Before the Building Practitioners Board

	BPB Complaint No. 26639
Licensed Building Practitioner:	Craig Anthony O'Brien (the Respondent)
Licence Number:	BP 118522
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	by audio visual link
Hearing Date:	31 July 2025
Decision Date:	26 August 2025

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr C Lang, Building Surveyor and Quantity Surveyor

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding

The Respondent **has** committed disciplinary offences under sections 317(1)(d), (da)(ii), (g) and (h) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) of the Act.

The Respondent's licence is cancelled. He may not reapply to be licensed for a period of three months. He is ordered to pay costs of $2,350. A record of the disciplinary offending will be recorded on the Public Register for three years.

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Summary

[1] The Respondent changed the design for a pile foundation by adding additional piles. No consent process was followed. The Board decided, in relation to those changes and other building work he carried out or supervised, that he had committed disciplinary offences under sections 317(1)(d), (da)(ii), (g) and (h) of the Act. The Board also decided that the Respondent had not committed a disciplinary offence under section 317(1)(i) of the Act.

[2] The Board decided that it would cancel the Respondent's licence as a result of the offending and order that he may not reapply to be licensed for a period of three months. The Board also ordered that the Respondent pay costs of $2,350. A record of the disciplinary offending will be recorded on the Public Register for three years, and the Registrar will be ordered to carry out further publication of the Board's findings.

The Charges

[3] 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]

[4] In this matter, the disciplinary charges the Board resolved to further investigate[2] were that the Respondent may, in relation to building work [OMITTED], have:

(a) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act;

(b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act;

(c) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act;

(d) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act; and

[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.

(e) conducted himself or herself 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)(i) of the Act.

[5] The Board gave notice that the issues it would further investigate in respect of section 317(1)(d) of the Act would be that the Respondent may have carried out or supervised the construction of a pile foundation that was contrary to the building consent issued, in that:

(a) additional piles that were not provided for on the building consent were installed and/or piles were installed at a different depth to that which was stipulated in the building consent without first ensuring a building consent amendment or minor variation had been granted for the changes;

(b) departed from the terms and conditions of a foundations building inspection waiver granted by the Building Consent Authority on 4 April 2024; and

(c) failed to install or ensure that a counterfort was installed as per the building consent.

[6] The issues the Board notified it would further investigate in respect of section 317(1)(h) of the Act were that the Respondent may have carried out or supervised design work that he was not competent to carry out with respect to installing additional piles and or changing pile depths.

[7] With respect to the allegation that the Respondent may have breached the Code of Ethics, the Board gave notice that the specific Code provisions it would further investigate were:

13 You must explain risks to your client;

14 Your duty to inform and educate client;

16 You must advise clients of any delays as soon as they become apparent;

18 You must normally follow your client’s instructions;

21 You must price work fairly and reasonably; and

25 You must conduct your business in a methodical and responsible manner.

[8] The Board advised that the conduct to be further investigated in respect of those Code provisions was in relation to:

(a) changes made to the pile foundation;

(b) pricing of changes to the pile foundation;

(c) the allocation of funds paid to pre-purchasing materials to be supplied by Placemakers.

[9] Finally, with respect to the Code of Ethics matters, the Board gave notice that it would also investigate whether, if upheld, the conduct reaches the disciplinary threshold for a finding of disreputable conduct under section 317(1)(i) of the Act.

Procedure

[10] The matter was set down to be heard as an in-person hearing. The Respondent did not attend and could not be contacted.

[11] The Respondent had attended a prehearing conference on 14 May 2025, when the Respondent accepted that 10 am on 31 July 2025 was a suitable date and time. A Notice of Hearing was issued providing the hearing details.

[12] The Board was confident that the Respondent was aware of the hearing date because, on 1 July 2025, at an appeal conference in the District Court concerning another matter, the Respondent informed the Judge that he had a date on 31 July 2025 before the Board.

[13] On the hearing day, the Board decided that it would not proceed with the hearing and provide the Respondent with an opportunity to explain why he did not attend. It would then make a decision as to whether the Respondent had simply failed to attend, and it would proceed to make a decision on the basis of the evidence before it, or it would allow an adjournment on the basis that there was a good reason for the Respondent's failure to attend. A Minute was issued giving the Respondent seven (7) working days to provide reasons why he did not attend the hearing, together with supporting evidence.

