

## Before the Building Practitioners Board

BPB Complaint No. CB 25660  
Licensed Building Practitioner: [OMITTED] (the Respondent)  
Licence Number: BP [OMITTED]  
Licence(s) Held: Roofing – Torch on Roof Membrane

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

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Complaint or Board Inquiry                      Complaint  
Hearing Location                                      Auckland  
Hearing Type:    In Person  
Hearing Date:    30 March 2022  
Decision Date:    10 May 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr C Preston, Chair  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2  
Ms J Clark, Barrister and Solicitor, Legal Member  
Mrs K Reynolds, Construction Manager

**Appearances**                      Mr J Strauss for the Respondent

#### **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 not** committed a disciplinary offence under section 317(1)(c), (da)(ii), or (h) of the Act.

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Background to the Hearing</b> .....	4
<b>Background to the Complaint</b> .....	4
<b>Evidence</b> .....	4
<b>Board’s Conclusion and Reasoning</b> .....	7
Membrane application is restricted building work.....	7
Restricted Building Work defined .....	8
External Moisture Management System .....	9
Of a kind described in subclause (3) of the Order .....	11
Of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act .....	12
Ambulatory approach to interpretation .....	21
Analogous findings on restricted building work .....	22
Supervision requirements.....	23
Conclusion.....	25
<b>Publication</b> .....	26
<b>Suppression</b> .....	26

### Summary of the Board’s Decision

- [1] The Respondent has not committed a disciplinary offence. The Board decided that tanking was restricted building work but that the Respondent relied on the prevailing industry position at the time that it was not restricted building work and that the reliance was, in the circumstances, reasonable.

### The Charges

- [2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [OMITTED], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act) in that, the Respondent may have

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

carried out the application of a weatherproof membrane to a masonry wall, which he may not have been licensed to do;

- (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (c) breached section 314B of the Act (s 317(1)(h) of the Act) in that the Respondent may have carried out the application of a weatherproof membrane to a masonry wall, which he may not have been competent to do.

### Function of Disciplinary Action

[3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*.<sup>3</sup>

[4] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,<sup>4</sup> Collins J. noted that:

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

[5] 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:<sup>5</sup>

*... 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.*

[6] 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

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

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

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

<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [7] 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.

### **Inquiry Process**

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Background to the Hearing**

- [10] On 10 May 2021, the Board issued a draft decision finding that the Respondent had committed an offence under section 317(1)(da)(ii) of the Act and invited the Respondent to comment or present further evidence before the Board issued a final decision. Counsel for the Respondent made submissions in response dated 25 May 2021. The response raised further issues, and consequently, by Board Minute dated 8 June 2021, the Board invited submissions on the further disciplinary grounds of sections 317(1)(c) and (h) of the Act. Supplementary submissions dated 6 July 2021 were received. On 30 July 2021, the Board decided that an in-person hearing was required. A Notice of Proceeding was issued detailing the charges set out in paragraph [2] above.

### **Background to the Complaint**

- [11] The Respondent of NZ Waterproofing Specialists Limited was engaged by KB Projects Limited as a subcontractor to carry out underground tanking on a masonry wall on a new residential dwelling that was under construction.

### **Evidence**

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.<sup>6</sup> 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.

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [13] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [14] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Respondent and Paul Chisnall, Barrister, Special Advisor to the Board appointed under section 322(1)(d) of the Act. A Special Adviser can be appointed to assist the Board at a hearing.
- [15] In addition to the written submissions provided prior to the hearing, Counsel for the Respondent provided an opening statement and a synopsis of submissions at the hearing.
- [16] It was not in dispute that the Respondent carried out the tanking work. At the hearing, the precise location of the work was confirmed by the Respondent by reference to building consent plans. (Document 4.6, Pages 1358 and 1272 of the Board's file.)
- [17] The Respondent's position was that:
- (a) The tanking work was not within the Respondent's licensed building practitioner roofing class of license, and as such, the Board had no jurisdiction to investigate.
  - (b) The complaint was withdrawn by the Complainant, and in those circumstances, there was no "public protection" required and accordingly, the Board should not proceed with the matter.
  - (c) Section 88 of the Act creates a purely administrative obligation which has no legal consequence and does not create any legal liability.
  - (d) In this case, the record of work served no purpose because it was known to both the owner and the local authority what work the Respondent had done.
  - (e) In any event, a record of work was provided by the Respondent to the main contractor, and this satisfies the requirement as the main contractor was vis-a-vis the Respondent, the owner's agent. The Respondent had no knowledge of the owner, but as soon as he did, he provided a copy to them.
  - (f) There is no breach of section 317(1)(h) because there is no evidence that the work carried out was incompetent.
  - (g) There is no breach of section 317 (1)(c) because the tanking work is not restricted building work.
- [18] In his opening statement, Counsel for the Respondent stated that there was little point in addressing the matters further from what had already been said and that

the hearing was a total waste of time. The work in issue was not restricted building work, and there was nothing here to investigate.

