

## Before the Building Practitioners Board

	BPB Complaint No. CB25713
Licensed Building Practitioner:	Christopher Barnett (the Respondent)
Licence Number:	BP117536
Licence(s) Held:	Carpentry

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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 Type:	On the Papers
Hearing and Draft Decision Date:	30 September 2021
Final Decision Date:	21 December 2021

#### Board Members:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2  
Mr R Shao, LBP, Carpentry and Site AOP 1

#### 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 disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

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### Summary of the Board’s Decision

- [1] The Respondent carried out building work in a negligent manner and in a manner that was contrary to the building consent issued. He is fined \$1,500 and ordered to pay costs of \$750.

### Background to the Complaint

- [2] On 30 September 2021, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.

- [3] 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.
- [4] The Complainant in this matter had previously complained to the Board about the conduct of the Respondent in respect of the same building work<sup>1</sup>. On 11 May 2020, the Board issued a decision in respect of that complaint<sup>2</sup>. The decision was that the Respondent had breached section 317(1)(da)(ii) of the Act when he failed to provide a record of work on completion of restricted building work. The Board fined the Respondent the sum of \$1,500.
- [5] The Board also decided that, in respect of an allegation that the Respondent had breached section 317(1)(b) of the Act (negligence or incompetence), that regulation 9(e) of the Complaints Regulations applied as there was insufficient evidence to warrant further investigation. Regulation 9(e) states:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (e) there is insufficient evidence to warrant the investigation of the complaint;*

- [6] Turning to the new complaint Regulation 9(g) of the Complaints Regulations can apply to a complaint that has previously been dealt with by the Board. The regulation provides:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (g) its subject matter has been considered previously by the Board, and the Board—*
- (i) considered that the complaint did not warrant further investigation, because 1 or more of paragraphs (a) to (f) applied to it; or*
- (ii) otherwise made a decision on the complaint.*

- [7] The Board's 11 May 2020 decision to not further investigate the allegation under section 317(1)(b) of the Act was not a final determination. It was open to the

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<sup>1</sup> Complaint number CB25294

<sup>2</sup> Barnett [2020] BPB 25294

Complainant to lay a new complaint with new evidence. That was what occurred. The Complainant has made a new complaint and has provided new compelling evidence. On this basis, the Board has decided that regulation 9(g)(i) does not apply and that the Board should, pursuant to regulation 10, further investigate the allegation under section 317(1)(b) of the Act.

- [8] The Board decided that regulation 9 did not apply to the allegation under section 317(1)(b) and (d) of the Act, under regulation 10 the Board is required to hold a hearing.

**Allegations that will not be Further Investigated**

- [9] The complaint also raised allegations of breaches of sections 317(1)(c), 317(1)(da)(ii) and 317(1)(i) of the Act. The Board decided that regulation 9 did apply to those aspects of the complaint and that it would not further investigate those allegations.

- [10] Section 317(1)(c) makes it an offence for a Licensed Building Practitioner to carry out (other than as an owner-builder) or supervise restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise. There were two allegations.

- [11] One was in relation to the installation of a waterproofing membrane. There was evidence on the file that the membrane work was supervised by a Licensed Building Practitioner.

- [12] The other was that a boundary peg had been removed. Work on a boundary peg is not restricted building work and, as such, there is no requirement to be a Licensed Building Practitioner.

- [13] Given those factors, the Board decided that regulation 9(a) applied. It states:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

*(a) it does not come within the grounds for discipline;*

- [14] Turning to section 317(1)(da)(ii) of the Act (failure to provide a record of work) the Board made a finding and imposed a penalty on that matter in its 11 May 2021 decision. As such, regulation 9(g)(ii) applies:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

- (g) *its subject matter has been considered previously by the Board, and the Board—*
- (ii) *otherwise made a decision on the complaint.*

