

Before the Building Practitioners Board

	BPB Complaint No. CB26156
Licensed Building Practitioner:	Michael Clews (the Respondent)
Licence Number:	BP129033
Licence(s) Held:	Carpentry; 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	Whangarei
Hearing Type:	In Person
Hearing and Decision Date:	3 October 2023

Board Members Present:

- Mr M Orange, Chair, Barrister (Presiding)
- Mr D Fabish, LBP, Carpentry and Site AoP 2
- Ms J Clark, Barrister and Solicitor, Legal Member
- Mr P Thompson, LBP, Carpentry

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 disciplinary offences under sections 317(1)(b), (d) or (da)(ii) of the Act.

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Summary

- [1] The Respondent was engaged by the Complainant to construct a new detached one-bedroom dwelling and a shed. The Complainant alleged that there were aspects of the building work, based on an expert report and failed Council inspections, that were constructed in a negligent or incompetent manner and were contrary to the building consent. The Complainant also complained that the Respondent had not provided a record of work until seven months after leaving site and only after it being requested by the Complainant.
- [2] The Board had to first determine the delineation of the work carried out as between the Respondent and another Licensed Building Practitioner (Mr [OMITTED]) on site, who was also the subject of Board Inquiry. Based on the evidence of the Respondent and Mr [OMITTED], the Board determined that each had participated in all aspects of the work, and there was no one item which could be attributed exclusively to one Licensed Building Practitioner over the other.
- [3] The question for the Board was whether the building work carried out by the Respondent was negligent or incompetent. This required a determination of two issues – had the Respondent departed from an acceptable standard, and, if so, was that departure serious enough to warrant a disciplinary finding.

- [4] The further issue before the Board was whether the Respondent had carried out building work in a manner contrary to the building consent. To determine this issue, the Board has only to find that building work departed from the building consent and does not have to consider if that departure was deliberate or negligent. However, the seriousness of the conduct under investigation does have to be taken into account.
- [5] The Board found, in respect of most of the identified workmanship issues and matters which were contrary to the building consent, the Respondent had explained his approach to the Building Inspector from the Territorial Authority and obtained his consent to the approach taken by the Respondent. The work was passed by the Council inspection at the time and the failed Council inspections were an overturning of the originals after the Respondent had left the site. On this basis, the Board accepted a defence of reliance on official advice. For the remaining building workmanship issues, the Board found that they did not reach the seriousness threshold.
- [6] In addition, the Respondent did not provide a record of work to the Complainant or the Territorial Authority until asked for it some seven months after leaving site. The Board accepted the evidence of the Respondent that he did not consider that his restricted building work was complete as he expected to return to the site. On that basis, completion had not been reached, and therefore, the statutory obligation to provide the record of work had not been triggered any earlier than when it was requested by and provided to the Complainant.

The Charges

- [7] 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
- [8] 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:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317 (1)(b) of the Act; and
 - (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 has supervised, to provide the owner and the

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.

Territorial Authority with a record of work, on completion of the restricted building work (section 317(1)(da)(ii) of the Act).

- [9] In further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, above, the Board gave notice that it would inquire into the issues noted in the [OMITTED] report, the failed items in the Council inspection reports dated 3 May 2021 and 15 September 2021, and the alignment of the framing.

Consolidated Hearing

- [10] This matter proceeded as a consolidated hearing with CB26265 in respect of Mr [OMITTED]. The Respondents were witnesses for each other. A separate decision has been issued in respect of Mr [OMITTED].

Evidence

- [11] 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 relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [12] In the first instance, the Board sought to clarify the work delineation between the Respondent and Mr [OMITTED], who is also a Licensed Building Practitioner. The Respondent said they "both worked together as a team" and "both were doing all jobs together" such that it was not possible to sign responsibility for specific tasks to one or the other person. The Board accepted this position.
- [13] The Board's questions at the hearing centred on the workmanship issues identified in the [OMITTED] report produced by [OMITTED] after an inspection of the property on 19 July 2021.