- [19] Mr Chisnall was asked by the Board to provide a legal opinion on the class or classes of licence required for a Licensed Building Practitioner to carry out or supervise the application of exterior membrane systems on a wall as part of an external moisture-management system.
- [20] Mr Chisnall identified the issue as raising two questions – is the application of an exterior membrane system to a wall restricted building work? And if so, what licence class is required to carry out or supervise that work?
- [21] In his report, Mr Chisnall analysed the statutory scheme and concluded that *“the application of exterior membrane systems on a wall as part of an external moisture management system is not restricted building work. There is no requirement that a LBP carry out or supervise the work.”* (Document 5.3.1, Page 5111 of the Board’s file).
- [22] At the hearing, Mr Chisnall described the statutory scheme as a *“cascade of moving parts”* and emphasised that in order to satisfy the Restricted Building Work definition in Clause 5 of the Building (Definition of Restricted Building Work) Order 2011, the building work in question must fit within each and every one of the criteria.
- [23] Mr Chisnall determined that the tanking work satisfied clause 5(2)(a)(ii) of the Building (Definition of Restricted Building Work) Order 2011 in that tanking is the construction or alteration of the external moisture-management system of a house.
- [24] However, in respect of clause 5(2)(b), he did not consider that tanking was within the kinds of building work described in clause 3 – being bricklaying, block laying, carpentry, external plastering, foundations, or roofing. He was assisted in this conclusion by referring to the Licensed Building Practitioners Rules 2007. He used the competencies for each licence class to indicate the scope of building work covered by the class.
- [25] Mr Chisnall’s final point was that because tanking did not fall within a kind of work specified in clause 5(2)(b), it also could not satisfy clause 5(2)(c) as being within a licensing class designated under section 285 of the Act. Mr Chisnall expressed the opinion that if “site” had been one of the kinds of building work specified in clause 5, then tanking would have satisfied the clause 5 criteria and been restricted building work.
- [26] The Board took on the role of contradictor and questioned Mr Chisnall to test his approach. It was put to Mr Chisnall that a purposive approach to statutory interpretation would place weight on one of the intentions of the legislation being to address weathertightness issues in building work. He acknowledged this but stated that he found two Ministry of Business, Innovation and Employment (“the Ministry”) determinations<sup>7</sup> quite persuasive, even though they *“collide with legislative intent”*.

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<sup>7</sup> Determination 2014/021 24 April 2014 and Determination 2014/064 19 December 2014.

- [27] Mr Chisnall acknowledged that the Board had the expertise to look at the issue afresh and was not bound by the Ministry Determinations.
- [28] In addressing Mr Chisnall's report, Counsel for the Respondent stated that there was nothing he could disagree with or add.

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

- [29] The Board has decided that the Respondent **has not**:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
  - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); or
  - (c) breached section 314B of the Act (s 317(1)(h) of the Act).

### Membrane application is restricted building work

- [30] The Board decided that the application of weatherproof membrane (tanking) to an exterior masonry wall, when carried out under a building consent on a residential dwelling or small to medium apartment building, is restricted building work. It follows that those who carry out or supervise tanking must be Licensed Building Practitioners and that a record of work must be provided on completion as per the requirements of section 88(1) of the Act.<sup>8</sup>
- [31] Notwithstanding this finding, the Board recognises that at the time the Respondent carried out this work, he relied on industry advice and commentary that tanking was not restricted building work. In this respect, whilst ignorance of the law is not a defence, ignorance based on erroneous advice from an official can be. In *Wilson v Auckland City Council (No 1)*,<sup>9</sup> the appellant was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for the defence in that case. In *Tipple and Gun City Limited v Police*<sup>10</sup> Holland J found that where a person committed a crime believing it to be lawful on the grounds of "officially induced error", it was in the public interest as well as being just that that person should not be held criminally liable.

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<sup>8</sup> The decision relates to external moisture and E2 of the Building Code, not to internal moisture and E3.

<sup>9</sup> [2007] NZAR 705 (HC)

<sup>10</sup> (1994) 11 CRNZ 132

- [32] It is for those reasons that the Board makes no disciplinary finding in respect of the Respondent's conduct.
- [33] However, the Board takes this opportunity to set out its position on this issue and to signal to all Licensed Building Practitioners that tanking is restricted building work.

#### Restricted Building Work defined

- [34] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council:
- 401B Order in Council declaring work to be restricted building work*
- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*
- [35] The Building (Definition of Restricted Building Work) Order 2011 ("the RBW Order") was passed to establish restricted building work. Clause 5 of the Order stipulates:
- 5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
- (2) *This clause applies to building work that is—*
- (a) *the construction or alteration of—*
- (i) *the primary structure of a house or a small-to-medium apartment building; or*
- (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
- (b) *of a kind described in subclause (3); and*
- (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
- (3) *The kinds of building work referred to in subclause (2)(b) are—*
- (a) *bricklaying or blocklaying work;*
- (b) *carpentry work;*

- (c) *external plastering work:*
- (d) *foundations work:*
- (e) *roofing work.*

- [36] On the basis of the RBW Order, there are three requirements that need to be met for building work to be restricted building work. They are:
- (a) it must relate to the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building;
  - (b) be of a kind described in subclause (3) of the RBW Order; and
  - (c) be of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.
- [37] Under section 84 of the Act, restricted building work must be carried out by a Licensed Building Practitioner:
- All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*
- [38] It is on these requirements that the matter before the Board needs to be determined. If tanking is restricted building work, then section 84 applies. If not, then anyone can carry out tanking.