[14] All notices, minutes and directions have been issued to the Respondent's email address, which he maintains on the Register for Licensed Building Practitioners (LBPs), which was also the email address that the Respondent asked the Board to communicate with him on. The email asking why he did not attend the hearing bounced as undeliverable with an unknown address error. Earlier communications had not bounced. Because of the bounced email, the Minute asking why he had not attended the hearing was also posted to the Respondent at the postal address he maintains on the LBP Register. The Board did not receive a response.

[15] The Board considered that the Respondent had been adequately served with notice of the hearing and with the Minute asking him why he had not attended, and that he had been afforded his natural justice rights, as set out in section 283 of the Act. In making that decision, the Board has taken into account that section 301(1)(d) of the Act provides for an "address for communications" and that under section 302 of the Act, LBPs must keep their details, including their contact details, up to date. The Board would also expect, if there has been a change of contact details whilst a matter is under consideration, that the Respondent would inform the Board of those changes. The Board has also noted that the notices sent to the Respondent have been served in accordance with section 394 of the Act (service of notices) and that sufficient time has been allowed for the service of the Minute by post, having taken

into account the provisions of subsection 394(5) of the Act, which refers to delivery in the ordinary course of the post.

[16] Finally, in deciding to proceed and make a decision, the Board notes that the purposes of the disciplinary provisions in the Act would be defeated if Licensed Building Practitioners were able to avoid complaints by not engaging in investigations or appearing at hearings. As such, it is appropriate that it deals with the matter.

Evidence

[17] The Board must be satisfied on the balance of probabilities that the alleged disciplinary offences have been committed[3]. Under section 322 of the Act, the Board has relaxed rules of evidence, which allow it to receive evidence that may not be admissible in a court of law.

[18] The Respondent contracted, by way of his company, Building Labour Solutions Limited, which is now in receivership, to construct a new residential dwelling. A New Zealand Certified Builders fixed price contract was used. Building work started on or about 23 January 2023 and continued through until 13 September 2024, when the Respondent's company went into receivership.

Piles and Consent Conditions

[19] During the build, the Respondent advised the Complainants that the Engineer and Auckland Council required that some proposed piles be increased in size and depth and additional piles (poles) be installed. He issued a contract variation for the change. No building consent change processes were completed in relation to the change before the additional piles were installed or the consent design was increased. The Complainant alleged that the additional poles were not required and that the Respondent overcharged for the contract variation.

[20] The Auckland Council, acting as the Building Consent Authority (BCA), waived the requirement for a foundation inspection. A BCA inspection record dated 4 April 2023, noted:

> *As agreed by the site contact (the Respondent), this inspection has been waived subject to all work being completed in accordance with the Building Consent. Note- Any remedial works identified by engineer must be signed off by the engineer and noted in their site observations. Any deviation or variation from the consent will not be waived and will require an inspection to take place.*
>
> *This waiver is for a IFO foundation.*
>
> *The scope of this inspection waiver covers all foundation work associated with this building consent.*

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

Please provide Geotech engineer's details at next inspection.

Council will require the following documentation (if applicable to the inspection) to be on-site at the next inspection or it will not proceed.

Engineers who provide PS4 certificates for Structural and or Geotechnical work must be on the Auckland Council producer statement register: Refer to the following link.

The following must be provided at the next inspection:
1. Geotechnical and/or structural engineers' site observations including photos relating to the waived inspection consented works.
2. Surveyor set out certificate.
3. The contractor is to record and keep Quality Control evidence such as photos demonstrating compliance in case council requires it.
4. Markup plan of the consented works that have been inspected by the engineer.

The following must be provided by CCC stage:
A. Record of Work Memorandum from the LBP carrying out the consented works confirming it complies with the approved building consent or, if not Restricted Building Works, provide a producer statement construction PS3 cert from the contractor carrying out the work covering the relevant NZBC clauses,
B. Engineer PS4 Certification.

This waived inspection may be deemed null and void if the above documentation is not provided or the building works are not as per the consented plans.

By accepting this waiver council deems you to have understood and accepted the above documentation requirements. If there are any issues with supplying these documents respond before any further works take place within 24 hours.

