

## Before the Building Practitioners Board

	BPB Complaint No. 26510
Licensed Building Practitioner:	John Te Whenua Hune (the Respondent)
Licence Number:	BP 138434
Licence(s) Held:	Carpentry

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### 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	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	11 December 2024

#### Board Members Present:

M Orange, Chair, Barrister (Presiding)  
Mr G Anderson, LBP, Carpentry and Site AoP 2  
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor  
Ms E Harvey McDouall, Registered Architect  
Mr C Lang, Building Surveyor and Quantity Surveyor

#### 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 cladding on a new kit-set residential build. The Respondent did not complete his building work and intended to return once a design solution for cladding around windows was provided. In the interim, a dispute arose with the main contractor, and reports were completed that dealt with the compliance of the building work. Those reports raised various issues, including issues with the cladding. The Board investigated the cladding and whether the Respondent had failed to provide a record of work on completion of restricted building work. The Board decided that the Respondent had not committed any disciplinary offences on the basis that the issues that had been established were not serious enough to warrant disciplinary action and, with regard to the record work, completion had not occurred.

## 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.<sup>1</sup>
- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMMITED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;

<sup>1</sup> 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.

<sup>2</sup> 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; 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.

[4] 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 the matters set out in a report from Stefan Baines of Maynard Marks and, in particular, those set out in sections 3.1 and 3.2 (pages 850 and 851 of the Board's file) and the further detail provided in a report from Daniel Gray of Maynard Marks (commencing on page 1070 of the Board's file), but only as they relate to the building work that the Respondent carried out or supervised on the exterior cladding.

#### **Consolidation**

- [5] 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] The Board sought agreement for consolidation of this matter with complaint number CB26509. The consent of all those involved was forthcoming. The two matters were consolidated.

#### **Evidence**

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.<sup>3</sup> 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.

#### **Background**

- [8] The complaint related to the construction of a consented kit-set dwelling supplied by Easybuild. The Respondent was engaged to install BGC Duragrove and Nu Line Plus Weatherboards on a cavity system. Other contractors were involved in the build, including the Licensed Building Practitioner (LBP) under investigation in matter CB26509. The Respondent's involvement was between August and October 2023.
- [9] In June 2024, as part of an investigation of a claim lodged with Master Build Services Limited, Maynard Marks was instructed to review the completed building work. They produced two reports. The first noted a number of issues, including the following:

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- Timber pole piles are likely to have been founded on soft soil forming a 'soft pile toe' which could be causing continuing settlement of the building. Maynard Marks recommends that an investigation be carried out by a suitably qualified geotechnical engineer to determine the condition of the soil under the piles.
- Floor levels are outside of acceptable tolerances. The design engineer has suggested packing of the piles to bring the bearers to within tolerance. Maynard Marks agree with this remedial solution from a structural perspective.
- External wall frames/panels have not been installed within the allowable tolerances within the vertical and horizontal plane as set out in NZS3604 2011.
- Internal wall frames require re-positioning ensuring these are installed plumb, square and straight. Removal of some internal linings will be required to achieve this.
- BCG Duragroove sheets have not been installed or fixed in place in accordance with the manufacturer's installation guide. Any deviation from this will void the manufacturer's warranty. Removal of claddings is unavoidable in repositioning of the external wall frames.

[10] The Respondent was not responsible for the building work associated with the first three items. Those items, however, impacted the cladding that he was responsible for.

[11] The Respondent did not have any experience with the cladding types that were used. He stated that, prior to starting the installation, he had researched the product and its installation. The Respondent noted that issues arose with the installation of the cladding because of the placement of windows that were close to each other, which made it difficult to install sheets around them. Other witnesses confirmed that this was a problem with Easybuild kitsets.

[12] The Respondent also gave evidence that he was waiting for a resolution on an issue with the windows, was not aware of the fact that the building was subsiding or of the impact this was having on cladding lines, did not know about a dispute that had arisen with the main contractor, and that his work was not complete because he was waiting for materials to be supplied and the window issue to be resolved. On that basis, he had not provided a record of work.

### **Negligence, Incompetence, and Contrary to a Building Consent**

[13] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of

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<sup>4</sup> *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.

the same class of licence. This is described as the *Bolam*<sup>5</sup> test of negligence.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

- [14] In terms of building consents, they 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.<sup>9</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> If it does not, then a disciplinary finding cannot be made.