#### External Moisture Management System

- [39] In terms of the first element in paragraph [36] above, the aspect the Board is concerned with is the external moisture-management system of a house or a small-to-medium apartment building.<sup>11</sup>
- [40] Clause 3 of the RBW Order provides a definition of the phrase external moisture-management system as:
- external moisture-management system, in relation to a building,—***
- (a) *means a system (whether comprising only one or 2 or more building elements) that is intended to provide—*
    - (i) *resistance to the penetration of the building by moisture from outside it; or*
    - (ii) *resistance to the accumulation within the building’s fabric of moisture that has penetrated it from outside the building; and*
  - (b) *includes any of the building’s building elements that are or form part of damp-proofing, roof cladding or a roof cladding system, a ventilation system, wall cladding or a wall cladding system, or waterproofing; and*
  - (c) *includes any part of its external moisture-management system*

#### *Tanking*

- [41] The work carried out in this case by the Respondent has been described in various ways – “tanking”, “waterproofing” and “application of a weatherproof membrane”.

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<sup>11</sup> The terms “house” and “small-to-medium apartment building” are defined in clause 3 of the Order.

Tanking is a form of waterproofing where sheets of waterproof material are applied to walls and floors either above or below ground in order to prevent water ingress (penetrating damp) and protect walls and floors. It has been recognised that “tanking” and “damp-proofing” can be interchangeable terms.<sup>12</sup>

[42] For tanking to be an external moisture-management system, there are two elements of the definition in paragraph [40] above that need to be satisfied. The first is that it is a system that is intended to provide resistance to the penetration or accumulation of moisture. Tanking, on the plain meaning of the words, clearly satisfies that element.

[43] The second element relates to the positioning or placement of the system. The tanking, in this instance, was the application of a membrane to an external wall that was backfilled and which contained drains at its base. The membrane was required to waterproof the wall. It, therefore, was a building element that formed part of its waterproofing. In this respect, the Acceptable Solutions and Verification Methods for Compliance with clause E3 of the Building Code (E2/AS3) states:

*Concrete and concrete masonry construction with the scope of CCANZ CP 01, and that complies with CCANZ CP 01, will meet the performance criteria of NZBC E2.*

[44] CCANZ CP 01 is the Code of Practice for Weathertight Concrete and Concrete Masonry Construction issued by the Cement & Concrete Association of New Zealand January 2014. It provides various definitions.

**Membrane**

*A pliable sheet like waterproofing layer, applied as a fluid or as a sheet.*

**Waterproof membrane**

*A membrane impervious to water which is placed to prevent the passage of water and water vapour through a concrete or concrete masonry element.*

[45] CCANZ CP 01 also provides the following specifications:

**2.1 Specific design criteria for weathertightness**

*Concrete requires weathertight protection comprising either an EIFS, a plaster system, a coating system, a veneer, membranes or to be made of weathertight concrete.*

**8.1 Maximum acceptable moisture**

*The maximum moisture contents shall:*

- a) *For concrete floors, have a relative humidity of less than 75% at the time of applying wall membranes, sealants, weathertightness systems or fixed floor coverings, and*

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<sup>12</sup> MBIE Determination 2014/064 at [5.8.2]

- b) *For concrete walls, have a relative humidity reading of less than 70% at the time of applying wall membranes, sealants or weathertightness systems.*

[46] It is, therefore, clear that for compliance with the Building Code, waterproofing systems or products can be required, and that tanking meets the definition of an external moisture-management system.

Of a kind described in subclause (3) of the Order

[47] To be restricted building work, the building work must also be “of a kind” described in clause 5(3) of the RBW Order, being:

- (a) bricklaying or blocklaying work;
- (b) carpentry work;
- (c) external plastering work;
- (d) foundations work; and
- (e) roofing work.

[48] The RBW order does provide definitions for bricklaying or blocklaying work, external plastering work and roofing work as follows:

***bricklaying or blocklaying work*** means the laying of bricks or blocks or erection of brickwork or blockwork

***external plastering work*** means—

- (a) *the application of plaster to the outside of a building; or*
- (b) *the application of a proprietary plaster system to, or installation of a proprietary plaster system on, the outside of a building*

***roofing work*** means the construction or installation of roofs or the installation of roofing material

[49] The definitions are generic in nature. The RBW Order does not define carpentry or foundation work. Neither is defined in any of the other related legislative instruments. The recognised New Zealand Qualifications Framework qualifications for carpentry and foundations (New Zealand Certificate in Carpentry (Level 4) and New Zealand Certificate in Foundation Construction (Level 3) with strands in Concrete Foundation Walls and Concrete Slab On-Ground, and Pile Foundations) provide for a wide scope of envisaged building work.

[50] Tanking can form part of the building work which is “of a kind” described in all of the listed “kinds of building work”, although, within the roofing context, it is commonly referred to as a membrane. It is used throughout buildings, both internally and externally, and at all stages of the building process to prevent water ingress. The words “of a kind” signal that tanking does not have to fit precisely into one of these definitions. It need only be “of a kind” or, in other words, comparable to, or corresponding to, those listed. The general rules of statutory interpretation require words to be given their ordinary meaning. On a plain and ordinary interpretation,

tanking fits within all of the listed building work. Accordingly, the Board is satisfied that the second element has been satisfied.