[21] As matters transpired, the conditions set out above were not met. At a BCA inspection that took place on 14 August 2024, the extra unconsented piles were noted as follows:

Failed Comments:

1. Work completed in accordance with plans (Work requires amendment)

2. Subfloor pile heights and layout (Fail)

3. Subfloor point loads (Fail)

4. Subfloor bracing as per plan (Fail)

5. Subfloor: Bearers/ stringers as per plan (Fail)

6. Subfloor: Joists as per plan (Fail)

7. Subfloor: pile grade treatment as per plan (Fail)

8. Subfloor: bearer grade treatment as per plan (Fail)

9. Subfloor: joist grade/ treatment as per plan (Fail)

10. Subfloor: membrane substrate support (Fail)

Additional Comments:

INSPECTION SCOPE:

+ Partial IFG Framing Inspection carried out for Subfloor framing only.

Subfloor layout not as per plan. Subfloor diagonal brace piles and foundation piles layout not as per currently consented stamped SED plans. They have an extra foundation pile on the back 2 rows, not as per plan. They've presented a new sets of SED plans with no approved stamp but checked system record that no MV or Amendment was approved under this consent.

ITEMS TO BE RESOLVED:

1 - Amendment required: Subfloor diagonal brace piles and foundation piles layout not as per stamped SED plans. IFO Foundation inspection was also waived on 04/04/2023 so this pile layout change will void the IFO waived inspection due to waiver conditions. They've added an extra foundation pile on the back 2 rows, layout not as per foundation plan. They've presented a new set of SED plan with no approved stamp, checked system record that no MV or Amendment was approved under this consent.

2 - Full Framing inspection required, subfloor to be fully rechecked once amendment is approved.

3 - DPC missing between pile and bearer connections where piles cuts to FGL is under 300mm. Not as per NZS3604.

4 - Surveyor certificate for siting set out and FFL

OUTCOME:

FAIL - No further inspection to be carried out until Item 1 is resolved. Once done, subfloor framing to be inspected in full. Please email West TL [OMITTED] *or* [OMITTED] *to discuss about amendment or minor variation process.*

Next Booking - IME Site Meeting.

[22] The BCA confirmed by email on 27 September 2024 that: “There is no record of Auckland Council providing instructions to add additional 10m poles”.

[23] In his response to the complaint, the Respondent set out:

The suggestion that the 10-meter piles were not required is inaccurate. While it is true that the geotechnical engineer did not specifically request these

> *piles, the decision to install them was based on professional judgment to ensure the long-term stability of the structure, especially considering the flooding incident and the unstable ground conditions.*

[24] There was no evidence that the Respondent had consulted an engineer or other suitably qualified person in relation to the installation of the additional piles or that what was done complied with an Acceptable Solution.

[25] Nor was there any evidence that the Complainants were presented with advice or options by the Respondent in relation to his opinion that additional piles were required.

Counterfort Drain

[26] Regarding the counterfort drain, it was required under the building consent, and the geotechnical engineer advised by email on 13 September 2024, that the counterfort drains had not been installed, but that the Respondent had been reminded about the requirement "many times".

Pricing and Allocation of Funds

[27] The Board instructed a Quantity Surveyor as a Special Adviser under 322(1)(d) of the Act[4] to assist it in its inquiries. He was asked to provide opinions on the amounts charged for the contractual variation for the piles and whether the amounts invoiced for materials to be supplied by Placemakers for flooring, frames and roof trusses, and steel for roof and wall claddings were reasonable and in line with industry rates and amounts when the variation was issued.

[28] The Special Adviser provided a report. He noted:

> *Despite the dispute over the necessity and instruction of the changes, I have assessed the reasonableness of the costs claimed in VAR001. Based on the scope described and pricing as of March 2023, I estimate the fair cost of the variation to be approximately* ***$113,425 (including GST)****, which is close to the Respondent's claimed amount of* ***$115,466.80 (including GST)****.*
>
> And
>
> *Following a comprehensive review of the complaint file, it is evident that the matter does not relate to a formal variation but rather to a payment of $236,000 (including GST) made by the Complainant at the Respondent's request. While the Respondent maintains that this was a standard progress payment made in accordance with the contract, the evidence particularly a contemporaneous text message and the invoice issued on the same day strongly suggests that the payment was intended to cover the cost of specific materials, namely flooring, frames, roof trusses, and NZ steel for roof and*

[4] 322 Board may hear evidence for disciplinary matters
(1) In relation to a disciplinary matter, the Board may—
(d) appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).

wall cladding. The description on the invoice also deviates from the contractual milestone of "Ready for Roof," indicating that the conditions for the fourth stage payment had not been met. As such, I do not accept the Respondent's assertion that the payment was contractually justified.

