

Before the Building Practitioners Board

	BPB Complaint No. CB25847
Licensed Building Practitioner:	Callum Sheridan (the Respondent)
Licence Number:	BP123187
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	Auckland
Hearing Type:	In Person
Hearing Date:	24 May 2023
Decision Date:	18 June 2023
Board Members Present:	
	Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
	Ms K Reynolds, Construction Manager
	Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances: Mr J Donkin 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 under section 317(1)(b) of the Act.

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Summary

- [1] The Respondent’s company was engaged by the Complainant to provide labour, subtrades and materials for various construction works across a number of commercial buildings at [OMITTED], Auckland. The work related to the construction or renovation of buildings for a scientific facility.
- [2] The Respondent and the Complainant disagreed over the representations made to each other regarding the need for a building consent for the work. The Board was concerned that the Respondent had either failed to ensure a consent was in place before work commenced or continued to carry out or supervise work on the project, which required a building consent. The Board investigated those issues and decided the Respondent had not committed this disciplinary offence.
- [3] The decision was made on the basis that the Respondent, supported by considerable corroborating evidence, established that he had raised the issue with the Complainant and had then stopped working on the part of the project which required the building consent.
- [4] In addition, the Board had advised that there were aspects of workmanship it would investigate. The Respondent did not carry out the building work under investigation. He may have been the supervisor. The building work was not restricted building work,¹ and there was no statutory obligation on the Respondent, as a Licensed Building Practitioner, to supervise the work. The Board can, however, still inquire as to the appropriateness of supervision even if it is not statutorily required. In this case, the Board found that the amount of supervision responsibility taken on by the Respondent was minimal, and his role was more as a project manager. The Board, therefore, found that the disciplinary offence had not been committed.

¹ Building (Definition of Restricted Building Work) Order 2011 – this was a commercial building and as such did not meet the primary definition of a “house or small to medium apartment building”

The Charges

- [5] 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
- [6] In this matter, the disciplinary charges the Board resolved to further investigate³ 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:
- (a) IN THAT, he may have failed to ensure that a building consent was in place prior to him undertaking the work and may have carried out or supervised building work which required a building consent; and
 - (b) AS SET OUT IN the report of [OMITTED] dated 10 September 2022 in respect of Section 3, B1-Structure and B-2 Durability; and
 - (c) AS SET OUT IN the Auckland City Council file for the processing of the Certificate of Acceptance application, and in particular, the Engineer's rebar scanning review and structural assessment reported 9 August 2021.

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 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 A threshold test applies to both. Even if

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)

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"

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?

- [9] 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
- [10] There were two aspects of the inquiry. Firstly, whether the Respondent's conduct was negligent or incompetent for failing to ensure a building consent was in place prior to the work being undertaken and/or continuing to do building work when a building consent was required. The second aspect, in respect of the alleged workmanship issues, was whether the Respondent's supervision was negligent or incompetent.

Failure to ensure a building consent was in place; Continuing work when a building consent was required.

- [11] Building work must not be carried out except in accordance with a building consent, unless it is building work (as described in Schedule 1 of the Act) for which building consent is not required.¹³ A builder has further responsibilities to ensure consented work is carried out in accordance with that consent and that non-consented work complies with the building code.¹⁴
- [12] The Respondent gave evidence in his written response that the scope of the work was very general in nature and was constantly changing, with direct instructions being given by the Complainant to the crew on site. He stated that the original scope of work in February 2021 was *“re-lining the inside of the old milking shed and replacing roof iron, lining the inside of an existing steel framed barn, patching a concrete slab in the stables and creating non structural partition work, removing a commercial kitchen in the lodge and replacing the sinks with new sinks, replacing the hot water cylinder with a large external one, replacing vinyl flooring, adding a non-structural partition wall and undertaking further renovation works, adding lights and heating to the chapel, adding guttering and water tanks, installing new water tanks. “*

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.

