

BPB Complaint No. C2-01269

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

AGAINST

Mark Brown, Licensed Building Practitioner
No. BP 106965

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 6 October 2015 in respect of Mark Brown, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 18 May 2011.
- [4] The Board has considered the complaint 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 |
| Robin Dunlop | Board Member |
| Catherine Taylor | Board Member |
- [6] The matter was considered by the Board in Christchurch on 11 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:
- | | |
|-----------------|---------------------------|
| Geraldine Kelly | Counsel for the Registrar |
| Gemma Lawson | Board Secretary |

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|------------|------------------------------------|
| Mark Brown | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Support person for the Complainant |
| [Omitted] | Witness for the Complainant |
| [Omitted] | Witness, Engineer, [Omitted] |
| [Omitted] | Witness, [Omitted] |
| Neil Eade | Christchurch City Council |

Members of the public were not present.

- [8] A potential witness, [Omitted], could not be located and as such did not appear to give evidence at the hearing.
- [9] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [10] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [11] On 17 February 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [12] On 28 April 2016 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint 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).
- [13] On 18 July 2016 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [14] 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 Kingdom¹.
- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:

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

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

² [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.

- [16] 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 between a complainant and the person who is the subject of the complaint.

The Hearing

- [17] The hearing commenced at 9.30 a.m.
- [18] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [19] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [20] The complaint related to earthquake repairs undertaken on a dwelling owned by the Complainant. She alleged that the repairs were carried out:
- (a) without a building consent; and
 - (b) in a negligent or incompetent manner.
- [21] The Complainant also alleged that the scope of works was less than was required under the provisions of her insurance contract. The Board noted that this was a matter that did not fall within the Board’s jurisdiction and as such it did not form part of the Board’s investigation.

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*³ 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

³ [2009] 1 NZLR 1

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 Board was provided with a high volume of documentation and evidence, some 1,345 pages in total. The Board was indebted to Counsel for the Registrar for providing a comprehensive summary of the documentation. Annexed hereto is her Complaint Overview which the Board has included rather than traversing the matters again.
- [24] The Complainant provided an opening submission which was read in for her by her Support Person. In it she summarised her complaint and outlined her allegations and, amongst other things, she:
 - (a) reaffirmed her allegation that the Respondent has acted in a negligent, incompetent and deliberately misleading manner (in respect of the building consent);
 - (b) outlined that the Respondent has signed off on the completed work on more than one occasion despite the work not being up to code;
 - (c) detailed how misinformation has been passed on to the Christchurch City Council on numerous occasions; and
 - (d) outlined how the Certificate of Acceptance granted by Christchurch City Council was issued after further false information was provided to Christchurch City Council by the Respondent on floor levels.
- [25] The Complainant also advised the Board that the damage to the house occurred in the June 2011 earthquake. Little if any damage occurred in the September 2010 or February 2011 earthquakes.
- [26] With regard to the matters the Board was investigating it received and heard evidence that earthquake repairs undertaken at the property included subfloor work and above ground bracing work and that a building consent had been applied for which covered both areas of work. The subfloor work commenced and was completed prior to the building consent being granted. The bracing work was carried out post the issue of the building consent. A Code Compliance Certificate was refused for the subfloor work as it had been completed prior to the building consent being granted. A Certificate of Acceptance was applied for in respect of the subfloor work. The Certificate of Acceptance was eventually granted.
- [27] The Respondent answered questions. Notably he advised the Board:
 - (a) he did not engage a specialist under floor repairer as none were available at the time of the repairs and he did not advise the Complainant of this;

- (b) consenting was undertaken by office administrative staff at Nu Build Project Management Limited (NuBuild) an entity in which the Respondent is a director and shareholder;
- (c) he had little or no influence over the administrative staff at NuBuild;
- (d) he was not sure whether or not the building consent had been granted at the time the subfloor work was undertaken;
- (e) he was not sure why a building consent for the subfloor work was applied for;
- (f) as regards the floor levels he advised that the repair strategy was to bring the walls and structural elements into alignment but ensuring the likes of window and door jambs were plumb and/or did not stick or jam. Once this was complete internal floor levels were adjusted;
- (g) there was evidence of pre-existing issues with floor levels;
- (h) additional work, over and above that required for earthquake repairs and what was originally scoped, was carried out to the subfloor including items such as strapping piles; and
- (i) some of the items revealed by the critter cam reports and photographs, such as blocking, were not performing any structural function.