- [15] The regulation recognises the principle of *res judicata*, which is that where a matter has been determined in an earlier proceeding, it should not be re-opened. There needs to be finality to proceedings and that the Board should not allow the re-litigation of matters that have been heard and on which a decision has been made. as such, the Board will not further investigate the allegation of a breach of section 317(1)(da)(ii) of the Act.
- [16] The final allegation to which regulation 9 applies is that relating to section 317(1)(i) of the Act (conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute).
- [17] In considering whether the investigation of specific allegations is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*,<sup>3</sup> Justice Gendall stated, as regards the threshold for disciplinary matters:
- [21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*
- [18] Again, in *Pillai v Messiter (No 2)*<sup>4</sup> the Court of Appeal stated:
- ... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*
- [19] Turning to allegations of disrepute, the Courts have stated that the same high threshold applies, and the Board notes that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

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<sup>3</sup> [2001] NZAR 74

<sup>4</sup> (1989) 16 NSWLR 197 (CA) at 200

*This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[20] On this basis, the Board has decided that whilst there was some evidence that may have come within the provisions of disrepute, the Board decided that the alleged conduct did not reach the seriousness threshold as outlined in the above court decisions. On that basis, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied:

***Complaint not warranting further investigation***

*A complaint does not warrant further investigation if—*

*(f) the investigation of it is—*

*(ii) unnecessary;*

**Allegations Being Investigation – Draft Decision Process**

[21] 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<sup>5</sup>. 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<sup>6</sup>. 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.

[22] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.

[23] The Board does, however, note that there may be 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, a Draft Decision was issued and the Respondent and Complainant were provided with an opportunity to comment and to present further

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<sup>5</sup> Clause 27 of Schedule 3

<sup>6</sup> *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

### **Disciplinary Offences Under Consideration**

[24] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had, in respect of building work carried out or supervised at [Omitted], Nelson:

- (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 (section 317(1)(d) of the Act).

### **Function of Disciplinary Action**

[25] 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>7</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>8</sup>.

[26] 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>9</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."*

[27] 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

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<sup>7</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>8</sup> [1992] 1 NZLR 720 at p 724

<sup>9</sup> [2016] HZHC 2276 at para 164

conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>10</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.*

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

[29] 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**

[30] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>11</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.

[31] The Respondent was engaged to construct a new build residential dwelling at [Omitted], Nelson. The Complainant, the owner of the dwelling, provided a large volume of documentation in support of the complaint, including reports from persons who had reviewed the building work and provided reports and inspection records from the Building Consent Authority (BCA). The main issues the Complainant raised were with the manner in which a building wrap, soffits and Cant strips were installed, the protection provided for laminated beams, the sealant used for an external wall, the installation of windows, the standard of subcontractors work and the removal of boundary pegs.

[32] As noted in paragraph [27] the Board’s jurisdiction and the investigation of a Licensed Building Practitioner’s conduct is limited to that which amounts to serious

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<sup>10</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>11</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

negligence. The Board reviewed the complaint and response to ascertain those matters which met the threshold for disciplinary action. In doing so, the Board noted that many of the issues identified were contractual in nature or were not the direct responsibility of the Respondent within the context of the licensing and disciplinary regime. The matters disclosed in the documentation that the Board considered reached that threshold were:

- Window installation;
- Cant strips; and
- Soffit installation.

[33] Included in the reports was one from [Omitted] dated 22 February 2021, completed by [Omitted], Building Surveyor and peer-reviewed by [Omitted], Chartered and Registered Building Surveyor. The report consolidated and summarised a report provided by [Omitted] Limited dated 10 December 2020 obtained by the Complainant, and it included the Respondent's responses to the issues raised in the [Omitted] report. It dealt with a total of 35 individual alleged defects. The [Omitted] report was commissioned by Master Build Services as part of a dispute resolution process. It was provided to the Board by the Respondent.

