

Before the Building Practitioners Board

	BPB Complaint No. CB26165
Licensed Building Practitioner:	Slarhudin Mahmud (the Respondent)
Licence Number:	BP135253
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 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 not** committed disciplinary offences under sections 317(1)(b) or (d) of the Act.

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Summary

- [1] The Respondent was engaged by Mr [OMITTED] of [OMITTED] on a labour-only basis to do specific tasks as instructed on a project at [OMITTED], Auckland. The project was the construction of two detached dwellings and 4 attached two-storey dwellings, but this hearing was concerned only with the construction of a retaining wall on the boundary of the project property and 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. The Board needed to determine firstly the extent of the Respondent’s involvement in the aspects of the construction of the retaining wall, which the Board had given notice it was investigating. These were focussed on the site cut, excavation and drainage work, 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.
- [3] 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.
- [4] The Board determined that whilst the Respondent carried out and supervised the construction of the retaining wall, he had not been responsible for the site cut at the commencement of the project and had expressed concerns about the sequencing of the retaining wall construction. The Respondent was also a labour-only contractor without full control of the project, which, the Board found, was being directed by another Licensed Building Practitioner and the developer. As a result, the Respondent’s conduct

did not depart from an acceptable standard. As such, the Board did not consider the other elements of the offence and found that the complaint had not been substantiated.

- [5] As regards the charge of building contrary to a building consent, the Board found that whilst the initial work on the retaining wall was not in accordance with the resource consent requirements, the conduct was not serious enough to warrant a disciplinary outcome. The Board made this decision on the basis that the Respondent ceased work when the issues were encountered and then completed the work in accordance with the revised Council consented plan.

The Charges

- [6] 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
- [7] In this matter, the disciplinary charges the Board resolved to further investigate² 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; and
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [8] 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 protected and supported, the wall was constructed, and drainage was managed and which failures may have caused damage to a neighbouring property.

Consolidated Hearing and Post Hearing Submissions

- [9] This matter proceeded as a consolidated hearing with CB26158 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 October 2023 and evidence from Mr [OMITTED] and Mr [OMITTED] was received by the Board.
- [10] Mr Anderson, a Board Member attended the first hearing on 5 September but was unavailable for the reconvened hearing on 29 October 2023. The remaining Board members constitute a quorum, and this decision has been made by those members only. A separate decision has been issued in respect of Mr [OMITTED].

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.

- [11] Mr [OMITTED] chose to leave the reconvened hearing before its conclusion due to another meeting. The hearing continued in his absence. The Board gave Mr [OMITTED] 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.³ Mr [OMITTED] obtained the transcript and then provided a written statement and some photographs. In addition, he had 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.
- [12] By email to the Board dated 3 October 2023, the Respondent sought to respond to Mr [OMITTED] photographs by asking the Board to contact the digger driver shown in the photograph. The Board noted the Respondent's further submission, but it was unnecessary for the Board to advance this line of inquiry further, given its acceptance of the evidence that the Respondent was not present or involved in the site excavation, as set out in this decision.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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

- [14] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ 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*⁶ test of negligence.⁷ 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.⁸ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁹ If it does not, then a disciplinary finding cannot be made.

³ Board Minute dated 29 September 2023

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ *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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ 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)

⁸ 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"

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".

Has the Respondent departed from an acceptable standard of conduct?

- [15] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹ as well as the requirement that all building work must comply with the Building Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²
- [16] 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.
- [17] The Respondent gave evidence that he was a labour-only contractor who had worked for Mr [OMITTED] of [OMITTED] on a previous project. Mr [OMITTED] agreed. The Respondent had a team of 7, including himself. He contracted to do the retaining wall and then, on a staged basis, anything further Mr [OMITTED] asked him to do. He described his relationship with Mr [OMITTED] as "close like brothers", and he has continued to do work for him.
- [18] Mr [OMITTED] is also a Licensed Building Practitioner with a Carpentry licence. His role on the project is relevant in determining the level of the Respondent's responsibility. Mr [OMITTED] 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 [OMITTED] for Mr [OMITTED]. Mr [OMITTED] agreed with this description of their initial involvement with each other.
- [19] Mr [OMITTED] denied any responsibility 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 licence was not being used. Mr [OMITTED] maintained that his role was limited to giving advice to Mr [OMITTED] because of his building expertise and experience, visiting site once or twice a week and doing quality assurance for the owner in his absence.
- [20] These assertions were in the face of evidence to the contrary –
- (a) Mr [OMITTED], in emails produced at hearing, called Mr [OMITTED] "management for the project".
 - (b) Mr [OMITTED]'s evidence was that Mr [OMITTED] 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 Mr [OMITTED] may render for the assistance he gave. Mr [OMITTED] confirmed that on subsequent projects, Mr [OMITTED] invoices him for his time at an hourly rate.