Foundation Pile

- [14] Two of the piles were cut short by about 15mm, and a timber wedge was inserted. The Respondent explained that this was a temporary measure and that he intended to replace the wedge with a plastic packer but never had the opportunity to return to site to do so.

Bearer to Joist Connection

- [15] The bearer to joist connection did not have joist hangers as required by the consented drawings. The Respondent said this was done to save the homeowners money and was discussed with and accepted by the Council inspector. The Respondent did not get this acceptance confirmed in writing or obtain a minor variation.

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

Sub Floor Damp Proofing

- [16] The black polythene laid as subfloor damp proofing was not taped to the pile foundation. The Respondent said that the ground clearance was greater than 600mm and, therefore, the damp proofing was not required. Mr [OMITTED] agreed with this position. The Respondent gave evidence that he had laid the damp proofing as he considered it best practice.

Wall Cladding

- [17] The base of the cladding did not extend 50mm past the bearer as required by the consented drawings. The Respondent said he extended the cladding 50mm below the joist and that the drawings conflicted on this point. He acknowledged that he did not discuss this with the designer or seek a minor variation or amendment to the building consent.
- [18] The Respondent said that the timber used was tanalised and Mr [OMITTED] agreed that it complied with E2 of the Building Code.

Window Flashings

- [19] The flashings did not extend past the windows by 2 ribs as required by the consented drawings. The Respondent said that he used an alternative design, which included a back flashing from under the head flashing to the bottom of the cladding. He said this was discussed with and accepted by the Council inspector. The Respondent again acknowledged that this was not confirmed in writing or checked with the designer.

Water Ponding under the House

- [20] The Complainants pointed to the ponding of water under the house, and the Board inquired with the Respondent whether this was related to the excavation cut. The Respondent said that the cut had been made larger than allowed for in the plans because of the contour of the land. Again, the Respondent acknowledged that there was no designer input for this decision. The Respondent, however, explained that the water ponding was not related to the cut but was caused by an overland flow path coming out of the bank. He diverted the flow from the work site by digging a trench. The Respondent understood that the owner was addressing the issue with a drainlayer.

Wall Bracing

- [21] This issue was raised in the Council inspection of 3 May 2021, and the Respondent advised that this work was not done by him or Mr [OMITTED].

Internal Framing

- [22] The Complainants alleged that internally framed walls needed straightening. Mr [OMITTED] did not see any issues with this at the time of his inspection. The

Respondent said that he may have missed a few screws, but this was not detrimental.

Negligence or Incompetence

[23] 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 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?

[24] 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

[25] The Respondent departed from the consented drawings in a number of respects and did not obtain designer input or ensure there was an amendment or minor variation to the building consent. These failures are departures from an acceptable standard of conduct.

[26] However, the Board took note of the Respondent's interactions with the Council inspection officers and their specific assent to the changes made by the Respondent in relation to the window flashings and the joist hangers. Whilst the Respondent did not get this assent noted in writing, the Board accepts that it did occur on the basis that, at the time, the Council inspections were passed. The re-inspections which failed these aspects of the building work were in May and September 2021, some 5

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"

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.

and 9 months, respectively, after the Respondent had left the site in December 2020.

- [27] Further the Respondent gave evidence that the only reason he did not apply for a minor variation or amendment of the building consent was because the Council inspector did not at the time require one.
- [28] The Courts have recognised a defence to breaches of the law based on erroneous official advice or “officially induced error.”
- [29] In *Wilson v Auckland City Council (No 1)*,¹² the appellant was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*,¹³ Holland J found that where a person committed a crime believing it to be lawful on the grounds of “officially induced error”, it was in the public interest as well as being just that that person should not be held criminally liable.
- [30] The Board considers the Respondent was given and relied on official advice from the Council inspector. Ordinarily, the Board would find a licensed building practitioner to have been negligent where they have not built in accordance with consented plans, had no design input (where necessary) for changes and failed to obtain a minor variation or amendment for those changes. Given the reliance, however, the Board does not consider the Respondent has been negligent or incompetent in this instance in respect of the window flashings and joist hangars.
- [31] The Board still needed to consider whether the other matters raised in the [OMITTED] report amounted to negligent or incompetent conduct.