[28] Neil Eade gave evidence. He was not able to give specific evidence as to why a building consent was required for the under floor work other than that it involved structural work and that in his opinion all structural work including that which is undertaken as repair, replacement or maintenance under Schedule 1 of the Act requires a consent even if it involves only a single pile. He confirmed the Certificate of Acceptance granted by Christchurch City Council was for the subfloor work. The bracing work carried out was performed under the building consent granted.

Boards Conclusion and Reasoning

[29] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁴. Judge McElrea provided guidance on the interpretation of those terms:

[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 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.

⁴ Judge McElrea, DC Whangarei, CIV-2011-088-313

- [30] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁵ 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.

- [31] There are two matters for consideration by the Board. These are whether the Respondent has been negligent or incompetent in respect of:

- (a) subfloor building work completed; and
- (b) the carrying out of building work without a building consent.

- [32] Dealing with the building work itself the Board finds that the Respondent has not been negligent nor incompetent. Whilst there was evidence of some failings it was not clear to the Board whether the issues were pre-existing matters which, from a consenting purpose, need not have been completed. In this respect the Board notes the provisions of s 112(1)(b) of the Act which states:

112 Alterations to existing buildings

- (1) *A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—*
 - (b) *the building will,—*
 - (i) *if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or*
 - (ii) *if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.*

- [33] There were also items discovered by the critter cam reports which may or may not have been the work of the Respondent and in this respect the Board notes the evidentiary requirements for the Board to be satisfied on the balance of probabilities that the disciplinary offence has been committed.

- [34] With regard to the issue of carrying out building work without a building consent the Board has found in previous decisions⁶ that a licensed building practitioner who commences or undertakes building work without a building consent could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct can come within the provisions of s 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁷.

- [35] More recently the High Court in *Tan v Auckland Council*⁸ the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

⁵ [2001] NZAR 74

⁶ Refer for example to Board Decision C1030 dated 21 July 2014

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ [2015] NZHC 3299 [18 December 2015]

[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.

[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.

- [36] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [37] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required.
- [38] There was clear evidence before the Board that the Respondent knew a consent was being or was going to be applied for or was to be applied for in respect of the subfloor work. Notwithstanding this the work was undertaken and completed prior to the consent being issued. This was evident as the Christchurch City Council required a Certificate of Acceptance.
- [39] The Board does note that whilst it was not clear to it why a consent was required for the subfloor work as the building work may have fallen within the building consent exemption provisions of clause 1 of Schedule 1 of the Act, the fact remains that a building consent was being applied for and that the Respondent was aware of this. Even though building work may be exempt from a building consent an owner is entitled to apply for a building consent and obtain the benefits of having one, including an independent inspection of the building work carried out.
- [40] On the basis of the above the Board finds that the Respondent has been negligent in undertaking building work without a building consent.

Board Decision

- [41] The Board has decided that Respondent has carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act).

Disciplinary Penalties

- [42] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Actⁱ.
- [43] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [44] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration.

[45] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.

[46] The Board is aware that the common understanding of the purposes 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*⁹

[47] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*¹⁰:

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

[48] The High Court in *Patel v Complaints Assessment Committee*¹¹ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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.

[49] The Board considers a censure is the appropriate penalty. In coming to this decision it notes the context within which the non-consented building work was undertaken as well as the fact that further remedial work has been undertaken by the Respondent. With regard to this remedial work the Board notes that it may still not meet the Complainant's expectations but this is not a matter that is within the Board's jurisdiction.

Costs

[50] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

⁹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹⁰ [1992] 1 NZLR 720 at p 724

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [51] 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. The judgement in *Cooray v The Preliminary Proceedings Committee*¹² included the following:

“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

- [52] The judgment in *Macdonald v Professional Conduct Committee*¹³ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹⁴ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [53] In *Collie v Nursing Council of New Zealand*¹⁵ 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.