[34] In determining what reached the threshold, the Board took into account the following findings from the [Omitted] report:

***Analysis of Defects***

*During our visual inspection, it was found that a number of defects highlighted by [Omitted], MBS and the owner were as a result of poor workmanship. However, some of the defects maybe contractual in nature. Each defect is summarised within paragraph 3.3.1 –Non-Compliant/Incomplete Works and Defects. The defects have been assessed against the relevant standards and trade practices where applicable.*

***Conclusion***

*Following the completion of the inspection and reviewing of the defects throughout the property and grounds, it is recommended that the suggested remediation works within table 3.4.1 be undertaken ensuring that all works are carried out in a manner that meets appropriate industry standards.*

*It is our opinion that a significant number of the defects highlighted, such as the internal finishes and the installation of joinery air seals, can be easily rectified by a competent builder. Some other items that are identified as defects are not building compliance or contractual issues such as the alleged staining of the timber decking boards.*

*Additional design input is required from the homeowners designer prior to undertaking remedial works to the northern retaining wall tanking protection, while we consider this was installed in accordance with the designers instructions it does not appear to provide adequate protection to the tanking membrane.*

### **Summary of Main Remedial Works**

*Below is a list of the main remedial works, a complete list of remedial works is contained at table 3.3.1. This list excludes any alleged defects which have not been confirmed or in the case of the interior painting and Prolam posts are awaiting further reports.*

- *Air Seals - Remove architraves and air seals to all exterior joinery (including the garage door opening) and install new compliant backing rods, air seals, and architraves. Allow to paint repairs to match existing and to repair any damage caused as a consequence of the works.*
- *Cant strips to base of cladding – The Cladding beneath the windows and lower weatherboards should be completed in accordance with the consent.*
- *Fixing of Soffit linings – remove sections of soffit linings in locations (or metal roofing) and install additional timber blocking / soffit framing so that the soffit linings can be fixed in accordance with the James Hardie installation manual.*

[35] The full detail from the [Omitted]report on each of the items to follow can be found in Appendix One.

## Window Installation

[36] The specific issues identified with window installation were the failure to provide compliant waterproof air seals to the perimeter of trim cavities, no PEF backing rods installed to trim the cavity, gaps in expanding foam allowing air flow.

[37] The [Omitted]report noted the following

[Omitted]**Observations and Comments**

*We agree that based on the photographic evidence contained within the [Omitted] report dated 25/11/19 that the air seals are poorly formed and require repair/replacement. We do not consider that the way the air seals have been formed complies with the consented documents.*

*We agree that as a minimum all exterior joinery air seals will require investigation (which will require the removal of architraves) and if found to be incorrectly installed these will need to be remediated.*

**Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References**

*Not built in accordance with the building consent documentation.*

*No evidence of a failure to comply with the performance requirement of NZ Building Code clause E2. External Moisture.*

[38] The Respondent, in his response to the complaint, stated:

*This is correct they have not been installed as per the James Hardie Manual however I have not found a builder that has done this correctly yet.*

*The change of building wrap meant it could not be battened out as per the plans , we had to batten the top of all the trusses which lifted the fascia soffits and weather boards not allowing us the space to do it as per plans and this also had an impact on where the weatherboards met the windows  
Truss overhang is at 900 centres and that is where the blocks have always gone.*

*James Hardie had been doing it this way for ever but in 2013 they decided to up date their install specs for high wind zones. [Omitted] had said that all we needed to fix this was to seal around the perimeter and check that no nails had been missed which they had identified on their original report.*

*They change their stance on this when MBS and myself had offered to pay for this , they wanted more so they changed their specs on it.*

*The change of building wrap meant it could not be battened out as per the plans , we had to batten the top of all the trusses which lifted the fascia soffits and weather boards not allowing us the space to do it as per plans and this also had an impact on where the weatherboards met the windows.*

#### Cant Strips

[39] The specific issues identified was the failure to install Cant strips.

[40] The [Omitted]Report noted the following

#### **[Omitted]Observations and Comments**

*Mr Barnett agreed that remedial work is required the control the airflow into the wall cavity beneath windows (Currently he has allowed for remediation to 9 windows on the upper level and 2 windows and 6 doors on the lower level.*

*We consider that the any additional units that require attention can be addressed at that time.*

*Notwithstanding the actual number of units that need to be attended to, we consider that the window joinery installation should be completed in accordance with the building consent documentation. Detail 12 on sheet 21-A and the James Hardie Linear installation manual.*

*We were unable to locate a detail for the windowsills over the roof apron flashings. If no such detail exists, then the owners will need to obtain such a detail from their designer.*

