

Before the Building Practitioners Board

	BPB Complaint No. CB26042
Licensed Building Practitioner:	Jason Pullar (the Respondent)
Licence Number:	BP106243
Licence(s) Held:	Carpentry and Site AoP 2

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	Tauranga and by audio visual link
Hearing Type:	In Person
Hearing Dates:	14 April 2023 and 16 June 2023
Decision Date:	10 July 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:

Mr T Refoy-Butler 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.

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Summary

- [1] The Respondent has not committed a disciplinary offence. In relation to the most serious issue (non-compliant installation of weatherboards), the Board found that it was not satisfied, on the balance of probabilities, that an oral directive to install them in the manner that there were installed had not been issued. As regards the other issues, one was not serious enough to warrant disciplinary action (window flashings), and the Respondent was not responsible for the other (balustrade connections).

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:
- (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; and/or
 - (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.

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.

- [4] The Board gave notice that, in considering the matters alleged under sections 317(1)(b) and (d) of the Act, the Board would be investigating the installation and fixing of the shiplap weatherboards, the installation of window flashings, and glass balustrade connections to a 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.

Negligence or Incompetence

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

Has the Respondent departed from an acceptable standard of conduct?

- [7] 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 Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹

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

⁴ *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.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ 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)

⁷ 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”

⁸ *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”.

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

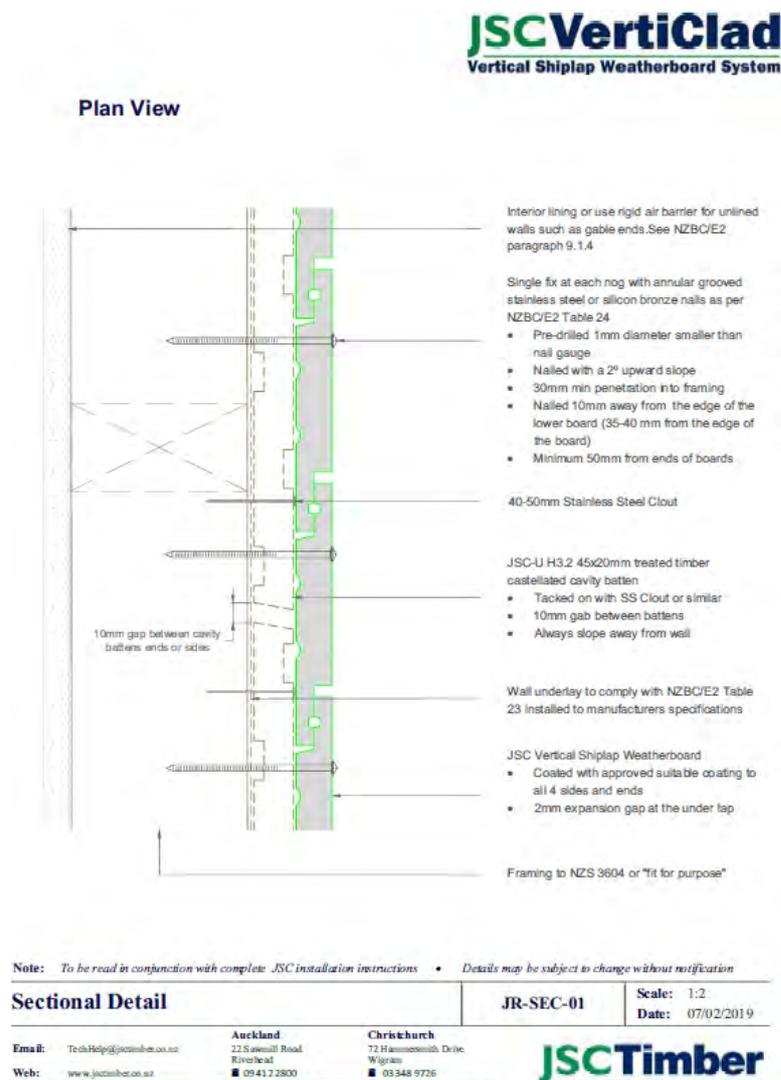
¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

- [8] There were three issues under consideration: weatherboards, window flashings and balustrade connections. Each is dealt with separately.

Weatherboards

- [9] At the heart of the matter was whether the Respondent had installed the weatherboards in accordance with the building consent. The product installed was a proprietary weatherboard manufactured by JSC Timber. The building consent included the manufacturer’s specification for the product, which, in turn, provided details on how the product was to be installed, including the methodology for fixings. The method of fixing the weatherboards was the issue before the Board.

- [10] The manufacturer’s specification (and weatherboard installation generally)¹² requires an expansion gap between boards, nailed 10mm away from the lower board (35 – 40mm from the edge of the board), as shown in the following diagram taken from the specification in the building consent:



¹² Weatherboards must meet the requirements of Clause E2 of the Building Code. E2/AS1 provides details on how compliance with clause E2 can be achieved. The manufacturer’s specifications were consistent with E2/AS1.

- [11] The Respondent's evidence was that he started the installation in a method that was consistent with the above but that soon after starting to install the cladding, issues were being experienced with weatherboard cupping and that he was given an oral directive by a Building Control Officer (BCO) who was carrying out a Post Wrap/Cavity Inspection¹³ to drill through the top and bottom boards 15-25mm from the lap with an oversized hole on the top board and to then nail through both boards to prevent cupping and splitting.¹⁴ The Respondent's employee gave evidence that he recalled the oral direction being given. The following picture shows the nailing pattern that was used after the direction was supposedly issued:



- [12] The Post Wrap / Cavity inspection did not record the oral instruction. It did note a formal directive to change the consented castellated batten to the underside of the lower roof junction to a solid batten to prevent venting into the roof space. When the oral directive to change the fixing method for weatherboards was put to the BCO, who no longer worked for the Whakatane District Council, he stated that if an instruction is not written in an inspection record, it would not have happened. A senior BCO from the Council present at the hearing stated that it was possible that an oral could have been given on-site but not recorded.

