

**APPEAL NUMBER 09/15**

**In the Matter of the Chartered Professional  
Engineers of New Zealand Act 2002**

**AND**

**In the matter of appeals to the Chartered  
Professional Engineers Council pursuant to  
Section 35**

**Between**

Mr and Mrs S (Appellants)

**And**

Mr W - CPEng, MIPENZ, IntPE(NZ) & Mr S –  
CPEng, MIPENZ, IntPE(NZ) (Respondents)

## Decision of the Chartered Professional Engineers Council dated 2 October 2015

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### The Appeal

1. This is an appeal to the Chartered Professional Engineers Council (“the Council”) under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”). The appeal is against a decision of the Registration Authority’s Chair of Investigating Committees acting as Adjudicator dated 15 June 2015.
2. The Chair of Investigating Committees acting as Adjudicator found that the complaint made against the Respondents should be dismissed under CPEng Rule 57(a) on the basis that there is no applicable ground for discipline under sections 21(1)(a) to (d) of the CPEng Act. Prior to this the Registration Authority’s Complaints Research Officer had recommended that the complaint against the Respondents be dismissed under CPEng Rule 57(ba) on the basis that the matter was insufficiently grave to warrant further investigation.

#### **21 Grounds for discipline of chartered professional engineers**

*(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer—*

*(c) has performed engineering services in a negligent or incompetent manner;*

3. Notice of Appeal was emailed to the Registration Authority on 10 July 2015, within the 28 day period allowed for appeals under Section 35 of the Act. After guidance by the Registration Authority on process requirements the Notice of Appeal was emailed by the Appellants to the Council on 13 July 2015.
4. Mr and Mrs S appealed the decision to dismiss the complaint against Messrs W and S citing:
  - a. Inadequate soil testing leading to deficient structural design of the building;
  - b. Deficient structural design for initial building consent;
  - c. Unnecessary change to the slab concrete block wall incurring additional cost for clients; and
  - d. Not itemising the account to inform clients fully of work carried out.
5. The parties were informed by letter on 6 August 2015 of the receipt of complaint and appeal documentation and advised of the appeal process and the two outcomes that the Council could deliver. The letter also sought responses regarding the parties’ respective agreement to the appeal being heard on the basis of the papers along with any supplementary submissions by 14 August 2015.
6. A letter was sent to the Parties on 26 August 2015 (inadvertently undated) informing them of the appointment of an appeal panel consisting of Chris Harrison as Principal, Jane Nees and Ross Tanner as members and advising that unless comments to the contrary were received by 4 September 2015 the Appeal would proceed on the basis of the papers. With the exception of the

notification of agreement of the Registration Authority, no response was received from the parties regarding the proposal to hear the appeal on the basis of the papers.

7. A further letter from the Council dated 10 September 2015 confirmed that the Appeal would proceed on the basis of the papers, specifically Mr and Mrs S's Notice of Appeal and the associated reply provided by R S Ltd (R S Ltd); the Registration Authority's complaint and decision documentation; and submissions by the Appellants and Respondents. The letter also confirmed that the Panel was scheduled to convene on 24 September 2015 to hear the appeal.
8. The Council received the submissions from all parties:
  - a. From the Appellants:
    - i. 13 July 2015 – Notice of Appeal
  - b. From the Respondents
    - i. 14 August 2015 – Response to Appellants' Notice of Appeal
    - ii. 3 September 2015 – Letter from Respondents recording a meeting held between Mr S one of the two Respondents and the Appellants
  - c. From the Registration Authority
    - i. 3 August 2015 - Complaint and decision documentation
9. The Panel met via audio-conference on 24 September 2015 to consider the appeal.

## **Background**

10. R S Ltd was commissioned by the House Company (BOI) to provide a specified scope of engineering services relating to a new two storey house to be built at the location of an existing residence at 10 Tikorangi Road, Opito Bay, Kerikeri in August 2006. The scope of services included:
  - a. Two site visits and soil testing
  - b. Structural calculations:
    - i. Block retaining walls
    - ii. Steel lintel
    - iii. Deck construction
    - iv. Wall bracing
    - v. Foundation
    - vi. Steel beams
    - vii. Bond beams
11. A site visit was carried out prior to the demolition of the previous dwelling, which included a single borehole to a depth of 2 metres to the rear of the dwelling with shear vane readings to assess soil type and strength. According to the

Respondents no geotechnical report was requested by The House Company or the Far North District Council. Structural calculations were undertaken, which included the structural design of the basement masonry block retaining wall forming part of the new dwelling, internal beams and bracing.