Despite this, the Complainant did consent to the payment, likely to facilitate the purchase of materials necessary for the build. However, due to the lack of detailed documentation, such as supplier quotes or a breakdown of intended purchases, it is not possible to precisely verify the value of the materials. Based on industry estimates, the cost of the materials referenced would likely have been around ***$150,000 including GST****, suggesting that the amount paid was more than sufficient, if not excessive. While there is no clear evidence that the Respondent explicitly represented the* ***$236,000 (including GST)*** *as the cost of materials, the context implies that the payment was made for that purpose.*

Contrary to a Building Consent

[29] 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.[5] Once issued, there is a requirement that the building work be carried out in accordance with the building consent.[6] Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.[7] Inspections ensure independent verification that the building consent is being complied with.

[30] 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.[8] 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.[9] If it does not, then a disciplinary finding cannot be made.

<u>Was there building work that differed from the building consent</u>

[31] There were three issues being investigated. They were:

(a) the installation of additional piles that were not provided for on the building consent and/or piles that were installed at a different depth to that which

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[5] Section 49 of the Act
[6] Section 40 of the Act
[7] Section 222 of the Act
[8] *Blewman v Wilkinson* [1979] 2 NZLR 208
[9] *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".

was stipulated in the building consent, without first ensuring a building consent amendment or minor variation had been granted for the changes;

(b) a departed from the terms and conditions of a foundation building inspection waiver granted by the Building Consent Authority on 4 April 2024; and

(c) failed to install or ensure that a counterfort was installed as per the building consent.

[32] The evidence established that extra piles were installed and the consented pile design depth and size, was altered. It also established that the change came about because the Respondent decided they were needed. There is no evidence that he consulted with anyone when he made that decision.

[33] The evidence also established that the counterfort drain had not been installed.

[34] Because extra piles had been installed, the counterfort had not been installed, and because of the failed foundations items noted by the BCA (subfloor: pile heights and layout, point loads, bracing, bearers and stringers, joists, pile grade treatment, bearer grade treatment, joist grade treatment, and membrane substrate support not as per the plans), it was clear that the conditions of the waiver granted by the BCA had not been met.

[35] Regarding the changes to the pile foundations, all building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[36] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code are satisfied. Section 49 provides:

> ***49 Grant of building consent***
>
> *(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[37] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

> ***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—*
> *(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.*

[38] In *Tan v Auckland Council*[10] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[39] The same applies to the ongoing verification of building work. A failure to notify the BCA of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

[40] Justice Brewer in *Tan* also noted:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[10] [2015] NZHC 3299 [18 December 2015]

[41] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[42] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[43] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with: by way of a minor variation under section 45A of the Act, or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for. In this matter, the Board's view is that the Respondent's changes to the pile layout and design were not minor and would have required an amendment.

[44] In this respect, section 45(4) of the Act states:

> *(4) An application for an amendment to a building consent must,—*
>
> > *(a) in the case of a minor variation, be made in accordance with section 45A; and*
> >
> > *(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[45] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent, then any building work that relates to the amendment cannot be carried out until the amendment is granted.

[46] It should also be noted that whilst a Certificate of Acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

> ***96 Territorial authority may issue certificate of acceptance in certain circumstances***
>
> *(3) This section—*
>
> > *(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*

> *(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[47] Given the above, the Respondent should not have proceeded to make the change to the piles layout and design without first ensuring that a building consent change was applied for and granted. Because he had proceeded to make the changes, the Board finds that he has conducted himself in a negligent manner.

<u>Was the conduct serious enough</u>

[48] The conduct was serious. It showed a disregard for building consent processes.

[49] First, the Respondent took it upon himself to make substantial structural changes that most likely required a formal building consent amendment. The Board also notes that the Respondent initially claimed that the change was required by the BCA and the engineer but later accepted that he made the decision to change the pile layout and design himself. Whilst the changes may, in the Respondent's opinion, have been needed, he was not in a position to make the unilateral decision that he did.