*We note that it appears that the owner has sealed the base of the window units with a spray foam sealant, which is contrary to the design of a drained and ventilated cladding system such as the one installed the base of the window units, which must be vented to the exterior to allow pressure equalisation. The spray foam will require removal to undertake the remedial works.*

#### **Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References**

*Building Consent details sheet 21 A.*

*James Hardie Linear installation manual.*

[41] The Respondent, in his response to the complaint, stated:

*HERE IS A LINK TO THE ONE WE USED. IT IS USED BY ALL BUILDERS IN NELSON AS THE COMPANY IS BASED HERE AND IT IS A BETTER SYSTEM.*

#### Soffits

[42] The specific issue identified was the failure to install soffits as per installation specifications.

[43] The [Omitted]Report noted the following

#### **[Omitted]Observations and Comments**

*We agree that in locations the soffits are not installed in accordance with the James Hardie technical literature and require repair as there is insufficient timber framing / blocking installed to allow for the correct fixing of the soffit linings.*

*It was agreed during our meeting of 30 September 2020 that this would be part of the remedial scope. [Omitted] suggested that by removing sections of roofing it may be possible to install additional soffit blocking without the need to remove the soffit lining.*

*It is likely this will require removal and replacement of the soffit linings to install the required framing timber to allow for correct fixing centres of 600 mm.*

*Mr Barnett has agreed to fix the soffits in accordance with the James Hardie installation instructions.*

#### **Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References**

*James Hardie Eaves and Soffit Installation Manual August 2017. Section 3.3 framing set-out table 11.*

[44] The Respondent, in his response to the complaint, stated that he had addressed this issue in his response to the window installation issue.

#### **Further Evidence and Submissions Received**

[45] Following the Board issuing a Draft Decision, it received submissions from the Complainant. The Respondent did not make a submission.

[46] The Complainant agreed with the findings under section 317(1)(b) and (d) of the Act, but expressed his overall dissatisfaction with the Board's Decision and, in particular,

the decision not to pursue the alleged conduct under section 317(1)(i) of the Act (conduct that may bring the licensing regime into disrepute) and the level of the penalty imposed. The Complainant submitted:

*The draft decision does not meet the purpose of the Board in protecting the public, maintaining the public confidence, and enforcing the high standards of propriety and professional conduct.*

[47] The Complainant noted, in support of his submissions, his involvement in the Chartered Accountants Disciplinary Tribunal<sup>12</sup>

#### Disrepute

[48] The Complainant submitted that the Board's findings under sections 317(1)(b) and (d) of the Act were such that a finding under section 317(1)(i) of the Act was also warranted. The Complainant submitted:

*We submit that the respondent has committed fraud, that his behaviour is fraudulent and that it is serious.*

*Very simply, the respondent was contracted and paid money in full, plus a considerable amount more, to build in accordance with the contract and consent. We paid the full amount of the basis this was done, and he led us to believe it was by the issue of the certificate of practical completion. When in fact he has not delivered what was paid for. That is fraudulent behaviour. He deceived us, and he took our money for work he hasn't done.*

#### Penalty

[49] The Complainant submitted the fine should be set at \$100,000 (the Act stipulates that the maximum fine that can be imposed by the Board under section 318 of the Act is \$10,000). The Complainant outlined the impacts of the conduct on the Complainant and submitted that fine was "in no way reflective of the stress and anxiety his actions have placed on us over the last 3 years". The Complainant questioned the mitigating circumstances the Board had found applied.

[50] The Complainant also submitted:

3. *That, to protect the public, the Respondent should be:*

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<sup>12</sup> It is noted that under clause 7.3(g) of the By-Laws of the Chartered Accountants Australia and New Zealand the maximum penalty that can be imposed in that jurisdiction is \$25,000 and that there is a wider scope for the award of costs and the imposition of alternative penalties.

- a. *Under supervision for a 2-year period by a Board appointed practitioner.*
- b. *Be required to undergo training in building practices and that technical competence signed off before he works unsupervised.*
- c. *That all his existing clients and any prospective clients are directly advised of this decision, and until such time as the Respondents negligence is remedied.*

[51] Again, the Board is restricted by the provisions of section 318 of the Act which set out the actions the Board may take having made a disciplinary finding.