- [54] In all the circumstances the Board considers the sum of \$750 is an appropriate sum toward the costs and expenses of, and incidental to, the inquiry by the Board. This is a reduced amount having taken into account the Respondent’s cooperation with the Board and its investigation.

Publication of Name

- [55] 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 Licenced Building Practitioners’ scheme as is required by the Act.
- [56] The Board is also able, under s 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.

- [57] 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

¹² HC, Wellington, AP23/94, 14 September 1995

¹³ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹⁴ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁵ [2001] NZAR 74

a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[58] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

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

Penalty: Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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 s 301(1)(iii) of the Act.

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.

Submissions on Penalty Costs and Publication

[60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 10 October 2016.

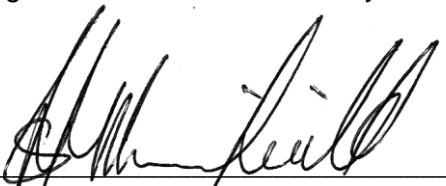
[61] If no submissions are received then this decision will become final.

[62] 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

[63] The right to appeal Board decisions is provided for in s 330(2) of the Actii.

Signed and dated this 19th day of September 2016



Richard Merrifield
Presiding Member

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:*

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- (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 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.*

Appendix: Extracts from Counsel for the Registrar Opening and Summary

Complaint Overview

3. The house is located at [omitted]. The complaint relates to the earthquake recovery repair program following the 22 February 2011 earthquake on the home.
4. The home is an older home and has compliance levels to the standards that applied when it was built. It also had some deterioration from its first built condition.
5. The repairs to the house were impacted by the existing precondition of the home, damage caused by the earthquake and the engineering difficulties of repairs causing further damage to the structure.
6. The Complainant alleges that the restricted building work was commenced and completed prior to a building consent being issued. She disputes the work was originally completed to a standard that was acceptable and alleges the work was covered up by the placement of the flooring.
7. Central to the complaint is the issue of completing repairs to the existing pre-earthquake standard even though it may not meet modern building code standards.
8. The Complainant has an insurance policy with IAG that prescribes repairs to a new standard that meets modern building code standards.
9. In her complaint the Complainant included a significant amount of supporting material. The Complainant described the arrangements of the repair of her house and the involvement of the Respondent around building consent. She said:

"My property is undergoing earthquake repairs which are being carried out by Nubuild Project Management Ltd a company owned by Mr. Mark Brown (LBP106965), Under the IAG, Hawkins earthquake repair program."

"These repairs include foundation under pining and re-levelling."

"Section 54 of the building contract (signed 2 April 2015) clearly states that the builder is clearly responsible for obtaining all building consents prior to work commencing. I questioned this on numerous occasions with Mr. Brown, my Hawkins RSM and IAG, my insurance company. I was first told that building consent was not required and then that if any consents were needed, they would be applied for later as exemptions."

"As it appeared to me that I was being given false information, I decided to contact the CCC (Christchurch City Council) myself and Mr. Grant Cousins, a Building Compliance Officer, said he would go and inspect what was being done (CCC Job 91949973). Because he could not get access to the property after a couple of attempts (the site was locked and the hazard board was some distance away from the street making it impossible to read the contact details for the builders), I met him on site and let him in on 29 July. Mr. Brown was then notified by the CCC that a building consent was required."

"I have numerous Building Site Status Reports (attached) from Hawkins which are co-signed by Hawkins and Mr. Mark Brown which comment on the consents:

June 22: Council documentation to be arranged"

July 6: Council documentation 'applied for'

July 21: Council documentation 'Applied for' but it also states the exemptions were being compiled by the designers and Cook / Costello and would be forwarded to CCC week ending 07/08/2015. Works completed in the period: footings and floor relevelled."

"I contacted the CCC each time I received these reports and was told no application had been submitted.

August 18: Exemption documents being compiled by designers and Cook/Costello. Documentation to be forwarded to CCC week ending ~~07/08/2015~~. New ETA 12/13 August.