Of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act

- [51] It was in relation to the third element “of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act” that Counsel for the Respondent and the Special Adviser raised issues. The submissions received were that none of the designated license classes included tanking within their competencies<sup>13</sup> and, therefore, that the third element had not been satisfied.
- [52] Mr Chisnall considered that the definition of building work in this subclause was limited to the kind of building work defined in subclause (3). The Board does not agree. The definitions in subclause (3) relate only to subclause (2)(b). The definition of building work in clause 5(2)(c) is not limited. It only has to fit into a designated licensing class.
- [53] The licensing classes required under section 285 of the Act were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010 (Licensing Order). It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Licensing Order, the following are the types of building work each class of licence can carry out:<sup>14</sup>

<b>Licensing class</b>	<b>Type of building work</b>
<i>General Licence Classes</i>	
<i>Design</i>	<i>Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>
<i>Site</i>	<i>Co-ordination or oversight of some or all of the construction or alteration of any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>
<i>Trade licensing classes</i>	
<i>Carpentry</i>	<i>Carpentry for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>

<sup>13</sup> The competencies referred to were those set out in the schedule 1 of the Building (Designation of Building Work Licensing Classes) Order 2010.

<sup>14</sup> Specialist licensing classes were also provided for but have not been implemented

<i>Roofing</i>	<i>Installation of roofs, or roofing materials, for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<b>Licensing class</b>	<b>Type of building work</b>
<i>External plastering</i>	<i>Application of external solid plaster, or proprietary plaster systems, to any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<i>Bricklaying and blocklaying</i>	<i>Laying or erection of bricks or blocks for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<i>Foundations</i>	<i>Construction or alteration of some or all of the foundations in or for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building</i>

- [54] The Licensing Order does not define the terms design, site, carpentry, roofing, external plastering, brick and block laying or foundations. Nor does it give any indication as to what the extent or perimeters of those areas of licence are. It must be borne in mind, though, that the purpose of the Licensing Order is to ensure there are license classes that can carry out and supervise restricted building work.
- [55] To implement the Licensing Order, the Licensed Building Practitioners Rules 2007 (the Rules) were established pursuant to section 353 of the Act. The Rules are a form of secondary legislation.<sup>15</sup> Secondary legislation is under section 115 of the Legislation Act 2019, disallowable. This ensures Parliamentary oversight of secondary legislation and the supremacy of the enabling legislation.
- [56] Mr Chisnall used the Rules, which contain the competencies and performance indicators for each licensing class, to reach the conclusion that the Rules do not include waterproofing<sup>16</sup> in the required competencies and, as such, the tanking of external walls did not fall within the license classes designated to carry out or supervise restricted building work.
- [57] The Ministry of Business Innovation and Employment has also previously taken the position that “*tanking is not restricted building work*”.<sup>17</sup> In *Weaver v HML Nominees Ltd*<sup>18</sup> the High Court held that a determination decision is a judicial decision for the purposes of considering whether an issue estoppel applied between the parties

<sup>15</sup> Section 5 of the Legislation Act 2019.

<sup>16</sup> Document 5.3.1, Page 5109 at para 38 and Determination 2014/064 at [5.9.5]

<sup>17</sup> MBIE Determinations 2014/021 at [4.1.5] and 2014/064 at [5.9.6]

<sup>18</sup> [2013] NZHC 2080

preventing them from re-litigating the matter. The High Court further held, however, that although the determination was binding on the parties, there was no issue estoppel broader in scope than that. The Board, therefore, considers that determinations are influential and are to be taken note of, but the Board is not bound to follow them.

- [58] A Ministry guidance document dated 21 March 2016, published under section 175 of the Act, also states that external tanking work is not restricted building work because it does not fit within one of the Licensed Building Practitioner license classes. This document is published only as a guide,<sup>19</sup> and as such, it is again noteworthy but not binding on the Board.
- [59] The Board does not agree with the bottom-up approach to interpretation the Special Advisor and the Ministry have used, whereby the Rules determine what superior legislation in the Order and Act mean. The Rules are, as noted above, an inferior legislative instrument issued by the Minister for Building and Construction. They cannot override the superior legislative instruments.
- [60] As noted, the Rules were established under section 353 of the Act. It states:

*353 Rules relating to licensed building practitioners*  
*(1) There must be made, and there must always be, rules containing the following minimum standards (LBP standards):*  
*(a) minimum standards of competence (including standards relating to knowledge and skills) that must be met for each licensing class; and*  
*(b) minimum standards for demonstrating current competence for each licensing class that must be met for continued licensing, and for the frequency at which assessments of current competence must be carried out.*

- [61] The reference in section 353 is to the establishment of “minimum standards of competence” for licensing. The Rules:

*set out the standards of competence that building practitioners must meet in order to be licensed, and detail the procedures for assessing competence and issuing licence cards. The Schedule to the Rules describes the competencies for the Design, Site, Carpentry, Roofing, External Plastering, Bricklaying and Blocklaying, and Foundations licensing classes.<sup>20</sup>*

- [62] Rule 4 states:

*Minimum standard of competence for each class of licence*  
*(1) The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*

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<sup>19</sup> s175 (2)(a) of the Act

