Before the Building Practitioners Board

	BPB Complaint No. CB25863
Licensed Building Practitioner:	Mark Hewitt (the Respondent)
Licence Number:	BP 118645
Licence(s) Held:	Carpentry and Site AoP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	12 April 2022
Final Decision Date:	11 July 2022

Board Members for Final Decision:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mr D Fabish, LBP, Carpentry and Site AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under sections 317(1)(b) and 317(1)(d) of the Act.

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Summary of the Board's Final Decision

[1] The Respondent carried out or supervised building work in a negligent manner and in a manner that was contrary to the building consent issued. His licence is suspended for three months, and he is ordered to pay costs of $1,000. The penalty and costs have been reduced on the basis that the matter has been dealt with on the papers as a draft decision. A record of the disciplinary findings will be on the public register of Licensed Building Practitioners for a period of three years.

The Charges

[2] The matter initially came to the Board's attention as a result of a media article about the Respondent's conduct in relation to building work at [OMITTED], Masterton. On 26 July 2021, the Board resolved to initiate a Board inquiry into the Respondent's conduct (Board Inquiry matter CB25850).

[3] On 17 August 2021, the Board received a complaint dated 29 July 2021 about the Respondent's conduct from the owner of the property. The matters complained about were the same as those the Board had resolved to investigate as part of its Board Inquiry.

[4] In the circumstances, the Board decided that it would discontinue the Board Inquiry (CB25850) and would proceed with the matter as a complaint.

[5] On 12 April 2022, the Board received a Registrar's Report in respect of the complaint. Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.

[6] Having received the report, the Board decided that regulation 9 of the Complaints Regulations did not apply. Under regulation 10 the Board is required to hold a hearing.

[7] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures[1]. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation[2]. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

[8] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence to allow it to make a decision on the papers. It also considered, given the purposes of the Licensing Regime, which are to maintain standards and protect the consumer, that it was not necessary to hold a hearing that deals with all of the matters complained about.

[9] The Board did, however, note that there may have been further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, it issued a Draft Decision. The Respondent and the Complainant were provided with an opportunity to comment and to present further evidence prior to the Board making a final decision. The board gave notice that if it directs or the Respondent requests an in-person hearing, then one would be scheduled.

[10] The Respondent did not seek a hearing.

[1] Clause 27 of Schedule 3

[2] *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Disciplinary Offences Under Consideration

[11] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent may have:

(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).

Function of Disciplinary Action

[12] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

[13] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board,*[5] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[14] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[6]:

> *… 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.*

[15] Finally, the Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the

[3] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[4] [1992] 1 NZLR 720 at p 724
[5] [2016] HZHC 2276 at para 164
[6] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[16] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Evidence as noted in the Draft Decision

[17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[7]. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[18] Included in the evidence before the Board was a High Court decision in respect of a civil dispute between the parties: *[OMITTED] v Hewitt Building Limited and Mark Wilson Hewitt* [2021] NZHC 1460[8]. The decision traversed some, but not all of the matters, raised by the Complainant in her complaint.

Licensing Regime

[19] The licensing regime and the Board's jurisdiction under it are predicated on the principle that each licensed building practitioner is responsible and accountable for their own work. If a complaint comes before the Board that relates to building work carried out or supervised by another Licensed Building Practitioner then, if the matters complained about are serious enough, it may resolve to investigate those persons.

[20] Similarly, the Board does not have jurisdiction to deal with persons who are licensed in other trades, such as electrical, plumbing, drain-laying and gas-fitting as they have their own enabling legislation and disciplinary regimes.

[21] The above is raised as the complaint made raised issues with the building work that was completed by other Licensed Building Practitioners and other licensed trades such as plumbing and drainage. The Board is not able to investigate those matters as regards the Respondent's conduct with one exception. The Respondent holds a Site AoP 1 Licence. In so far as the matters complained about relate to the coordination and oversight of the building work, the Board can further investigate the conduct.

