Before the Building Practitioners Board
At Christchurch

BPB Complaint Numbers: C2-01277 and C2-01278

Under the Building Act 2004 (the Act)

IN THE MATTER OF An inquiry by the Building Practitioners' Board under section 315 of the Act

AGAINST [First Respondent], Licensed Building Practitioner No. [omitted]

AND

[Second Respondent], Licensed Building Practitioner No. [omitted]

INQUIRY DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] The matter before the Building Practitioners' Board (the Board) is a consolidated Board led inquiry[1] into the conduct of:

(a) [First Respondent]; and

(b) [Second Respondent].

[2] The matters being investigated are whether the Respondents have, in relation to building work at [omitted] Christchurch:

(a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

(b) conducted themselves 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 First Respondent is a licensed building practitioner with a Carpentry Licence issued 24 February 2012.

[4] The Second Respondent is a licensed building practitioner with a Carpentry Licence issued 20 November 2012 and Site Area of Practice 2 Licence issued 20 June 2014.

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

[5] 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).

[6] The following Board Members were present at the hearing:

Chris Preston	Chair (Presiding)
Richard Merrifield	Deputy Chair
Brian Nightingale	Board Member
Mel Orange	Board Member
Robin Dunlop	Board Member
Dianne Johnson	Board Member
Catherine Taylor	Board Member
Bob Monteith	Board Member

[7] The matter was considered by the Board in Christchurch on 7 June 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[8] The following other persons were also present during the course of the hearing:

Person	**Reason for Attendance**
Paul Hobbs	Registrar
Ella Tait	Counsel for the Registrar
Sarah Romanos	Board Secretary
[Omitted]	First Respondent (C2-01277)
[Omitted]	Support person for [omitted]
[Omitted]	Second Respondent (C2-01278)
[Omitted]	Counsel for the Respondents and [omitted]
Warren Batchelar	Chartered Engineer representing the Ministry of Business Innovation and Employment (MBIE), Assessor for MBIE Inspection Report
[Omitted]	Quality Assurance Manager Earthquake Commission (EQC)
[Omitted]	Counsel for EQC
[Omitted]	General Manager, [omitted]
[Omitted]	Technical Services Fletchers Earthquake Recovery (FEQR)
[Omitted]	Technical Services FEQR
[Omitted]	Counsel for FEQR

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

Board Procedure and Inquiry Background

[10] 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).

[11] On 29 January 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.

[12] 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 Respondents:

(a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

(a) conducted themselves 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).

[13] The Board also resolved that the matter should, subject to agreement from the Respondents, be consolidated. Both Respondents agreed to consolidation.

[14] On 19 May 2016 prehearing conferences were convened by Mel Orange. Each Respondent was present for their respective conferences as was Counsel for the Registrar. The hearing procedures were explained and the attendance of both Respondents at the substantive hearing was confirmed. Counsel for the Registrar was instructed to supply the Respondents with key court and Board decisions relevant to the matters before the Board in the inquiry.

[15] At the prehearing conference the First Respondent Batistich made an application for the hearing to be held in private. On 1 June 2016 the Board met and resolved to hear the matter in private having been satisfied that reasonable grounds existed. The Board also ordered that interim suppression would apply.

Function of Disciplinary Action

[16] 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 Kingdom[2].

[17] 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 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*

[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

profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

[18] 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 inquiry.

The Hearing

[19] The hearing commenced at 10.45 a.m.

[20] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.

[21] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board. The Board invited all person involved in the hearing to question each witness who gave evidence.

Substance of the Inquiry

[22] 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	Based on the information provided by the PMO (Programme Management Office), the repair methodology included: • Re-levelling of floor by jacking and packing, notching of bearers. • Replacement of a section of concrete slab. • Jacking and underpinning of footings and ground improvement under load bearing walls due to these footings being undermined by the removal of a section of the slab, see above. This is consistent with the observations from the inspection with the exception of no evidence of ground improvement work having been performed.