"The last site meeting we had for this property was on the morning of 14 August 2015. I requested Mr. Cousins came to this site meeting as no application had been received and I was very concerned that the work was continuing and the consentable repairs were being covered up by the floors being replaced. Both Hawkins and IAG kept telling me the consents had been applied for even after I had told them they had not"

"At the site meeting Mr. Brown was still insisting that the consent application had been submitted. Mr. Cousins checked that it had not been submitted in the 30 minutes since he had left the office, which it had not. Mr. Brown was late arriving for the meeting so he was not aware that Mr. Cousins was from the CCC, and he was not impressed when he found out. The Building Consent application was finally submitted on that afternoon by George Hattingh, from the drafting zone, which covered the foundation repairs as well as the bracing plans."

August 28: The same as the previous report.

"The consent was refused on 9 September 2015 on the grounds that the foundation work had already been completed."

September 11: Hawkins comment COA (Certificate of Acceptance) works done submitted to council 11/9/15.

"An application for a Certificate of Acceptance (#37001019) for the foundation re-levelling was logged with the Christchurch City Council on 12 September 2015 and names Mr. Mark Brown as the builder who undertook the work."

"The application also included signed PS1 and PS4 issued by Cook Costello Ltd as saying the work had been completed in accordance with the relevant requirements of the Building Consent and Codes. These were provided on the basis of the information provided to them by the Contractor. Mr. Mark Brown."

“Since the application was submitted the CCC has sent a request for more information which has resulted in Hawkins engaging in Cavity Critter-under Floor Inspections to inspect the work carried out on the house. I requested a copy of the report from IAG and was not in the least surprised that the work that was done is not up to the building code.”

“I have enclosed a copy of the report which includes photos.”

10. Accompanying the complaint was a plan by the engineering firm Cook Costello relating to a leveling plan for the house.
11. The complainant has also supplied a quote for the work which was initialed by two persons K J and M B.
12. Also attached was a business record of the progress of the repair by NuBuild entitled “Nubuild Programme [omitted]”. Under the following headings it recorded:

| Activity | Plan Start | Actual Start | Percentage Complete |
|---------------------------|-------------------|---------------------|----------------------------|
| Relay flooring | 8/03/2015 | 8/03/2015 | 100% |
| Pack and straighten Walls | 8/05/2015 | 8/07/2015 | 80% |

13. The Complainant also attached a report entitled Cavity Critter Under Floor Inspections dated 17 September 2015. In summary the report identified the following points:
 - Jerry can piles and normal concrete piles used in the house
 - The strength of the concrete in the jerry cans could not be confirmed
 - Bearer joints without support and packing
 - Bearer joints with no connection to the piles
 - Electroplated strapping and no stainless steel
 - Bearer connections to the ring foundation
 - Bearer join clashed with untreated plywood
 - Packing of piles non-compliant with code
 - Pile installed upside down
14. The Complainant became increasingly concerned that the foundation work on the house was not up to standard and code. The Complainant sought meetings with her insurer IAG and Hawkins and obtained an agreement that Nubuild and the Respondent would cease work until the issue of the foundations was resolved. This was because above floor Gibraltar Board (GIB) was being fitted and plastering was occurring. Should the foundations need further jack and packing the above floor work would be damaged.

15. The Complainant drove past the address on 3 November 2015 and discovered work was continuing on the site by the Respondent and Nubuild. She discovered that the flooring was being replaced and was concerned the pile work was being covered up. As a result she emailed a letter to [Omitted] of IAG. In summary the letter said:

- The Complainant consulted her lawyer and it was agreed to change the locks to enforce the agreement
- There was no attempt to cancel the building contract but to get the foundation works inspected before any further work by Nubuild.
- The locks on the house would be changed on that night and she would provide a suitable time to remove any tools inside the house.
- The complainant would be available to let Cook Costello into the premises so they could conduct their investigations
- That the complainant had to take this measure to bring things under control.