[50] Second, the Respondent also abused the trust that was placed in him regarding the foundation inspection waiver the BCA granted. The terms of that waiver were clear. It was also clear that the Respondent had paid little regard to those terms and had not constructed the foundations in accordance with the building consent, as shown by the extensive list of failed items that were later identified by the BCA.

[51] Finally, the counterfort drain was not constructed, and whilst not as serious an issue as the first two items, he was repeatedly reminded by others of the need to construct it, and his disregard for those instructions was consistent with the overall disregard he showed for the building consent and the building consent change process.

<u>Has the Respondent breached section 317(1)(d) of the Act</u>

[52] The Respondent has carried out and supervised building work that was contrary to the building consent.

Failure to Provide a Record of Work

[53] 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.[11]

[54] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[12] unless there is a good reason for it not to be provided.[13]

[11] Section 88(1) of the Act.
[12] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[13] Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise restricted building work

[55] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure of a residential dwelling, which is restricted building work.[14]

Was the restricted building work complete

[56] The Respondent's building work came to an end when his company was put into receivership on or about 13 September 2024. After that date, he was not going to be able to carry out or supervise any further restricted building work. That was when a record of work was due.

Has the Respondent provided a record of work

[57] The Respondent has not provided a record of work.

Was there a good reason for the Respondent to withhold his records of work

[58] There are no known good reasons. The board notes that whilst the respondent's company may have been put into receivership, that receivership would not have prevented him from providing a record of work as per the requirements of section 88 of the Act.

[59] The Respondent should also note that a record of work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. As such, if there were monetary issues between the Respondent and the Complainant, those issues would not have been a good reason not to provide a record of work.

[60] Finally, the Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Did the Respondent fail to provide a record of work

[61] The Respondent has failed to provide a record of work on completion of restricted building work.

Code of Ethics

[62] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.[15] It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes[16] for some time, and the Board has taken guidance from decisions made in other regimes.

[14] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011
[15] Building (Code of Ethics for Licensed Building Practitioners) Order 2021
[16] Lawyers, Engineers, Architects and Accountants, for example

[63] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.

[64] The disciplinary provision in the Act simply states, "has breached the code of ethics". Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board,*[17] Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

> *Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[65] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. In *Collie v Nursing Council of New Zealand,*[18] the test was stated as:

> *[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.*

[66] Finally, when considering alleged breaches of the Code of Ethics, the Board needs to consider whether the conduct, if upheld as a breach of the Code, reaches the threshold for a disciplinary finding of disrepute, which is a more serious disciplinary finding.

<u>The Conduct</u>

[67] There were three issues the Board was investigating: design changes made to the pile foundation, pricing of the changes to the pile foundation and the allocation of funds paid to pre-purchasing materials.

[68] Dealing with the pricing changes and allocation of funds first, the Board sought a report from a Special Adviser to assist it in its investigations. The Special Adviser's report did not, in the Board's view, provide a basis on which a finding of a breach of the Code of Ethics could be made. Whilst the Complainants put forward evidence to support the allegations and express their opinions, the board needed strong evidence on which to make a finding, and in this respect, the Board has applied the

[17] [1992] 1 NZLR 720 at 724
[18] [2001] NZAR 74

standard set out in *Z v Dental Complaints Assessment Committee,*[19] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond a reasonable doubt.*

[69] Accordingly, the Board has decided that there was insufficient evidence to establish, on the balance of probabilities, that the Respondent had breached clauses 21 or 25 of the Code of Ethics (you must price work fairly and reasonably, and you must conduct your business in a methodical and responsible manner) regarding pricing changes and allocation of funds.

[70] Turning to the remaining allegation, the design changes to the pile foundation, the Board was of the view that the conduct did come within clauses 13, 14 and 16 of the Code. They state:

> ***13 You must explain risks to your client***
>
> *(1) You must take all reasonable steps to—*
>
> > *(a) discuss with your client the design and construction risks of any project you are undertaking and any particular building method you are using in carrying out or supervising building work; and*
> >
> > *(b) ensure that your client understands the options available to mitigate those risks before the work is commenced.*
>
> *(2) If you become aware of a risk that has arisen or become apparent during the course of carrying out or supervising building work, you must, as soon as practicable, advise your client in writing.*

[19] [2009] 1 NZLR 1

14 Your duty to inform and educate client

You must provide your client with sufficient information and advice to enable them to make an informed decision to enable you to continue with your building work.