Issue Estoppel

[22] As noted above, the Board was provided with a High Court decision relating to civil proceedings. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel, which

[7] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1
[8] CIV-2019-435-005, Justice Cooke

can create a legal bar to asserting a particular position. Estoppel can arise from a previous determination of the matter by a court[9].

[23] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are:

(a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties[10].

(b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action[11].

(c) Issue estoppel can only be founded on findings that are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel, however definite the language in which they are expressed[12].

(d) The purpose of any estoppel is to work justice between the parties. It is therefore open to the courts to recognise that in special circumstances, inflexible application of estoppel may have the opposite result[13]. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: "A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice"[14].

[24] The Board considers, in this case, that estoppel applies as regards the judgements made in the High Court. As such, the Board decided that it need not make any further inquiry with regard to those matters and that it would limit this Draft Decision to the matters traversed in the High Court decision.

<u>The High Court Decision</u>

[25] The High Court decision summarised the matters before it as follows:

> *[1] In June 2016 Ms Barbara [OMITTED] signed a fixed price building contract with Hewitt Building Ltd to extend and renovate a house that she had purchased on the outskirts of Masterton. She remained living onsite whilst the building works were undertaken. The building work was largely completed by December 2016 but a series of problems and disputes had*

[9] Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).
[10] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352
[11] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41
[12] *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce
[13] *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry
[14] *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

> *emerged and continued to emerge through 2017 and 2018. The Masterton District Council issued a Notice to Fix deficiencies with the building on 19 October 2018, and at the date of trial no Code of Compliance Certificate has yet been issued.*

[26] The Respondent's company, Hewitt Building Limited (in liquidation), was sued as the First Defendant as was the Respondent as the Second Defendant. The Respondent was the sole shareholder and director of Hewitt Building Limited. The First Defendant did not defend the claim.

[27] The High Court decision noted, as regards the facts:

> *[8] A building consent was issued by the Masterton District Council on 28 April 2016, and the work progressed following that time. I accept Ms [OMITTED]'s evidence that Mr Hewitt did not give her a copy of the consented plans. All that he provided her was six pages of earlier design plans which were conceptual in nature. I also accept her evidence that the consented plans were not retained on site in a manner that she could inspect them.*

[28] Justice Cooke found that the Respondent departed from the building consent in various ways as the build progressed:

> *[9] The plans pursuant to which the consent was granted were not of good quality. Mr Hewitt's own expert witness, Mr [OMITTED] described them as "pretty poor". In effect Mr Hewitt treated them as outlining the essence of what Ms [OMITTED] wanted, but he would depart from them not only to deal with variations agreed with Ms [OMITTED], but also where he could save costs on the fixed price contract. This was part of Mr Hewitt's modus operandi through his company. If Mr Hewitt could achieve the building work in the consented plan in a different way from that in the plan that he thought that Ms [OMITTED] would be happy with, and which the Masterton District Council would accept, he would seek to do so if it involved cost saving. In terms of variations from the building consent, and therefore the building contract, when he could personally do the variation work he would not arrange a contractual variation. He would also complete some works that should properly have been undertaken by one of the other trades. He would only arrange a formal variation if sub-contractors work was required which needed to be paid for. Otherwise he would treat it as part of the swings and roundabouts he was seeking to manage for the overall project through which he hoped to make a profit. As part of this process he would also seek to persuade the Masterton District Council that any departures from the consented plan should be able to be dealt with by a variation to the consent, or if he believed he could get away with the change without informing the Council he would keep the change to himself.*

[29] The judgement went on to note, as regards the facts:

