

BPB Complaint Numbers: C2-01280

IN THE MATTER OF

Under the Building Act 2004 (the Act)

An inquiry by the Building Practitioners' Board
under section 315 of the Act

AGAINST

Brendan Hammond, Licensed Building
Practitioner No. BP 104658

INQUIRY DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The matter before the Building Practitioners' Board (the Board) is a Board led inquiry¹ into the conduct of Brendan Hammond, Licensed Building Practitioner (the Respondent).
- [2] The matter being investigated is whether the Respondent has, in relation to building work at [omitted]:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a licensed building practitioner with a Carpentry Licence issued 1 December 2010.
- [4] The Board has considered the inquiry under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Catherine Taylor | Board Member |
| Robin Dunlop | Board Member |
- [6] The matter was considered by the Board in Christchurch on 10 August 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:

¹ The inquiries were initiated from a Board resolution dated 21 March 2016

Person	Reason for Attendance
Gemma Lawson	Board Secretary
Brendan Hammond	Respondent
[Omitted]	Witness for the Respondent
Geoff Hardy	Legal Counsel for the Respondent
[Omitted]	Witness, Licensed Building Practitioner

- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure and Inquiry Background

- [9] The matter was a Board led inquiry resulting from an initial Board resolution of 8 September 2015 to investigate licensed building practitioners identified in an inspection report completed by assessors working on behalf of MBIE on 19 May 2015 (the MBIE Inspection Report).
- [10] On 2 February 2016 the Registrar of the Board prepared a report in accordance with regs 19 and 20 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the inquiry.
- [11] On 21 March 2016 the Board considered the Registrar's report and in accordance with reg 22 it resolved to proceed with the inquiry that the Respondent:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (a) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [12] On 27 July 2016 a pre-hearing teleconference was convened by Board Member Mel Orange. The Respondent and his Legal Counsel were present as well as Counsel for the Registrar. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [13] The common understanding of the purposes 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 Kingdom².
- [14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*³:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously

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

³ [1992] 1 NZLR 720 at p 724

described, there is a common thread of scope and purpose. Such provisions exist 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 practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [15] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes.

The Hearing

- [16] The hearing commenced at 1 p.m.
- [17] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [18] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Inquiry

- [19] The MBIE Inspection Report outlined the inspection results and noncompliant building work in the table below. The score scale for the results was based on the following:
1. Non-compliance with Building Code and/or MBIE Guidance for repairing and rebuilding houses affected by the Canterbury earthquakes;
 2. Minor defect, which may include minor non-compliance with Building Code and/or MBIE Guidance for repairing and rebuilding houses affected by the Canterbury earthquakes; and
 3. Compliance with Building Code and MBIE Guidance for repairing and rebuilding houses affected by the Canterbury earthquakes.

Inspection Results

Criteria	Result	Measurements/Notes
Summary of Earthquake Repair Methodology	N/A	<p>Based on the information provided by the PMO (Programme Management Office), the repair methodology included:</p> <ul style="list-style-type: none"> • Re-levelling of floors by reducing the height of the existing timber piles. • Epoxy crack repair of perimeter concrete foundation. <p>This is consistent with observations from the inspection with the exception of limited evidence of epoxy crack repairs of perimeter concrete foundation.</p>

Criteria	Result	Measurements/Notes
Structural Aspects (Building Code Clause B1) - Compliance of earthquake repair and general workmanship.	1	The following structural issues were observed: <ul style="list-style-type: none"> Inadequate bearing surface between piles, packers and bearers. Bearers not secured to piles. Cracks present in one concrete pile. Over-notched new bearer in two locations. Earthquake related cracks in perimeter foundation not repaired to include pre-existing cracks exacerbated by earthquakes.
Durability Aspects (Building Code Clause B2) - Compliance of material selection for earthquake repair work.	1	The following durability issues were observed: <ul style="list-style-type: none"> Lack of damp proof course between piles and packing/bearers. Inappropriate material (e.g. fibre cement) used as packers.
Floor levels	N/A	The MBIE floor level survey indicates that floor slopes are beyond acceptable limits based on MBIE guidance (slopes in the order of 1:100 were measured). Other observations include doors and benches out of plumb. While some pre-existing differential settlement is considered likely, evidence from the inspection indicated the floor levels have not been returned to their pre-earthquake condition and more extensive re-levelling should have been carried out.
Other observations about the earthquake repairs.	N/A	

[20] Included with the report were a series of photographs showing the noncompliant building work.

[21] The matters outlined in the above table formed the basis of the Board's inquiry.

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*⁴ 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

⁴ [2009] 1 NZLR 1

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 reasonable doubt.