[52] On costs, the Complainant submitted:

4. *That to ensure the industry does not wear the actual costs of the Respondents negligence, costs are awarded against the Respondent that reflect the actual costs incurred in this process, and with a 20% discount (which is all that is warranted). We estimate this figure to be \$24,000, not \$750.*

[53] The Complainant based his estimation on his previous experience.

[54] The Board took the further evidence and submissions into account when making this Final Decision.

### **Conclusion and Reasoning**

[55] 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

[56] The Board's Draft Decision findings which follow are affirmed.

[57] When making its Final Decision the Board reviewed whether it should further investigate the Respondent's conduct under section 317(1)(i) of the Act (disrepute). It decided that it would not. The Board did not consider that the findings of negligence and building contrary to a building consent were such that a further finding of disrepute was warranted. The Board was also mindful that making an

additional finding could result in the Respondent being penalised twice for the same action.

- [58] The Board also considered that the other matters raised in relation to disrepute were, in the main, issues that should be resolved in other jurisdictions and which, in the context of a commercial dispute, did not reach the threshold for further investigation in respect of disrepute.

### Negligence and/or Incompetence

- [59] 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*<sup>13</sup> test of negligence which has been adopted by the New Zealand Courts<sup>14</sup>.

- [60] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>15</sup>. 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.

- [61] 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<sup>16</sup>. 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<sup>17</sup>.

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

### **3 Purposes**

*This Act has the following purposes:*

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<sup>13</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>14</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>15</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>16</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>17</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[63] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>18</sup> and be carried out in accordance with a building consent<sup>19</sup>. 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.

[64] Turning to seriousness in *Collie v Nursing Council of New Zealand*,<sup>20</sup> 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.*

[65] The [Omitted]report identified various quality and compliance issues with the building work. Of those identified and discussed, three were significant and reached the threshold for disciplinary action: installation of windows, soffits and Cant strips.

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<sup>18</sup> Section 17 of the Building Act 2004

<sup>19</sup> Section 40(1) of the Building Act 2004

<sup>20</sup> [2001] NZAR 74

With regard to each, there was independent evidence that the work had not reached the standard expected from a licensed building practitioner. As such, 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.

Contrary to a Building Consent

[66] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

**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.*

[67] 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.

[68] Again, the [Omitted]report identified building work that had not been completed in accordance with the building consent issued with regard to window, soffit and Cant strip installation. 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<sup>21</sup>.

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<sup>21</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

[69] The Board does, however, note that there is a degree of duplication in the findings of negligence and contrary to a building consent. This will be taken into consideration when considering the appropriate penalty.

### **Penalty, Costs and Publication**

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

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

### Penalty

[72] 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*<sup>22</sup> 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.*

[73] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>23</sup> 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.

[74] In its Draft Decision, the Board noted that the Respondent was fined by the Board in relation to the same property and Complainant with regard to the failure to provide

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<sup>22</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>23</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

a record of work. The Board set out that in determining the penalty for this offence, the Board has taken the totality principle into account and has assessed the penalty on the basis of what it would have been had the current disciplinary offence been considered at the same time as the record of work matter. On that basis, the Board decided that a total fine of \$4,000 would have been an appropriate starting point.

[75] The Board found that there were some mitigating factors, including the contractual dispute and the Respondent attending to remedial work. Taking those factors into account, and noting that the Respondent has already been fined the sum of \$1,500 for the record of work matter, the Board indicated that a further fine of \$1,500 was warranted. That effectively reduced the starting point by \$1,000.

[76] The Complainant disagreed with the Board's position. The Respondent has not made any submissions.

[77] The Complainant submitted alternative penalties which were outside of the Board's statutory jurisdiction. Notwithstanding, the Board notes the Complainant's position that more severe punishment is required. The Board does not agree. The Respondent has not previously appeared before the Board and, on the basis of the conduct that has been upheld, the penalty is consistent with other penalties imposed by the Board, and it will serve as a deterrent.

#### Costs

[78] 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."

[79] 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<sup>24</sup>.