> *[12] On 8 May 2017 the Council undertook an inspection, and a number of items did not pass.*
>
> *[14] An amended application for a building consent was filed at Mr Hewitt's instigation, but limited to the relocation of a bedroom wall. A related inspection took place by the Council on 24 April 2018. A number of issues were again raised in the Council's site notice, including the need for an amended consented plan given items that were identified as not matching the consent that had been issued.*
>
> *[15] In a subsequent letter dated 30 April 2018, the Council wrote to Mr Hewitt stating, amongst other things:*
>
> > I may be missing something, but it appears from existing and proposed plans provided …, that significant changes are happening i.e. between garage and dwelling, interior and exterior door changes, footprint changes etc. Please clarify.
>
> *[16] Mr Hewitt responded the following day and he stated amongst other things:*
>
> > The only change from the original consent is the wall change to the corner bedroom which is the subject of the Amendment.
>
> *[17] This was not true. Mr Hewitt had made a number of changes as he went which had not been drawn to Ms [OMITTED]'s, or the Council's attention. Mr Hewitt had made the changes when he believed he could broadly achieve the same standard of building work in a manner that met what Ms [OMITTED] had wanted, and which allowed him to save money on the fixed price contract.*

[30] And:

> *[19] In July 2018 an independent advisor retained by the Council engaged in another site visit. He provided an eight-page report raising a number of issues. By way of summary that report stated:*
>
> > There are a range of matters here which appear to have been further complicated by plans that had inconsistencies between drawings. In addition, there are changes that have been made during the project that do not appear to have both owner and MDC approval. Many of these changes are noted in failed inspection records. I note that some of these changes do not necessarily equate to non-compliance with the Building Code (as opposed to Ms [OMITTED]'s expectations not being met and any subsequent breach of contract between Ms [OMITTED] and her contractors).

> *[20] By notice dated 19 October 2018 the Masterton District Council then issued a Notice to Fix under ss 164 and 165 of the Building Act 2004. It identified a number of matters that needed to be remedied before a Code of Compliance Certificate could be issued, including issues related to the requirements for durability under B2 of the Code, and external moisture under E2 of the Code.*

[31] Justice Cooke found that the Respondent had not breached any of the statutory warranties in Part 4A of the Act as he had not been a party to the contract. He then addressed the Respondent's tortious liability. He traversed the contractual relationships and decided that the Respondent was not responsible for the First Defendant's failure to perform the contract and generally found that the Respondent was not liable for the majority of the claims made. There were exceptions where findings were made against the Respondent on the basis that building work did not meet the building code.

Abodo cladding

[32] Justice Cooke found:

> *[147] I am satisfied from the evidence that the Abodo cladding has a number of defects and that it is not compliant with the Building Code, including because of a warranty that will not be now provided by the supplier. The durability requirements of the Code cannot be satisfied, and it may well be that over time the cladding would leak and cause damage to the property. I accept that that remedial work will be necessary to make the cladding Code compliant, and obtain a Code of Compliance Certificate from the Council.*

[33] And:

> *[149] For these reasons I accept that Mr Hewitt personally engaged in poor building practices, that he applied the cladding in a manner that does not comply with the Code, and that it is necessary for the plaintiff to incur the assessed expenditure in order to make the building sound and Code compliant, and they obtain approval from the Council. I accordingly uphold the plaintiff's claim in the amount of $19,935.*

[34] In respect of other issues raised with the cladding Justice Cooke did not find that the Respondent was liable as the matters were contractual, but he did note:

> *[150] There is then a further additional claim advanced by the plaintiff in association with this cladding. This is partly associated with window flashings penetrating the Abodo cladding which Mr [OMITTED] confirmed did not comply with the Code. But in addition Mr [OMITTED] identified that the windows and doors do not match the consented plans as they are of different sizes, and have small pane windows that do not open. The foam bond breaker installed at the rear of the joinery problem identified by Mr [OMITTED] is also connected to this.*

Roof

[35] Justice Cooke found:

> *[158] I am satisfied that notwithstanding it is not presently in the Council's Notice to Fix that there are deficiencies with the installation of the roof, and that remedial work is required to make it Code compliant. If remedial work is not undertaken the roof will likely fail the durability and weathertightness requirements of the Code and damage will occur.*

