

## **Before the Building Practitioners Board**

	BPB Complaint No. CB26341
Licensed Building Practitioner:	Stephen Roberts (the Respondent)
Licence Number:	BP134874
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:	By Videoconference
Hearing Date:	11 April 2024
Decision Date:	16 May 2024

#### **Board Members Present:**

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)  
Ms K Reynolds, Construction Manager  
Mr P Thompson, LBP, Carpentry, Site AoP 3

#### **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)(b) of the Act.

## Contents

<b>Summary</b> .....	<b>2</b>
<b>The Charges</b> .....	<b>2</b>
<b>Evidence</b> .....	<b>3</b>
<b>Negligence or Incompetence</b> .....	<b>4</b>
Has the Respondent departed from an acceptable standard of conduct.....	5
Was the conduct serious enough? .....	8
Has the Respondent been negligent or incompetent? .....	8
<b>Board’s Decision</b> .....	<b>9</b>

## Summary

- [1] The Board needed to consider whether the Respondent had negligently or incompetently supervised the carrying out of the building work. The Board’s investigation was based on a Council site notice and an engineering report.
- [2] The Board also considered whether the Respondent ought to have considered whether a building consent was necessary for an external staircase.
- [3] The Respondent raised the defence of reliance on official advice based on a conversation with a Council Officer. On the evidence before the Board, this defence was established, and the Board did not uphold the ground of discipline.
- [4] The Board also noted that the building work on the staircase was carried out by an employee of the Respondent, and as it was not restricted building work, there was no obligation on the Respondent to supervise the work. The Respondent nevertheless took on that supervisory responsibility.
- [5] However, the Board held that the workmanship issues did not reach the seriousness threshold, and the disciplinary offence was not upheld.

## The Charges

- [6] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [7] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED] have

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<sup>1</sup> 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.

- [8] In further investigating the Respondent's conduct under sections 317(1)(b) of the Act, the Board inquired into the issues with the exterior stairway identified in the report from Certa Engineering Limited dated 8 August 2023 and the site notice from the Kapiti Coast District Council dated 24 July 2023 and into whether the Respondent ought to have considered whether the exterior stairway required a building consent.

### **Evidence**

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. 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.
- [10] The Respondent was engaged to construct a new two-storey residential dwelling. The Respondent took over the project from a previous builder, and he was not involved in the initial consent processes.
- [11] The Respondent has 27 years building experience, mostly in the residential area. He progressed from labourer, apprentice, qualified carpenter, site foreman, and then Licensed Building Practitioner in 2018. On this project, he worked on-site for the first 3 months and then took a step back and supervised his crew of workers. This included a qualified carpenter who had been working with the Respondent for 6 years and continues to work for the Respondent managing projects.
- [12] At the time of this project, the Respondent advised that he also had a few small projects underway with different crews that he was supervising.
- [13] On this project, the Respondent worked on site for about 3 months being involved in the engineered front and rear retaining walls and the upper first storey foundations. He stated that he then continued his involvement in a supervisory capacity. He stated in his written response that "*I was the overall person in charge of overseeing the work...I was on site a minimum of once per day.*" The external staircase at issue was built by the Respondent's employee.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

## Negligence or Incompetence

- [14] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>5</sup> test of negligence.<sup>6</sup> To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>7</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.
- [15] The conduct being considered is the Respondent's supervision, as he did not carry out the building work on the staircase.
- [16] There is no requirement for a Licensed Building Practitioner to supervise non-restricted building work. This is because of the combined effect of sections 401B and 84 of the Act. Section 401B of the Act allows building work to be declared as restricted building work by Order in Council.<sup>9</sup> It only applies to building work that is carried out under a building consent. At the time that this building work was carried out it was not restricted building work as it did not have a building consent.

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as "an inability to do the job"

<sup>8</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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".

<sup>9</sup>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.*

- [17] In previous Board decisions, it has found that the definition of supervise in section 7<sup>10</sup> of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent and which is not restricted building work. The Board's position has been that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a Licensed Building Practitioner.
- [18] In this matter, the evidence established that the Respondent did have a supervisory role in the building work, which was not restricted building work. On that basis, the adequacy of the Respondent's supervision of the building work was considered by the Board without differentiation between restricted and non-restricted building work.

