

## Before the Building Practitioners Board

|                                 |                                |
|---------------------------------|--------------------------------|
|                                 | BPB Complaint No. CB26158      |
| Licensed Building Practitioner: | Adrian Davids (the Respondent) |
| Licence Number:                 | BP129635                       |
| 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           | Auckland  |
| Hearing Type:              | In Person   |
| Hearing Dates:             | 5 September 2023; 29 September 2023               |
| Decision Date:             | 2 November 2023                                   |
| Board Members Present:     |   |
|                            | Mr M Orange, Chair, Barrister (Presiding)         |
|                            | 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** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent is fined \$1,500, censured, and ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and the decision (without naming the Respondent) will be published in Code Words.

The Respondent has not committed disciplinary offences under sections 317(1)(d) or (i) of the Act.

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**Summary**

- [1] Mr [OMITTED] of [OMITTED] was developing two detached dwellings and four attached two-storey dwellings at [OMITTED], Auckland. The Respondent was engaged as a real estate agent by Mr [OMITTED] to sell the properties when completed. Mr [OMITTED], a Licensed Building Practitioner with a carpentry licence, was contracted to [OMITTED] on a labour-only basis to undertake certain construction tasks as requested by Mr [OMITTED]. One of these tasks was the construction of a retaining wall along the boundary with the Complainant’s property.
- [2] The sequencing and method of the construction of the retaining wall resulted in impacts to the land of the Complainant, including slips and damaged services pipes.
- [3] The Board needed to determine the extent of the Respondent’s involvement in the construction of the retaining wall, and then the question for the Board was whether

any building work carried out or supervised 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 work had been carried out 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 that the Respondent's involvement in the project was more than just that of providing real estate services. He had taken on a project management role and was directing the construction of the retaining wall. The Respondent argued he could not be held responsible for another Licensed Building Practitioner (Mr [OMITTED]) as one LBP cannot supervise another.
- [6] The Respondent did not understand the significance of the difference between restricted building work and other building work in this regard. Whilst for restricted building work, only one Licensed Building Practitioner (LBP) can carry out and/or supervise the work, leading to only one LBP having the responsibility to supply a record of work, the same restriction does not apply to non-restricted building work.
- [7] The Board found that the preponderance of evidence supported the Respondent taking on a directional and supervisory role, despite his protestations otherwise.
- [8] The Board also found that the Respondent's conduct was not of an acceptable standard, evidenced by the failures of the retaining wall, the impacts on the Complainant's property and the failure to follow the resource consent requirements incorporated into the building consent.
- [9] The departures reached the seriousness threshold, and as such, the disciplinary offence of supervising building work in a negligent manner was established.
- [10] The Board did not uphold the charge of building contrary to a building consent. Although there was evidence that the work failed to meet the required resource consent conditions, the Board found that the Respondent should not solely bear the responsibility for this.
- [11] The further disciplinary offence of disreputable conduct did not reach the seriousness threshold and was not upheld.
- [12] The Respondent is fined \$1,500, censured, and ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and the decision (without naming the Respondent) will be published in Code Words.

### **The Charges**

- [13] 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>
- [14] 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], Auckland, have:
- (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; and
  - (c) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(1)(i) of the Act.
- [15] In further investigating the matters under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the Respondent's role in the construction of a boundary retaining wall that may not have been constructed in accordance with the building consent and incorporated resource consent in respect of the manner in which excavations were carried out, excavation exposed cuts were protested and supported, the wall was constructed, and drainage was managed and which failures may have caused damage to a neighbouring property.
- [16] In further investigating matters under section 317(1)(i) of the Act, the Board gave notice that it would be inquiring into the Respondent's conduct, refusal to provide documentation that may have been reasonably requested, and refusal to engage, respond or deal with the damage that may have been caused by the failure to build the retaining wall in accordance with the building consent and resource consent.

### **Consolidated Hearing and Post Hearing Submissions**

- [17] This matter proceeded as a consolidated hearing with CB26165 in respect of Mr [OMITTED]. The Respondents were witnesses for each other. The hearing on 5 September 2023 was adjourned part heard as two summoned witnesses, Mr [OMITTED] and Mr [OMITTED], did not attend the hearing. The hearing reconvened on 29 September 2023, and evidence from Mr [OMITTED] and Mr [OMITTED] was received by the Board.

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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.

