

Before the Building Practitioners Board

	BPB Complaint No. C2-01538
Licensed Building Practitioner:	Mohammed Sattar (the Respondent)
Licence Number:	BP 105378
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	27 February 2018
Decision Date:	13 August 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Procedure:

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

Board Decision:

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

Contents

Introduction	2
Procedure	2
Function of Disciplinary Action	3
Evidence	3
Board’s Conclusion and Reasoning	6
Penalty, Costs and Publication	9
Penalty	9
Costs.....	10
Publication	11
Section 318 Order	11
Submissions on Penalty, Costs and Publication	12
Right of Appeal	12

Introduction

- [1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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).

Procedure

- [2] The Board held a hearing and received evidence on the two disciplinary charges above.
- [3] On 20 March 2018 the Board issued its decision on the 317(1)(da)(ii) matter as regards the failure to provide a record of work on completion of restricted building work. The Board upheld the charge and imposed a penalty and costs in respect of it.

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

- [4] As part of the hearing the Board adjourned the 317(1)(b) matter to allow a Board Inquiry into [Omitted].
- [5] The Registrar’s report into [Omitted] recommended that the matter should not proceed to a hearing on the basis that regulation 21(a) of the Complaint’s Regulation’s applied, that is that the the Inquiry did not come within the grounds for discipline set out in section 317 of the Act . The Board agreed with that recommendation.
- [6] Having received the Registrar’s report for [Omitted] the Board has decided to proceed to making a decision on the section 317(1)(b) matter.

Function of Disciplinary Action

- [7] 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [8] 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*⁴ 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.”*
- [9] 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. It does not have any jurisdiction over contractual matters.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [11] The Board heard evidence at the hearing from:
- | | |
|--------------------|--------------------|
| [Omitted] | Complainant |
| Mohammed Sattar | Respondent |
| William Hursthouse | Technical Assessor |
- [12] The Respondent was engaged by the Complainant to construct a new residential dwelling under a building consent. The Complainant and Respondent were known to each other with the Respondent being related to the Complainant's wife.
- [13] The Complainant raised issues with the time taken to complete the build and with the quality of the build.
- [14] The Complainant's allegations included a number of contractual and/or commercial matters that did not come within the Board's jurisdiction. Matters that did and which related to the allegation of negligence and/or incompetence, which the Complainant compiled from an [Omitted] report dated 12 October 2016 were extensive and related to multiple areas of the house. It was supported by photographs of the alleged defects.
- [15] The Complainant stated that he had had to engage a law firm to demand that defects in the house be remedied and that costs be recovered and that a number of requests for the builder to come and tidy the defects were made but that the Respondent refused the requests. Some minor items were, however, attended to by the Respondent on 17 November 2017.
- [16] The Respondent provided a written response to the Complaint. In it he dealt with the contractual/commercial matters and also stated that "they were happy to rectify all issues". He responded to a number of the allegations made.
- [17] The Board decided to obtain independent evidence as regards the building work and as such it instructed a Technical Assessor to attend the property and complete a report. The Technical Assessor was asked to report on:
- (a) Who designed the work;
 - (b) Who issued the Certificate of Work;
 - (c) Obtain and review the consented plans and any variations, code compliance certificate, inspection notes, producer statements and records of work;
 - (d) Identify all LBPs on site, including the roofer; and
 - (e) Visit site and assess workmanship and comment on any matters that do not meet Building Code and/or Building Consent.
- [18] The Technical Assessor identified the following person.

Mohammed Sattar	Licensed at the time	Carpentry
[Omitted]	Licensed at the time	Bricklaying

[Omitted]	Licensed at the time	Blocklaying
[Omitted]	Licensed at the time	Roofing
[Omitted]	Licensed at the time	Waterproofing

- [19] As each licensed person is responsible and accountable for the building work that they carry out and/or supervise the focus of the evidence needs to be on that which the Respondent was responsible and accountable for.
- [20] As regards building inspections the Technical Assessor noted:
- (a) there were 22 inspections carried out between April 2015 and May 2016. Of note 10 were 'fails' and site instructions were issued on at least five occasions;
 - (b) site instructions issued on 25 September 2015 listed 10 separate items to be remediated while the following site instructions dated 12 October 2013 listed 13 items to be remediated; and
 - (c) the first final inspection was 'simply stopped', with the inspector noting: "inspection ceased due to many onsite issues noted for this final inspection. Subfloor and rear deck only completed to exterior". Followed by a long list of outstanding issues and finishing with: "This is not a complete list of issues..." The next final inspections also failed.
- [21] The Technical Assessor included in his report a table of all the inspections and the fails that were noted in each. They were extensive and many were significant and or serious.
- [22] The Technical Assessor noted, as regards carpentry work, from his site inspection:
- The garage door does not seal when shut, either at the bottom or at the top. With respect to the bottom seal, the gaps either side are much larger than the gap in the middle which suggests either the bottom of the door is curved down in the middle, or (more likely) the concrete rises up in the middle. The top not sealing is an adjustment issue - the door just needs to close a little further.*
- One of the ranchslider door reveals is not supported and therefore moves quite a lot.*
- As noted in the [Omitted] report, the wardrobes in two of the bedrooms upstairs are poorly installed, as is the door under the stairs.*
- I did not see anything which appeared to me to be obviously non-compliant with the building code.*
- [23] The Technical Assessor's report was supported by photographs.