Has the Respondent departed from an acceptable standard of conduct

- [19] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>1</sup> as well as the requirement that all building work must comply with the Building Code<sup>11</sup> and any building consent issued.<sup>12</sup> The test is an objective one.<sup>13</sup>
- [20] The focus of the Board's investigation was the construction of exterior stairs, which ran alongside a retaining wall, which in turn was on the boundary with a neighbour.
- [21] The Respondent said in his written response – *“It was a secondary staircase that the owner had advised us was solely for the purpose of getting a lawnmower up to the back section.”*

*Staircase design and consent*

- [22] The Respondent acknowledged that the exterior stairs were not included in the consented drawings, but as he was not involved in the initial consent process, he did not know why that was the case.
- [23] The Complainant, who was the homeowner, explained that as the stairs were against a retaining wall shared with the neighbour and this was still being finalised, the exterior stairs were always going to be retrospectively addressed. She stated in evidence that an amendment to the building consent for the stairs

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<sup>10</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.*

<sup>11</sup> Section 17 of the Building Act 2004

<sup>12</sup> Section 40(1) of the Building Act 2004

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

was discussed with the Respondent. She assumed that had one been needed it would have been arranged.

- [24] The Respondent stated that he did not consider that the stairs needed a building consent, and had he thought they did he would have discussed this with the Complainant.
- [25] The Kapiti District Council site notice of 24 July 2023 states - *“Stairway from driveway to top was not consented...Exterior stairs are not part of the consent and noncompliant... Stairs built over 1.5m High must be carried out with a building consent...A Certificate of Acceptance application needs to be made to council with engineers design to make the stairs compliant.”*
- [26] At the hearing, the Respondent advised that he had had a conversation with the Kapiti District Council inspector, Mr Wilson prior to commencing the construction of the exterior stairs. He said that he relayed this conversation at the time to his engineer. The Respondent’s evidence was that he was told by the Council Officer that a building consent for the exterior stairs was not necessary.
- [27] He understood this to be on the basis that it was a secondary private service staircase, it was considered landscaping and did not require a consent.
- [28] This matter had not been raised by the Respondent in his written response to the Board. The Board gave the Respondent time after the hearing to provide further evidence to corroborate his evidence about the conversation.
- [29] The Respondent provided an email from Barend Geldenhuys, Senior Structural Engineer of Pillar Projects Limited, dated 6 May 2024. Evidence that it was sworn as being a true statement in front of Justice of Peace was later provided on 15 May 2024.
- [30] The Engineer stated – *“I can confirm that in 2023, [the Respondent] queried with me information told to him by KCDC inspector Anthony Wilson regarding not needing a consent for an exterior staircase at 30 Rainbow Court, Raumati South.*  
  
*Upon later receiving a failed inspection notice that referred to the stairs, a conversation between [the Respondent], ....and myself...was had on Friday 24 November 2023...Conversation was held regarding structural and regulatory requirements for the timber stair.”*
- [31] The Board notes that approval of an amendment to the building consent , with respect to the external stairs, was granted on 5 September 2023. This was based on a design and Producer Statement from Certa Engineering. A Code Compliance Certificate was issued in respect of the project on 19 September 2023.

*Staircase workmanship issues*

- [32] Certa Engineering Limited's report dated 8 August 2023 identified several items as not acceptable. These were –
- (a) Members - 90x 45 Stringer Support beam 1 (mid-span) to be replaced with 240 x 45 H3.2 SG8.
  - (b) Connections – in 5 locations - bugle-head screws to be replaced with stainless steel bolts and washers.
  - (c) Members (Handrails) – in 3 locations replace balusters at less than 900mm centres.
  - (d) Connections (Handrails) – in 1 location replace balusters with less than 900mm centres.
- [33] Further a site notice from Kapiti District Council dated 24 July 2023 stated *“Barrier formed up the stairs will require engineers review with likely remedial work. Bottom rails on the barrier fence next to the laundry door going to steps need the gap closed up more, with a maximum gap of 100mm. Exterior stairs require handrail to comply with NZ building code D1. Gaps between treads are 140mm, max gap is 100mm. Treads held in place by 3 x 14g bugle screws and rebated into stringers. Support posts do not appear to have any bolts to the stair structure.”*
- [34] The Respondent advised that he determined the timber to be used for the staircase by using NZS3604 span calculators and used 14 gauge screws as a temporary measure before they would be bolted. He stated that the stairs were 95% complete when he was told not to return to site by the Complainant. The Board did not have any concern with the Respondent's approach to the design of the external staircase.
- [35] Regarding the greater than 100mm gap identified by the Council, the Respondent said that he understood planter boxes were to be placed there to rectify this issue.
- [36] The Respondent submitted that he expected to be able to finish the staircase. He always knew there needed to be handrails and other items of remediation, but these had been left off at the Complainant's request to make it easier to bring furniture up the staircase. It was the only part of the building which did not pass inspection. He said that he was not told that a final inspection was taking place and not told that it included the stairs.
- [37] After the stairs failed the inspection, the Respondent said:
- “we immediately engaged our engineer, had a meeting with him to show him the photos of the staircase and provide him with the “as built” specifications and arranged to meet him on site the following day for him*

