

Before the Building Practitioners Board

	BPB Complaint No. C2-01833
Licensed Building Practitioner:	James Chamberlain (the Respondent)
Licence Number:	BP 101412
Licence(s) Held:	Carpentry and Site AOP 2

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	Wellington
Hearing Type:	In Person
Hearing Date:	25 July 2018
Decision Date:	13 August 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Appearances

Rachel Connor – Legal Counsel for the Respondent

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.

Board Decision:

The Respondent **has not** committed a disciplinary offence.

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Introduction

- [1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 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 (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) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

- [6] In addition to the documentary evidence before the Board heard evidence at the hearing from:

James Chamberlain	Respondent
[Omitted]	Complainant
Warren Neville	Technical Assessor
[Omitted]	Witness, [Omitted]

- [7] The Respondent was engaged by the Complainant and her partner to undertake renovations to an existing dwelling. The building work was carried out under a building consent. The Complainant stated the Respondent was also engaged as the project manager. The Respondent stated that the job followed on from work on a previous property that had been completed without issue. He did not consider that he was the project manager.

- [8] The Complainant made the following allegations which were supported by photographs:

- (a) failed to correctly interpret working drawings and technical documentation thereby also failing to construct the work in accordance with the Building Consent;
- (b) failed to seek clarification or additional design documentation;
- (c) did not provide any Health and Safety documentation;

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (d) failed to adequately manage the site with respect to time, quality, waste, cost and safety along with failing to adequately supervise non-licensed workers;
- (e) failed to manage conflict with the Tiler (engaged by the Complainant);
- (f) failed to build in a competent manner; and
- (g) inadequately supervised staff or subcontractors, resulted in;
 - (i) incorrect layout of the bathroom resulting in the shower cubicle being too small;
 - (ii) Incorrect positioning of a bathroom partition resulting in mis-alignment of fittings and pipe-work;
 - (iii) incorrect level of bathroom floor installation;
 - (iv) reluctance to trim existing framing to permit acceptable alignment of fittings (toilet and kitchen extractor fan);
 - (v) unacceptable positioning of the kitchen window;
 - (vi) construction of the kitchen wall being outside of the specified position;
 - (vii) incorrect construction of the kitchen subfloor resulting in subsidence and “bounce”; and
 - (viii) inadequately secured kitchen bench resulting in “pulling” away from the wall;
 - (ix) french door size alteration without consultation resulting in adjacent window sills being higher than specified;
 - (x) window installed out of plumb;
 - (xi) adjacent interior doors installed to different heights;
 - (xii) guttering installed with incorrect fall;
 - (xiii) inappropriate use of architrave materials resulting in excess wastage;
 - (xiv) damage to the bedroom floor;
 - (xv) a reluctance on the part of the Respondent to make good work considered to have been undertaken incorrectly;
 - (xvi) other defects as noted within the complaint documentation, however, it is considered that these are of an aesthetic and functional nature related to the installation of plumbing components rather than restricted building Work.

[9] The Complainant stated that dissatisfaction with the work of the Respondent led to the Respondent’s involvement on site being suspended prior to full completion of the intended work. At the hearing the Complainant stated that the work was

stopped half way through as a result of the number of issues that had accumulated and that the Respondent was just dealing with the issues that were cheap and easy to fix and that he was ignoring the more difficult matters.

- [10] A Technical Assessor was appointed to review the file and the building consent documentation and to undertake a site inspection and to provide a report. He noted:

4.1.1 The building work addressed in this report is as follows: Originally intended as modifications to an early 20th century villa including new bathroom, kitchen and ensuite along with areas of minor extensions, this work extended to unexpected demolition and rebuild of the wall framing to the lean-to section at the rear of the dwelling due to the deteriorated condition of framing exposed during the construction process.

4.1.3 The Complainant advised via email (appended) that the work was undertaken under a full contract (not sighted by the Author) on a charge up basis, whereby the Respondent would provide materials, labour and sub-contractors. No "mark-up" was intended to be added to the Subcontractors charges and it eventuated that the Complainant took over payment of these accounts. The Complainant also organised the kitchen, provided bathroom fittings and obtained specific architrave profiles. A dissatisfaction with the intended Tiler led to the Complainant engaging their own Tiler and through dissatisfaction (due to damage caused) engaged a Gib stopper to complete that aspect of the work.

The Complainant advised that the work was mainly undertaken by the Complainants son with assistance from a couple of unknown labourers. In an attempt to have the work completed as per the required deadline, another LBP [Omitted] was taken on for approximately one month at the insistence of the Complainant.

- [11] With regard to the building work the Technical Assessor noted, with some limitations that, in general:

... it is considered that the work was undertaken, within reason, in accordance with that consent.