Flashings to Coloursteel cladding

[36] With respect to exterior joinery flashings, it was claimed that the flashings were not installed as per the consented plans. The issue was raised in a Notice to Fix. was made that was an allegation that Justice Cooke found:

> *[165] I accept the plaintiff has established on the balance of probabilities that there has been defective work by Mr Hewitt. For these reasons I uphold the claim. In part this is because a builder's duty of care extends to keeping proper records of what is done if consented plans are not followed. It is possible that the Council may accept the work without the Coloursteel being removed and reinstated. But even if that happened it remains possible that there is a latent defect that is not Code compliant that could result in damage.*
>
> *[166] In the end I am not prepared to accept Mr Hewitt's evidence at face value, particularly given the Notice to Fix, and his own expert's evidence. I accordingly uphold this element of the claim in the full amount claimed of $35,640.*

<u>The Respondent's Response</u>

[37] The Respondent noted, for financial reasons, that he decided to defend himself in the civil proceedings but not the company. He noted that it was arguable that he could have defended some of the claims against his company and that only three claims were upheld against him personally. He noted:

> *I continue to maintain that the majority of changes made on this build were either a) initiated by Mrs [OMITTED] or b) the result of consultation with her as to what she wanted at the time. These changes did change the consented plan and I admit those changes should have been submitted to council.*
>
> *I made the mistake of not following these changes up in writing with Mrs [OMITTED] and/or doing a variation to the contract.*

Further Evidence and Submissions Received

[38] Following the Board issuing a Draft Decision, it received submissions from both the Complainant and the Respondent.

The Complainant's Submission

[39] The Complainant made a submission on 23 June 2022. The Complainant sought an in-person hearing. The Complainant noted that she had further evidence that was available and would be filed prior to an in-person hearing.

[40] The Complainant made a further submission on 29 June 2022. She raised issues with the High Court decision the Board had relied on in its Draft Decision and the Board's interpretation of that decision. She again sought to submit further evidence. The Complainant stated:

> *I look forward to being able to set this wrong, right. Mr Hewitt cannot be allowed, anymore to conduct himself in the way he is and has. I will proceed to gather evidence when I am given permission. I will provide paper evidence to each and every item in the many pages of 1.1.5 -10.3.*

[41] As noted in paragraph [13] above, the disciplinary process provided for in the Building Act is not designed to redress issues or disputes between a complainant and a respondent. The Board does not and cannot resolve contractual disputes or provide redress or remedies. Its capacity and powers are limited to those that are provided in the Building Act.[15] Its function, with respect to complaints, is:

> *to receive, investigate, and hear complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2*[16]

[42] The Board cannot right wrongs. It can discipline Licensed Building Practitioners, and, in doing so, it can fulfil the purpose of the licensing regime, which is to ensure standards are maintained, and the public is protected. The question for the Board is whether, with the action that was outlined in the Draft Decision, those purposes would be fulfilled. The Board is of the opinion that they will be as, whilst there may be further issues that could be investigated at a hearing, the Board's finding that the Respondent has breached section 317(1)(b) and (d) of the Act and the fact that the finding and penalty will be recorded on the Public Register for a period of three years does maintain standards and protect the public. As such, given the Respondent has not requested an in-person hearing, the costs involved in holding an in-person hearing, and the limited additional value that would be gained, the Board has decided that one is not required.

The Respondent's Submission

[43] The Respondent made a submission on 28 June 2022. He noted

> *Thank you for the opportunity to respond to your draft decision. I fully accept and will not be challenging any of the Board's findings. I have learnt very valuable lessons from this case and reflected at length on my practice. I am*

[15] Section 342 of the Act
[16] Section 343(1)(b) of the Act

very grateful that, should your decision not change, I will be able to continue practising after serving out the suspension period and payment of costs.