¹³ Sections 40 and 41 of the Act

¹⁴ Section 14E of the Act

- [13] As regards the need for a building consent for the work at this initial point, the Respondent said:
- (a) The contractual responsibility for obtaining consents was on the Complainant. The Respondent stated that he *“was not engaged to provide any advice on this process and [the Complainant] did not seek any input from me...”*
 - (b) He accepted the Complainant’s statements that a different consenting process applied to this scientific facility and consent could be granted retrospectively by way of a Certificate of Acceptance.
 - (c) The Complainant assured him that he would *“sort it out later”*.
- [14] Mr Kirkland of the Auckland City Council agreed that at the start of the work, as initially anticipated, it was possible that the work was within the Schedule 1 exemption from the need to obtain a building consent on the basis that the work was comparable and the replacement was in the same position.
- [15] In the process of undertaking the milking shed renovation work, the Respondent discovered rotten untreated timber. He had this work demolished and at that point, advised the Complainant that the building required a building consent.
- [16] The Respondent says that in response to raising the issue of a building consent, the Complainant said that the works could not stop due to financial pressures. He stated in his written response – *“...the longer this went on, the less comfortable I became with it, and this contributed to the breakdown of our relationship by late March 2021. Around this time I asked [OMITTED] to stop work on the insectary/milking shed as [the Complainant] could not provide any proof of a Council exemption to the normal consenting process....We did not undertake any further work on the building after this...”*
- [17] The Respondent reiterated at the hearing that he stopped work in mid/late March 2021 on the milking shed as a direct result of his concerns over the building consent requirement. Work continued on other buildings on the site until payment issues arose, and the Respondent left the site on 16 April 2021.
- [18] The Respondent provided handwritten notes from a site meeting on 23 February 2021. At the hearing, he confirmed that the notes were taken simultaneously at the meeting and that the handwriting was his. In attendance at the meeting were the Respondent, the Complainant, the Complainant’s business partner, and [OMITTED] (one of the Respondent’s workers). These notes record -
- Business Partner –*“wants to stop construction on milk shed until further notice”*
- Complainant-*“no we need to keep going we loose [sic] 1 mil for month having this not running”*

Respondent – *“extra work, if PPL [complainant] asks council they will say need consent”*

Complainant- *“ no will communicate that later get consent or letter of acceptance can’t stop”*

Respondent- *“so happy to proceed & will this affect subbie timing”*

Complainant – *“yes ok fine sort later”*

Complainant - *“ so ok to proceed without consent on milk shed SF [complainant] to sort later?”*

Complainant- *“this is fine”*

Complainant – *“Add clear light roof to side milk shed”*

Respondent- *“This will make bigger foot print”*

Complainant- *“ok can always get letter of acceptance building is over 100 years old it is existing can deal with later. No time to stop. Push on as need to get valued.”*

- [19] The Respondent also provided written statements from Mr [OMITTED], Mr [OMITTED], Mr [OMITTED], and Mr [OMITTED], all of whom worked on the site. These statements support that the issue of a building consent was brought to the Complainant’s attention and that his responses were he had a *“special council dispensation”, “he could sort it out later”, “just get on with it because he [Complainant] can’t afford to wait and he could sort it out later”, “We were assured on multiple occasions that architectural drawings and consents were underway and would be produced on the back of the renovation/ setup of the labs (it was all about the urgency of the setup so they could relocate facilities and start working)”, “due to a dispensation, this was no longer needed.”*
- [20] The Respondent’s evidence that the Complainant gave direct instruction to the crew on site and made multiple changes to the scope of the work is also supported by the statements of the workmen referred to above.
- [21] Ms [OMITTED] was engaged by the Complainant in a project management role and lived on site. She remained in this role until after the Respondent left the site. She gave evidence that the Complainant was onsite all the time, always talking to the contractors and that the *“pressure on the contractors was on a whole other scale”*.
- [22] Ms [OMITTED] also confirmed that the Respondent raised the issue of a building consent with the Complainant, and she said that she had also raised it with the Complainant. The Complainant’s response, according to Ms [OMITTED], was that it *“had been taken care of”* and that *“he was going to be following it up”*.
- [23] Ms [OMITTED] also confirmed that she attended most of the weekly site meetings with the Respondent and Complainant and that the Respondent took notes at

every meeting. She also agreed that the Complainant said that he had a dispensation for the building consent and could not stop work as he would lose money.