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<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> 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)

<sup>7</sup> 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"

<sup>8</sup> *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".

<sup>9</sup> Section 49 of the Act

<sup>10</sup> Section 40 of the Act

<sup>11</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>12</sup> *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".

### Conduct under investigation

- [15] When considering the Respondent's building work, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>13</sup> and any building consent issued.<sup>14</sup> The test is an objective one.<sup>15</sup>
- [16] The specific items noted in relation to the cladding and the Respondent's building work related to incorrect fixings, failure to seal sheet joints, popping nails, sheets out of plumb, sheets not aligned at the bottom edge, an excessive gap at the soffit, and butt joints used instead of shiplap.
- [17] The Respondent gave evidence that he used the materials supplied, including the correct fixings and seals, some butt joints were used in areas where sheet installation was difficult and that the head contractor's project manager had advised him to use butt joints, and that other issues, except those relating to alignment, were limited to areas around the windows in relation to which he was waiting for a resolution.
- [18] With respect to alignment, as noted, the Respondent was not aware of the issues with the subfloor that arose after he left the site. He also stated he did not check the framing before installing the cladding to make sure that it was true and correct and that he was not aware of any issues with the framing when he installed the cladding. With respect to an inconsistent gap at the soffit, the Respondent stated that he had asked for longer sheets, but they were not provided.

### Has the Respondent been negligent, incompetent or has he built contrary to the consent

- [19] The Board has decided that the Respondent has not committed a disciplinary offence under either section 317(1)(b) or (d) of the Act. The reasons are as follows.
- [20] First, the Board decided that whilst the use of butt joints was a compliance issue, and there were sheets that were not aligned or not plumb and which did not meet an acceptable standard, the issues were not, by themselves, serious enough by themselves to warrant disciplinary action. In this respect, the Board has applied the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>16</sup> and those in *Pillai v Messiter (No 2)*,<sup>17</sup> an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, where 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.*

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<sup>13</sup> Section 17 of the Building Act 2004

<sup>14</sup> Section 40(1) of the Building Act 2004

<sup>15</sup> *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.

<sup>16</sup> [2001] NZAR 74

<sup>17</sup> (1989) 16 NSWLR 197 (CA) at 200

- [21] Second, with regard to sheets being out of plumb, not aligned at the bottom edge, and an excessive gap at the soffit, the Board accepted that design issues around windows, subsidence of the foundations and the supply of sheets that may not have been long enough would have impacted the installation of the cladding and, as such, the Board has decided that it would not make a disciplinary finding with respect to them on the basis that the conduct has not, taking into account the contributing factors, fallen below an acceptable standard.
- [22] Finally, with respect to the alleged use of incorrect fixings and a failure to seal sheets, the Board decided that there was insufficient evidence to make a finding. The compliance reports provided were not definitive, and the Respondent's evidence refuted the allegations. Accordingly, neither allegation can, on the balance of probabilities, be established.

### **Failure to Provide a Record of Work**

- [23] 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.<sup>18</sup>
- [24] 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 territorial authority on completion of restricted building work<sup>19</sup> unless there is a good reason for it not to be provided.<sup>20</sup>

### **Did the Respondent carry out or supervise restricted building work**

- [25] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included the exterior cladding, which is restricted building work because it forms part of the structure and/or external moisture management system of a residential dwelling.<sup>21</sup>
- [26] The Respondent gave evidence that he was not aware of the dispute that had developed and that he was waiting for a design solution prior to finishing his work. The Board accepted that evidence and, on the basis of it, decided that completion had not occurred, and because it had not, the obligation to provide a record of work had not arisen. On that basis, the Board has decided that the Respondent has not breached section 317(1)(da)(ii) of the Act.
- [27] Now that the Respondent is aware of the dispute, he should provide a record of work without delay.

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<sup>18</sup> Section 88(1) of the Act.

<sup>19</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>20</sup> Section 317(1)(da)(ii) of the Act

<sup>21</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

**Board Decision**

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

Signed and dated this 28th day of January 2025.



**M Orange**  
Presiding Member

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**<sup>i</sup> 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.*