[44] In determining whether a hearing is required, the principal consideration is the need to adhere to the principles of natural justice. In this respect, the Board needs to ensure that the Respondent is given a fair opportunity to be heard. Given the submission received from the Respondent, the Board is satisfied that this requirement has been met and that an in-person hearing is not required.

[45] The Respondent also queried matters relating to suppression and the penalty to be imposed. Those matters will be addressed by the Board in the penalty decision portion of this decision.

[46] To the limited extent that it is relevant, the Board has taken the submissions into account when making this Final Decision.

Board's Conclusion and Reasoning

[47] The Board has decided that the Respondent **has:**

(a) carried out or supervised building work or building inspection work in a negligent 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)

and **should** be disciplined

[48] The reasons for the Board's decisions follow. They do not differ from those made in the Draft Decision.

<u>Negligence</u>

[49] The finding of negligence relates to how the building work was carried out.

[50] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[17] test of negligence which has been adopted by the New Zealand Courts[18]. It is to be noted that the test for negligence in a disciplinary context and that which applies to civil tortious liability are not the same and, as such, whilst the factual findings made by the High Court are applicable, some of the legal findings as regards negligence are not binding on the Board as the Board is considering the conduct within a different context, that of a disciplinary regime.

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

[18] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

[51] The New Zealand Courts have stated that the assessment of negligence in a disciplinary context is a two-stage test[19]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[52] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[20]. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner[21].

[53] The Board notes that the purposes of the Act are:

> ***3 Purposes***
> *This Act has the following purposes:*
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
> *(i) people who use buildings can do so safely and without endangering their health; and*
> *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
> *(iii) people who use a building can escape from the building if it is on fire; and*
> *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
> *(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[54] As Justice Cooke noted in his decision, Justice Tipping in B*ody Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 stated, as regards the purpose of the Building Act:

> *[44] The purpose of the Act and the building code is to maintain minimum standards of construction. Those standards are designed to protect the interest society has in having buildings constructed properly. The minimum standards avoid the waste, inefficiency, economic losses and health and*

[19] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[20] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[21] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *safety issues that might well be encountered if the only potential control was contractual. The Act and code are also based on the premise that non-compliance with the code necessarily has a health or safety connotation; so that does not have to be established in addition to non-compliance.*

[55] As noted above, building work must comply with the Building Code.[22] Under section 40 of the Act it must also be carried out in accordance with a building consent[23]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[56] With regard to the building work, the High Court found that there were a number of defects with the Abodo cladding and that it was not compliant with the Building Code; deficiencies with the installation of the roof, which, without remedial work, was likely to fail the durability and weathertightness requirements of the building code; and that there may have been defective work as regards exterior joinery flashings.

[57] The Board has already established that issue estoppel applies. The Board need not inquire further as to whether to not the building work had been carried out to an acceptable standard. It had not. What remains to be determined is whether the conduct was serious enough to warrant a disciplinary finding. In *Collie v Nursing Council of New Zealand*[24] , the Court's noted, as regards the threshold for disciplinary matters, that:

> *[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.*

[58] Justice Cooke noted in his decision a pattern of behaviour whereby changes would be made so as to save money. The departures were not error, oversight or carelessness. They were deliberate and certainly not minor in nature.

[59] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

<u>Contrary to a Building Consent</u>

[60] Justice Cooke made a finding that the Respondent's obligation was to build in accordance with the building code and not necessarily in accordance with the building consent. As previously stated, that was in relation to tortious liability. The finding does not apply to the conduct of a Licensed Building Practitioner where there

[22] Section 17 of the Building Act 2004
[23] Section 40(1) of the Building Act 2004
[24] [2001] NZAR 74

is a specific disciplinary charge of failing to build in accordance with a building consent.

[61] Section 40 of the Act requires that all building work must also be carried out in accordance with a building consent. It states:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[62] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

> ***49 Grant of building consent***
>
> *(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[63] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out above.

