

## Before the Building Practitioners Board

	BPB Complaint No. C2-01787
Licensed Building Practitioner:	Stephen Potter (the Respondent)
Licence Number:	BP 129795
Licence(s) Held:	Foundations – Concrete or Timber Pile

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	13 June 2018
Decision Date:	28 June 2018

#### Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)  
Mel Orange, Legal Member  
Catherine Taylor, Lay Member  
Bob Monteith, LBP Carpentry and Site 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.

#### Board Decision:

The Respondent **has not** committed a disciplinary offence.

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## Introduction

- [1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

## Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>4</sup> Collins J. noted that:
- “... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”
- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

## Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [6] In addition to the documentary evidence the Board heard evidence at the hearing from the Respondent. The Complainant also sent the Board submissions for it to consider as part of its deliberations.
- [7] The Respondent was engaged to complete re-piling work. The work was purportedly carried out under clause 1 of Schedule 1 of the Act. The Complainants raised issues with the time it took to carry out the building work and with the responsiveness of the Respondent. Those matters fall outside of the Board's disciplinary jurisdiction.
- [8] The Complainants engaged [Omitted] to review the building work that had been carried out. The author of the report noted:
1. *Foundations have not been finished in accordance with building code regulations in areas (need repair and finishing to comply with building code - 6kn connectors, stainless steel fixing where necessary etc.)*
  2. *Foundation pile on the south side of front entry stairs has been installed outside of building line (needs removal and reseating)*
  3. *Sag in bearer below the north side of front entry porch (needs central foundation pile installed)*
  4. *No malthoid or fixing connections from the bottom of new jack studs to original shallow founded concrete foundation piles (immediate repair necessary).*
  5. *Gap between bearer and foundation pile on north bearer line (needs packing).*
  6. *New bearer installed on north bearer line has been cut short (needs cleat fixed against foundation pile to strengthen join)*
  7. *Foundation concrete depth and size were not checked at the time of inspection.*
- [9] Photographs of the building work noted above were included with the Complaint.
- [10] The Respondent did not, prior to the hearing, engage in the complaint process. He explained, at the hearing, that he did not because of personal issues in his life at the time which he struggled to cope with.
- [11] Correspondence provided by the Complainants did, however, contain relevant information. In particular an email from the Respondent to the Complaint of 6 July 2016 stated:

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

*As discussed, a number of the replacement jack studs we've installed are sitting upon concrete piles that are not in good condition or seated in good ground. This is particularly evident on the front right of the house when facing it from the road. This morning I shot the levels of the underfloor we had raised yesterday and recorded a 15mm slump from the levels we recorded at close of play yesterday.*

*We have also found that some of the piles in the mid floor have lost functionality. The piles readily fracture and are able to be easily moved by hand. Neither of these factors should be present with piles that are fit for purpose.*

*We've lifted the veranda area and that has had a pronounced effect on the visual aesthetic.*

*The proposed solution is to install HS square wooden house piles in place of those existing piles that are no longer functional. The appropriate rate for this work is at \$65 per hour plus GST per person, plus material costs and travel. I estimate that an additional 60 hours of labour in aggregate is required to complete the variations within Schedule 1 Building Act 2004. There are a number of piles that are no longer functional remains an unknown at this point, however should the magnitude of the work approach the limits of Schedule 1 Building Act 2004 then we ought discuss engaging with Auckland Council for a building consent. That situation is not present at this point in time though am flagging that as a potential consequence of substantial replacement of the existing piles.*

- [12] At the hearing the Respondent outlined that he had been engaged to carry out levelling of an existing house that had already had remedial building work carried out such as a replacement roof being installed. He stated that there was an approximate 75-100mm slope in the floor level that he was to remediate and that he had not been engaged to complete a re-pile of all of the foundations.
- [13] The work he completed involved the replacement of approximately 10 piles out of about 100 piles that formed the foundations. The Respondent stated that he had assessed the building work and had formed the view that it fell within the provisions of clause 1 of Schedule of the Act and as such that a building consent was not required.
- [14] The Respondent outlined how he undertook the building work. He noted that the existing piles were jack studs connected to concrete piles which were made out of cinder blocks. The existing block piles were very brittle. They shattered when drilled (to create fixing points) and that, as such, they had to be replaced with continuous wooden piles.
- [15] The Respondent noted that the remaining piles under the house (those that he did not carry out any work on) were also constructed with cinder blocks and jack studs

which were not adequately connected and that, in his opinion, they all needed to be replaced. He stated that if any more than the 10 piles that he replaced were to be replaced then a building consent would have been required. He claimed that he gave verbal advice to this effect to the Complainants.