- [18] Mr Anderson, a Board Member, attended the first hearing on 5 September but was unavailable for the reconvened hearing on 29 September 2023. The remaining Board members constitute a quorum,<sup>3</sup> and this decision has been made by those members only. A separate decision has been issued in respect of Mr [OMITTED].
- [19] At the commencement of the reconvened hearing, at approximately 9.30am the Respondent advised the Board that he needed to leave the hearing at 10am. The Respondent was offered the opportunity to ask for an adjournment, which he declined. The Presiding Member advised that the hearing would continue and it was the Respondent's choice whether he left.
- [20] The Respondent chose to leave the hearing, and the hearing continued in his absence. The Board gave the Respondent the opportunity to obtain a transcript of the hearing and to respond in writing to the further evidence received by the Board after his departure and/ or to make a closing statement.<sup>4</sup> In response, the Respondent requested the transcript and then provided a written statement and some photographs. In addition, the Respondent referenced some photographs in the first hearing, and these were provided by him after the hearing. The Board has considered the further evidence and submission in reaching this decision.

### **Evidence**

- [21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.

### **Negligence or Incompetence**

- [22] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>6</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>7</sup> test of negligence.<sup>8</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>9</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if

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<sup>3</sup> Clause 30 of Schedule 3 Building Act 2004

<sup>4</sup> Board Minute dated 29 September 2023

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>6</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>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</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>9</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”

the conduct fell seriously short of expected standards.<sup>10</sup> If it does not, then a disciplinary finding cannot be made.

Did the Respondent supervise building work?

- [23] Mr [OMITTED] gave evidence that he was a labour-only contractor who had worked for Mr [OMITTED] of [OMITTED] on a previous project. He contracted to build the retaining wall and then, on a staged basis, anything further Mr [OMITTED] asked him to do.
- [24] The Respondent said that he met Mr [OMITTED] when working on a site neighbouring another of Mr [OMITTED]'s developments. He became involved in this project, in his capacity as a real estate agent, to sell the properties at 54 Parker Avenue for Mr [OMITTED]. Mr [OMITTED] agreed with this description of their initial involvement with each other.
- [25] The Respondent denied any responsibility for or project management role on the project. He was adamant that there was no contract with Mr [OMITTED], he was not being paid, and that his building practitioners' licence was not being used.
- [26] He stated that his role was limited to giving advice to Mr [OMITTED] due to his building expertise and background, visiting the site once or twice a week and doing quality assurance for the owner in his absence.
- [27] These assertions were in the face of evidence to the contrary –
- (a) Mr [OMITTED], in emails produced at the hearing, called the Respondent "management for the project".
  - (b) The site safety board at the property listed the Respondent as the site contact.
  - (c) The Respondent booked the Council inspections and attended 34 of them.
  - (d) The Respondent is noted on a site inspection sheet as "site manager" with his Licensed Building Practitioner number recorded.
  - (e) Instructions to Mr [OMITTED] by text – for example, the amount and type of concrete to be ordered; "...we still need detail drain bridging piles by manhole so don't retain that area please"; "Concrete tomorrow 12.30 need steel starter bars extended and washouts closed please".
  - (f) The Complainant gave evidence that the Respondent introduced himself as the Project manager and as the sole contact. She was told not to contact Mr [OMITTED].

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<sup>10</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".

- (g) The Complainant produced a photograph in the adjournment between the two hearings, which she explained showed the Respondent carrying out work on the project. The Respondent explained the photograph from the Complainant as depicting a late stage in the project where he was helping with finishing lines and that this was the only occasion he was “on the tools”.
  - (h) Mr [OMITTED] considered the Respondent to be the project manager and he gave evidence that the Respondent was in charge of the project and told him what to do next.
- [28] Mr [OMITTED] told the Board that he was on site every day. He stated that the Respondent was the project manager who “helped him out” and instructed some of the subcontractors, including [OMITTED], the drainlayer. Mr [OMITTED] further told the hearing that now that the “paperwork” on this project was being tidied up he would consider any invoice the Respondent may render for the assistance he gave. Mr [OMITTED] confirmed that on subsequent projects, the Respondent has invoiced him for his time at an hourly rate.
- [29] In establishing the role of the Respondent on this project, the Board prefers the evidence of Mr [OMITTED], and the Complainant, which is supported by the documents. In addition, Mr [OMITTED] categorised the Respondent as project manager and described him as such in his email to the Respondent and, of significance, said that the Respondent instructed the drainlayer subcontractor. The Board does not accept that the Respondent was acting solely as a real estate agent in his interactions with Mr [OMITTED], Mr [OMITTED], and the Complainant. He took on an instructional role through his actions, even if there may not have been a formal contract in place to record or remunerate this.
- [30] In his written response, the Respondent stated – “...I am not the LBP for this job as there is a building company employed. Meaning I am not undertaking or supervising any of this work nor is my LBP being used ... The law states that 2 LBPs under the same licence class cannot be held account for the same work. My LBP was never used I shouldn't be held account. I never undertook restricted building work or supervised the other lbp in this matter...”.
- [31] The Respondent fails to understand the distinction between building work and restricted building work in this regard. Restricted building work cannot be carried out by one Licensed Building Practitioner and supervised by another. This is because each Licensed Building Practitioner is responsible for the restricted building work he or she carries out or supervises and this is reflected in the obligation to provide a record of work in respect of it. The retaining wall construction is not restricted building work and, as such, can be carried out by one Licensed Building Practitioner and supervised by another.