[64] In *Tan v Auckland Council*[25] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

> *[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.*

[65] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process.

[25] [2015] NZHC 3299 [18 December 2015]

Moreover, undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

[66] Justice Brewer in *Tan* also noted:

> *[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.*

[67] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court, on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

[68] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[69] In this respect, section 45(4) of the Act states:

> *(4) An application for an amendment to a building consent must,—*
>
> *(a) in the case of a minor variation, be made in accordance with section 45A; and*
>
> *(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[70] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[71] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

> ***96 Territorial authority may issue certificate of acceptance in certain circumstances***
>
> *(3) This section—*

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

[72] Turning to the facts established by the High Court in the civil proceedings, Justice Cooke found that there were clear departures from the building consent and an approach to consenting matters that did not accord with the above requirements.

[73] As changes were made to what was stipulated in the building consent, and the correct process for making those changes was not always used, the building work was not been completed in accordance with the building consent.

[74] Unlike negligence contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established[26]. On that basis and the facts as found by the High Court, the Board finds that the disciplinary offence has been committed.

Penalty, Costs and Publication

[75] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[76] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs and publication.

Penalty

[77] The purpose 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. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[27] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

> *[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.*

[78] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[28]. The High Court, when discussing penalty stated:

[26] *Blewman v Wilkinson* [1979] 2 NZLR 208
[27] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[28] [2012] NZAR 481

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[79] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[80] In *Daniels v Complaints Committee 2 of the Wellington District Law Society,*[29] the High Court, in relation to the principles relating to suspension of a legal practitioner's licence stated:

> *[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.*

[81] This was affirmed in *Jefferies v National Standards Committee,*[30] where the High Court also stated:

> *[25] I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.*
>
> *[26] And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*[31]

[29] [2011] 3 NZLR 850
[30] [2017] NZHC 1824
[31] *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

[82] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[32] the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[83] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

[84] In its Draft Decision, the Board noted that the Respondent's conduct was at the more serious end of the scale. He displayed a cavalier attitude toward the building consent processes and building code compliance, and the failings found by the High Court have had significant ramifications for the Complainant. He put the stated purposes of the Building Act at risk. On that basis, the Board adopted a starting point of cancellation of the Respondent's licence. The Respondent has been found to be personally liable for some of the claims made in the civil proceedings. The Board has taken that into consideration as a mitigating factor. It also took into account that this matter has been dealt with on the papers. Taking those factors into account, the Board indicated that it would reduce the penalty to once of a suspension, which the Board considered was warranted to punish the Respondent and which is also required to deter others from such conduct.

[85] The Board's indicative penalty decision in the Draft Decision was that the Respondent's licence would be suspended for a period of three months. The period was reduced from a starting point of six months on the basis that the matter has been dealt with on the papers. The Board noted that the Respondent would not be able to carry out or supervise restricted building work but that he can be supervised in respect of the same by a Licensed Building Practitioner and will be able to carry out building work that is not restricted building work without supervision.

[86] The Respondent has accepted the Board's penalty. It is confirmed. The Respondent did query when the suspension period starts. The commencement date will be the date that his decision is issued. From that date, the Respondent will not be able to carry out or supervise restricted building work. He will be able to complete records of work for any restricted building work that he carried out or supervised up until that date (but not after). Any restricted building work that continues after that date will have to be carried out or supervised by a Licensed Building Practitioner with a current licence, and that person will have to complete a record of work for any work that they carry out or supervise.

[32] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

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

[88] 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[33].

[89] In *Collie v Nursing Council of New Zealand,*[34] 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.*

[90] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[35] the High Court noted:

> *[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
>
> *[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

[91] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. Adjustments based on the High Court decisions above are then made. The current matter was simple, given that it was dealt with on the papers.