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

- (c) The site safety board at the property listed Mr [OMITTED] as the site contact.
 - (d) Mr [OMITTED] booked the Council inspections and attended 34 of them.
 - (e) Mr [OMITTED] is noted on a site inspection sheet as “site manager” with his Licensed Building Practitioner number recorded.
 - (f) Instructions were given by Mr [OMITTED] to the Respondent 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”.
 - (g) The Complainant gave evidence that Mr [OMITTED] introduced himself as the Project manager and was the sole contact. She was told not to contact Mr [OMITTED].
 - (h) 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”.
- [21] In addition, the Respondent considered Mr [OMITTED] to be the project manager, and he gave evidence that Mr [OMITTED] was in charge of the project and told him what to do next.
- [22] The Respondent’s first involvement in the project was to drop off materials before work commenced. The Respondent said that he told Mr [OMITTED] and Mr [OMITTED] 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 the Respondent’s view, “too close to the boundary”. He was not involved in or on-site for the site cut and excavation. The excavator was engaged directly by Mr [OMITTED].
- [23] Mr [OMITTED] agreed that he had engaged the excavator, the contractor who demolished the existing house on the site and [OMITTED] the drainlayer. Mr [OMITTED] also agreed that the Respondent had told him that the retaining wall should be constructed before the drainage was undertaken.
- [24] After commencing the build of the retaining wall, the Respondent was told by Mr [OMITTED] to stop work because of a manhole issue – that is, the manhole was close to the retaining wall, and the retaining posts needed to be one metre away from the edge of the manhole to the outside of the retaining post. To address this issue new plans were needed, and the Respondent was told to stop work while this was attended to by Mr [OMITTED] and Mr [OMITTED].
- [25] At this stage, the Respondent 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 returned and completed the retaining wall as per the plan.

- [26] In establishing the role of Mr [OMITTED] on this project, the Board prefers the evidence of the Respondent and the Complainant, which is supported by the documents. In addition, Mr [OMITTED] categorised Mr [OMITTED] as the Project Manager and described him as such in his email to the Respondent and, of significance, said that Mr [OMITTED] instructed the drainlayer subcontractor. The Board does not accept Mr [OMITTED]' evidence that he was acting solely as a real estate agent in his interactions with the Respondent, Complainant and Mr [OMITTED]. He took on an instructional and directional role through his actions, even if there may not have been a formal contract in place to record or remunerate this.
- [27] In terms of the specific building work which the Board listed it would investigate - excavations were carried out, excavation exposed cuts were protected and supported, the wall was constructed, and drainage was managed, the Board makes the following findings.
- (a) The Respondent had no responsibility for the site cut and excavation. It was undertaken by a separate contractor engaged by the owner and was not done under the Respondent's supervision.
 - (b) The protection of the exposed cuts when the work was halted, due to the manhole issue, was done in accordance with expert engineer advice and as such, was of an acceptable standard.
 - (c) There was no evidence to suggest the construction of the retaining wall was inadequate or not in accordance with the revised plan.
 - (d) Drainage management was a matter the Respondent specifically raised with the owner and Mr [OMITTED], and his advice was not followed.
- [28] The issues with the retaining wall seem to have stemmed from building sequencing and construction methodology. The Board considers, given the labour-only role taken on by the Respondent and the advisory/ instructional actions of Mr [OMITTED], that the Respondent's conduct was acceptable and did not breach the standard required of a Licensed Building Practitioner.

Was the conduct serious enough?

- [29] It is not necessary to consider this element of the offence as the Board has found that the Respondent's conduct did not breach the required standard.

Has the Respondent been negligent or incompetent?

- [30] The Respondent has not carried out or supervised building work in a negligent or incompetent manner.

Contrary to a Building Consent

- [31] 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.¹³ Once issued, there is a requirement that

¹³ Section 49 of the Act

the building work be carried out in accordance with the building consent.¹⁴ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁵ Inspections ensure independent verification that the building consent is being complied with.

- [32] 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.¹⁶ 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.¹⁷ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [33] The Respondent and Mr [OMITTED] had copies of the building consent, which incorporated the resource consent requirements with respect to the retaining wall.
- [34] The initial work undertaken on the construction of the retaining wall was not in accordance with the building consent because the Resource consent required *"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."*
- [35] The Respondent accepted this was not done. The Board also accepts and relies on the opinions of [OMITTED] in determining that these resource consent requirements were not met.

Was the conduct serious enough?

- [36] As with the Board's finding for the disciplinary offence under section 317(1)(b) of the Act, the departures from the building consent were not serious enough to make a finding under section 317(1)(d) of the Act.
- [37] In making this finding, the Board takes into account that the Respondent ceased work on the retaining wall as soon as issues were encountered and then completed it in accordance with the revised Council consented plan.

¹⁴ Section 40 of the Act

¹⁵ Section 222 of the Act

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁷ *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".

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

[38] Accordingly, the Board finds that the Respondent has not committed the disciplinary offence under section 317(1)(d) of the Act.

Board's Decisions

[39] The grounds of discipline under sections 317(1)(b) and (d) of the Act are not upheld.

Signed and dated this 9th day of November 203



Mr M Orange
Presiding Member

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.*