- [32] In Board Decision C2-01143,<sup>11</sup> the Board found that the definition of supervise in section 7<sup>12</sup> of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board's position, therefore, is that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent, an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in section 7 that the supervision of the building work is *"sufficient to ensure it is performed competently"* applies to all building work carried out under the supervision of a licensed building practitioner.
- [33] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of noncompliance.
- [34] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992<sup>13</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:
- "As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."*
- [35] The Board finds that because of his actions, the Respondent took on a supervisory and directional role on the project. It is not relevant in determining the Respondent's role whether or not he was remunerated for it. The Respondent assumed responsibility for the work being undertaken by exercising the role of project manager. In making this finding, the Board particularly points to Mr [OMITTED]'s evidence that the Respondent instructed the drainlayer subcontractor, the booking of and attendance at Council inspections, the representations made verbally and in

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<sup>11</sup> Board Decision dated 14 April 2016

<sup>12</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

*(b) complies with the building consent under which it is carried out.*

<sup>13</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011



documents that the Respondent was the Project manager and the evidence of direct instruction to Mr [OMITTED].

- [36] The Respondent's attitude in responding to the Investigator about the complaint and at the hearing was misguided and unhelpful. A blatant and somewhat nonchalant denial of responsibility in the face of evidence to the contrary was not a responsible approach for a Licensed Building Practitioner to adopt.

Has the Respondent departed from an acceptable standard of conduct?

- [37] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>14</sup> as well as the requirement that all building work must comply with the Building Code<sup>14</sup> and any building consent issued.<sup>15</sup> The test is an objective one.<sup>16</sup>
- [38] Both the Respondent and Mr [OMITTED] accepted the various expert reports on the Board file from [OMITTED], [OMITTED] and [OMITTED] (who investigated on behalf of [OMITTED] for the Complainant) and accepted that damage had occurred to the neighbour's (the Complainant's) property as a result of the construction of the retaining wall.
- [39] The view of [OMITTED], loss adjusters reporting to the Complainant's insurance company was *"During the construction works, the contractor has excavated to the boundary line, and failed to properly support or retain the land on the [Complainant's] side of the boundary. A retaining structure has been put in place, however it has not been filled along most of the length, with fill only present at the top of the property where the cut is shallowest. The retaining structure has been placed against the forms for the foundations rather than to support the boundary line in some places. Other areas have retaining poles, but no structure connecting them. We do not consider the retaining in place to be fit for purpose, based on the damage that has occurred to the fenceline and land."*
- [40] The view of [OMITTED] Limited was – *"...movement consistent with prolonged lack of support had affected almost the entire length of the fenceline and footing on the common boundary..."; "...the failure of those developing [OMITTED] to ensure short lengths of excavation were supported before continuing with excavation or by using a hit and miss excavation methodology has resulted in movement extending across the boundary between [OMITTED] and [OMITTED] into [OMITTED]. The loss of support has resulted in a collapse across the boundary at the Eastern end of the fenceline which extends into [OMITTED] and clearly affects uPVC pipes inferred to be the private sewer and stormwater line services [OMITTED]..."*

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<sup>14</sup> Section 17 of the Building Act 2004

<sup>15</sup> Section 40(1) of the Building Act 2004

<sup>16</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.