[92] Whilst the matter was dealt with on the papers, there have, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of $1,000 be paid by the Respondent. The Board considers that this is a reasonable sum

[33] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.
[34] [2001] NZAR 74
[35] CIV-2011-485-000227 8 August 2011

for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

[93] Again, the Respondent has accepted the draft order, which is confirmed.

Publication

[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 Licensed Building Practitioners' scheme as is required by the Act[36]. The Board is also able, under section 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.*

[95] 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. This is in addition to the Respondent being named in this decision.

[96] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[37]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[38]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[39]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[40].

[97] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[41]. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[98] The Board indicated that, based on the above, it would not order further publication.

[99] The Respondent, in his submission to the Board following the Draft Decision being issued, noted the impact on him and his family of the various proceedings against him and the effect publication may have. He asked for suppression for his and his family's sake.

[100] Courts and tribunals generally have the power to suppress details relating to a hearing. Within the Building Act, however, the matter is not specifically dealt with in

[36] Refer sections 298, 299 and 301 of the Act
[37] Section 14 of the Act
[38] Refer sections 200 and 202 of the Criminal Procedure Act
[39] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[40] ibid
[41] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

that the Board is not provided with an express power to suppress. This can be compared with the provisions of section 153 of the Electricity Act, which provides the Electrical Workers Registration Board with the power to prohibit publication. The question then is whether the Board has the ability to order suppression.

[101] The Board has found in previous decisions that it has, in certain respects, a summary jurisdiction. A summary jurisdiction is one in which the tribunal has a degree of flexibility in how it deals with matters and wherein it retains inherent jurisdiction beyond that set out in the enabling legislation. In *Castles v Standards Committee No.3,*[42] the High Court held that the disciplinary jurisdiction under the Lawyers and Conveyance Act 2006, which contains the same provision as those in the Building Act, was a summary jurisdiction. In *Orlov v National Standards Committee 1,*[43] the High Court put it as:

> *[29] Parliament has provided that the tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.*

[102] Given the above, the Board considers that it does have the inherent jurisdiction to order the suppression of details relating to a hearing. However, as noted, there is a principle of open justice and open reporting within New Zealand. As such, good grounds need to be shown as to why a matter or details should be suppressed.

[103] The Criminal Procedure Act provides details on various grounds in respect of criminal matters. They are[44]:

> *Publication would be likely to:*
> *(a) cause extreme hardship to the person charged, a witness or a person connected to those persons or the matters; or*
> *(b) cast suspicion on another person that may cause undue hardship to those persons; or*
> *(c) cause undue hardship to any victim of the offence; or*
> *(d) create a real risk of prejudice to a fair trial; or*
> *(e) endanger the safety of any person; or*
> *(f) lead to the identification of another person whose name is suppressed by order or by law; or*
> *(g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or*
> *(h) prejudice the security or defence of New Zealand.*

[42] [2013] NZHC 2289
[43] [2013] NZHC 1955
[44] Refer ss 200 and 202 of the Criminal Procedure Act

[104] Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[45]. In *N v Professional Conduct Committee of Medical Council,*[46] the High Court stated the tribunal must be satisfied that suppression is desirable having regard to the public and private interests, and consideration can be given to factors such as:

(a) issues around the identity of other persons such as family and employers;

(b) identity of persons involved and their privacy and the impact of publication on them; and

(c) the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

[105] The present matter has already received public attention. The Board previously indicated that it would not take overt steps to further publish the matter. That remains its position. The Board does not, however, see that the tests for a blanket suppression have been satisfied. Whilst it accepts that there may be an impact on the Respondent and his family should the matter be further reported on or referred to by other persons, it does not consider that, having balanced the open reporting principles with the potential hardship that may arise, suppression is warranted.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of three [3] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.**
Costs:	**Pursuant to section 318(4) of the Act, the 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 section 301(l)(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.**

[107] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

[45] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[46] ibid

Right of Appeal

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

Signed and dated this 2nd day of August 2022

Mr C Preston
Presiding Member

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[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.