16. The Complainant included a photograph of the hazard board for the site. The board included details of the contractor. The information read:

Contact person – Mark Brown
Contact Phone – [omitted]
[omitted]
[omitted]

17. Attached to the complaint was a copy of a letter dated 6 November 2015 from [Omitted] to Grant Matthews Nubuild Project Management Ltd. In the letter [Omitted] made the following comments:

“As requested Cook Costello visited the property at [omitted] on the 5th November 2015 to:

- *Undertake a floor level survey*
- *Comment on the condition of the chimney base*

Review the following information-

- *Structural Report completed by Terra Southern dated 13 December 2013*
- *Post re-levelling floor levels provided by Nubuild dated 12 October 2015*
- *Cavity Critter report completed by subfloor inspections dated 17th September 2015”*

18. In summary the letter made the following points:

- There was a maximum floor variation of 36mm;
- The number of floor slopes exceeded 0.5% between more than 2 meters apart; and
- There was no cracking to the base of the chimney foundation

19. The letter made a number of conclusions and recommendations including:

-
- Based on the review of the floor levels taken from the site visit the repair work had not been completed to a standard that met the MBIE guidelines;
 - The re-levelling process ended to avoid compromising the functionality of the superstructure (doors windows linings);
 - The building structure had been lifted to as close as practical to its pre-earthquake level without compromising its structure;
 - To meet the MBIE floor level criteria the excessive floor levels can be rectified by a jack and pack method by notching the floor bearers;
 - Additional re-leveling may affect the repair works already completed; and
 - The chimney base was stable.
20. Attached to the Cook Costello report were 14 black and white photographs which had stainless steel fixings on the piles and bearers. It appeared that some improvements had been made to the work between the time the Cavity Critter report of 17 September 2015 and the Cook Costello report of 6 November 2015.
21. On 12 November 2015 the Respondent forwarded a one page response to the complaint. The response did not specifically address the issue of building without a building consent and largely commented on the relationship with the Complainant. In summary under the heading of "Misinformation" he said:
- He informed [omitted] of information as he had been told it prior to meetings;
 - That he had been given the information and was passing it on as he had been told; and
 - That due to the misinformation [Omitted] had formed a level of mistrust with him and he suggested someone apart from himself to meet with her. Nubuild Project management agreed.
22. The Respondent also supplied a list of persons with who could be contacted with regard to the standard of workmanship Nubuild had carried out.

The Respondent concluded by saying:

"I believe that I have conducted myself honestly I have and have only passed on information as it has been relayed to me. If clarification on any issue is needed my phone no and email address are below."

Further Information

23. On 24 November 2015 a Cavity Critter report was provided to the investigator by the Complainant. The report largely consisted of photographs with some comments. It is clear

that some remedial work has been completed on the foundations since the last Cavity Critter report of 17 September 2015. In Summary the report noted:

- Ring foundations with no connection used
- Repaired cracks in ring foundation with epoxy resin inserted
- Floor areas with rot
- Borer in bearer
- Connections to piles not stapled to bearer
- Packers without the correct wood treatment used (H1.2 where should be H3.2)
- An upside down pile
- Bearer with join over pile not correctly connected

24. The report showed repairs and improvements to the pre-existing piles and foundations.

25. On 18 December 2015 [Omitted] and [Omitted] of Cook Costello compiled a report on the repairs for Hawkins Construction. The conclusion to that report said:

“Based on the review of the additional information we consider that there are some minor defects with the repair works carried out in which the work does meet the MBIE criteria. The following work should be considered:”

“Rectifying floor slopes exceeding 0.5% to meet the MBIE floor level criteria. This can be achieved by using a jack and pack method or by notching the floor bearers.”

“Rechecking the timber packers used for packing the floors. Any timber packers treated to H1.2 should be replaced with H3.2 timber packers or approved plastic shim packers. Where practical the placement of DPC should be considered.”

“Splice plates should be added to bearers notched over intermediate supports as per Appendix 2 of the HNZ guidelines.”

“The upside down precast pile has not been installed correctly and should be removed and replaced with a correctly installed pile.”

“Remedy any subfloor vents which have been plastered over or ensure that adequate subfloor ventilation is provided.”

“The shower base should be checked for any damage.”

