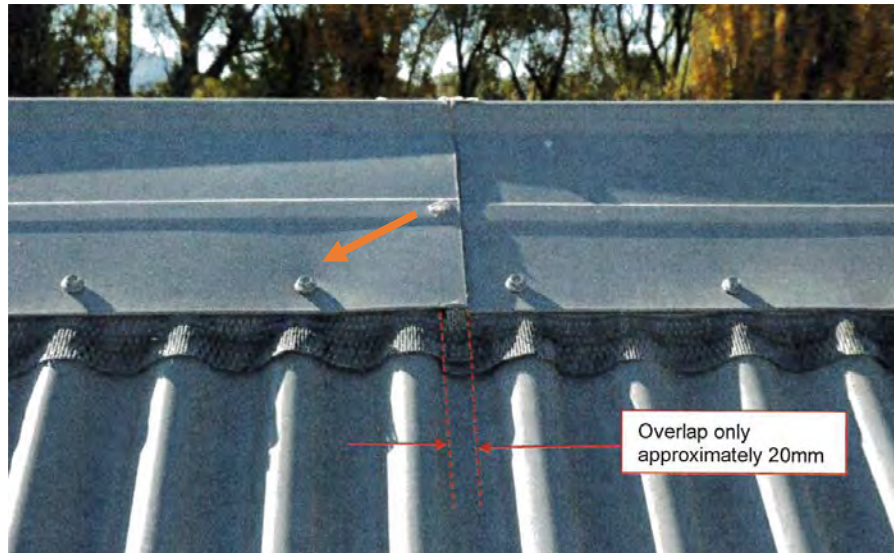
[28] There was some dispute over whether it was a dry cavity system and whether vent holes were for the purpose of ventilation or were, as regards bottom vent holes, designed to be weep holes. Mr [OMITTED]'s report stated that the holes were above finished floor level and that they would not perform as weep holes.



- [29] Mr [OMITTED] questioned, from his review of photographs, whether flashings had been installed during the construction process.
- [30] Questions were also raised about the brick ties that were installed by Mr [OMITTED]. He stated he had used 35mm screws affixed to the structural cavity battens and that this was how Mr [OMITTED] had instructed the ties to be installed.

Longrun corrugated iron roofing

- [31] Mr [OMITTED]'s report raised issues with the installation of roof flashings and whether there was an expansion joint installed under a ridge capping. Mr Oughton, who installed the roof and flashings, stated that an expansion joint was installed and that it had been cut in underneath the overlapping ridge cap above the fixing screw line as per the requirements of E2/AS1. Mr [OMITTED] noted that a pot rivet had been installed partway along the ridge cap (as shown in the following photograph) and that it would, if the overlap had been installed as described, have also penetrated the expansion joint.



- [32] Mr [OMITTED] gave his opinion that the pot rivet was at risk of shearing when the ridge expanded when it heated up and that the method used was that for a sill flashing, not a ridge capping.
- [33] Mr [OMITTED] gave evidence the pot rivet was installed after the work had been completed by him when he was trying to locate possible leaks, and the ridge cap was removed. The Complainant did not agree with Mr [OMITTED]'s evidence.

Consent changes

- [34] The evidence received on 11 January was that whilst early changes to the building consent were processed through the designer and the Building Consent Authority, later changes to the cladding were not documented as Mr [OMITTED], the on-site Building Control Officer, did not require any form of documentation.

28 February 2023 evidence

- [35] The hearing was resumed on 28 February 2023, and evidence was received from Mr [OMITTED], who was, at the time the build was undertaken, a Building Control Officer at the McKenzie District Council. The evidence received at the 11 January 2023 hearing was put to him and, in particular, that he had provided on-site directions as to how the building work was to be undertaken and that he did not require the submission of documentation for on site changes.
- [36] With respect to the cladding changes, Mr [OMITTED] gave evidence that he directed the changes, including those around the windows, and that those changes were an improvement.
- [37] Mr [OMITTED] noted that the consented methodology for the longrun iron cladding was direct fix, and the cavity system he directed was a "betterment".
- [38] With regard to the stone cladding, Mr [OMITTED] confirmed that weep holes were not installed, but that vent holes designed to equalise pressure were because it was

a dry cavity system. He also confirmed that he directed the methodology to be used around windows.

- [39] With respect to head flashings, Mr [OMITTED] stated they were not required as the windows went up to the soffit, and it was an acceptable solution for them to be siliconed as opposed to a flashing being installed.
- [40] Mr [OMITTED] confirmed that he did not direct or require any form of change documentation to be filed and that he considered the changes he directed were minor variations, and that he was authorised to process them on-site.
- [41] Mr [OMITTED] was asked why the changes were not noted in the inspection notes. He stated that, at the time, they were short-staffed, were changing systems and that there was no formal policy in place to deal with on-site changes. Mr [OMITTED] outlined for the Board his extensive experience and qualifications as a builder and Building Control officer.
- [42] Finally, with regard to the brick ties, Mr [OMITTED] confirmed that he had directed the use of 35mm screws into the battens and that it was compliant as an acceptable solution as the battens were at 300mm centres and were fixed with 90mm nails. Mr [OMITTED] also noted that whilst the Stonemason's Best practice may stipulate other methodologies, that document is not a Compliance document.

Board's Conclusion and Reasoning

- [43] The Board has decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); or
 - (c) breached section 314B of the Act (s 317(1)(h) of the Act).
- [44] The Respondent carried out the building work complained about and was involved in the changes to the building consent that formed part of the Board's investigations. Ordinarily, the Board would find that he is responsible for any changes to the building consent that occur during the build that were not dealt with in an appropriate manner.
- [45] In this matter, the changes were directed by a Building Control Officer but were not captured on the building consent file. The question for the Board is whether it was reasonable for the Respondent to rely on those directions and whether he was expected to carry out any further action notwithstanding them.
- [46] The courts have stated that a person is entitled to rely on advice or directions from a person in a position of regulatory authority. In *Wilson v Auckland City Council (No 1)*,¹⁰ the appellant was convicted of having carried out building work pending the

¹⁰ [2007] NZAR 705 (HC)

grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*¹¹ 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.

- [47] The Board considers the Respondent was given and relied on official advice and directions from Mr [OMITTED], an authorised Building Control Officer and that, in the circumstances, it was reasonable for him to take the position that as Mr [OMITTED] had issued those directions and had passed the associated inspections, no further action was required. On that basis, the Board finds that the disciplinary offences have not been committed.
- [48] Turning to the issues with the roofing iron, the Board was satisfied that the work had not been carried out in a non-compliant manner.

Signed and dated this 23rd day of March 2023

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a long horizontal stroke extending to the right.

M Orange
Presiding Member

¹¹ (1994) 11 CRNZ 132