- [24] The Respondent gave evidence that the foundation preparation was carried out under his supervision but that another licensed building practitioner placed the concrete floor. He also gave evidence that he sustained an injury to his hand and that [Omitted] carried out and/or supervised the carpentry work once the foundations were complete.
- [25] The Complainant gave evidence that [Omitted] left the job when it was about half completed and that the balance of the work was carried out under the Respondent's supervision.
- [26] Investigations into [Omitted] showed that he was employed as a carpenter under the supervision of the Respondent and that the construction of the property was done by the Respondent's business and their sub-contractors. [Omitted] was involved in the installation of the house framing and trusses only in or around between July and September 2015. [Omitted] stated that the Respondent was in control of the building work and he was working under his guidance.

Board's Conclusion and Reasoning

- [27] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [28] Turning to the negligence that has been found the Board notes that negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
- [29] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [30] 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*⁹ it was stated as "*an inability to do the job*".

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

- [31] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [32] 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 Act¹¹. 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 practitioner¹².
- [33] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

- [34] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

- [35] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

- [36] Turning to the evidence before the Board it notes that the non-compliance issues noted by the Technical Assessor were not, of themselves, sufficiently serious enough to warrant disciplinary action being taken. Rather, what the Board was concerned with and the conduct on which it has made its decision that the Respondent was negligent, is in respect of the continued failure of inspections of the building work.
- [37] It was clear from the number of failures, the building work that failed and the lack of attention to failed item from inspection to inspection that due care was not being taken during the build. These continued failures were the result of the Respondent's conduct. Not [Omitted].
- [38] In this respect the Board notes that the purpose of a building inspection by a building consent authority is, amongst other things, under section 222(4)(a) of the Act to:

to determine whether—

- (i) building work is being carried out without a building consent; or*
- (ii) building work is being carried out in accordance with a building consent;*

- [39] The inspection system also relies on a licensed building practitioner making an assessment of the building work against both the building consent and the building code prior to calling for an inspection. The licensed building practitioner should not call for an inspection unless they are satisfied that both have been complied with and the building work is ready for an inspection.
- [40] The fact that an inspection is called for implies that the building work to be inspected is complete and is compliant. This was not the case in the Complaint before the Board. The number and breadth of inspection failures shows that the work was not in a state whereby it was ready for an inspection. The Respondent has failed in his duty to ensure the building work was in a state whereby it was ready for an inspection.
- [41] In this respect the building consent authorities' s role is not to instruct or direct a licensed building practitioner on how to carry out the build or what needs to be done to comply with the building consent or building code. It is simply to check what has been done against those documents and note any failures. The expectation is

¹⁵ [2001] NZAR 74

that matters that are noted will be attended to prior to further inspections being called for. Again this was not occurring.

- [42] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.
- [43] The Respondent has repeatedly called for inspections when the building work was not ready for inspection. There have been 22 inspections which is a high number of inspections, 10 of them failed as did the final. The final inspection was called off by the inspector as there was simply too much left to be done.
- [44] The Board accepts that inspections will fail from time to time and it will not always follow that a licensed building practitioner will be negligent because they do. The difference in the present case is the high number of failed inspections over multiple issues showing that the work was not ready to be inspected and the failure to attend to failed items and site instructions.
- [45] The Board also finds that the Respondent was the responsible licensed building practitioner. It does not accept his evidence that another licensed building practitioner was responsible for the build post completion of the foundations.

Penalty, Costs and Publication

- [46] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [47] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [48] 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*¹⁶ 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

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [49] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁷ 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 penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [50] The Board has already dealt with penalty for the record of work matter under section 317(1)(da)(ii). It imposed a fine of \$1,500.
- [51] The Board considers that a fine for the negligence matter is also the appropriate penalty. It has taken into consideration the penalty already imposed and has considered what the overall penalty should be. On this basis, and taking into account that there are neither mitigating not aggravating factors the fine for this matter will be \$2,000.

Costs

- [52] 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.”
- [53] 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 case¹⁸.
- [54] In *Collie v Nursing Council of New Zealand*¹⁹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [55] The Respondent has already been ordered to pay costs of \$1,000 toward the costs of and incidental to the Board’s inquiry with respect to the section 317(1)(da)(ii) matter. The Board reserved costs were reserved for this matter.
- [56] Having taken into consideration the costs already imposed the Board considers the further sum of \$1,500 should be ordered in costs for this matter. In ordering the amount of costs the Board has taken into consideration the fact that a Technical Assessor was appointed and the additional costs incurred as a result of the Respondent’s claim that another licensed building practitioner was responsible.

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

¹⁸ *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.

¹⁹ [2001] NZAR 74

Publication

- [57] 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 Act²⁰. 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.*
- [58] 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.
- [59] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.
- [60] 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 interest²⁵. 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.
- [61] Based on the above the Board will not order further publication.

Section 318 Order

- [62] For the reasons set out above, the Board directs, with respect to the finding under section 317(1)(da)(ii) that:
- Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

²⁰ Refer sections 298, 299 and 301 of the Act

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

- [63] 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.

Submissions on Penalty, Costs and Publication

- [64] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 September 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 13TH day of August 2018



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*