“Lively floors should be remedied.”

“The contractor will need to ensure that their work complies with the Building Code, therefore work should be undertaken to rectify any non-compliant items and a PS3 should be provided. Issuance of a PS4 for the subfloor work can be provided upon completion of the building work.”

26. On 12 September 2015 [Omitted] made an application for a Certificate of Acceptance to the Christchurch City Council on behalf of Nubuild Ltd.

27. As a result of the application the Christchurch City Council (Joanne Hay – Building Control Officer) compiled a report for the Certificate of Acceptance. In the report executive summary it said:

“The property is a single story dwelling located in a residential suburb on a flat site classified as TC2 by CERA. Construction comprises of a timber frame with timber weatherboard cladding and corrugated steel roofing cladding on a pitched roof. There is a concrete perimeter foundation and internal concrete piles. The weather on the day of the inspection was Sunny.”

“The scope of works included in the Certificate of Acceptance comprise of releve works to the dwelling on result of earthquake damage with a floor level drop of 58mm. The method used is jack and pack the internal concrete piles and insert grout under the perimeter foundation.”

“At time of site visit I witnessed remedial refurbishment works being carried out to the interior such as removal of linings which is included under the Building Consent: [Omitted].”

“Based on site visit and documentation provided as of 14 October 2015 the recommendation was to decline the Certificate of Acceptance application as work was not in compliance with the Building Code. After further discussions with [Omitted] further photographic evidence and in relation to pile location plan was provided. Photographs for each pile before and after repair work were analysed and provided clarification that work had been completed in accordance with Guidelines from Ministry of Business, Innovation & Employment, Earthquake repairs: Packing house piles (March 2014). I am satisfied that work has achieved compliance with the Building Code and the decision has been made to revert the initial recommendation to decline and now recommend to approve the Certificate of Acceptance application.”

Review and further information

28. On 21 January 2016 the Complainant commented on the response, namely:
- She believed the Respondent was distancing himself from Nubuild Project Management and blaming them for misinformation;
 - She pointed out that the Respondent is a director of Nubuild Project management. Her building contract said Nubuild Project Management were the contractors and it was signed by the Respondent;
 - The hazards board on the construction site named the Respondent as the contact person;
 - The Complainant provided a one page typed written document detailing numerous documents as the Respondent being the builder;
 - The Complainant agreed with the Respondent’s response that contact should be made with other parties to see if they were happy with the works done;
 - The Complainant also suggested that the work on the foundations was actually completed by [Omitted] under the supervision of the Respondent; and

-
- The complainant said she had been told that [Omitted] was a LBP. Her lawyer, Hawkins and IAG were also present at the time.
29. On 25 January 2016 the Complainant forwarded to the Registrar copies of Producer statements and records of work signed by the Respondent, namely:
- PS3 - Jack and underpin sections of foundations relevel interior floor as per engineers instructions dated 7 July 2015
 - Record of Building Work (foundations and subfloor framing) identifying it as restricted building work dated 7 August 2015.
 - PS3 – Underpinning and relevelling dated 21 October 2015
30. On 16 February 2015 clarification was sought from the parties mentioned in the Respondent's response.
31. [Omitted] allegedly said:
- The job at [Omitted] is still currently being worked on. Within the last few days there has been a meeting between all the parties and it is agreed there is still a little more work required by the builder. The builder has done everything and it is fixed. Much of it was not required for him to do but he did out of good will."*
- "One of the issues with this house was that it is very old and was not up to code prior to the earthquakes. The piles would not have met current code requirements and the fixing of them to bring it up to code was over and above the contract we had to do the earthquake repairs."*
- "The house was not level in the first place. There was a need to get the floor slopes level but this was not earthquake related."*
- "This was a jack and pack job and did not require building consent. Usually under the earthquake repairs the builder seeks a Code of Acceptance after the work is done. Other work in the house may have required a building Consent but not the levelling of the house."*
- "An application for COA was put in but later withdrawn"*
32. In a telephone conversation with [Omitted] she allegedly said:
- "I manage the repair of [Omitted] for IAG. The reconstruction work as far as the foundations were concerned was just a releveling of the house. This was a jack and pack job. The existing piles would not have met code requirements of today. This is an old house with pre-existing level issues prior to the earthquake. There was a mix up over the building consent and if one was needed to be lodge. It did not need one just a council exception. The work required to be done was identified by a Cavity Critter report."*

"There was numerous times at meetings with Lyn where it was described that an application for a building consent was being prepared. There was a major communication breakdown around this issue which is resolved."