Criteria	Result	Measurements/Notes
		The repair strategy for the garage has not addressed the structural issues of the storey above it. This is demonstrated by unacceptable floor slopes in the floor above the garage (also see "Floor levels" below). Consequently we consider the repair methodology performed is inappropriate based on the MBIE guidance.
Structural Aspects (Building Code Clause Bl) - Compliance of earthquake repair and general workmanship.	1	The following structural issues were observed: • Inadequate bearing surface between piles, packers and bearers. • Packers not secured to bearers. • Inadequate sub-grade support to some piles and parts of the perimeter foundation. Out of 42 piles approx. 75% with poor workmanship.
Durability Aspects (Building Code Clause B2) -Compliance of material selection for earthquake repair work.	1	The following durability issues were observed: • Lack of damp proof course between piles and packing/bearers. Inappropriate material (e.g. fibre cement).
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 1:50 were measured). While some pre-existing differential settlement is considered likely, evidence from the inspection indicates 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	

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

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

Evidence

[25] 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 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.*

Warren Batchelar

[26] Mr Batchelar confirmed his role as contracted technical expert for the investigations carried out into earthquake repairs by MBIE and co-author of the MBIE Investigation Report and outlined his experience and background as an engineer. He answered questions relating to the MBIE Inspection Report. Included in his evidence were the following relevant matters:

(a) there were no impediments to his gaining access to the underfloor area where the noncompliant work was identified or to all of the subfloor areas using existing subfloor openings;

(b) the adequacy of the bearing noted in the report related to the use of generic load calculations for determining adequate bearing for piles as opposed to specific load bearing calculations for each pile. He noted that transference of load is not the same for every pile;

(c) the packers shown in the photographs were door packers which were not what was specified in the repair documentation and they had not been secured. Packers could have been secured by installing packers which were wider than the piles which would then have allowed for them to be secured to the bearer above the packers and this methodology was referenced in the repair documentation;

(d) inadequacy of bearing related to piles that were no longer integrally connected to the ground. In questioning it was established that these piles were near to or formed part of the perimeter and that when the perimeter was lifted these piles were most likely also lifted. Those that could have been disconnected should have been prior to the lifting taking place;

[4] [2009] 1 NZLR 1

(e) the reference to the repair methodology not being adequate included that there were two different types of foundation (one being timber-framed suspended timber floor structures with perimeter concrete foundation and the other timber -framed dwelling on concrete floor (slab-on-grade) with brick or concrete masonry exterior cladding veneer) with the two different structures pulling away from each other by approximately 70mm creating sloping floor levels on the second storey. The initial repair strategy did not deal with this aspect; and

(f) there did not appear to have been any new piles installed and this was confirmed by the Respondents.

[27] None of the persons involved in the hearing contested the findings of the MBIE Inspection Report other than as regards bearing capacity calculations.

[28] Mr Batchelar considered a building consent would have been needed for the work as it would not have fallen within the provisions of Schedule 1 of the Building Act. Those representing FEQR did not agree with his opinion.

[Omitted]

[29] [Omitted] from EQC gave evidence outlining his role at EQC and the processes used for under cap[5] repairs which were managed by FEQR as the agent of EQC. He advised that the requirements for a licensed building practitioner to be involved in the repairs and for a producer statement to be signed by a licensed building practitioner (PS3) was not an EQC requirement but an FEQR requirement. His evidence was that the EQC expectation was that FEQR would ensure the repair was completed to scope and in accordance with the building code and that whilst they carried out some random audits they relied on FEQR as regards quality.

[30] [Omitted] was questioned as regards repair targets. He advised that he was aware of monthly completion targets but not of quality targets.

