

Before the Building Practitioners Board

	BPB Complaint No. 26394
Licensed Building Practitioner:	Steven David Ruthven (the Respondent)
Licence Number:	BP133460
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	by audio-visual link
Hearing Type:	In Person
Hearing and Decision Date:	28 August 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

M Parker for Mr Ruthven
N Graham for Mr [OMITTED]

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 carried out restricted building work (cladding) in relation to a new residential dwelling. The work was mostly complete when a dispute arose between the owner and the main contractor, which prevented full completion. The Respondent’s work, which had been inspected and passed by the Building Consent Authority (BCA) during the build, was re-inspected some twelve months after the Respondent’s involvement in it. The BCA, on the basis of that re-inspection, issued a notice to fix (NTF). The NTF stipulated that the cladding was to be removed and replaced because of compliance issues. By the time the hearing took place, the NTF had been withdrawn and replaced. The replacement NTF did not require the removal of all the roofing. Some compliance issues with the roofing did, however, remain. The Board’s decision, as regards the remaining compliance issues, was that those issues did not reach the threshold for the Board to take disciplinary action under either section 317(1)(b) or (d) of the Act.
- [2] The Board also investigated whether the Respondent had failed to provide a record of work on completion or restricted building work. The Board decided that because the restricted building work was ongoing, completion had not occurred. Accordingly, it did not make a finding under section 317(1)(da)(ii) of the Act that the Respondent had breached section 88(1) of the Act.

The Charges

- [3] 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
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Dunedin, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [5] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, it would be inquiring into weatherboard cladding issues identified in a Notice to Fix issued on 7 July 2023 (starting at page 1199 of the Board's file) and the associated failed inspection dated 7 July 2023, and those issues noted in a Site Observation completed by James Hardie dated 28 June 2023 (pages 146 and 147 of the Board's file).

Consolidation

- [6] 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.
- [7] This matter was consolidated with a related complaint about Mr [OMITTED], [OMITTED], complaint number [OMITTED].

Evidence

- [8] 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

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.

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

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [9] The Respondent was subcontracted to install cavity battens, cladding and associated flashings on a new residential build. As a result of a contractual dispute, the anticipated scope of building work was mostly but not fully completed. The Respondent both carried out and supervised the restricted building work and was mostly present when the work was completed.
- [10] During construction, inspections were carried out by the Building Consent Authority (BCA) and were passed. That allowed the build to continue through its various stages. Of note in this respect is that the compliance issues noted in the 7 July 2023 inspection and the first NTF were not identified at the earlier inspections.
- [11] A Final Inspection was undertaken on 8 December 2022. Only minor issues were noted. A Building Control Officer (BCO) from the BCA gave evidence at the hearing that, when the 8 December Inspection was completed, scaffolding had been removed and, as such, it was not possible to complete a close-up inspection. A further check of the building work, when scaffolding had been reinstated, allowed for a closer inspection of the building work. This resulted in the failed 7 July 2023 inspection and the first NTF.
- [12] At the hearing, the Board was provided with a letter from the Dunedin City Council (the BCA) dated 26 August 2024. The letter noted that the 7 July 2023 NTF had been cancelled, and a new NTF had been issued. The letter stated:
- The new notice requires the roof flashings and all cladding systems to be installed as per the approved building consent a BA-[OMITTED] and the manufacturer's specifications.*
- [13] This contrasted with the original NTF, which stated:
- Remove roof and cladding systems to the reinstalled as per the approved building consent a BA-[OMITTED] and manufacturers specifications.*
- [14] The BCO gave evidence that the replacement NTF resulted from further inquiries with the Respondent and others involved in the build, the receipt of further evidence that indicated there were reasonable grounds to be satisfied that the building work was compliant and discussions about a pathway to compliance.
- [15] The Board was also provided with email correspondence from the Dunedin City Council dated 26 August 2024. It contained an itemised list of issues to be addressed under the replacement NTF to comply with the Building Code (the pathway to compliance noted above). The BCO confirmed that not all of the issues identified at the 7 July 2023 inspection were now relevant.
- [16] The Board proceeded with its investigations on the basis that they would be limited to the replacement NTF and the 26 August 2024 list of issues. In terms of the

Respondent, his involvement in those issues related to supervising the installation of cladding and associated flashings. The noted issues in the 26 August email were:

Cladding:

- *Head flashings are to be sealed to the top of the window and door, as required for a very high wind zone.*
- *Internal corner between main house and lean-to needs to be rectified.*
- *Bargeboards to be installed in the lean-to-roof area.*
- *Bargeboards to the main roof have been cutting into the cladding system and need to be extended to allow the cladding to run behind the barges.*
- *Oblique flashings are required for soffits to wall junctions.*
- *Soffit moulding was not installed; however, this was an optional component for the drawing owners to confirm if they wanted it installed or left off.*
- *Gaps at the bottom of windows should be closed off with cladding.*
- *Linea oblique has less than 10 mm of cover on windows and doors.*
- *It appears the Linea weather board has been fixed at the floor joist junction, where it's meant to be unfixed as per figure 26 on the manufacturer's specifications.*
- *The edges of the cladding are still to be sealed.*
- *Gaps under head flashings and penetrations are to be appropriately sealed.*
- *Items on the cladding report from Jamies Hardie are to be addressed to the point that Jamies Hardie will issue their warranty.*
- *Cladding system to be adequality re-sealed (painted) to meet the durability requirements.*

[17] Counsel for the Respondent submitted that the remaining issues were either incomplete building work or were minor in nature and did not reach the threshold for disciplinary action.