- [24] The Complainant had a different view of the situation. In many respects, his evidence directly contradicted that of the Respondent. The Complainant stated that he *“disagreed entirely”* with much of the Respondent’s and Ms [OMITTED]’ evidence. He stated:
- (a) He did not speak directly to the Respondent’s team and denied he gave them any instructions.
 - (b) He did not say the building was exempt from needing a building consent.
 - (c) He relied on the Respondent telling him that a building consent was not needed over several conversations at the weekly site meetings.
 - (d) The first he became aware that the building required a building consent was when he had funding issues and required a valuation in April 2021.
 - (e) He never put forward financial pressure as a reason for not seeking a building consent.
 - (f) The need for a building consent arose because the Respondent demolished the milk shed without his permission.
 - (g) It should have been clear to the Respondent from the beginning that a building consent was needed because the greenhouse was an additional building outside the footprint of the original building.
 - (h) The notes of the meeting on 23 February 2021 produced by the Respondent were a *“fabrication”*.
- [25] Early in the project – the Complainant gave the date as 19 January 2021 – the Respondent was shown a powerpoint presentation by the Complainant. This powerpoint presentation was provided to the Board after the hearing by the Respondent’s Counsel. The Complainant pointed to the reference to an addition to the existing footprint as *“100m2 Venlo style glasshouse extension to Southern facing wall”*. This reference the Complainant argued should have alerted the Respondent to the need for a building consent.
- [26] To this, the Respondent countered that the powerpoint presentation was very early on, and there had been many changes to the scope of the project since then. As evidence that he had not initially picked up on the addition of the greenhouse the Respondent stated that he had framed up an area inside the milk shed building to include windows. He would not have done this if he had appreciated that the greenhouse was to be added on to the building. The Respondent points to email correspondence with the Complainant on 7 and 8 March 2021 to support this.

- [27] Ms [OMITTED] concurred with the Respondent and said that the greenhouse as an addition was a change in the last few weeks of the project, and before that, it had been part of the milk shed building.
- [28] In deciding whether the Respondent's conduct was of an acceptable standard (in respect of the building consent allegations), the Board has to address the conflicts in the evidence before it. The Board decided that it preferred the evidence of the Respondent over that of the Complainant. The Board made this finding for two reasons – inconsistencies in the evidence given by the Complainant and the weight of evidence supporting the Respondent's evidence.
- [29] Two matters stood out as demonstrating inconsistencies in the Complainant's evidence. First, in denying that he spoke to or instructed the workers, he said that he worked all day off site and only occasionally came across the workers in the evening. Later on, however, he agreed when questioned by the Board that his business relocated to the site in March 2021, and he was therefore on site all day from then. Secondly, the Complainant rejected as a fabrication the notes of the February 2021 meeting produced by the Respondent. However, those notes recorded an issue which the Complainant raised – namely that his business partner wanted to stop work but that he had overrode him – thus giving credibility to the authenticity of the notes.
- [30] Of the greatest significance in making the Board's finding is the substantial corroborating evidence from independent witnesses. Four workers and Ms [OMITTED] supported the evidence of the Respondent in the crucial aspects of the Respondent questioning the need for a building consent and the Complainant maintaining for various reasons that one was not necessary.
- [31] The Board finds, therefore, that in respect of the issues concerning the building consent the Respondent has not departed from an acceptable standard of conduct. The Board accepts on the balance of probabilities that the Respondent rightly did not consider that the project required a building consent initially, raised the issue appropriately multiple times in the circumstances of the assurances he was given by the Complainant, and rightly stopped work on the relevant building when he was no longer comfortable with the position.
- [32] The Board, however, reminds the Respondent of his obligations as a Licensed Building Practitioner in respect of building consents¹⁵ regardless of the contractual allocation of responsibility but also notes the acknowledgement made by the Respondent *"I accept as an LBP I have my own responsibilities independent of what the Contract said. If I was to do this all again, I would have refused to progress any works that might need a consent until such time as [the Complainant] could prove that he had the claimed exemption, or until he provided the necessary consent."*

¹⁵ Sections 14E and 40 of the Act.

