

## Before the Building Practitioners Board

	BPB Complaint No. CB25396
Licensed Building Practitioner:	Christopher Dinan (the Respondent)
Licence Number:	BP 118154
Licence(s) Held:	Carpentry and Site AOP 2

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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 Type:	On the Papers
Draft Decision Date:	4 August 2020
Final Decision Date:	5 November 2020
Board Members Present:	
	Chris Preston, Chair (Presiding)
	Richard Merrifield, LBP, Carpentry and Site AOP 2
	David Fabish, LBP, Carpentry and Site AOP 2
	Faye Pearson-Green, LBP, Design AOP 2

#### 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 section 317(1)(b) and 317(1)(d) of the Act.

**Contents**

**Summary of the Board's Decision**..... 2

**Background**..... 2

**The Charges** ..... 3

    Regulation 9 Decisions..... 3

    Disciplinary Offences to be Investigated ..... 3

**Draft Decision Process**..... 3

**Evidence**..... 4

**Board’s Conclusion and Reasoning**..... 5

    Negligence..... 5

    Contrary to a Building Consent..... 7

**Decision on Penalty, Costs and Publication** ..... 8

    Penalty ..... 8

    Costs..... 9

    Publication ..... 9

**Section 318 Order**..... 10

**Right of Appeal**..... 10

**Summary of the Board's Decision**

[1] The Respondent has been negligent and has failed to comply with a building consent in supervising excavations and the construction of a retaining wall which were not in accordance with the building consent documentation issued. He is fined the sum of \$4,500 and ordered to pay costs of \$1,000.

**Background**

- [2] On 4 August 2020, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent. The Board decided that a hearing into the Respondent’s conduct was required, but that it would issue a Draft Decision and invite further evidence and submissions. The Respondent was advised that he could seek to have the Draft Decision set aside and to have the matter determined at an In-Person hearing.
- [3] On 17 September 2020, the Respondent requested an In-Person hearing. A Notice of Proceeding was issued, and a prehearing conference to set the matter down for a hearing was held. The matter was set down for a hearing on 9 December 2020 in Hamilton.
- [4] On 4 November 2020, following the prehearing conference, the Respondent advised that he no longer wanted the matter to be taken to a hearing and that he would accept the findings in the Draft Decision. He requested that the Draft Decision be

reinstated. On the basis of that request, the Draft Decision which follows is affirmed and is made final.

## **The Charges**

### Regulation 9 Decisions

- [5] The complaint to the Board contained an allegation that the Respondent had breached section 317(1)(da) of the Act by failing to provide documentation.
- [6] With regard to those allegations the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

*(a) it does not come within the grounds for discipline; or*

- [7] The reason the Board reached that decision was that the documentation sought (plans, quotations, emails) did not come within the types of documentation stipulated in either section 317(1)(da)(i) or (ii). As such the matters complained about do not come within the Board's jurisdiction.

### Disciplinary Offences to be Investigated

- [8] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [9] Under regulation 10 the Board is required to hold a hearing in respect of these matters.

## **Draft Decision Process**

- [10] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures<sup>1</sup>. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation<sup>2</sup>. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

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<sup>1</sup> Clause 27 of Schedule 3

<sup>2</sup> *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- [11] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [12] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs, or the Respondent requests an in-person hearing, one will be scheduled.

### **Evidence**

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [14] In this case a new multi-unit development consisting of five proposed three-story units with attached garages at *[Omitted]* had been approved for construction by the Hamilton City Council, and a Building Consent was issued on 30 November 2018.
- [15] The Building Consent allowed for the demolition of the existing house, surrounding hard landscaping and retaining wall as well as substantial site excavation and new boundary retaining walls. The excavation was adjacent to three side boundaries, two of which were owned by the Complainant (*[Omitted]* and *[Omitted]* to the north).
- [16] A surveyor's report was provided prior to excavation. It clearly set out boundary lines and where excavation for the retaining wall was to be undertaken.
- [17] Excavation was carried out adjacent to *[Omitted]*. A new retaining wall was constructed which extended over the boundary line which was not in accordance with the Building Consent or the surveyor's site set-out.
- [18] When the Council were made aware of this, a Notice to Fix was issued dated 19 June 2019. The Notice to Fix stated a retaining wall had been constructed on the property over the boundary and into *[Omitted]* which was in contravention of the approved Building Consent. At the widest point approximately three meters of the neighbouring *[Omitted]* had been excavated.
- [19] The Notice to Fix gave the Respondent's company until 9 August 2019 to comply with the Notice. To remedy the contravention or non-compliance the Notice to Fix stated that either an amendment to the building consent for the retaining wall had to be obtained or it had to be removed and constructed in accordance with the approved building consent. The Respondent did not contest the Notice to Fix. The retaining wall has not been re-constructed.

