

Before the Building Practitioners Board

	BPB Complaint No. CB26060
Licensed Building Practitioner:	Nicholas Smith (the Respondent)
Licence Number:	BP131755
Licence(s) Held:	Brick and Block – Veneer

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
Hearing Type:	In Person
Hearing and Decision Date:	23 March 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, LBP, Design AoP 2
	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

[1] The Respondent installed brickwork on a workshop. During the completion of the brickwork, the Council inspected the work and issued a Notice to Fix. Multiple non-compliant matters were noted, including that the frames and windows had not been constructed in accordance with the building consent. Those issues related to building work carried out by the Complainant and his son. Issues were also raised with the brickwork completed by the Respondent. In relation to those issues, the Board found that whilst there had been some departures from an acceptable standard, the breaches were not serious enough to warrant a disciplinary finding.

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 in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and/or

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.

- (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act;
- [4] The Board gave notice that, in further investigating the allegations, it would be inquiring into the matters noted in a Notice to Fix issued dated 11 August 2022 except that if the Respondent did not carry out or supervise any work on framing elements, then the inquiry will be restricted to matters relating to the brick veneer.
- [5] At the hearing, it was established that the Complainant, an engineer, and his son had carried out the building work up to the brick veneer, including installing building wrap and battens and windows. On that basis, this decision only deals with the issues raised in the Notice to Fix that relate to the quality and compliance of the brickwork.

Evidence

- [6] 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.
- [7] As a general note, at the hearing, the Board preferred the evidence of the Respondent to that of the Complainant. The Board noted that the Complainant, at times, contradicted himself and that his evidence was inconsistent with the documentary evidence on file.

Negligence or Incompetence

- [8] 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.

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,

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 Code⁹ and any building consent issued¹⁰. The test is an objective one.¹¹
- [10] The structure complained about was consented as a workshop. It included a bathroom with sanitary fixings. The Complainant described it in correspondence as a granny flat. As it was not consented as a habitable dwelling, it was not restricted building work.
- [11] The building consent issued had a double-wall steel frame with a cavity between the two frames onto which a Mammoth panel was to be installed. The Complainant prefabricated the steel frames in Australia and shipped them to New Zealand. The frames he fabricated were mostly single-wall, and the Mammoth panel was not installed. The non-compliance was noted in the Notice to Fix. The frames, which were installed by the Complainant and his son, whom he described as a tradesman, overhung the foundation edge in places. The windows, which were also installed by the Complainant, and which were also sourced from Australia to save money, were not those that were consented. The Notice to Fix stated they were installed incorrectly with multiple instances of non-compliance.
- [12] The Complainant installed battens to secure the building wrap and stated he did so on the instruction of the Respondent, who denied issuing those instructions. The Complainant later contradicted himself as he gave evidence that he decided to install 20mm battens because of the wind conditions and would not cause any restriction of the air flow throughout the cavity. The building consent did not stipulate battens. The battens intruded into the brick cavity and, as stated in the Notice to Fix, compromised the required cavity.
- [13] Building inspections were not called for during the build. The Complainant maintained that all inspections had been called, but a Council witness, **Omitted**, the inspections team leader, gave evidence that three inspections had not been called for or carried out. In his opinion, items of non-compliance noted in a Notice to Fix would have been identified earlier if inspections had been called for. **Omitted** also noted that, as work had been covered over, it was difficult to ascertain whether the build had been carried out in a compliant manner. An example was the overhanging frames. The Complainant referred to engineer inspections that had been passed. An engineer's report dated 13 May 2021 issued to the Complainant by Red Co in respect

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.

of framing noted ten items of non-compliance with the Board Shed and six with the workshop. The report was noted by the Council in the Notice to Fix.