[80] In *Collie v Nursing Council of New Zealand*,<sup>25</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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<sup>24</sup> *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.

<sup>25</sup> [2001] NZAR 74

*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.*

[81] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>26</sup> 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.*

[82] 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. The current matter was complex. Adjustments based on the High Court decisions above are then made.

[83] The Board noted the matter was dealt with on the papers. There has, 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 \$750 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

[84] Again, the Complainant disputed the amount and the methodology. He based his position on his experience with disciplinary matters for accountants. The regimes

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<sup>26</sup> CIV-2011-485-000227 8 August 2011

and processes are different. The process under the Building Act and the Complaints Regulations is a simple one. The costs order is appropriate.

### Publication

[85] 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<sup>27</sup>. 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.*

[86] 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.

[87] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>28</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>29</sup>. 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>30</sup>. 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*<sup>31</sup>.

[88] 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<sup>32</sup>. 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.

[89] Based on the above, the Board will not order further publication.

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<sup>27</sup> Refer sections 298, 299 and 301 of the Act

<sup>28</sup> Section 14 of the Act

<sup>29</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>30</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>31</sup> *ibid*

<sup>32</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### **Draft Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with 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.

[91] 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.

### **Right of Appeal**

[92] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 20<sup>th</sup> day of January 2022.



**Mr M Orange**  
Presiding Member

Appendix One – Excerpts from [Omitted] Report

Defect Ref.	Example Photo	Defect Description as per [Omitted] Limited report dated 10/12/2020 [Omitted] opinion as to why Mr Barnett's scope of works will not remedy certain defects	[Omitted] Scope of Repairs	[Omitted] Observations and Comments	Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References (refer to Appendix B)	[Omitted] Minimum Likely Remedial Repair Action Required
1	 <p>This photograph obtained from [Omitted] report dated 25/11/19.</p>	<p><i>Inadequate Air seals. Mr Barnett's scope of works is limited to a select number of doors and windows and does not remediate the defect in all locations.</i></p>	<p><i>Remove architraves and air seals to all exterior joinery (including the garage door opening) and install new compliant backing rods, air seals, and architraves. Allow to paint repairs to match existing and to repair any damage caused as a consequence of the works.</i></p>	<p>We agree that based on the photographic evidence contained within the [Omitted] report dated 25/11/19 that the air seals are poorly formed and require repair/replacement. We do not consider that the way the air seals have been formed complies with the consented documents.</p> <p>We agree that as a minimum all exterior joinery air seals will require investigation (which will require the removal of architraves) and if found to be incorrectly installed these will need to be remediated.</p>	<p>Not built in accordance with the building consent documentation.</p> <p>No evidence of a failure to comply with the performance requirement of NZ Building Code clause E2. External Moisture</p>	<p>We agree with the proposed [Omitted] repairscope.</p> <p>Remove architraves and air seals to all exterior joinery (including the garage door opening) and install new compliant backing rods, air seals, and architraves. Allow to paint repairs to match existing and to repair any damage caused as a consequence of the works.</p>

Defect Ref.	Example Photo	Defect Description as per [Omitted] Limited report dated 10/12/2020	[Omitted] Scope of Repairs	[Omitted] Observations and Comments	Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References (refer to Appendix B)	[Omitted] Minimum Likely Remedial Repair Action Required
		[Omitted] opinion as to why Mr Barnett's scope of works will not remedy certain defects				
3 & 4		<p><i>Excessive air flow to cavity</i></p> <p><i>Mr Barnett's scope of works is limited to a select number of doors and windows and therefore does not remediate the defect in all locations.</i></p>	<p><i>Upper level:</i></p> <p><i>a. Supply and install purpose made metal flashing to the base of all the windows and the void at the cladding to roof junction on the south elevation.</i></p> <p><i>b. Supply and install H3.1 timber canting strip to the base of the weatherboard cladding, allow to paint bottom weatherboard to match existing.</i></p> <p><i>Lower level:</i></p> <p><i>a. Supply and install an extension to the uPVC cavity closure. Hold in place using uPVC welding solvent.</i></p> <p><i>Note 'cant strips' are small strips of timber that support the base of the lowest weatherboard and also close off any gap that may exist between the cavity closure and the</i></p>	<p>Mr Barnett agreed that remedial work is required to control the airflow into the wall cavity beneath windows (Currently he has allowed for remediation to 9 windows on the upper level and 2 windows and 6 doors on the lower level. We consider that any additional units that require attention can be addressed at that time.</p> <p>Notwithstanding the actual number of units that need to be attended to, we consider that the window joinery installation should be completed in accordance with the building consent documentation. Detail 12 on sheet 21-A and the James Hardie Linear installation manual.</p>	<p>Building Consent details sheet 21 A.</p> <p>James Hardie Linear installation manual.</p>	<p>We agree with the extent of the [Omitted] repair scope and consider that both the windows and lower weatherboard installation should be completed in accordance with the consent.</p>