16 You must advise clients of any delays as soon as they become apparent

You must, in relation to any building work you are carrying out or supervising, take all reasonable steps to—

(a) give your client regular reports on progress; and

(b) ensure that your time frame estimates to clients are realistic; and

(c) promptly notify your client when time frames for completing work change, particularly in the event of delays; and

(d) ensure that delays in completing the building work are prevented wherever possible.

[71] The Respondent did not consult with the Complainants or any more knowledgeable professionals before the changes were made, and did not provide a detailed explanation for why he considered the extra piles necessary nor the reasons for the increase to the approved pile design. Further, rather than explaining why they were needed, the Respondent stated that the Council and the engineer had required the extra piles, which was not true.

[72] The Board also notes that, even if the changes had been necessary, which is unlikely, the Respondent did not present any alternative options to allow for an informed decision. Rather, he made a unilateral decision and exposed the Complainants to significant increases in cost, which may not have been necessary, as a result.

[73] The Board also notes that the Respondent's actions resulted in delays and that he did not keep the Complainants informed as to why the delays were occurring or when further progress would be made.

[74] Given the above factors, the Board is of the view that the Respondent has breached clauses 13, 14 and 16 of the Code of Ethics.

[75] In terms of the remaining Code of Ethics provision, the Board gave notice that it would investigate clause 18, which states that you must normally follow your client's instructions. The Board's view was that the matters relating to that clause have been dealt with by the Board, and its findings that the Respondent breached section 317(1)(d) of the Act when he carried out or supervised building work that was contrary to the building consent issued. As such, no disciplinary findings will be made with respect to clause 18.

<u>Was the conduct serious enough</u>

[76] The clauses under consideration for a distant refining are clauses 13, 14 and 16. The Board has noted that the Respondent, in relation to the extra piles, did not seek

professional advice from others before deciding that they were required, unfairly apportioned blame for their need on others, and failed to give advice or updates to the Complainants. Those factors put the conduct into the serious category for which a disciplinary finding is required.

Has the Respondent breached the Code of Ethics

[77] The Respondent has clauses 13, 14 and 16 of the Code of Ethics.

Disrepute

[78] 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[20];
- honest mistakes without deliberate wrongdoing[21];
- provision of false undertakings[22]; and
- conduct resulting in an unethical financial gain[23].

[79] The Courts have consistently applied an objective test when considering such conduct.[24] 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.[25]

[80] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,[26] that the Respondent has brought the regime into disrepute and that the conduct was sufficiently serious for the Board to make a disciplinary finding.[27]

The conduct complained about

[81] The conduct was that which the Board was investigating in relation to a breach of the Code of Ethics.

Was the conduct serious enough

[82] The Board decided that the conduct did not reach the threshold for a finding of disrepute. The findings of a breach of the Code of Ethics is sufficient and appropriate.

Has the conduct brought the regime into disrepute

[83] The Respondent has not conducted himself in a distributable manner.

[20] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[21] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[22] *Slack, Re* [2012] NZLCDT 40
[23] *Collie v Nursing Council of New Zealand* [2000] NZAR 7
[24] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[25] *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519
[26] *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.
[27] *Collie v Nursing Council of New Zealand* [2001] NZAR 74

Misrepresentation or Outside of Competence – Design Work

[84] Section 314B(b) of the Act provides:

> *A licensed building practitioner must—*
> *(b) carry out or supervise building work only within his or her competence.*

[85] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b), a Licensed Building Practitioner must only work within their individual competence.

[86] The Respondent holds a Carpentry licence. Licensing classes are designated under section 285 of the Act. The building work he carried out on the change to the piles was design work, as defined by the Building (Design Work Declared to be Building Work) Order 2007. Ordinarily, design work is carried out by a person who holds a Design licence or is deemed to hold one. Deemed persons are architects and chartered professional engineers. If the change to the design had gone through the correct building consent process, the design changes would have had to have been developed and submitted by a licensed designer together with a Certificate of Design Work certifying the design was compliant with the Building Code.

[87] The Board is not aware of any particular competencies that the Respondent holds in relation to design work, other than his general experience. The Board notes that others who were more suitably qualified considered that the additional piles were not necessary. The Board considers that, in those circumstances, the Respondent was working outside of his personal competence when he developed a design for piles that differed from the building consent. The disciplinary charge is upheld.