[Omitted] and [omitted]

[31] Messrs' [omitted] from FEQR gave evidence as regards their present roles and those at the time of the repairs. Neither had any direct involvement with the repairs although [omitted] was the senior engineer of the team that was responsible for the job. [Omitted] signed off the Technical Hub Project Certification for the claim. They advised that FEQR has a requirement for accredited contractors used by them to have a licensed building practitioner as part of their business. They produced an email sent to WGL and other contractors in September 2013 (prior to the repair work being undertaken) stipulating that all repair work which would normally be defined as restricted building work was to be undertaken or supervised by a licensed building practitioner. This was accepted into evidence. They were not able to advise as to whether there was any requirement to have more than one licensed building practitioner where there were a high number of unlicensed staff under the employ or direction of the contracted repairer.

[32] With regard to the PS3 process they gave evidence that a PS3 was required for final payment and that reliance was placed on it to confirm the building work had been carried out to the required standards. The PS3 had to be signed by a licensed building practitioner. There were no inspections carried out by FEQR to confirm the

[5] Repairs that fell within the EQC level of insurance cover as opposed to those that exceeded the cap and were handled by the insurer.

veracity of the PS3. There was no system or process (at the time) for auditing the work completed except for work carried out under an engineered design and specification. In this respect the witnesses advised that references on the FEQR documentation to inspection was only in relation to an engineered solution for work done on a concrete slab, not to sub floor work on piles.

[33] In relation to the process used to decide whether a consent was required they advised it was based on the engineering strategy and their interpretation of Schedule 1 and Determinations under the Act. The witnesses were questioned on the documentation which showed an initial assessment that a building consent was required and the subsequent and final decision that a building consent was not required. They advised that the decision resulted from a final engineering review.

[34] Both EQC and FEQR were questioned on whether there were any records of either Respondent or their employer [omitted] contacting them to express concerns over the repair methodology and the scope not being sufficient to bring the home up to code and being pressured to sign PS3 documents. They advised there were not and that their processes were such that any contact would be recorded.

[35] They were also questioned on who had the final say stating that no one was forced to sign any documentation and that EQC, as the contracting entity requiring the building work to be carried out, was the decision maker.

[Omitted]

[36] Counsel for the Respondents and [omitted] produced witness statements for all three persons. Each accepted that the work was not completed to the required standard and the two Respondents accepted they should not have signed the PS3 documents and both they and [omitted] regretted their actions.

[37] [Omitted] outlined how WGL had started with a small number of staff in Christchurch (approximately 6) doing mainly cosmetic painting and decorating repairs. The business quickly grew to the point where, within 12 months, there were 154 staff working in cosmetic repairs as well as in more technical areas such as under floor repairs where they had about 30 staff. He accepted the business processes and systems had not kept pace with the growth and they had employed dubiously qualified staff. He gave evidence that WGL only had one licensed building practitioner in Christchurch, the First Respondent [omitted], who was signing off all the PS3 documentation (some 620 jobs in total) prior to the Second Respondent [omitted]being transferred south to join the operation.

[38] He outlined how he felt they were being pressured to sign PS3 documents and to turn work around as quickly as possible. The incentives were that if you finished jobs you would be allocated more work and with an expanding business cash flow pressures required that they maintain the pace. He considered the PS3 documents were worthless and it was a case of just signing them to get paid. He accepted the First Respondent had raised concerns with him about being uncomfortable signing the PS3 documents but he reassured him stating they were “not worth the paper they were written on”.

The Respondents

[39] The Respondents worked for WGL who were contracted to undertake earthquake repairs at the site. Neither Respondent carried out any physical building work.

[40] The First Respondent outlined his role with WGL noting he started directly supervising cosmetic work but soon moved into more of a management role where

he had to rely on the staff on site. In this respect he stated he placed a large degree of reliance on [omitted] who claimed he was a licensed building practitioner with a Site Area of Practice 2 Licence. He did not make any enquiries to verify this claim.

[41] The Board's own investigations, when trying to locate [omitted] to summons him to the hearing, revealed he was known by numerous aliases and that he was not licensed under the name he gave to WGL or any of the aliases.