- [12] The limitations were:

Despite the plans being sequentially numbered, no indication of dimensions for the kitchen/living area alterations, either original or covered under the amendment, are contained within the bundle. Scaling is provided, however, dimensions taken off anything other than original drawings would need to be verified. The extent of the rear extension appears to be intended to be in alignment with previous original wall lines.

As the wall framing to the entire rear elevation lean-to aspect of the building has been rebuilt, it is not considered possible to verify if the extent of the

extension conforms to the footprint of the original building line or not. Nor is it considered possible to determine if such items as exterior joinery are positioned correctly other than by scale measurement of the documentation. As such, no efforts have been made to verify these positions.

The Respondent has made comment referring to dimensioned hand sketches provided by the Complainant. These have not been sighted at the time of publication.

- [13] The same hand sketches were referred to at the hearing but were not produced.
- [14] The Technical Assessor also made comment about areas of non-compliance with required standards in respect of ground clearances, springiness in the floors, a drain channel and guttering gradients on a lean-to roof. The Technical Assessor also commented on specific allegations made by the Complainant.
- [15] The Respondent made a written response to the Complaint. He responded to each of the allegations and further noted:
 - (a) the property in question was a very tight site with all materials having to come through the front door and with nowhere to store any materials or tools on site and that there were possessions in the home that impeded them;
 - (b) the matter had been through a dispute resolution process where the complaint was found to be unsubstantiated;
 - (c) there was a building consent issued for all the work that was to be done and the job was inspected at all required stages; and
 - (d) he did not walk away from the job.
- [16] At the hearing the Respondent submitted evidence by way of a sworn affidavit and Counsel for the Respondent made submissions based on the affidavit. The submissions noted:
 - (a) it was a charge up job;
 - (b) aspects of the build were project managed by the Complainant's partner and that the Complainant instructed and certain trades directly including the tiler, kitchen joinery and the benchtops; and
 - (c) the Respondent was not involved in the plumbing or electrical work which were managed by the Complainant.
- [17] The Complainant countered that the plumber and the electrician were engaged by the Respondent and that initially their invoices were sent to him but that they were subsequently sent directly to the Complainant as a matter of transparency.

- [18] Counsel for the Respondent also submitted that the Respondent could not be held accountable for the conduct of other trades and that the Respondent's own conduct did not meet the two-step test required for a finding of negligence.
- [19] The affidavit also gave evidence and responses as regards the specific allegations.
- [20] The Board questioned witnesses at the hearing about specific allegations to obtain further clarification on some of them. These were with regard to:

Floors

It was noted that the existing floors were close to ground level, were not level in certain areas and that there were also issues as regards old and new flooring levels and that there would be a degree of springiness to them prior to building work being undertaken. It was further noted that the consented designs for the building work did not provide for additional strengthening or structural support to pre-existing areas of the house but that the Respondent did install additional sub floor joists members in the kitchen area. He did not install joinery units.

The Complainant noted that the floors were not springy prior to the building work being undertaken.

Evidence was also heard that the underlying ground was excavated to allow polythene to be laid which was a council requirement but not a consent requirement. The Respondent stated he placed DPC on the top of piles.

The Technical Assessor noted in his report that the floors were within tolerances of NZS 3604 2011 and reiterated within the MBIE Guidance document "Guide to tolerances, materials and workmanship in new residential construction 2015".

The Technical Assessor also noted that the out of level aspect of the flooring adjacent to the kitchen bench may be related to movement of the bench top away from the wall.

As regards changes in floor level from a wardrobe to a bedroom the Respondent stated that there was a difference in floor heights and that he accommodated for the install of carpet. The Technical Assessor noted it as a fall of approximately 3mm toward the ensuite and then a rise of approximately 14mm to the bathroom floor level over a distance of approximate 2 metres. The consent noted carpet. The flooring installed as timber.

Window Levels

Evidence was heard that windows heights were raised by 100mm to match door heights. The Complainant stated this meant the windows, which were designed to accommodate views when sitting, were interrupted. The Respondent stated that raising windows heights were discussed and agreed with the Complainant's partner. The Complainant disagreed stating that it was a significant issue and that the impact of the change was not made clear. The Technical Assessor and the designer

considered the change would have been considered a minor variation under section 45A of the Act. The change was not brought to the building consent authorities' attention but the related inspection was passed.

It was noted that other amendments to the building consent were processed by the designer but that a change from double to single glazing was not dealt with as either an amendment or a minor variation.

No contract variation documentation was put before the Board.

Bathroom and Shower

There was varying evidence as regards the layout of the fittings in the bathroom. The Complainant's evidence was that the building consent design was only indicative and that hand drawn detail was provided and that the fit out was not as per the later instructions given. The Complainant also noted that the fittings had been purchased prior to the start of the project and were on site when the various trades undertook their work.