<u>Has the Respondent carried out building work that was outside of his competence</u>

[88] The respondent has carried out building work (design work) that he was not personally competent to carry out and has breached section 317(1)(h) of the Act.

Board Decisions

[89] The Respondent **has** breached sections 317(1)(d), (da)(ii), (g) and (h) of the Act.

[90] The Respondent **has not** breached section 317(1)(i) of the Act.

Penalty, Costs and Publication

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

[92] Because the Respondent did not attend the hearing or respond to the Board's directions, the matter was determined in the absence of the Respondent attending. Included was information relevant to penalty, costs, and publication. The Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[93] The Board has the discretion to impose a range of penalties.[ii] 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.[28] It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:[29]

(a) protection of the public and consideration of the purposes of the Act;[30]

(b) deterring the Respondent and other Licensed Building Practitioners from similar offending;[31]

(c) setting and enforcing a high standard of conduct for the industry;[32]

(d) penalising wrongdoing;[33] and

(e) rehabilitation (where appropriate). [34]

[94] 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[35] and applying the least restrictive penalty available for the particular offending.[36] In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty [37] that is consistent with other penalties imposed by the Board for comparable offending.[38]

[95] 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.[39]

[96] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

[97] The Respondent's approach to the matters under inquiry is also an aggravating feature. The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels*

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[28] 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]

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

[30] Section 3 Building Act

[31] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

[32] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

[33] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[34] *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

[35] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

[36] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

[38] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

[39] 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.

v Complaints Committee,[40] the High Court held that it was permissible to take into account as an adverse factor when determining the penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. The Respondent's failure to engage and appear is germane in this respect.

[98] The Board also notes that it was considering three disciplinary matters in relation to the Respondent at the same time, but that the Respondent has not appeared previously before the Board, so this matter cannot be considered to be a second or subsequent disciplinary offence. However, the Board can apply the totality principle and consider the Respondent's conduct in light of the other matters before it. In that respect, the Board noted a cavalier attitude towards compliance and failure to engage in and take responsibility for issues and faults arose across all three matters, putting the conduct at the higher end of the scale.

[99] In terms of not taking responsibility, it is also relevant that the Respondent appealed one of the Board's earlier decisions (the appeal was struck out because the Respondent failed to appear in relation to it on two occasions) and has stated an intention to appeal another. The non-acceptance of findings indicates that the Respondent is not prepared to take responsibility for his actions and that he poses a risk to the public.

[100] Because of the other disciplinary matters and the seriousness of the conduct in this matter, the Board has decided that a cancellation of the Respondent's licence is warranted to protect the public, to punish the Respondent, and deter others from such conduct. Accordingly, the Board will order that the respondent's licence be cancelled and that he not be able to reapply to be licensed for a period of three months.

Costs

[101] 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.[41]

[102] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings[42]. The starting point can then be adjusted up or down with regard to the particular circumstances of each case[43].

[103] 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 complex and was, because the Respondent did not appear, dealt with on the papers. Adjustments are then made.

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[40] [2011] 3 NZLR 850.

[41] *Collie v Nursing Council of New Zealand* [2001] NZAR 74

[42] *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

[43] *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.

[104] Based on the above, the Board's costs order is that the Respondent is to pay the sum of $2,350 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a complex matter that has been dealt with on the papers. It is significantly less than 50% of the actual costs.

Publication

[105] 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,[44] 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.

[106] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.[45] 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.[46]

[107] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication. There is public interest in the matter, and it is important that others learn from the Respondent's conduct. The article is to be published in the Wrap Up and in any other publication that the Registrar thinks fit.

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months. .**

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,350 (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, the Respondent will be named in this decision, which will be published on the Board's website, and the Registrar is directed to publish an article in the Wrap Up summarising the matter.

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[44] Refer sections 298, 299 and 301 of the Act
[45] Section 14 of the Act
[46] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[109] 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

[110] 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 **Wednesday, 10 December 2025**. 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

[111] The right to appeal Board decisions is provided for in section 330(2) of the Act[iii].

Signed and dated this 19th day of November 2025.

Mr M Orange
Presiding Member

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[i] ***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."

[ii] ***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.*

(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.

[iii] ***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.