<sup>20</sup> Explanatory note to the Licensed Building Practitioner Rules 207

(2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

- [63] It is clear that the Rules are for the purpose of evaluating whether or not an applicant for a licence meets the applicable minimum standard when seeking a building licence. They do not determine what is and is not restricted building work. Nor do they provide an exhaustive list of all of the types of building work that can (and by inference cannot) be done by persons holding various classes of licence. They do cover common or expected areas of competence. This is to be expected from an instrument which is designed to be used by the Registrar when deciding whether or not to grant a licence.
- [64] Quite clearly, section 353 of the Act does not authorise the establishment of a set or sets of building work that is or is not restricted building work. That is not its purpose, and to use it in that way would be to derogate from the purpose for which restricted building work was enacted.
- [65] Given those factors, the Board considers that it is wrong to define and interpret the scope of each license class by reference to the Rules. They may provide guidance but are not determinative and should not be used to thwart the statutory licensing regime. As such, the Board considers that they are an interpretative tool<sup>21</sup> but should not dictate the scope of a licensing class or be used to limit the purposes of the Act.
- [66] To the extent that the competencies and performance indicators are tools of interpretation, the Board places weight on the words “*of a kind*” in clause 5(3) and the introductory words to the listed performance indicators – “*may include but not limited to*”, which in the Board’s view signals a wide definition of the licensing classes.
- [67] To this end, the Board notes waterproofing is contemplated as being within both carpentry and foundation licence classes as evidenced by reference to, respectively, “*Fix exterior claddings. May include but not limited to –...moisture barrier (building wrap)*”<sup>22</sup> and “*Excavate and prepare for footings and slab on ground in accordance with documentation. May include but not limited to –... apply damp proofing material (membrane or emulsion).*”<sup>23</sup>
- [68] When this approach of considering the competencies and performance indicators as a tool is taken, then the Site class competencies cover waterproofing by stating – “*May include but not limited to – waterproof and water resistant membrane*

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<sup>21</sup> Discussion of the required approach to statutory interpretation is contained in paragraph [62] with reference to section 5 of the Interpretation Act 1999 and *Commerce Commission v Fonterra Cooperative Group Limited* [2007] NZSC 36

<sup>22</sup> Licensed Building Practitioner Rules 2007 Schedule 1 pg 31

<sup>23</sup> Licensed Building Practitioner Rules 2007 Schedule 1 pg 47

systems”,<sup>24</sup> although, at the same time, it has been recognised that a Site Licence does not allow the holder to carry out or supervise restricted building work.

[69] The Board considers pragmatic definitions which are reflective of industry practice, and not limited to competencies or performance indicators, are to be preferred and that this ensures the legislative intent behind restricted building work is achieved.

[70] Looking at the legislative intent behind restricted building work, the Legislation Act 2019 states:

*10 How to ascertain meaning of legislation*

*(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*

*(2) Subsection (1) applies whether or not the legislation’s purpose is stated in the legislation.*

*(3) The text of legislation includes the indications provided in the legislation.*

*(4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation. 10 Ascertaining meaning of legislation.*

[71] This provision was discussed by the Supreme Court in *Commerce Commission v Fonterra Cooperative Group Limited*<sup>25</sup> within the context of the repealed provision in section 5 of the Interpretation Act 1999:

*[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. [Footnotes omitted]*

[72] The principles extrapolated from this case and applied to the interpretation of the RBW order are:

- (a) Text and purpose are the key drivers of statutory interpretation
- (b) Even if the meaning appears plain (in isolation of the purpose), the meaning(s) of the text must then be cross-checked against the purpose of the legislation.

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<sup>24</sup> Licensed Building Practitioners Rules 2007 pg 28

<sup>25</sup> [2007] NZSC 36 at [22]

- (c) In determining the purpose, regard must be had to both the immediate and general legislative context; it may also be relevant to consider the social, commercial or other objective of the legislation.

[73] In *R v Pora*, the majority of a Full Bench of Court of Appeal accepted that materials such as select committee reports and parliamentary debates may be relevant to the interpretative exercise.<sup>26</sup>

[74] Firstly, the Board's view is that the meaning of restricted building work in the RBW Order is plain, even in isolation of the purpose, and tanking comes within it. Moreover, in cross-checking the meaning against the purpose of the RBW order, the inclusion of tanking accords with the purpose of the legislation.

[75] The Licensed Building Practitioners Scheme was created and implemented within a unique social and commercial context. The identification of systemic issues and failures in New Zealand buildings which resulted, at a basic level, in the entry of water into primary structures, led to significant industry wide investigation. The Building Industry Authority (BIA) produced a report, commonly referred to as the Hunn report<sup>27</sup>. Amongst its many recommendations was that the BIA should explore the issues involved in the national registration of builders and building-related trades, given the concerns raised in the report about the standards of some trade practices on site. This ultimately led to a suite of legislative changes and the creation of the Licensed Building Practitioners regime.

[76] When the Building Bill was introduced to Parliament in 2003, the Minister stated<sup>28</sup>:

*This bill marks an important milestone in the development of an appropriate regulatory framework for the building industry that both the industry and consumers have been seeking. Although the weathertightness issue was a catalyst for this work, scrutiny of the industry through the Hunn committee, the Government Administration Committee's inquiry into weathertightness, and, indeed, the review of the Building Act itself, allowed us to look at wider issues relating to building regulation. Like a well-designed building, the changes reflected in this bill are a complementary and integrated package. They are designed to work together to minimise risks of future regulatory failure. The catchphrase I have acquired for myself over recent weeks since we concluded the discussion document work is "design and build it right first time". That has become a motto for me, and if we can get that right, then the risk of the kinds of things we have seen happen in the past occurring again will be minimised. That does not mean there will not be failure. We cannot actually prevent failure from occurring altogether, and that is why the bill addresses consumer protection as well.*

[77] The Bill introduced the Licensed Building Practitioner regime:

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<sup>26</sup> *R v Pora* [2001] 2 NZLR 37 (CA).