Negligence or Incompetence

[18] 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

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)

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?

- [19] 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
- [20] Looking at the issues raised in the replacement NTF and the associated list, the Board was satisfied that whilst there was some non-compliance, the issues did not reach the threshold for disciplinary action. In coming to this decision, the Board has noted that the overall seriousness of the matters under investigation had significantly decreased between the first NTF and the replacement NTF. Further, in reviewing the issues and those raised in the James Hardy Observation, the Board noted that they were minor and could be rectified. In this respect, had the issues remained as stated in the first NTF, which required the replacement of the roof cladding that was installed under the Respondent's supervision, then the Board's decision might well have been different.
- [21] Notwithstanding the finding, the Respondent should note that there is an expectation that Licensed Building Practitioners will get building work right the first time. He should not rely on others to identify compliance issues or on rectification processes to bring his building work up to the required standard.
- [22] The Board also cautions the Respondent as regards his practice of installing what is supplied. There is a strict requirement in the Act to build in accordance with the building consent. As such, if materials are supplied that differ from those that are specified in the building consent or that will not achieve compliance requirements, then he should either insist that the correct materials are supplied or liaise with the designer to establish if a consent change is required.

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.

Has the Respondent been negligent or incompetent?

- [23] The Respondent **has not** carried out or supervised building work in a negligent or incompetent manner.

Contrary to a Building Consent

- [24] 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.
- [25] 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 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.
- [26] For the same reasons that the Board has found that the Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act, the Board finds that the Respondent has not committed a disciplinary offence under section 317(1)(d) of the Act. In short, whilst there were some departures from the building consent, the departures were not serious enough.

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

- [27] The Respondent **has not** breached section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [28] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.¹⁷
- [29] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the

¹² Section 49 of the Act

¹³ Section 40 of the Act

¹⁴ Section 222 of the Act

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".

¹⁷ Section 88(1) of the Act.

territorial authority on completion of restricted building work¹⁸ unless there is a good reason for it not to be provided.¹⁹

Did the Respondent carry out or supervise restricted building work?

[30] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included building work on the primary structure and/or external moisture management system of a residential dwelling, both of which are both restricted building work.²⁰ It follows that a record of work was required.

Was the restricted building work complete?

[31] The building work did not have the usual linear progression to completion. Whilst the Respondent's building work initially came to an end in or about September 2022. A record of work was provided to the owner's agent in February 2023. Subsequent events called into question the compliance of the Respondent's building work. The result was that further restricted building work was required. The Respondent gave evidence that he had returned to the site some weeks prior to the hearing to complete further restricted building work. Additionally, the evidence received at the hearing established that, in order to satisfy the replacement NTF requirements, further restricted building work was needed. The Respondent stated that he would be returning to carry out or supervise that work.

[32] On the basis of the above, the sequence of events indicates that, as of the date of the hearing, the restricted building work was still not complete. On that basis, it is arguable that a further record of work is required and that the previous record of work, was a partial record because the restricted building work has yet to be completed. As such, the Board has decided that the Respondent has not breached section 317(1)(da)(ii) of the Act.

[33] The Board makes two comments regarding regards records of work and the Respondent's practices in relation to them. Firstly, whilst it may be arguable that the provision of a record of work to an agent satisfies the requirement of providing it to the owner, caution should be exercised over this practice. The statutory requirement to provide a record of work could be defeated if records of work were provided to an agent who then withholds them. Further, providing a record of work to the owner or their agent and not to the Territorial Authority does not satisfy the requirements of section 88 of the Act. In *Hanif* [2019] BPB 25132, however, the Board decided that the provisions of section 88(1) of the Act would have been satisfied when a record of work was provided to the Territorial Authority but not the owner in a timely manner because the record of work is then in the public domain. As such, The best course of action is to provide it to the Territorial Authority as well as to the agent or owner.

¹⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁹ Section 317(1)(da)(ii) of the Act

²⁰ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

- [34] Secondly, the Respondent should note that when a building contract comes to an end and it is apparent that the LBP will not be able to carry out any further restricted building work that completion, for the purposes of section 88(1) of the Act, will have occurred and a record of work will be due. Again, if a contract comes to a premature end, the best course of action is to immediately provide a record of work to the Territory Authority in accordance with *Hanif*.

Did the Respondent fail to provide a record of work?

- [35] The Respondent **has not** failed to provide a record of work on completion of restricted building work.
- [36] The Respondent is reminded that once all remedial work is complete, a record of work should be provided for all of the restricted building work that he has carried out or supervised.

Board Decisions

- [37] The Respondent has not breached sections 317(1)(b), (d) or (da)(ii) of the Act.

Signed and dated this 9th day of October 2024.



Mr M Orange
Presiding Member

ⁱ 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.*