[42] In terms of the site the First Respondent went to it two times but not when the actual work was being carried out. He relied on the competence and information provided to him by [omitted] and did not carry out any checks or inspections himself. He signed the PS3 based on information received including the technical inspection reports provided by FEQR who, in turn, stated they were relying on the contractor's statements as regards compliance of the work.

[43] The First Respondent outlined his work processes at the time. In general he met with staff in the office on Wednesday and Thursday each week and spent Monday and Tuesday signing off project documentation including PS3 documentation. [Omitted] gave evidence that the PS3 documents were generated by an excel spreadsheet which captured the scope of work being undertaken and transferred it onto the form supplied by FEQR (noting, however, that the PS3 produced by the First Respondent was hand-written).

[44] The Respondents gave evidence, as did the EQC and FEQR witnesses, as regards the process for scoping works. At the time jobs were initially assessed by EQC and, if under cap, passed onto FEQR who carried out an initial assessment with the contractor. This was generally a zip-line assessment which involved taking floor levels and then developing an estimate of work required based on those levels. This was the method used at the site to which the inquiry relates. The First Respondent carried out a zip-line re-scope with EQC and FEQR. No under floor investigation was carried out and any additional work required had to be applied for as a variation to the scope. [Omitted] stated that this was common once under floor investigations were carried out and was a lengthy process that placed financial pressure on the contractor.

[45] The Second Respondent [omitted] gave evidence as to his involvement at the site. The Second Respondent, an employee of WGL in the north, moved south in March 2014 to join the Christchurch WGL operation to help with earthquake repairs. This was after the initial underfloor repairs had been carried out. As with the First Respondent he was uncomfortable signing PS3 documents. When asked to sign the PS3 for the site in question he was only a couple of months into the role and was unsure as to the procedure and had had no involvement in the project. He was under the impression it had been signed off by FEQR by an FEQR engineer but took no steps to confirm this.

[46] The Second respondent, in his witness statement, outlined how he was supervising 15-20 repair projects at a time and felt under pressure to complete work with insufficient time to supervise or to check prior to signing certification documentation. Given these circumstances he had to rely on the competence, checks and inspections of others.

Board's Conclusion and Reasoning

Negligence or Incompetence – Legal Principles

[47] 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 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.*

[48] 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.*

[49] 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.*

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

Negligence and Incompetence – the Respondents' Conduct

[51] The Board accepts that neither of the Respondents carried out any physical building work. Rather the matters which the Board needs to consider in relation to the

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[6] Judge McElrea, DC Whangarei, CIV-2011-088-313
[7] [2001] NZAR 74
[8] (1989) 16 NSWLR 197 (CA) at 200

disciplinary charge of negligence and incompetence is the conduct of the two Respondents in respect of their:

(a) supervision of the building work;

(b) supervision of building work that may have required a building consent; and

(c) completion of the producer statements.

Supervision of Building Work

[52] In Board Decision C2-01143[9] the Board found that the definition of supervise in s 7[10] of the Act must be interpreted in such a way as to give effect to the purpose of the legislation which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board's position, therefore, is that under the disciplinary provision in s 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in s 7 that the supervision of the building work is *"sufficient to ensure it is performed competently"* applies to all building work carried out under the supervision of a licensed building practitioner.

[53] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[54] Turning to look at the conduct in question both Respondents have accepted the work was noncompliant. It follows that it was not performed competently as per the requirements of the Act. The question then is whether their supervision contributed to this and whether their conduct fell below the expected standards.

[55] Both Respondents supervised a high volume of work and a high number of workers from a distance and they placed heavy reliance on others without implementing any systems or processes to ensure the work was being performed competently.