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

[20] The Respondent was provided with the complaint. His response to it was that the complaint had been made to avoid paying for the shared costs of a fence and retaining wall and that the commercial matters were being dealt with in the Disputes Tribunal.

### **Board's Conclusion and Reasoning**

[21] The Board has decided that the Respondent **has**:

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

and **should** be disciplined

[22] The reasons for the Board's decisions follow.

#### Negligence

[23] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>4</sup> test of negligence which has been adopted by the New Zealand Courts<sup>5</sup>.

[24] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>6</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[25] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>7</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>8</sup>.

[26] The Board notes that the purposes of the Act are:

### **3 Purposes**

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<sup>4</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>5</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>6</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>8</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

*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.*

[27] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>9</sup> and be carried out in accordance with a building consent<sup>10</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[28] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>11</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[29] The Board was of the view that a significant site excavation with potential to impact multiple properties had been undertaken and that extra care was required to insure that the boundary lines were identified and the excavation and retaining wall were in the correct place and in accordance with the Building Consent.

[30] The Board noted that there was a surveyor's plan that clearly set out the site and stakes were provided by the surveyor locating the boundaries. The excavation contractor should have been supervised to ensure the work was compliant.

[31] The location of boundaries and the setting up of the site is a critical part of building work, especially given the possible impact on neighbouring properties and in this case the extent of excavation undertaken. It needed careful supervision. It should

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<sup>9</sup> Section 17 of the Building Act 2004

<sup>10</sup> Section 40(1) of the Building Act 2004

<sup>11</sup> [2001] NZAR 74

not have been left up to the excavation contractor to ensure compliance. Nor should there have been reliance on the neighbouring fence line to act as the boundary.

- [32] It is the Board's view that this was a significant lack of supervision.
- [33] Given that a clear surveyor's plan and boundary set-out was produced to allow an accurate set out for the property and for the excavation for the retaining walls, the Respondent has been negligent in his failure to ensure it was followed.
- [34] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

#### Contrary to a Building Consent

- [35] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. 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] 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.
- [37] In this case the building consent was issued based on the surveyor's plans in terms of the boundary locations. An application for an amendment was not applied for in respect to the excavation which extended over the boundary. The work that was completed was not in accordance with the Building Consent, as set out in the Council's Notice to Fix.
- [38] Unlike negligence, contrary to a building consent is form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No

fault or negligence must be established<sup>12</sup>. Give this the Board finds that the disciplinary offence has been committed.

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

- [39] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [40] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and 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

- [41] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>13</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>14</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [43] In considering penalty the Board had a starting point of \$5,500. It adopted a high starting point given that the excavation extended significantly into the neighbouring property and it was a critical error that would not have been made had the approved Building Consent documents and the surveyor's plans and site set-out been followed. The Board also notes that the extent of the error has meant that approximately three meters of the neighbouring property has been excavated.

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

<sup>13</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>14</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [44] The Board has reduced the fine by \$1,000 on the basis that the Respondent corrected the error immediately. Based on the above, the Board's final penalty decision is a fine of \$4,500.
- [45] The Respondent requested that, some or all the fine be paid to a charity. The legislative provisions in the Act do not allow for a fine to be dealt with in that manner.

### Costs

- [46] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [47] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>15</sup>.
- [48] In *Collie v Nursing Council of New Zealand*<sup>16</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

*But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

- [49] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

### Publication

- [50] 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>17</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

*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.*

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<sup>15</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.

<sup>16</sup> [2001] NZAR 74

<sup>17</sup> Refer sections 298, 299 and 301 of the Act

- [51] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.
- [52] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>18</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>19</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>20</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>21</sup>.
- [53] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>22</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [54] Based on the above the Board will not order further publication.

### Section 318 Order

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

<b>Penalty:</b>	<b>Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$4,500.</b>
<b>Costs:</b>	<b>Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.</b>
<b>Publication:</b>	<b>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.</b> <b>In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.</b>

- [56] 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.

### Right of Appeal

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

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<sup>18</sup> Section 14 of the Act

<sup>19</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>20</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>21</sup> *ibid*

<sup>22</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 6<sup>th</sup> day of November 2020



**Chris Preston**  
Presiding Member

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<sup>i</sup> **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."*

<sup>ii</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.*