Defect Ref.	Example Photo	Defect Description as per [Omitted] Limited report dated 10/12/2020	[Omitted] Scope of Repairs	[Omitted] Observations and Comments	Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References (refer to Appendix B)	[Omitted] Minimum Likely Remedial Repair Action Required
		[Omitted] opinion as to why Mr Barnett's scope of works will not remedy certain defects				
			<p>back of the weatherboard.</p>	<p>We were unable to locate a detail for the windowsills over the roof apron flashings. If no such detail exists, then the owners will need to obtain such a detail from their designer.</p> <p>We note that it appears that the owner has sealed the base of the window units with a spray foam sealant, which is contrary to the design of a drained and ventilated cladding system such as the one installed the base of the window units, which must be vented to the exterior to allow pressure equalisation. The spray foam will require removal to undertake the remedial works.</p>		

Defect Ref.	Example Photo	Defect Description as per [Omitted] Limited report dated 10/12/2020	[Omitted] Scope of Repairs	[Omitted] Observations and Comments	Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References (refer to Appendix B)	[Omitted] Minimum Likely Remedial Repair Action Required
		[Omitted] opinion as to why Mr Barnett's scope of works will not remedy certain defects				
5.		<p>Noisy soffit linings</p> <p>Mr Barnett agrees to fix the soffits in accordance with James Hardie installation instructions which will remedy the defect. In this way [Omitted] scope and Mr Barnett's scope are consistent.</p>	<p>Supply and install H1.2 treated timber soffit dwangs at 600 mm centres, to allow correct sheet fixing in accordance with the James Hardie installation specification.</p> <p>Replace one isolated fibre cement sheet, (soffit lining) located on the south west elevation.</p> <p>Allow to paint the soffit repairs to match existing and to repair any damage caused as a consequence of the works.</p>	<p>We agree that in locations the soffits are not installed in accordance with the James Hardie technical literature and require repair as there is insufficient timber framing / blocking installed to allow for the correct fixing of the soffit linings.</p> <p>It was agreed during our meeting of 30 September 2020 that this would be part of the remedial scope. [Omitted] suggested that by removing sections of roofing it may be possible to install additional soffit blocking without the need to remove the soffit lining.</p> <p>It is likely this will require removal and replacement of the soffit linings to install the required framing timber</p>	<p>James Hardie Eaves and Soffit Installation Manual August 2017. Section 3.3 framing set-out table 11.</p>	<p>We agree with the proposed repair scope proposed by Mr Barnett and [Omitted], which will require removal of soffit linings in locations (or metal roofing) and the installation of additional timber blocking / soffit framing so that the soffit linings can be fixed in accordance with the James Hardie installation manual.</p>

Defect Ref.	Example Photo	Defect Description as per [Omitted] Limited report dated 10/12/2020	[Omitted] Scope of Repairs	[Omitted] Observations and Comments	Assessment on Compliance with the NZ Building Code and/or Building Consent, and Technical References (refer to Appendix B)	[Omitted] Minimum Likely Remedial Repair Action Required
[Omitted] opinion as to why Mr Barnett's scope of works will not remedy certain defects						
				<p>to allow for correct fixing centres of 600 mm.</p> <p>Mr Barnett has agreed to fix the soffits in accordance with the James Hardie installation instructions.</p>		

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**<sup>i</sup> 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."*

**<sup>ii</sup> 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.*