[56] Looking at each of the items in paragraph [53]:

(a) the type and complexity of the work:

(i) the work was being carried out under Schedule 1 of the Building Act and therefore without the benefit of a building consent authority

[9] Board Decision dated 14 April 2016

[10] Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

checking the work. In such circumstances the risks of noncompliant work being carried out are greater and as such more care and therefore closer supervision is required. It was clear on the evidence before the Board, however, that little if any actual supervision by either Respondent was provided; and

(ii) both Respondents knew or ought to have known that it was a FEQR requirement that the work be supervised by a licensed building practitioner. Their signing a PS3 was a statement which, regardless of their perception of what they were signing, affirmed to those relying on it that the work had been supervised by them in their capacity as a licensed building practitioner;

(b) the experience of the person being supervised;

(i) evidence was heard that the standard of employees engaged by WGL reduced as the complexity and volume of the work increased (some 10-12 jobs per week). An increase in complexity and volume should have been matched by an increase in supervision. The converse occurred and whilst the Board accepts the situation was imposed on the Respondents by their employer they had a responsibility to take steps to ensure they were able to supervise adequately which they did not do;

(ii) with regard to the First Respondent [omitted] and his reliance on [omitted], whilst it is acknowledged he was informed by him that he was an LBP, he did not take any steps to verify this noting that each LBP is issued a licence card and there is a public register which can easily be searched. The Board considers he was negligent in not checking and verifying the skills and competence of the person in whom he was placing so much reliance;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(i) as outlined above there was little if any past experience or knowledge of the workers and with respect to the Second Respondent [omitted] he stepped into the role of supervising and started signing PS3 documentation with little if any knowledge of the workers or the work;

(d) the number of persons or projects being supervised;

(i) evidence was heard that, at the time of the repair work being carried out, 154 staff were being supervised by a single LBP. The Second Respondent was brought in to assist but by that time the First Respondent was no longer taking an active role so the ratio remained the same. Even if the lesser number of 30 persons involved in the underfloor repair work is used the ratios are still unrealistic and the Board does not consider it feasible that a single person can provide adequate supervision to so many unlicensed persons;

(e) the geographic spread of the work being supervised

(i) the work was all in the Canterbury earthquake region and the Board does not consider this factor would have contributed to the complexities of supervising.

[57] Taking into account all of the above factors the Board finds that the Respondents have been both negligent and incompetent in their supervision and that the failings are serious enough to warrant disciplinary action. They both displayed a serious lack of care as well as a serious lack of competence as judged by the standards expected of licensed building practitioners.

[58] The Board does consider that the First Respondent [omitted] is more culpable than the Second Respondent [omitted] but this is a matter for consideration as regards penalty, not liability.

[59] The Board also accepts that the pressures placed on them by their employer and the general processes and systems used by FEQR have also contributed but again this goes to mitigation.

Building Consent

[60] The Board has found in previous decisions[11] that a licensed building practitioner who commences or undertakes building work without a building consent where one was required could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct could come within the provisions of s 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068[12].

[61] More recently the High Court in *Tan v Auckland Council*[13] Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

> *[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.*

[62] 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.

[63] The question for the Board to consider is whether, at the time the repair work was undertaken the Respondent, as the supervisor, knew or ought to have known that a building consent was required.

[64] In this respect this Board notes the differing opinions of the witnesses as to whether the repair work fell within the provisions of Schedule 1 of the Act or not. The Board does note, however, that the ultimate decision was made by engineers working for FEQR. In such circumstances the Board considers it reasonable for a licensed building practitioner to rely on the assessment of a qualified engineer.

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[11] Refer for example to Board Decision C1030 dated 21 July 2014

[12] Board Decision C2-01068 dated 31 August 2015

[13] [2015] NZHC 3299 [18 December 2015]

[65] The Board did not have sufficient evidence before it to make an assessment on whether or not a building consent was required although the weight of evidence tended toward a building consent being required and obtaining a consent is always a safer, albeit not a cheaper, option. It did, however, consider that the processes used by FEQR to determine whether a consent was required created risks that work which should have been consented was undertaken without one. Zip line assessments did not show the true extent of work required and as work evolved and became more substantial the requirement for a consent was not revisited. It was also noted that the building consent authority was not consulted as regards the building consent exemptions. Conversely, it was noted that work which required engineering input was inspected by FEQR and closely monitored yet work which fell within Schedule 1 was left to the contractors with the only quality control in place being the requirement that they have a licensed building practitioner and that the practitioner sign a PS3.