- [41] Mr [OMITTED] said that he told Mr [OMITTED] and the Respondent that the retaining wall needed to be done in a staged fashion and that the wall needed to be built before the drainage. This advice was not followed, and the drainage work proceeded before the retaining wall was built and was, in Mr [OMITTED]'s view, "too close to the boundary". Mr [OMITTED] confirmed that he was told by Mr [OMITTED] that the retaining wall should be constructed before the drainage work was undertaken.
- [42] The Respondent gave evidence that he did not consider that the retaining wall needed to be built before the drainage and that Mr [OMITTED] wanted to do the drainage first due to contractor availability. He said that he may have advised against doing the retaining wall first but did not recall.
- [43] Mr [OMITTED] advised that he was on site every day and confirmed the Respondent's involvement with the subcontractors, including importantly the drainlayer, [OMITTED]. Mr [OMITTED]'s evidence was that the Respondent managed this subcontractor and was on site for the site cut and excavation work. At the hearing, the Respondent said that "he helped to advise" on the site cut and on getting the boundary survey and datum point for heights. The Respondent said that the excavation subcontractor was engaged by Mr [OMITTED]. Mr [OMITTED] agreed that he had engaged this subcontractor.
- [44] After Mr [OMITTED] commenced work, an issue with the closeness of the manhole to the retaining posts was discovered. To address this issue, new plans were needed, with architectural and engineering input. The Respondent told Mr [OMITTED] to stop work while this was attended to by himself and Mr [OMITTED].
- [45] At this stage, Mr [OMITTED] propped the retaining wall and then put in further support under the direction of an engineer. He then left the site to await the revised plans. He later returned and completed the retaining wall as per the plan.
- [46] The issues with the retaining wall seem to have stemmed from building sequencing and construction methodology. The Board considers that the Respondent directed and supervised the site cut, the excavation and the sequencing of the work. He directly managed the drain laying subcontractor, and he was involved in a day-to-day capacity overseeing and directing the work of Mr [OMITTED]. Clear damage to the Complainant's property has resulted from the retaining wall construction, as evidenced by the expert reports provided and accepted by the Respondent.
- [47] As such, the Respondent, in his supervision of the project, departed from an acceptable standard of conduct.

Was the conduct serious enough?

- [48] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.

- [49] The Board notes the issues with the retaining wall have caused considerable difficulty for the Complainant, including experiencing grey and urinal waste issues and the possibility of further slippage of the land. It has been expertly assessed to require in excess of \$85,000 worth of remedial work.
- [50] As noted, the Respondent's conduct contributed to a need for extensive remedial work and has significantly impacted the Complainant. Seriousness, however, relates to the extent to which the Respondent's conduct departs from an acceptable standard as judged against other practitioners. Looking at this conduct, he undertook a role as a project manager and took it upon himself to issue instructions, which resulted in the aforementioned consequences. He then sought to distance himself from them. The Respondent's decisions were informed. He knew or should have known that the decision to depart from the appropriate methodology could result in downstream issues. There was no element of inadvertence, error or oversight. As such, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [51] The Respondent has negligently supervised the excavation of the site and the construction of the retaining wall. Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

**Contrary to a Building Consent**

- [52] 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>17</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>18</sup> Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.<sup>19</sup> Inspections ensure independent verification that the building consent is being complied with.
- [53] 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>20</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

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<sup>17</sup> Section 49 of the Act

<sup>18</sup> Section 40 of the Act

<sup>19</sup> Section 222 of the Act

<sup>20</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

decide if the conduct fell seriously short of expected standards.<sup>21</sup> If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[54] The Building work differed from the building consent in that it failed to meet the requirements of the Resource consent incorporated in the building consent.

[55] Specifically, these requirements included – *“Earthworks abutting neighbouring properties will be supported during excavation. Unsupported earthwork and the construction of the retaining walls at the site boundaries will need to be completed in short sections, no more than 3m length at any one time under the supervision of a suitably qualified engineer...Construction of earthworks...must be managed to ensure there is no uncontrolled instability or collapse affecting either the site or neighbouring properties.”*

[56] The Board accepts and relies on the opinions of [OMITTED] in determining that these resource consent requirements were not met.

Was the conduct serious enough?

[57] The Board finds that the Respondent’s conduct in departing from the building consent was not serious enough to make a finding under section 317(1)(d) of the Act. The Board has reached this decision on the basis that the Respondent was one of several people, including Mr [OMITTED] and the subcontractor, who were involved in the noncompliance with the consent requirements. As such, the Board does not consider that the Respondent alone should carry the disciplinary responsibility for this noncompliance.

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

[58] The Respondent has not committed the disciplinary offence under section 317(1)(d) of the Act.

**Disrepute**

[59] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:

- criminal convictions<sup>22</sup>;
- honest mistakes without deliberate wrongdoing<sup>23</sup>;
- provision of false undertakings<sup>24</sup>; and

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<sup>21</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>22</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>23</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>24</sup> *Slack, Re* [2012] NZLCDT 40

- conduct resulting in an unethical financial gain<sup>25</sup>.