<sup>27</sup> Report of the Overview Group on the Weathertightness of Buildings, 2002, Don Hunn, Ian Bond, David Kernohan

<sup>28</sup> Hansard Volume:611;Page:8425

*The bill provides for the licensing of building practitioners for the first time, and sets the framework for the licensing system, but the detail of how it will work in practice will be set out in regulation, after consultation with the industry. On Monday the Associate Minister of Commerce, the Hon John Tamihere, released a discussion document on this subject.*

- [78] The Building Amendment Bill followed. At its first reading, the responsible Minister stated<sup>29</sup>:

*With this amending legislation the Government is improving the clarity and effectiveness of the regulatory reforms set up under the Building Act 2004. This Act was passed as a response to the systemic issues that led to major building failure in the 1990s and, in a wider sense, to an expectation that New Zealand would re-establish our world-class reputation for quality-built buildings. The Act is the primary instruction for ensuring that New Zealanders' homes and buildings are built right the first time.*

- [79] When the Building Amendment Bill (No 3) was introduced to Parliament at its first reading, the responsible Minister noted:<sup>30</sup>

*The Government has no interest in deregulating at the cost of the health, safety, or financial security of New Zealanders. Quality of building work must come first—that is the fundamental purpose of the Building Act 2004. The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for. The Governments wants consumers in the sector to make informed decisions and to understand the risks and consequences of their decisions. I am pleased to report there is widespread support for the direction of the proposed changes.*

*I will now outline the key changes contained in the Building Amendment Bill (No 3). They cover three broad areas: clearer accountability, more efficient regulation, and improving skills and knowledge. These areas are all interrelated. We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified*

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<sup>29</sup> Hansard Volume:641;Page:10834

<sup>30</sup> Hansard Volume:669;Page:16053

*products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[80] At the Committee stage of the legislative process, the responsible Minister stated:<sup>31</sup>

*But you cannot make that change unless you can do something to acknowledge the skills of the practitioners doing the work. I know I have said it as a joke a number of times, but I stand by it: up until this week, all that an individual needed to do to be a builder in New Zealand was to have a cellphone, a dog, and a ute, and you could easily go out and build a house, and people did it all the time. Well, that changed on 1 March, 5 days ago. I know that it was 1 March, because today is my birthday and it was 5 days ago that the law changed. From 1 March a person needs to be a licensed building practitioner to do what we call restricted building work. That is brought into effect by this legislation. We say that restricted building work is building work that is critical to the structural integrity or the weathertightness capacity of the building. So a builder will still be able to move the kitchen cupboards around in a building without being a licensed practitioner, and still be able to do some renovations to wardrobes or the bathroom, or whatever. But when it comes to the restricted building work on a new building—that is, the structural integrity and the weathertightness aspects of a building—the practitioner will need to be a licensed practitioner, just as we ask people flying our 737s, which bring us to Wellington all the time, to be licensed pilots, and just as we ask our brain surgeons who are operating on a brain tumour in our heads to be qualified surgeons.*

[81] The legislative history shows a clear intention to address the weathertightness issues that led to the systemic failures noted in the Hunn report. The legislation aimed to improve the overall quality and compliance of homes and to do this, in part, by increasing the knowledge, skills and standards of those that are authorised to carry out or supervise restricted building work. The repeated reference to “right first time” is significant. Getting it “right first time” requires that those who are doing the work have been assessed and determined as competent.

[82] In this context, and more generally, the Building Act states the following purposes:

### **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*

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<sup>31</sup> Volume:678;Page:814

- (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.*

- [83] From the above discussion, the Board takes that one of the key drivers for the Licensed Building Practitioners scheme was to create professional accountability for building work so as to ensure safe, healthy, and weathertight buildings.
- [84] The Board finds that the intention in enacting the Licensed Building Practitioner regime was to ensure that the highest risk aspects of building work, those which have been designated as restricted building work, were only carried out or supervised by Licensed Building Practitioners. External water management is restricted building work. It follows that the RBW Order must be interpreted in such a way as to ensure that it is carried out or supervised by a Licensed Building Practitioner.
- [85] This also accords with the general principle of statutory interpretation that general provisions do not derogate from specific ones.<sup>32</sup> In this respect, the Licensed Building Practitioners Rules 2007 are general in their nature, whereas the Building (Designation of Building Work Licensing Classes) Order 2010 and Building (Definition of Restricted Building Work) Order 2011 are far more specific in their provisions and should be preferred.
- [86] Finally, the Board does not consider that Parliament would have intended that building work that is critical to the structure or weathertightness of a household unit should be carried out or supervised by anyone other than a licensed building practitioner. The licensing classes were left deliberately open rather than closed and prescriptive so that structural and weathertightness work could then fit within the most appropriate licensing class. In essence, the restricted building work provisions should be interpreted in such a way so as to advance the purposes of the legislation, not in such a way as to defeat them and the quality control measures and protections they offer the consumer and society in general.
- [87] Using wide practical definitions in order to achieve the purposes of the Act and, in particular, the Licensed Building Practitioners regime, the Board considers the building work undertaken, tanking, fits within a number of the designated classes, including carpentry, foundation, brick and block laying and roofing.
- [88] The Board is reinforced in its view by highlighting that waterproofing should not be treated any differently from other external applications such as plaster and other

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<sup>32</sup> Refer Burrows and Carter Statute Law in New Zealand 5<sup>th</sup>ed 2015 page 475

claddings (which are restricted building work). They all function as part of a system to ensure water from the outside does not get into the inside of a building. To that end, it fits squarely with the purpose of the Act and the Licensed Building Practitioners scheme that waterproofing should be restricted building work.