Was the conduct serious enough?

- [32] Based on court decisions,¹⁴ the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.
- [33] The Board found that the other matters raised in the [OMITTED] report did not reach the seriousness threshold. The Board accepts the Respondent’s evidence that they could and would have been remedied if the Respondent had returned to the site. In respect of the damp proofing under the subfloor, this was not a requirement of either the Building Code or the building consent.

¹² [2007] NZAR 705 (HC)

¹³ (1994) 11 CRNZ 132

¹⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74; *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA) at 200

Has the Respondent been negligent or incompetent?

- [34] The Respondent has not carried out building work in a negligent or incompetent manner and has not committed a disciplinary offence under section 317(1)(b) of the Act.
- [35] The Board reminds the Respondent, however, that due process must be followed. Minor variations should be applied for, Council concessions should be obtained in writing and designer input sought when necessary. The Respondent is not a designer and should not have proposed alternative window flashings without designer input. Adhering to this process is also a protection for the Licensed Building Practitioner.

Contrary to a Building Consent

- [36] 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.¹⁵ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁶ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁷ Inspections ensure independent verification that the building consent is being complied with.
- [37] 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.¹⁸ 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.¹⁹ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [38] The Respondent undertook building work which differed from the building consent in respect of the joist hangers, window flashings and wall cladding not extending below the bearers.

Was the conduct serious enough?

- [39] As with the Board's finding for the disciplinary offence under section 317(1)(b) of the Act, in respect of the departures from the building consent, the Respondent can avail

¹⁵ Section 49 of the Act

¹⁶ Section 40 of the Act

¹⁷ Section 222 of the Act

¹⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁹ *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".

himself of the reliance on official advice defence or that the departures were not serious enough to make a finding under section 317(1)(d) of the Act.

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

- [40] The Respondent has not carried out building work contrary to a building consent and has not committed a disciplinary offence under section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [41] 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.²⁰
- [42] 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 work²¹ unless there is a good reason for it not to be provided.²²

Did the Respondent carry out or supervise restricted building work?

- [43] The Respondent carried out restricted building work as the construction of the detached dwelling required a building consent and included the primary structure and external moisture management system of a house.²³

Was the restricted building work complete?

- [44] The Respondent advised that work started on 3 June 2020, and their last day on site was 7 December 2020. The Complainant asked the Respondent to leave the site due to a lack of funds and advised the Respondent that they would make contact when they required him back on site to complete interior linings. The Respondent said he saw another builder on the site in February 2021 but had no communication from the Complainant until the request for a record of work on 26 July 2021, which he provided on 2 August 2021.
- [45] The Board agreed that when the Respondent left site, he was expecting to return to complete work which included restricted building work – for example, removing the temporary packers on the piles.

Has the Respondent provided a record of work?

- [46] The Respondent provided a record of work on 2 August 2021 as soon as the Complainant requested one. This was his first communication from the Complainant since leaving the site. Until that point, the statutory obligation to provide a record of work had not been triggered as the Respondent legitimately expected to return to

²⁰ Section 88(1) of the Act.

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² Section 317(1)(da)(ii) of the Act

²³ Section 5 Building (Definition of Restricted Building Work) Order 2011

the site to complete his restricted building work. As such, the Respondent did not fail to meet the statutory requirements.

Board's Decisions

- [47] The Respondent has not committed the disciplinary offences under sections 317(1) (b), (d) and (da)(ii) of the Act.

Signed and dated this 3rd day of November 2023



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.*