- [23] The Respondent and his company Brendan Hammond Building Contractors Limited carried out the sub floor repairs as part of the earthquake repair programme. The Respondent was in charge of the repairs and he employed [Omitted], a licensed building practitioner, as the site foreman.
- [24] In his response to the complaint the Respondent stated that he did not believe the work in its current state complied with the Building Code. He went on to state the work has been left as is, the job was still with Fletchers EQR engineers and had not received sign-off from them and that the *“design solution is still open”*.
- [25] This was further expanded on at the hearing with the assistance of a written statement of evidence from the Respondent and submissions from his legal counsel. Included was evidence to the effect that:
- (a) the repair work was quoted on the basis of the provided scope of works. The quote specifically noted that there was no engineer's report (Engineer Designed Solution) for the foundation work;
 - (b) the foundation work on the house, specifically the jacking and packing of piles was, by way of a variation, removed from the scope of works. It was submitted that this was most likely due to a lack of an engineered solution. The removed work included dealing with the replacement of an area of some 18 metres of ring foundation;
 - (c) notwithstanding the removal by variation of the work some jacking and packing of piles was carried out because it was considered necessary so as to get the house level enough to carry out the rest of the work on the property;
 - (d) the jacking and packing carried out was only temporary work undertaken pending the provision of an engineered solution;
 - (e) the temporary work undertaken was not charged for;
 - (f) the required engineered sub floor work was carried out post the MBIE Report pursuant to an engineered solution and under a building consent. A code compliance certificate has been issued. The engineered solution used was not created nor provided until after the MBIE Report had been completed; and

- (g) the final repairs were carried out by a subcontracted organisation who specialised in such work. A producer statement from [Omitted] of [Omitted] for that work was provided to the Board.
- [26] Evidence was also given as regards the Contractor's Producer Statement for Construction (PS3). The Respondent submitted that in stating in the description of work within the PS3 that it covered "*scoped earthquake repairs as per attached quotation and variation orders*" it was a qualified statement and was not making any representation as regards the compliance of the temporary works.
- [27] The Respondent also gave evidence at the hearing as to his work history and experience and his overall experience with earthquake repairs stating that the vast majority of customers were happy with his work.
- [28] The witness [Omitted] confirmed the evidence provided by the Respondent.

Boards Conclusion and Reasoning

- [29] Legal Counsel for the Respondent provided submissions to the Board including that:
- (a) the Board's findings in C2-01277 and C2-01278⁵, the Board's first two earthquake repair hearings following the MBIE Report, were distinguishable on the facts before the Board in this case as:
 - (i) the work was only ever intended to be a temporary practical measure to enable the above-floor work to be performed; and
 - (ii) the subfloor work was, at the time of the MBIE inspection, unfinished, there was no intention to leave it in that state, the work could not be completed till an engineered solution was produced and the work was finally completed in a compliant manner;
 - (b) the PS3 was not expressing an opinion that the subfloor work was compliant; and
 - (c) there should not be a finding of negligence or incompetence or of bringing the regime into disrepute.

Negligence or Incompetence – Legal Principles

- [30] The Board has adopted the interpretation of the terms negligent or incompetent in the context of the Building Act of Judge McElrea in *Beattie v Far North District Council*⁶ where he stated:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also

⁵ Board Decisions dated 22 July 2016

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [31] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ 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.

- [32] The Board notes most judicial comments as regards seriousness relate to the medical disciplinary jurisdiction and a charge of professional misconduct where the threshold is considered to be higher than that for negligence or incompetence. Some lean toward it being a matter for consideration in penalty whilst others see it as a factor in determining liability. The more recent judicial statements, however, tend toward the latter. For example in *Pillai v Messiter (No 2)*⁸ 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.

- [33] On this basis the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.

Negligence and Incompetence – the Respondents' Conduct

- [34] The Board accepts that the work carried out by Respondent which was noted as being noncompliant by the MBIE Report was temporary work and it accepts the submission that this is a distinguishing factor from earlier cases heard by the Board. Significant to the Board was the fact that it was apparent that an engineered solution was always required and that the earthquake repair work was not going to be completed until such time as that engineered work was carried out.
- [35] Therefore, on the basis that the building work was temporary and has since been brought up to a compliant standard as part of the overall repair strategy, and not as a result of the MBIE Report identifying noncompliant work, the Board finds that the Respondent has not been negligent or incompetent.
- [36] The Board does, however, note that the Respondent's producer statement did not make it clear, to an independent reader, that it was a qualified statement and that the temporary sub floor work undertaken was not covered by it. In this respect the Board considers the Respondent could have done better but the conduct has not fallen below the standards to be expected of a licensed building practitioner.

⁷ [2001] NZAR 74

⁸ (1989) 16 NSWLR 197 (CA) at 200

Disrepute

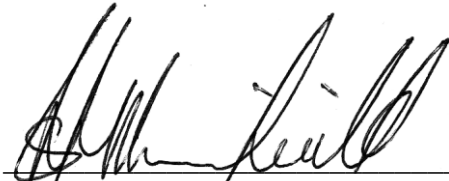
[37] Turning to the second disciplinary charge of disrepute the Board finds that as no grounds for discipline under s 317(1)(b) have been upheld there is no requirement to consider this disciplinary charge.

Board Decision

[38] The Board has decided that Respondent has not:

- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should be disciplined; and
 - (b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and should not be disciplined.

Signed and dated this 5th day of September 2016



Richard Merrifield
Presiding Member