Negligent or incompetent supervision of building work

- [33] The Respondent did not carry out any of the building work under investigation. The aspect of conduct that the Board is considering is his supervision of the building work considering the alleged items of poor workmanship as identified in Mr[OMITTED]'s report dated 10 September 2021.
- [34] The Respondent described his role as organisational. The team structure on site included 3 qualified carpenters of 10, 6 and 3 years' experience, respectively, together with hired labourers. The Respondent had worked with one of the men for 10 years and continues to employ two of them. The Respondent, in his written response, stated – *"I acted as project manager, in terms of helping [the Complainant] to coordinate the other trades, to sequence the build and to generally keep it heading in the right direction. I maintained general oversight and supervision of the Project."* He stated that the team on site was supervised by Mr [OMITTED] and that he was responsible for day-to-day matters on the build. Mr [OMITTED] brought issues to the Respondent's attention when needed, and the Respondent attended weekly site meetings with the Complainant and the workers on site.
- [35] Mr [OMITTED] supports this description of the workforce setup. He said, *"[the Respondent] would come to site meetings each week and stop in a few times a week, mainly to chat to the [Complainant] and to coordinate the subtrades. He will leave it to me to run the carpentry side of the project. It was my role to oversee the day to day carpentry work onsite... I would make the calls about the actual; building work. I could call [the Respondent] whenever I wanted...none of it was restricted building work so I was happy to supervise the ...guys on site."*
- [36] The building work in this project was not restricted building work as defined in the Act. As such, there was no requirement under the Act for the building work to be carried out or supervised by a Licensed Building Practitioner. This is because of the combined effect of sections 401B and 84 of the Act. Section 401B of the Act allows building work to be declared as restricted building work by Order in Council¹⁶. It only applies to building work that is carried out under a building consent.

¹⁶401B *Order in Council declaring work to be restricted building work*

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

[37] Section 84, in turn, provides:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[38] On the basis of the Order, for building work that was carried out to be restricted building work, it must have been in relation to the construction or alteration of the primary structure or the external moisture-management system of the house¹⁷. The building work described in the complaint was not related to either and was not carried out under a building consent. As such, it was not restricted building work.

[39] The Respondent was, therefore, under no legal obligation to supervise the building work.

[40] In previous Board decisions, it has found that the definition of supervise in section 7¹⁸ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent and which is not restricted building work. The Board's position has been that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a Licensed Building Practitioner.

[41] The circumstances of the present case differ from those that have previously come before the Board, where it has found that Licensed Building Practitioners were responsible for building work that was not restricted building work under their supervision. In this matter, the evidence established that the Respondent did not have a supervisory role in the building work.

[42] The Respondent's role in this project was limited to that of an organisational role. This is clear from the evidence of Mr [OMITTED], who considered himself to be supervising all of the building aspects of the job. The Respondent was not required to supervise the work done by the workers on site. Any supervision the Respondent may have done was notional and was not statutorily required.

[43] As such, the Board finds that the Respondent has not departed from an acceptable standard of conduct in respect of the alleged workmanship issues.

[44] The Board heard evidence on the alleged workmanship issues. Although it is unnecessary for the Board to make a finding in respect of these allegations, given its finding that the Respondent has no supervisory responsibility, the Board nevertheless records it accepts the evidence of the following -

¹⁷ Clause 5 Building (Definition of Restricted Building Work) Order 2011.

¹⁸ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

- (a) The work on the existing 150 and 200mm thick concrete masonry block walls was not undertaken by the Respondent's workers.
- (b) The two timber roof beams numbered 1 and 2 in Mr [OMITTED]'s report were not installed by the Respondent's workers.
- (c) No failure to comply with the building code in respect of the concrete floor slab was established. The Respondent's workers installed a moisture barrier and the Complainant confirmed this also.
- (d) The timber framing in the milk shed, given its intended use as a greenhouse, needed, in accordance with Mr [OMITTED]'s report to be suitable for a wet area. The Respondent acknowledged that if he had stayed on site this reframing with different timber, due to the change in its intended use, would have been done.

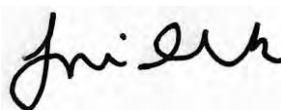
Has the Respondent been negligent or incompetent?

- [45] The Respondent's conduct in respect of the issue of a building consent was neither negligent nor incompetent.
- [46] The Respondent did not have a supervisory role in respect of the alleged workmanship issues and, as such, has not supervised building work in a negligent or incompetent manner.

Board's Decisions

- [47] The Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act.

Signed and dated this 27th day of June 2023



Mrs J Clark
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.*