- [89] An important consequence of building work being restricted building work is that an obligation to provide a record of work is created. The purpose of the Licensed Building Practitioners scheme is not being fully met if important weathertightness building work – waterproofing – does not trigger this obligation. In this respect, some may say that tanking is normally covered by producer statements and whilst that may be the case, there is no statutory requirement for producer statements. As such, a record of work remains an important record of who did or supervised what.

#### Ambulatory approach to interpretation

- [90] The provisions relating to restricted building work were progressively enacted in and around 2010. The building and construction industry is a dynamic one. Systems, methods and products are constantly evolving to provide more efficient methods and buildings, as well as the improved overall performance of buildings. These beneficial developments should be covered by the legislative framework and, in this respect, it is important that the Building Act and its various forms of secondary legislation are interpreted in such a way as to provide for those changes rather than restrict their adoption.
- [91] The Board considers that it is appropriate to adopt what is described as an ambulatory or updating approach to interpretation. This is where the courts interpret statutes to include new developments provided two conditions are satisfied. They are that the developments are within the purpose of the act and that the words of the act are capable of extending to them. The authors of Burrows and Carter Statute Law in New Zealand have noted that if the courts did not take this approach then Parliament would be put to the task of amending legislation much more frequently than it currently is and more than would be feasible.<sup>33</sup> The authors go on to refer to a House of Lords case:<sup>34</sup> “Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation” ambulatory interpretation is, as Lord Steyn described it in the case of *Quintavalle*, “a benign principle designed to achieve the wishes of Parliament”.<sup>35</sup>
- [92] This approach to interpretation is supported by in section 11 of the Legislation Act 2019, which states:

**11      *Legislation applies to circumstances as they arise***

*Legislation applies to circumstances as they arise.*

- [93] Adopting this approach, the Board considers that its finding that the application of external membranes is restricted building work ensures that the legislation remains

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<sup>33</sup> 5<sup>th</sup> ed., p. 413.

<sup>34</sup> Ibid, p. 422.

<sup>35</sup> *R on the application of Quintavalle v Secretary of State f Health* [2003] 2 AC 687 (HL) at [25].

fit for purpose and that the envisaged protections the licensing regime creates will be extended to all of the structural and watertight elements of a residential dwelling built under a building consent.

#### Analogous findings on restricted building work

[94] The Board's decision is also consistent with other decisions made by the Board about restricted building work. In *Peperē*<sup>36</sup> the Board found that the application of proprietary plaster systems over lightweight aerated panel systems was restricted building work. A similar question arose in terms of the inter-relationship between the Rules, the RBW and Licensing Orders, and the Act. The Board made the same decision noting:

[41] *It is clear that the Rules are for the purpose of evaluating whether or not an applicant for a licence meets the applicable minimum standard when seeking a building licence. They do not determine what is and is not restricted building work and cannot be read in such a way as to limit what has been declared as restricted building work.*

[42] *They do, however, provide a guide as to what types of work a licenced person can carry out. In this respect it is noted for external plastering that Schedule 1 of the Rules*

[95] The decision was supported, at the time, by submissions from Counsel for the Registrar, who appeared at the hearing and provided assistance.

[96] In *Colliver*<sup>37</sup> the Board decided that the installation of structurally insulated panels (SIPs) was restricted building work. In *Gilberd*<sup>38</sup> the construction of a deck that was connected to the house and was used as a means of access under Clause D1 of the Building Code was found to be restricted building work.

[97] It is also to be noted that there are other aspects of building where a Licensed Building Practitioner is required to supervise the restricted building work of other trades. For example, design work on a residential dwelling is restricted building work, and design practitioners must submit a Certificate of Design Work with a building consent application. That certificate will include an undertaking that various design elements comply with the Building Code, including design work that has been carried out by others such as a truss manufacturer. Carpenters and foundation practitioners will, more often than not, subcontract the placement of concrete in foundations. The concrete forms part of the building's structure, and its placement is restricted building work. Commonly, the subcontracted person is not licensed. As such, they will be supervised by the person who is authorised to carry out the restricted building work. The same applies to plasterboard that is a bracing element. It is commonly subcontracted, but the supervision and record of work are provided by a licensed carpenter being a person who is authorised to carry out the work. The

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<sup>36</sup> C2-01307, 26 April 2016

<sup>37</sup> C2-01649, 14 February 2018

<sup>38</sup> C2-01642, 19 March 2018

fact that others may be subcontracted to do the work does not derogate from the fact that it is restricted building work.

- [98] The Board has also noted the critical nature of waterproofing. It is a building element that is prone to failure, and it is important that it is done correctly as the implications of a failure can be far-reaching. It is for this reason that Building Consent Authorities require producer statements as they provide a degree of assurance. Producer statements are not, however, recognised in the Building Act and do not replace a record of work.
- [99] In line with the above, the Board has also taken into account in deciding that waterproofing is restricted building work, that waterproofing involves more than just applying a membrane. When the waterproofing relates to the prevention of moisture ingress in an underground building element, the system will compromise multiple parts: the membrane, membrane protection, placement of drains and backfill. Each element has to be completed competently and compliantly for the system as a whole to work. As such, it is important that each element is either carried out or supervised by a Licensed Building Practitioner to ensure that the overall system is compliant.