- [14] The Complainant did not and has not sought or been granted minor variations or amendments for the departures from the building consent that have occurred.
- [15] The Board considered that most of the matters raised in the Notice to Fix stemmed from the Complainant's building work, which preceded the Respondents.
- [16] The Respondent gave evidence that he was not aware that the build was consented and had identified areas of non-compliance prior to him starting but had proceeded as he had brought them to the Complainant's attention and had been instructed to proceed. In doing so, he took into account that the buildings were not intended to be habitable. He stated that if he had known it was consented, he would not have undertaken the job.
- [17] The Board cautioned the Respondent about his approach to building consents. All building work must be consented. There are exceptions, but these have to be established before the work starts. A Licensed Building Practitioner is expected to enquire and satisfy themselves as to whether a consent should be in place prior to commencing the work. Further, if in doubt, inquiries of the local Building Consent Authority should be made.
- [18] The issues raised in the Notice to Fix that were under investigation in respect of the Respondent were as follows:
- (a) The brick veneer cavity was, in places 20-30mm, whereas the minimum allowable is 40mm. The Respondent stated that the bricks were installed so as to catch the windows that the Complainant had installed. It was also noted that, in places, the frames overhung the foundation and intruded into the brick rebate space.
 - (b) No bituminous-type paint has been applied at the bottom of the brick rebate, contrary to the building consent plans. The Respondent accepted that this had not been done but considered it was part of the builder's responsibilities, and as he had advised the Complainant of the issue and had been instructed to proceed, he continued with the work.
 - (c) The brickwork extended too high. As a result, the brick cavity would be venting into the roof space. The Respondent stated that it was a result of a lack of plans on site. The Complainant maintained that the plans were on site and that he had also emailed them to the Respondent who denied having received them.
 - (d) The bricks have been installed too far back from the edge of the rebate. This creates a flat area for moisture to sit at the base of the bricks. The Respondent stated that this was related to the issue as regards the windows and the set out to catch the windows.

- (e) Mortar is visible on the brick ties, breaching the cavity and allowing moisture ingress to the building wrap and framing. The Respondent noted that this normally gets brushed off but that the tight access made it difficult in places to do so.
- (f) Visible tears in the building wrap. The Respondent noted the wrap had been poorly installed, that normally there would be a rigid barrier because it was a steel frame and he was not aware of the tears,
- (g) The brick veneer appears to be only fixed into the 40x20mm battens and not structurally fixed to the wall framing. **Omitted** noted that it was difficult to determine the fixings and that if the battens were structurally fixed to the frame, then fixing the ties to the battens would be acceptable. The Complainant stated the battens were fixed with super tech screws. The Respondent stated he used the 35mm screws for the brick ties.

[19] The Board found that there were some departures from acceptable standards. The bituminous-type paint should have been in place prior to the brickwork commencing, and the issues with the set out of the brickwork that arose because of the Complainant's work were such that the Respondent should not have commenced with the work until such time as they had been resolved.

Was the conduct serious enough

[20] Whilst the Board found that there had been some departures from acceptable standards, the Board found that the conduct was not sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent

[21] On the basis that the conduct was not serious enough, the Board finds that the Respondent has not been negligent nor incompetent.

Contrary to a Building Consent

[22] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹² Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹³ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁴ Inspections ensure independent verification that the building consent is being complied with.

[23] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent

¹² Section 49 of the Act

¹³ Section 40 of the Act

¹⁴ Section 222 of the Act

conduct.¹⁵ 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.¹⁶ If it does not, then a disciplinary finding cannot be made.

[24] The building work did not comply with the building consent. The majority of the non-compliance issues were the result of or arose as a result of the Complainant's building work. As with the finding under section 317(1)(b) of the Act, the Board does not, in the circumstances of the case, consider that the Respondent's conduct was serious enough.

Has the Respondent breached section 317(1)(d) of the Act

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

Board's Decisions

[26] The Respondent has not committed a disciplinary offence.

Signed and dated this 5 day of April 2023.



Mr/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*

¹⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁶ *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".

- (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.*