33. In a telephone conversation with [Omitted] he allegedly said:

"There have been big developments with this house particularly this year. We had a meeting yesterday with all the parties, including the complainant [Omitted] about the way forward. We have all agreed on the determination around the floor levels and some more packing by the builder is to be done."

"There appears to have been some miscommunications between the parties. We have looked at what the builder is responsible to repair as earthquake damage and what the insurance policy covered. We agree that if there is a safety issue it should be repaired. Some bearers will now be replaced as a result. In addition we have agreed that some more packing to relevel the floors would be required."

"Expectations as to the final repair may have been too high. For instance to get better levelling it would need the house lifted off the ring foundation. This is not possible however because it would cause damage to walls, frames, doorways, windows and the weatherboard. It is not possible to bring this house up to the expectations of the owner which would be better than pre earthquake standard."

"There is no need for a building consent for this house. It is just a lift and level job. All that is required is for an LBP to sign it off. There may be a need for a building consent for the bracing but that is a different piece of work. The work on levelling this house is ongoing and work has not finished."

34. In a telephone conversation with [Omitted] he allegedly said:

"Lots of things have developed since October 2015 when the Complaint to the BPB was made. Just to clarify this is not a re-pile job but a jack and pack job. There are lots of old historical issues with this house and these have been explained to the owner. The fact of the matter to relevel the house to it original state would cause significant damage to the house. The house cannot be brought back to current MBIE code levels."

"There was a mistake in the application for building consent in the first place as one was not required for the work."

"We had a round table meeting at IAG about two weeks ago. As the floor is "lively" due to pre-existing problems it has been decided strengthen the floor structure in an independent structure of the ring foundation. This is to strengthen the sub floor."

"This bracing has gone through as a building consent."

35. The investigator telephoned the Christchurch City Council Building Call Centre and arranged for a copy of the Council file on [Omitted] to be forwarded to him. He noted the following details and dates of events:

"Building Consent for levelling and bracing the building was applied for in August 2015"

"The application was refused by CCC "building consent application has been refused because the building work has been completed. Refer to building consent number [Omitted]."

"Application for a Certificate of Acceptance was applied for on 12 September 2015. Form says personnel who carried the building work were:

- *"[Omitted]*
- *"Mark Brown (Nubuild Homes Ltd) LBP No.106965"*

"Certificate of Acceptance [Omitted]for levelling the floor was approved by Council in September 2015."

"Building Consent ([Omitted]) for bracing was approved in October 2015 for further work on strengthening the floor."

Building contract

36. On 18 February 2016 the complainant forwarded the building contract to the investigator. The first paragraph under the heading "Agreement" said:

*"The Contractor will carry out and complete the Insurance works and the Owners Works (together referred to in this Building Contract as the **"Works"** as more particularly described in schedule 3) in accordance with th/is building contract, as may be varied in accordance with its terms, in a proper and tradesman like manner in accordance with all statutes, regulations and bylaws of government, territorial and other public authorities applicable to the works."*

Insurance policy

37. On 18 February 2016 the complainant forwarded a copy of her insurance policy. In the policy under the heading "*Repair, rebuild or pay cash.*" it stated:

"If you have a loss that is covered by this policy and you repair or rebuild the home, we'll pay:"

1. *"The cost of repairing or rebuilding the home to a condition as similar as possible to when it was new, using current materials and methods, and"*

2. *"any cost of compliance with government or local authority bylaws or regulations, as long as,"*

- (a) We pay the cost of compliance only for that part of the home that has suffered loss covered by this policy, and"
- (b) The home complied with all the requirements that existed at the time it was built and at the time of any alteration....."