Evidence was also heard as regards a grate in the shower which was terminated under beneath side wall tiling. The Complainant stated the shower was to be 900mm wide and that this was on the hand drawn sketches but was unable to confirm if this was framing size or finished size. The Respondent stated the 900mm grate which the Complainant supplied was cut to fit and could be removed and that it was the Complainant's design. The Complainant stated there was a risk of damage to the tiles when removing it.

With regard to marks on the tiles the Complainant stated they were porous tiles which were installed and sealed by the tiler in accordance with the suppliers instructions and then covered with plastic and that the marks complained about must have come from plaster being spilled on them.

Rear Extension

There was disagreement about the depth of the rear extension and implications on kitchen joinery. The Complainant alleged the kitchen was constructed 50mm too wide which was denied by the Respondent whose position was that the walls were made to align.

The Technical Assessor noted that as there are no dimensions denoted on the plans provided, it is not considered possible to provide a conclusive opinion on this allegation. He noted that the eastern internal kitchen wall appears to have gained some additional thickness requiring corresponding packing of the beam which extends across the dining/living area. The Respondent told him that this additional thickness of wall was necessary to plumb the original wall plane.

- [21] The Respondent's affidavit set out that the building work the Respondent was responsible for was completed on 27 January 2017 and that a record of work was provided on 10 February 2017 by way of it being delivered to the Complainant. The

Respondent submitted that the delay between completion of the restricted building work and provision of a record of work was 10 working days, not 2 months as suggested by the Registrar's report and that it was another licensed building practitioner's record of work that was provided two months after completion.

Board's Conclusion and Reasoning

[22] The Board has decided that the Respondent **has not**:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 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 (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) (s 317(1)(da)(ii) of the Act)

and should not be disciplined.

[23] The reasons for the Board's decision follow.

Negligence and/or Incompetence

- [24] Whilst the allegations were numerous the Board noted that many of them were commercial in nature or pertained to other trades. In this respect the Board notes that it does not have jurisdiction over commercial matters and that, as regards other trades, the persons carrying out the work are responsible and accountable for it. The Board cannot, for example, inquire into the work of the plumber or the electrician.
- [25] The Board can consider the Respondent's coordination and oversight of the building work and at his project management of it, especially as he holds a Site AOP 2 licence.
- [26] The Board notes, however, that the contractual relationship was not clear. The Board did not have the contract before it but noted, from the evidence received, that it was a charge up contract with no added margin and that there was a high level of engagement and instruction from the Complainant and her partner. It was not clear to the Board where the lines of responsibility fell with certain aspects of the build but it was clear that the Complainant and/or her partner did engage and instruct the tiler and as such the Respondent cannot be held to account for that aspect of the work. Moreover, as regards marks on tiles, the Board considered it was predominately a product issue.
- [27] That leaves the building work that the Respondent carried out or supervised.

- [28] Turning to that work and considerations of negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

- [29] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [30] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*⁹ it was stated as "*an inability to do the job*".
- [31] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [32] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².
- [33] The Board notes that the purposes of the Act are:

3 Purposes

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—*

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[34] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[35] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[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.

[36] The Complainant made a number of allegations not all of which related to the Respondent's building work. The Respondent in turn refuted those allegations. The Board also had before it the independent assessment of an expert. He did not find that there any significant areas of non-compliance. Moreover with issues such as springiness of the floor or the alignment of the addition the Board did not consider that the cause of either had been proven. The Respondent did what the building consent required. If more or different work was required it should have been specified. In other areas whilst there were some contraventions of the standards but, with the comments above as regards seriousness in mind, the Board finds the conduct complained about was not sufficiently serious enough to warrant a disciplinary outcome.

[37] The Board does, however, caution the Respondent that care needs to be taken in future to ensure that clear and accurate documentation is kept. A labour only or charge up contract does not negate the need to ensure that client instructions are recorded and clarified. In this case many of the matters before the Board may not

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

have required further investigation had the Respondent kept and made available such documentation.

Contrary to a Building Consent

- [38] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [39] As with the Board's considerations of negligence the Board did not hear any evidence of building work that did not comply with the building consent. Again this is based on the independent opinion of the Technical Assessor.

Record of Work

- [40] 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 work¹⁶.
- [41] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [42] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work ...".
- [43] On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as "immediately on completion" or "as soon as reasonably practicable". Given this and taking into consideration the requirement to give effect to the purpose of Parliament¹⁷ the Board considers the use of the words "on completion" denotes a short time thereafter.
- [44] In the present case the Respondent has submitted that the record of work was provided 10 working days after completion. The Board has accepted that it was provided in that time frame and that on this basis it has been provided within a short time of completion.

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ Section 5 of the Interpretation Act 1999

Signed and dated this 16th day of August 2018

A handwritten signature in cursive script that reads "Chris Preston".

Chris Preston
Presiding Member