

Before the Building Practitioners Board

	BPB Complaint No. 26376
Licensed Building Practitioner:	Sam Jahanbekam (the Respondent)
Licence Number:	BP128271
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 proceeding as a Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	1 August 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, 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 Board decided that the Respondent's conduct did not reach the threshold for a disciplinary finding to be made.

The Charges

- [2] The matter first came before the Board as a result of a complaint. During the investigation process, the Complainant withdrew the complaint.
- [3] Under regulation 17(2) of the Complaints Regulations, the Board may proceed with a Complaint that has been withdrawn as a Board Inquiry. As such, The Board retains a discretion as to whether or not it continues with a matter. In coming to a decision, the Board needs to take various matters into consideration including the sufficiency of evidence, the seriousness of the alleged offending, and whether an inquiry would further the purposes of Part 4 of the Building Act. Taking the foregoing into consideration, the Board decided it would proceed with the matter as a Board Inquiry.
- [4] The prescribed investigation and hearing procedure used by the Board is inquisitorial, not adversarial. The Board sets the charges and decides what evidence is required.¹
- [5] 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 carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, he may have failed to ensure an

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.

approved building consent was in place before work commenced and may have installed bracing contrary to the Building Code and manufacturer's specifications.

Evidence

- [6] The Board must be satisfied, on the balance of probabilities, that the disciplinary offences alleged have been committed.³ 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] The complaint related to alterations that were made to a property that the Complainant had purchased. A Certificate of Acceptance (CoA) application noted the work as:
- Replace brace wall between kitchen and living with 7,7 meters steel beam and steel posts as per structure engineer plan. Get the foundation spots to dig and reinforced concrete for posts installation. Cut the wall and ceiling, and prop the roof framing for beam installation and ceiling joist connections. Remove the wall in the hallway remove the ceiling joist and replace it with a new joist for a longer span. Relocate the braced wall with a new braced wall in the bathroom to make 3rd bedroom.*
- [8] The Complainant gave evidence that the alterations had to be carried out urgently because they were paying rent elsewhere. He stated that completing the alterations would mean his family could move in, and it would then alleviate the financial pressure the rental payments were creating. The Complainant was aware that a building consent was required, and he had consulted an engineer and obtained an engineering design for the intended work.
- [9] The Complainant gave evidence that his intention was to obtain a Certificate of Acceptance (CoA) after the work had been completed when he had accumulated the savings to pay for it. When informed of the provisions of section 40 of the Act, including the fines that can be imposed for carrying out building work without a building consent, the Complainant provided an additional reason for the urgency, which was that the previous owner had been a smoker and the residual odour was causing his daughter to be sick.
- [10] The Complainant stated that he had received advice from a Licenced Building Practitioner and from the engineer he had engaged for a design that the process of carrying out the building work and then applying for a CoA, would be an acceptable course of action.
- [11] The Complainant had not consulted the Auckland Council prior to starting the work to ascertain whether the process he was adopting was acceptable.

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

- [12] The Complainant also stated that the Respondent had advised him that doing the work and then applying for a CoA would be acceptable. The Respondent denied giving that advice but did state that the engineer had advised him that the work could be done without a building consent. The Respondent's evidence was that whilst he considered a building consent was required, he was prepared to undertake the work without one based on the engineer's advice.
- [13] The engineer referred to had been summoned to the hearing to give evidence but was reluctant to do so. He stated he was not going to be in New Zealand when the hearing was conducted. He did not attend.
- [14] When the work commenced, the Complainant initially engaged a different contractor to carry out the work. That contractor completed demolition work. The Respondent was then contracted to carry out the building work in accordance with the engineering design.
- [15] When a CoA was applied for, issues with the manner in which plasterboard bracing had been installed were raised. Specifically, a strip of plasterboard that was approximately 60 millimetres wide had been installed below the ceiling on a wall. The Respondent stated that this strip was installed because he could only source 2.4 plasterboard sheets at the time. His evidence was that he consulted with the engineer, who was not present at the hearing, and that the engineer approved a solution of installing solid blocking behind the strip of plasterboard. The engineer also provided an "asbuilt" bracing verification for the bracing, which was based on the Respondent's building work, as noted in the complaint. A Building Control Officer present at the hearing noted that the manufacturer's specifications stipulated that the minimum size of plasterboard for bracing was 300 millimetres.

Negligence or Incompetence

- [16] 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

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"

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

Building Consent

- [17] The Board's considerations relate to a possible failure to obtain a building consent prior to building work being carried out.
- [18] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.⁹ The primary obligation to obtain a building consent falls on the owner of the property. In this instance, the owner knew that a building consent was required but decided to have the work completed without one and to apply for a CoA. The basis of that decision appears to have been that there was an element of urgency to the building work. Section 41(1)(c) of the Act states that a building consent is not required in relation to building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently for the purpose of saving or protecting life or health or preventing serious damage to property. If section 41(1)(c) is relied on, there is a requirement that a CoA be obtained as soon as practicable after completion and that it is an offence if a person fails to do so.
- [19] Section 41(1)(c) of the Act did not apply to the intended building work. As noted by the building control officer present at the hearing, the exemption exists for situations such as emergency repairs after a natural disaster or an unforeseen event that causes damage to the extent that lives or property are at risk.
- [20] Turning to the Respondent's conduct, in *Tan v Auckland Council*¹⁰ the High Court noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [21] The above would equally apply to the Respondent and to the engineer, as they both fall into the category of a person who was in the best position to ensure unconsented work did not occur. As such, the Respondent had a duty to assess whether a building consent was required prior to the building work being undertaken.

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 Refer sections 40, 41 and 42A of the Act.

¹⁰ [2015] NZHC 3299 [18 December 2015]

[22] On the basis of the *Tan* decision, the Board finds that the Respondent should have ensured that a building consent was in place for the building work prior to commencing or that he had written confirmation from either the building consent authority or the engineer that one was not needed. As he did not, the Board finds that his conduct has fallen below an acceptable standard and that he has been negligent.

Was the conduct serious enough

[23] The Complainant's decision to proceed with the building work, knowing that a building consent was required, is a factor that the Board considers it can take into consideration when considering the seriousness of the conduct. It is a factor that distinguishes this matter from others that have come before the Board in that the Complainant has not relied on the Respondent's expertise or advice in making a decision to proceed without a building consent.

[24] More significant is the advice the Respondent states he received from an engineer. It was also noted that the engineer carried out site inspections, provided updated design documentation during the construction and provided a PS1 after the work had been completed. Given those factors, it is likely the Respondent received advice, and it may have been reasonable for him to proceed with the work on the basis that he relied on the advice of a design professional. The engineer who gave that advice was not present at the hearing and could not be questioned with respect to the advice he may have given. It is noted, however, that the engineer issued producer statements for the building work and that, in those statements, he did not state that a building consent was required.

[25] The cumulative effect of the above is that the Board considers the conduct is not serious enough to warrant a disciplinary outcome.

Bracing plasterboard

[26] On the same basis, with regard to the plasterboard issue, the Board finds that whilst the work was not carried out in accordance with the manufacturer's specifications, there was evidence that the Respondent relied on and followed the advice of an engineer. On that basis, the Board finds that the conduct does not reach the threshold for a disciplinary finding.

Board's Decision

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

Signed and dated this 29th day of August 2024.

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style.

M Orange
Presiding Member