

## Before the Building Practitioners Board

	BPB Complaint No. 26418
Licensed Building Practitioner:	Shane Samuel Lelievre (the Respondent)
Licence Number:	BP 133997
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	Complainant
Hearing Location	by audio-visual link
Hearing Type:	In Person
Hearing and Decision Date:	3 October 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.

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## Summary

- [1] The Respondent was contracted to build a new dwelling. Partway through the build, a complaint was made about the quality compliance of roofing work. The Board investigated various disciplinary allegations, including that the building work had been carried out or supervised in a negligent or incompetent manner or in a manner contrary to a building consent. The Board found that whilst there were some issues of concern, they were not serious enough to warrant a disciplinary finding.
- [2] The Board also found that because building work was ongoing, a requirement for a record of work had not yet arisen and that the Respondent had not breached section 317(1)(da)(ii) of the Act.
- [3] Finally, the Board investigated the Respondent's failure to provide a contract for his building work as per the requirements of section 362F of the Building Act. The failure to provide a contract can be a breach of the Code of Ethics for licensed building practitioners. The Code had not, however, come into force at the time of the contractual arrangements being made. As such, the Respondent had not breached the Code.

## The Charges

- [4] 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>
- [5] 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 [Omitted], have:

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<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.

- (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;
  - (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 (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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; and
  - (d) breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act.
- [6] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, it would be inquiring into the installation and compliance of the roof.
- [7] With respect to the allegation that the Respondent breached the Code of Ethics (section 317(1)(g) of the Act), the specific provision of the Code that the Board gave notice that it would further investigate was:
- 10. You must comply with the law**
    - (1) *When you carry out or supervise building work, you must ensure that the building work complies with the following:*
      - (a) *the Building Act 2004*
- [8] The specific matter to be investigated was an alleged failure to comply with section 362F of the Building Act, specifically the absence of a building contract.

### **Evidence**

- [9] 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.
- [10] The Complainant and the remediable builder were summoned but did not attend.
- [11] The Respondent was contracted to build a new residential dwelling in May 2022. The Respondent gave evidence that he offered a contract to the Complainant who declined it on the basis that she did not consider that one was necessary. It is noted that the Code of Ethics for licensed building practitioners was not in force in May

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

2022. The Respondent was not aware of the requirement to provide disclosure documentation under the Building (Consumer Rights and Remedies) Regulations.

- [12] The building work started and progressed. At the roofing stage, the Respondent hired subcontractors to carry out the roofing work under his supervision. He was, at the time, on holiday in Australia. Upon his return, he noted some minor issues with the roofing that he intended to rectify but was not able to because of a dispute with the Complainant.
- [13] The Respondent gave evidence that, since the complaint was made and leading up to the hearing, he has been attending to further completion work, including restricted building work, at the project site.

### **Negligence or Incompetence**

- [14] 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 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.
- [15] The Board, in this matter, did not consider the building work issues to be sufficiently serious. As such, they did not meet the threshold required for the Board to make a disciplinary finding.
- [16] Also, the Respondent did not carry out the roofing work. He supervised it. When the work was carried out, the Respondent was not in New Zealand. As such, his supervision was remote supervision. Notwithstanding, the Board did not receive any evidence that established that his supervision was inadequate, other than the minor issues noted. Further, the Respondent intended to deal with the issues when he returned but was not allowed to do so.

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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.

<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”.

- [17] Given the above, the Board has made a finding that the Respondent has not carried out or supervised building work and a negligent or incompetent manner.

### **Contrary to a Building Consent**

- [18] 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.<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> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>11</sup> Inspections ensure independent verification that the building consent is being complied with.
- [19] 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>12</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>13</sup> If it does not, then a disciplinary finding cannot be made.
- [20] The issues noted were issues that related to quality as opposed to compliance. On that basis, the Board decided that the Respondent had not carried out building work in a manner that was contrary to a building consent.

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

- [21] 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>14</sup>
- [22] 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>15</sup> unless there is a good reason for it not to be provided.<sup>16</sup>
- [23] In this matter, the evidence received at the hearing established that the building work, including restricted building work, was ongoing. It follows that completion has

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

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

<sup>11</sup> Section 222 of the Act

<sup>12</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>13</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>14</sup> Section 88(1) of the Act.

<sup>15</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>16</sup> Section 317(1)(da)(ii) of the Act

not occurred and, as such, the obligation to provide a record of work has not yet arisen. Accordingly, the Respondent has not breached section 317(1)(da)(ii) of the Act.

### **Code of Ethics**

- [24] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.<sup>17</sup> It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, Ethics have been a part of other regulatory regimes<sup>18</sup> for some time, and the Board has taken guidance from decisions made in other regimes.
- [25] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [26] As noted, the contractual arrangements for the build were entered into prior to the Code of Ethics coming into force. As such, it could be argued that the conduct under investigation did not, at the time it occurred, come within the disciplinary provisions in the Act. On that basis, the Board finds that the Respondent has not breached the Code of Ethics.
- [27] The Board did note that the Respondent was not fully aware of his obligations under the Building (Consumer Rights and Remedies) Regulations. The Board recommends that he study the regulatory handbook for Licensed Building Practitioners so that he is aware of his compliance obligations under Part 4A of the Act and the aforementioned Regulations.

### **Board Decisions**

- [28] The Respondent has not committed any disciplinary offences.

Signed and dated this 30<sup>th</sup> day of October 2024.



**M Orange**  
Presiding Member

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<sup>17</sup> Building (Code of Ethics for Licensed Building Practitioners) Order 2021

<sup>18</sup> Lawyers, Engineers, Architects and Accountants, for example