*to provide us with a remediation plan. When we notified [the Complainant] of this we received individual responses from them both telling us not to enter their property, that an engineer was not required and advising us that they had engaged another building practitioner to undertake the work. We subsequently heard from their engineer asking us for the “as built” specifications as he had been engaged by [the Complainant] to undertake the work. We also strongly dispute that the stairs were unsafe with the exception of the handrail not being installed, but this was at the request of [the Complainant]. In summary, we were not advised of the issues, and we were not given an opportunity to remediate them.”*

- [38] The Complainant was of the view that the stairs were complete when she called for the final inspection. She said that she was unaware that there was any remedial work to be done and had not been informed of any.

Was the conduct serious enough?

- [39] The Board considers the building work issues identified in the Certa report and the Council site notice were ones which the Respondent, had he been given the opportunity, was willing to address. This is supported by the email obtained from the engineer dated 6 May 2024. The issues are in the Board’s view minor, and do not reach the seriousness threshold. As such, they do not support a disciplinary finding against the Respondent in respect of his supervision.
- [40] The failure to ensure a building consent was in place prior to restricted building work being carried out is serious and reaches the threshold to require disciplinary consideration.

Has the Respondent been negligent or incompetent?

- [41] Ordinarily, the failure to ensure a building consent was in place for what was restricted building work would be negligent conduct as ignorance of the law is not a defence. Ignorance based on erroneous advice from an official can, however, be a defence and that is what occurred in this matter.
- [42] Reliance on official advice was upheld as a defence in *Wilson v Auckland City Council (No 1)*.<sup>14</sup> In that matter, 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 that defence in the case. In *Tipple and Gun City Limited v Police*,<sup>15</sup> Holland J found that where a person committed a crime believing it to be lawful on the

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<sup>14</sup> [2007] NZAR 705 (HC)

<sup>15</sup> (1994) 11 CRNZ 132



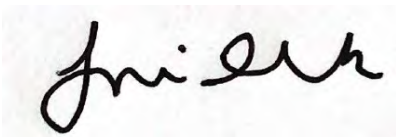
grounds of “officially induced error”, it was in the public interest as well as being just that that person should not be held criminally liable.

- [43] The Board considers the Respondent to be a credible witness. The conversation between the Respondent and the Council Officer led the Respondent to believe a building consent for the external stairs was not required. It accepts that the Respondent acted on this official advice in proceeding with the external staircase without a building consent.
- [44] The Respondent’s evidence is corroborated by the email from the Engineer dated 6 May 2024. That email details a contemporaneous conversation between the Respondent and the Engineer relaying the Council’s advice. While this is not direct evidence that the conversation with Council took place the Board accepts it as verifying the Respondent’s account of his conversation.
- [45] The Board also took into consideration that the Respondent had not set out to deliberately defeat the licensing regime. There was no intention or aggravating features as regards his conduct. On the basis of the above, the Board finds that the offence has not been committed.
- [46] The Board notes and commends the thorough written response to the complaint provided by the Respondent and takes that as signalling the seriousness with which he approached the complaint.
- [47] Finally, the Board cautions the Respondent that should any similar situation arise in the future he should get any advice he intends relying on in writing for his own protection.

### **Board’s Decision**

- [48] The Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act.

Signed and dated this 6<sup>th</sup> day of June 2024.



**Mrs J Clark**  
Presiding Member

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### ***Section 3 of the Act***

*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.*