Producer Statement

[66] The question of whether the completion of a producer statement can be considered building work was considered by the High Court In *Kwak v Park*[14], an appeal from a Weathertight Homes Tribunal decision. In it Woolford J stated:

> *[50] … the completion of producer statements is work, which can be defined as exertion or effort directed to produce or accomplish something. There is no logical reason why the ordinary meaning of work should not apply or the definition be restricted to physical work. Second, the work of completing a producer statement is in connection with the construction of a building, just as much as the physical work of applying a waterproof membrane.*

[67] Justice Woolford went on to comment at paragraph [53] of his judgment that:

> *It would be anomalous if the definition of building work was interpreted to exclude the completion of producer statements, which, in my view, are just as much building work as design and certification.*

[68] The Board is satisfied that the completion of a producer statement is building work and in this respect the Respondents were "carrying out" the building work.

[69] It is worth noting, prior to considering the statements made in the producer statements before the Board, that whilst producer statements are no longer a prescribed document under the Building Act they are still a commonly used document in the building industry and a great deal of reliance is placed on them to verify compliance and ultimately building safety and performance. This was made apparent in this instance by a preamble in the producer statement signed by the Respondents to the effect that:

> *This Producer Statement will be relied upon to confirm that the Building Works has, to the best of the Contractors knowledge, been performed in compliance with the NZ Building Code.*

[70] They then went on to provide the general statement that the provider:

> *… undertook or supervised the following building work and confirm that I am satisfied on reasonable grounds that the work performed is in compliance with the NZ Building Code and, where a building consent is applicable, in the compliance with the building consent.*

[14] [2016] NZHC 530

[71] There was, therefore, fair notice that the documents would be relied upon, and what it was that they were making a statement about. The producer statement was, however, a qualified statement in that it was made on *"reasonable grounds"*.

[72] There was no doubt that the building work was not in compliance with the Building Code and that the statements could not be relied on. The question for the Board is whether there were reasonable grounds for the Respondents to have made the statements or whether they were negligent or incompetent in making them.

[73] Looking at the processes used to create and sign the producer statements it is clear that they were treated as an administrative task and that little or no attention was given to what was actually being stated. It was treated as a payment process with scant checks being made to ensure the statements being made were accurate.

[74] Given this the Board does not consider there were reasonable grounds and that the manner in which the Respondents completed producer statements was both negligent and incompetent and that the matter is sufficiently serous to warrant a disciplinary outcome. The Board does not consider a reasonable licensed building practitioner would sign producer statements without first making appropriate checks to ensure their veracity or at least have systems and processes in place to ensure the same. To sign them on what was, to all intents, blind faith, puts the licensed building practitioner and those relying on the statements made by the practitioner at risk.

Disrepute

[75] Turning to the second disciplinary charge of disrepute the provision is similar to that in legislation governing other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents.

[76] The Board gave full consideration to the legal principles as regards disrepute in Board Decision C2-01111[15] noting that the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[16] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[17]

[77] Within the legal profession provision of a false undertaking was found by the Lawyers and Conveyancers Disciplinary Tribunal to have brought the profession into disrepute[18]. In the case the Tribunal stated;

> *Undertakings have to be given accurately and complied with meticulously, and Mr Slack's conduct in not turning his mind (as he described it) to the precise form of his undertaking is serious negligence, and without doubt adversely affects the profession's reputation. The profession relies on undertakings to facilitate its day to day activities, so conduct which undermines the value of an undertaking is an important issue.*

[15] Board Decision dated 2 July 2015
[16] [2012] NZCA 401
[17] [2012] NZAR 1071 page 1072
[18] *Slack, Re* [2012] NZLCDT 40

[78] As stated above within the building industry producer statements are treated as important documents and a high deal of reliance is placed on them, especially by building consent authorities. Compliance with the Building Code ensures buildings are safe. Given these factors the Board considers the production of a negligent producer statement is something that could bring the regime under the Act into disrepute.