[60] The Courts have consistently applied an objective test when considering such conduct.<sup>26</sup> The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.<sup>27</sup>

[61] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,<sup>28</sup> that the Respondent has brought the regime into disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.<sup>29</sup>

#### The conduct complained about

[62] The Complainant asked the Respondent for the developer's insurance details. She said at the hearing that this was in the hope that the insurance companies for the respective parties could sort out the remedial work required. The Respondent refused to give the details to the Complainant. At the hearing, the Respondent explained that the insurance details were not his to provide and it was up to the developer, Mr [OMITTED]. Mr [OMITTED] confirmed that he had refused to supply his insurance details.

[63] The Complainant also gave detailed evidence in the form of a spreadsheet and written submission, which set out the many attempts to resolve issues with the Respondent and obtain a written plan to remediate. These detailed texts, emails and meetings were from 12 January to 15 November 2022. In particular, the Complainant pointed to a text response from the Respondent to a request to meet with the Respondent's engineer. On 26 January 2022, the Respondent replied – *"...Clearly haven't done much construction before mate good luck your panicking [sic] for nothing we are doing everything right showed you that engineers inspected but your [sic] are still not happy these are professionals we are dealing with who are much more qualified than yourself."*

#### Was the conduct serious enough?

[64] On the basis of the above matters and the facts as presented in the complaint, the Board has decided that the allegations of disreputable conduct do not reach the threshold to warrant a disciplinary outcome.

[65] The conduct predated the date on which the Code of Ethics came into force. The Respondent should note that the alleged behaviour may have been in breach of the Code of Ethics principles had it occurred in the required time frame. The Board

<sup>25</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>26</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>27</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>28</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>29</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

cautions the Respondent to, in the future, take his obligations to others seriously and engage meaningfully in resolving issues.

Has the conduct brought the regime into disrepute?

[66] The Board finds that the alleged conduct does not reach the seriousness threshold and as such the regime has not been brought into disrepute.

**Board's Decisions**

[67] The Respondent has committed an offence under sections 317(1)(b) of the Act. The Respondent has not committed offences under sections 317(1)(d) or (i) of the Act.

**Penalty, Costs and Publication**

[68] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[69] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[70] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>30</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>31</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>32</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>33</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>34</sup>
- (d) penalising wrongdoing;<sup>35</sup> and
- (e) rehabilitation (where appropriate).<sup>36</sup>

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<sup>30</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>31</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>32</sup> Section 3 Building Act

<sup>33</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>34</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>35</sup> *[OMITTED] v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>36</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

- [71] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>37</sup> and applying the least restrictive penalty available for the particular offending.<sup>38</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>39</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>40</sup>
- [72] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>41</sup>
- [73] In this matter, the Board adopted a starting point of a fine and a censure because the negligent conduct is at the lower end of the scale, and this is a proportionate penalty, consistent with other comparable offending.
- [74] It is a mitigating factor that the Respondent is not solely culpable – responsibility also rests on Mr [OMITTED] and the drain laying and excavation subcontractors. There are no aggravating factors.
- [75] Taking the noted factors into account, the Board decided that the Respondent is ordered to pay a fine of \$1,500 and is censured. A censure is a formal expression of disapproval.

### Costs

- [76] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>42</sup>
- [77] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>43</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>44</sup>.
- [78] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate. Adjustments are then made.

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<sup>37</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>38</sup> *[OMITTED] v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>39</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>40</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>41</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>42</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>43</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>44</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

[79] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the usual tariff for a half-day hearing. No additional amount has been added for the reconvened hearing as the need for the adjournment was not the Respondent's doing.

#### Publication

[80] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>45</sup> and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.

[81] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>46</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>47</sup>

[82] Based on the above, the Board **will** order further publication of this decision in Codewords for the education of the profession, but the Respondent is not to be named in such publication.

#### **Section 318 Order**

[83] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to sections 318(1)(d) and (f) of the Building Act 2004, the Respondent is censured and ordered to pay a fine of \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

**In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register, the Respondent being named in this decision and publication of the decision on the Licensed Building Practitioners' website.**

<sup>45</sup> Refer sections 298, 299 and 301 of the Act

<sup>46</sup> Section 14 of the Act

<sup>47</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055



[84] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### **Submissions on Penalty, Costs and Publication**

[85] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **1 December 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs, and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs, and publication.

### **Right of Appeal**

[86] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iv</sup>.

Signed and dated this 9<sup>th</sup> day of November 2023



**Mr 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.*

**ii Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

**iii Section 318 Disciplinary Penalties**

- (1) *In any case to which [section 317](#) applies, the Board may—*
- (a) *do both of the following things:*
    - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*

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- (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which [section 317](#) applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

<sup>iv</sup> **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—
  - (b) to take any action referred to in section 318.*

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*