#### Supervision requirements

- [100] The Board is aware that this decision and those that have previously been made may create some disquiet for Licensed Building Practitioners who may be concerned about the extent of their responsibilities and liabilities as a supervisor. In this respect, it should be noted that providing a record of work is not “signing off”. It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself, create any liability that would not otherwise exist, as section 88(4) provides:

*(4) A record of work given under subsection (1) does not, of itself,—  
create any liability in relation to any matter to which the record of work  
relates; or give rise to any civil liability to the owner that would not otherwise  
exist if the licensed building practitioner were not required to provide the  
record of work.*

- [101] If it transpired that waterproofing carried out under the supervision of a Licensed Building Practitioner had been carried out in a negligent or competently manner, and a complaint was made to the Board about it, then the Board would investigate the adequacy of the supervision. The term supervise is defined in section 7<sup>39</sup> of the Act. The definition states:

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<sup>39</sup> 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.*

*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.*

[102] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992.<sup>40</sup> The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the Court are instructive. In the case, Judge Tompkins stated at paragraph 24:

*“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

[103] When investigating complaints that involve supervision, the Board looks at 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; and ultimately
- (d) whether the work met the requirements of the building code and building consent and, if not, the level of non-compliance.

[104] Taking those factors into account with respect to waterproofing, the factors that the Board might inquire into could include:

- (a) was a licensed applicator used, and were checks made to ensure the licence was current;
- (b) was any due diligence carried out to establish, on reasonable grounds, that the applicator was competent;
- (c) what instructions were given, and checks were made before during and after the work is carried out and at each stage; and
- (d) was a valid producer statement obtained.

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<sup>40</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

[105] If a Licensed Building Practitioner adhered to the above, then it is more than likely they will have met their supervisory obligations. However, if it is a case of instructing and trusting that the work will be completed in a competent and compliant manner, then a Licensed Building Practitioner may be found to have been either negligent or incompetent.<sup>41</sup>

### Conclusion

[106] On the basis of the above analysis, the Board determines that the application of exterior membrane systems as part of an external moisture-management system is restricted building work.

[107] Having found that the Respondent did not commit any offences under section 317, it is not strictly necessary to address the points made by the Respondent's Counsel. However, for the sake of completeness, to the extent that they raise points other than the restricted building work argument, the Board briefly addresses these.

- (a) The fact that the Complainant withdrew his complaint does not affect the Board's jurisdiction to consider the matter<sup>42</sup>. The lack of a Complainant does not mean there is no public protection element in continuing to pursue the matter. There is value in the message any Board decision sends to Licensed Building Practitioners and to the public in general. 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.
- (b) Section 88 of the Act is an administrative obligation, but contrary to Counsel's submission, legal liability does attach to it. Section 317(1)(da)(ii) of the Act makes it a disciplinary offence to breach section 88 of the Act.
- (c) The provision of a record of work is a statutory obligation. It creates a permanent record that is available to persons who seek to review a property file, including subsequent owners. It is not correct, therefore, in any particular case, to claim it serves no purpose.
- (d) The provision of the record of work to the main contractor does not satisfy the Licensed Building Practitioner's statutory obligation. Counsel submitted that the main contractor was the owner's agent, and thus provision of the record of work to the owner had been achieved. No evidence that the main contractor was the owner's agent was presented, and therefore, this argument was not established.

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<sup>41</sup> 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. Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. Beattie put it as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, it was stated as "an inability to do the job".

<sup>42</sup> Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 clause 17(2)

## Publication

[108] The Board can only order public notification of a decision if it upholds a ground of discipline and imposes a penalty. This is because the publication provision forms part of the disciplinary penalties in section 318 of the Act. Notwithstanding, the matters traversed and the decisions made in this matter are important for the wider industry. It is important that the findings are disseminated. Accordingly, the Board will request that the Registrar develop and publish educational materials based on the decision.

## Suppression

[109] Whilst the Board cannot order any further publication, that does not restrict persons seeking information about the Licensed Building Practitioner or the complaint.

[110] The Board's usual practice is to name Licensed Building Practitioners who appear in its decisions which are then published on its websites. Suppression orders can be used, however, to prevent a Licensed Building Practitioner being identified.

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

[112] 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*<sup>43</sup> 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*,<sup>44</sup> 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.*

[113] Given the above, the Board considers that it does have the inherent jurisdiction to order the suppression of details relating to a hearing.

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<sup>43</sup> [2013] NZHC 2289

<sup>44</sup> [2013] NZHC 1955

[114] In New Zealand, there is a principle of open justice and open reporting. This is enshrined in the Bill of Rights Act.<sup>45</sup> Ordinarily, good grounds need to be shown as to why a matter or details should be suppressed.

[115] The Criminal Procedure Act provides details on various grounds in respect of criminal matters. They are<sup>46</sup>:

*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.*

[116] Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>47</sup>. In *N v Professional Conduct Committee of Medical Council*<sup>48</sup> 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.

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<sup>45</sup> Section 14

<sup>46</sup> Refer ss 200 and 202 of the Criminal Procedure Act

<sup>47</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>48</sup> *ibid*

[117] The Board recognises that identifying the Respondent could unfairly impact him and, given the nature of the findings, a suppression order is appropriate. Accordingly, the Board orders that the Respondent's name and details are to be redacted from the published version of this decision.

Signed and dated this 29<sup>th</sup> June 2022

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a long horizontal stroke extending to the right.

Mr M Orange  
Presiding