[79] The Board also considers the level of negligence shown in the supervision of the building work and in the processes used with regard to the creation of the producer statements to be that of gross negligence and as such the conduct was such that it was also likely to bring the regime into disrepute.

Board Decision

[80] The Board has decided that First Respondent [omitted] has:

(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)

and should be disciplined.

[81] The Board has decided that Second Respondent [omitted] has:

(b) 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),

and should be disciplined.

Disciplinary Penalties

[82] 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 Act[i].

[83] 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.

[84] As part of the materials provided to the Board for the hearing the Respondents provided submissions on mitigation and the Board was invited to deal with such matters as part of its substantive decision. Accordingly the Board has decided to dispense with calling for further submissions.

[85] 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 purpose 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.*[19]

[86] Both Respondents have accepted a level of responsibility for the producer statements but were caught up in events that were contributed to by their employer and FEQR. The First Respondent's [omitted] health has also suffered as a result of the events.

[87] The Respondents have made submissions as regards the impact loss or suspension their licence would have on them. The Board does not consider, given the mitigation and circumstances surrounding the matter, that suspension or cancellation is required. Rather both Respondents are to be censured and the First Respondent [omitted], who had a greater involvement in the repair work, is to be fined the sum of $750 and the Second Respondent [omitted] is to be fined $500.

[88] It is to be noted that the Board considered the matters before it to be very serious and the final penalty arrived at should not be taken as an indication of the seriousness. The Board's initial position was that substantial fines in the range of $2,000 to $2,500 were warranted but it has reduced the fines in recognition of the unique circumstances the earthquake repairs presented and the mitigation put forward.

Costs

[89] 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."

[90] 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* [20] 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.*

[91] The judgment in *Macdonald v Professional Conduct Committee*[21] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[22] where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

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[19] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[20] HC, Wellington, AP23/94, 14 September 1995
[21] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[22] High Court, Auckland, CIV-2009-404-005245, 25 February 2010

[92] In *Collie v Nursing Council of New Zealand*[23] 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.*

[93] The Board notes both Respondents have been cooperative with the inquiry and that they consented to the matter being consolidated. Given these factors the order for costs will be reduced. The Board considers the sum of $1,000 for each Respondent to be a reasonable sum toward the Board's costs.

Publication of Name

[94] 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.

[95] 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.*

[96] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing.

[97] The Respondents have made submissions as to the effect publication will have on their professional reputations and future work prospects. The First Respondent [omitted] has also made submission on the effect publication may have on his health.

[98] The Board considers further publication is required as there is a strong public interest in the matter. At the same time the Board notes the effect publication may have on the First Respondent. Given these competing factors the Board will order that the decision be published but without naming the Respondents.

Penalty, Costs and Publication Decision

First Respondent [omitted]

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

Penalty:	**Pursuant to s 318(1)(d) of the Building Act 2004 the First Respondent is censured and under s 318(1)(f) is ordered to pay a fine of $750.**
Costs:	**Pursuant to s 318(4) of the Act, the First Respondent is ordered to pay costs of $1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

[23] [2001] NZAR 74

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 be action taken to publicly notify the Board's action but the First Respondent will not be named in the publication.

Second Respondent [omitted]

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

Penalty: **Pursuant to s 318(1)(d) of the Building Act 2004 the Second Respondent is censured and under s 318(1)(f) is ordered to pay a fine of $500.**

Costs: **Pursuant to s 318(4) of the Act, the Second Respondent is ordered to pay costs of $1,000 (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 be action taken to publicly notify the Board's action but the Second Respondent will not be named in the publication.

Right of Appeal

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

Signed and dated this 22nd day of 22 July 2016

Chris Preston
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:

(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.