- [16] The Complainants corresponded with the Respondent querying the need for a building consent should further piling work be carried out. The Respondent emailed his advice on 6 July 2016 to the effect that:

*The original quote was to replace piles along the side of the house where there was an obvious failure of the piles. The concern I had was that the side of the house where the access hatch was located had a significant lean. This indicated that the house was 'falling' rather than sinking, and hence the decision to recommend repiling .*

*The additional work we've uncovered was where the house was sinking rather than falling. This has to do with the ground under the foundations not being able to support the weight of the house above it (vertical movement) rather than the house falling (horizontal movement).*

*This work was not anticipated in the original quote or inspection and was only uncovered after the weight of the house was taken off the piles.*

*Replacing the jack studs is different to installing new piles. The jack studs are vertical timber members sitting on concrete piles and supporting bearers or bottom plates. Jack studs and piles are different elements of a foundation. Building Consent is not required at this point. The trigger for consent will be whether the works we are doing can no longer be said to be 'not substantial' as per Schedule 1 Building Act 2004. What is and is not substantial is a matter of judgment for the practitioner undertaking the works.*

- [17] The Board questioned the Respondent with regard to the allegations noted in the [Omitted]. As regards each he stated:

1. Stainless steel fixings – the Respondent refuted the claim. He stated that he had used stainless steel fixings where required and referred to NZS3604 and the distance from the ground requirements in NZS3604 as regards when stainless steel fixings are required.
2. Pile outside of building line – the Respondent stated that he had installed the pile in the same location as the original pile and that there was adequate bearing.
3. Bearer Sag – the Respondent accepted that there was a sag and stated that a pile had been left out as the Complainants had wanted access to the subfloor space. He considered that the span that was left was within the maximum span allowance within NZS3604 and that further work was to be carried out

but it was dependent on how the Complainants wanted to finish the area. The Respondent did not consider installing a temporary support.

4. Malthoid – the Respondent stated that this had not been completed as there was further work to be completed and that it would have been done as part of that work.
5. Gap between bearer and foundation pile – the Respondent did not consider the gap was excessive or non-compliant.
6. Bearer cut short – the Respondent considered the work met the requirements of NZS3604 and that there was sufficient coverage but that it could be improved with the installation of a T Cleat.

[18] The Respondent was asked why he had provided a record of work when the building work he had carried out was not restricted building work. He stated that he provided it because the Complainants had asked for one.

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

- [19] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should not be disciplined.
- [20] There were two matters for consideration. The first was whether the building work required a building consent. The second was whether the building work that was carried out was completed to an acceptable standard.

### **Building Consent**

- [21] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
- [22] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [23] The Board has found in previous decisions<sup>6</sup> that a licensed building practitioner who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068<sup>7</sup>.
- [24] The Respondent stated that he carried out the building work out under the provisions of clause 1 of Schedule 1 of the Act. Clause 1 states:

#### ***1 General repair, maintenance, and replacement***

<sup>6</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>7</sup> Board Decision C2-01068 dated 31 August 2015

- (1) *The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*
- (2) *Replacement of any component or assembly incorporated in or associated with a building, provided that—*
  - (a) *a comparable component or assembly is used; and*
  - (b) *the replacement is in the same position.*
- (3) *However, subclauses (1) and (2) do not include the following building work:*
  - (a) *complete or substantial replacement of a specified system; or*
  - (b) *complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or*
  - (c) *repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
  - (d) *sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

- [25] The specific provision that the Respondent would have been relying on would have been subclause (2).
- [26] The Board finds that the replacement of jack studs and concrete piles with continuous piles was the replacement of a component with a comparable component in the same position and that the provisions of subclause (3) did not apply.
- [27] The reason for this finding is that only a small percentage of piles were replaced. Had the remainder or a higher number of piles been replaced then a building consent would have had to be obtained prior to the building work being carried out as it would have become a “complete or substantial replacement” as per subclause (3)(b).
- [28] Accordingly the Respondent has not been negligent in not obtaining a building consent. The Board does note that it had to further investigate this matter as the documentation before the Board when it made its regulation 10 decision to proceed to a hearing did not disclose the extent to which piles were replaced. Had the Respondent provided a response to the Complaint setting out the actual work that had been completed and the reasons why it was done under Schedule 1 then this matter may not have proceeded any further.

#### Acceptable Standard of the Building Work

- [29] The Board has decided that whilst there was some work that was not completed to an acceptable standard the conduct complained about was not sufficiently serious

enough to warrant disciplinary action. In this respect the Board notes the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>8</sup> as regards the threshold for disciplinary matters:

*[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.*

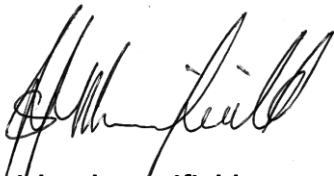
[30] In *Pillai v Messiter (No 2)*<sup>9</sup> the Court of Appeal stated:

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[31] On this basis of the above the Board has decided that the conduct complained about has not reached the threshold that requires a disciplinary outcome.

[32] Once again it is disappointing that the Respondent did not, prior to the hearing, engage in the complaint process. Had he done so and provided a response to the Complaint a hearing may not have been required.

Signed and dated this 28<sup>th</sup> day of June 2018



**Richard Merrifield**  
Presiding Member

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<sup>8</sup> [2001] NZAR 74

<sup>9</sup> (1989) 16 NSWLR 197 (CA) at 200