¹³ Inspection dated 3 September 2019 completed by [OMITTED].

¹⁴ Approximately five boards had been installed at that time.

- [13] The Respondent was asked why he continued with the weatherboard installation in the manner directed without a formal written directive having been issued. He responded that, in essence, you do as you are told when it comes to instructions issued by a BCO.
- [14] The Whakatane District Council did not raise the issue with the method of fixing weatherboards in subsequent inspections. The final inspection noted other issues with the cladding but did not reference the method of fixing.
- [15] It was clear that the weatherboards were not installed as per the manufacturer's specifications. Nor were they installed in accordance with an acceptable solution for compliance with Clause E2 of the Building Code, such as E2/AS1. On a prima facie basis, the building work was not carried out to an acceptable standard.
- [16] The question for the Board is whether an oral directive to depart from the consent methodology was issued and, if it was, whether the Respondent was entitled to rely on it. The question arises because reliance on advice or instructions from a person in a position of authority can be a defence. In *Wilson v Auckland City Council (No 1)*,¹⁵ the appellant was convicted of having carried out building work pending the 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*,¹⁶ 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.
- [17] Whether an oral directive was given comes down to a question of credibility. The Respondent and his employee were adamant that a directive was issued at a Pre Wrap/Cavity Inspection. The BCO, who was alleged to have issued the directive, denied giving it. Unlike other on-site directives, it was not recorded in writing. One directive from the BCO that was recorded (as regards cavity battens) did deviate from the manufacturer's specifications.
- [18] As previously noted, the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*,¹⁷ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists,

¹⁵ [2007] NZAR 705 (HC)

¹⁶ (1994) 11 CRNZ 132

¹⁷ [2009] 1 NZLR 1

between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [19] In this matter, there was competing evidence. The Respondent, who has considerable experience, claims he changed how he was fixing the weatherboards because a BCO instructed him to. The BCO denies that instruction. It would seem to the Board that it would be unusual for an experienced carpenter to use the method of installation for reasons other than being told to. At the same time, it would be unusual for an instruction of that type to be issued and for it not to be recorded, especially when others were. That said, the BCO did issue an instruction that deviated from the consent in relation to cavity battens.
- [20] The Board notes the reference in *Z v Dental Complaints Assessment Committee* to “stronger evidence” being required. In this matter, the Board has formed the view that there is insufficient evidence to establish, on the balance of probabilities, that the oral direction was not given. As such, the defence of officially induced error is open to the Respondent, and, on that basis, the Board finds that whilst the manner in which the weatherboards were installed was not acceptable, the Respondent was not negligent or incompetent as he may have been following a directive issued to him by a person in authority (a Building Consent Officer).

Window Flashings

- [21] The final inspection noted that window flashings were not installed as per the building consent. It was clarified at the hearing that the issue included missing stop-ends, gaps in sealant foam, and flashings not turned up. The witness was not able to stipulate the extent of the alleged non-compliance. The Respondent’s evidence was that bar one stop-end that he knew was missing, the stop-ends had been installed, and other trades may have dislodged them during the build process. He further stated that flashings were not turned up because doing so would have damaged the powder coating. He had no explanation for why there may have been gaps in the foam sealant.

- [22] In considering the above, the Board has decided that whilst there was some evidence of building work that was not carried out to an acceptable standard, the conduct was not serious enough to warrant disciplinary action.
- [23] In *Collie v Nursing Council of New Zealand*,¹⁸ when discussing the threshold for disciplinary matters, the Court stated:

[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.

- [24] In *Pillai v Messiter (No 2)*,¹⁹ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, 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.

- [25] Considering those judicial directions, the Board considered that the Respondent's conduct did not meet the tests. In short, there was no deliberate departure or indifference displayed.

Balustrade Connections

- [26] The evidence heard was that the Respondent created the structure for the balustrade but that he did not install the balustrade. The installation was carried out by [OMITTED], who were paid directly by the Complainant. The balustrade system installed differed from what was consented. The Respondent stated he provided the structure as per the directions he received from [OMITTED].
- [27] The issue the Board was investigating was the framing support for the balustrade that was installed. The Board was satisfied that the Respondent did not install the balustrade and was not responsible for the issue raised.

Has the Respondent been negligent or incompetent?

- [28] The Board finds that the Respondent was neither negligent nor incompetent. He is cautioned, however, that he should always obtain written evidence of any directions received if those directions depart from a building consent. The risks attendant to relying on oral instructions were all too apparent in this matter, and if written instructions had been obtained, a hearing would not have been required.

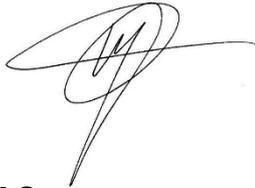
¹⁸ [2001] NZAR 74

¹⁹ (1989) 16 NSWLR 197 (CA) at 200

Contrary to a Building Consent

- [29] Having made the findings above, the Board need not consider the ground of discipline under section 317(1)(d) of the Act as, in short, the same defence applies as regards the weatherboards, the windows flashing issues do not reach the required threshold and the balustrade connections were not carried out by the Respondent.

Signed and dated this 2nd day of August 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.*