12. In April 2007 at the request of the House Company, R S Ltd made a further site visit in relation to softer material encountered in the lower corner of the building. An instruction was given to extend the footing with local excavated piles into good ground.
13. R S Ltd had no further involvement in the project. No construction monitoring was requested of R S Ltd with all construction review undertaken by the Far North District Council.
14. In 2008 R S Ltd were named as seventh respondent to the house owners' (Appellants') claim under the Weathertight Homes Resolution Services Act 2006 and Amendment Act 2007.
15. Damages were determined in varying amounts against all respondents except R S Ltd who were not required to pay damages, tending to suggest that R S Ltd were not considered by the resolution process to have contributed in a significant manner to the problems which were the subject of the damages.
16. The core evidence provided at the time of the complaint includes evidence that was used in support of the claim by Mr and Mrs S referred to in 14 above. The water-focus of that claim has no clear alignment with the main elements of the Appeal outlined in 4(a) to (d) above. However, it is acknowledged as important that the decision being appealed, and therefore the elements of complaint to which that decision referred, have been properly investigated and that the parties have had adequate opportunity for their views to be heard.

## **The Appeal**

17. The Panel can only consider items that are specifically appealed. s37 (6) of the Act states:

*Nothing in this Part gives the Council or District Court the power to review any part of the decision other than the part to which the appeal relates.*

18. The Panel has reviewed the documentation referred to in 7 above and the submissions of the parties in relation to the Complaint, which were provided through the Registration Authority.

## **Process**

19. Appeals to the Council are by way of rehearing (section 37(2) of the Act). The Panel is entitled to confirm, vary or reverse a decision (section 37(5)(a)) and may make any decision that could have been made by the decision authority (section 37(5)(c)).
20. The Panel can only consider the matters that relate to the performance of chartered professional engineers as required by the Act and the Rules. The IPENZ complaints and Council appeals process cannot consider commercial or contractual matters. Complainants should address such matters through conventional legal channels.

## Commentary

21. From the documentation reviewed, the nature of the complaint to which this appeal relates is such that the Panel considers there to be only one possible applicable ground for discipline under the Act in this case:

### **21 Grounds for discipline of chartered professional engineers**

*(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer—*

*(c) has performed engineering services in a negligent or incompetent manner*

22. With regard to the Appeal and the Complaint to which it relates the Panel notes that the Appellants have made significant reference to evidence submitted as part of the Appellants' claim under the Weathertight Homes Resolution Services Act 2006 and Amendment Act 2007, a process which involved the Respondents as seventh respondents with regard to that claim, and which resulted in the latter being the only respondent not to be required to pay damages.
23. The specific elements in the original complaint to which the Adjudicator's Decision being appealed refers, while obviously important to the Appellants, do not in the Panel's view stand out as indicative of misconduct that could lead to findings that either or both of the Respondents had performed in a negligent or incompetent manner.
24. Having considered the evidence provided by the Parties, the Panel is of the view that it has had access to adequate evidence and that the Parties have had sufficient opportunity for their respective concerns to be heard. In making the decision reached the Panel is satisfied that the process culminating in the decision has been consistent with the principles of fairness and natural justice.

## Findings of the Appeal Panel

25. As noted in 10 above, R S Ltd, the employer of the Respondents, was engaged by the House Company (BOI) under a written agreement in August 2006. The Panel has seen no evidence of a contractual relationship between the Appellants and the Respondents (or the Appellants and the Respondents' employer) and in the view of the Panel this limits the accountabilities and obligations between the Appellants and the Respondents.
26. The scope of services in the agreement between R S Ltd and the House Company (BOI) was confined to the items listed in 10 above.
27. It is important to note that the Appeal relates to a decision in relation to the Respondents Mr. W and Mr. S. The panel has kept this in mind in regard to numerous references to the Respondents' employer R S Ltd.
28. There were four elements to the complaint on which the appealed decision is based.
- a. [4a above] inadequate soil testing leading to deficient structural design:
- i. In an email of 13 July 2015 to CPEC the Appellants made reference to third party views (Mr. Dowdall and P K Engineering) that the house was not founded on good ground. The Respondents noted in an annotated email

response that “the soil test was carried out as per the House Company (BOI) requirements prior to the existing house removal” The Panel notes also that the Producer Statement – Design (PS1) signed off by Steven Turner stated that he believed on reasonable grounds the Structural Design provided by R S Ltd complies with the relevant provisions of the Building Code subject to *“site verification of the following design assumptions: 300kPa ultimate bearing capacity soils...”*. The Panel is satisfied that under the terms on which R S Ltd were engaged, they had no brief or obligation to undertake further soil tests.

- ii. In the annotated email response referred to in i above the Respondents also stated *“the building foundation was designed to be below the expansive soils onto good ground (greater than 300 KPa Ultimate Bearing Pressure).”* This was also addressed in a letter from the Respondents on 6 March 2015, which, in referring to the affidavit of Edward Hugh Dowdall, 14 Jan 2010, noted *“R S Ltd carried out a soil test to the rear of the existing dwelling, prior to demolition and confirmed the presence of minimum 300 KPa ultimate bearing capacity soil (100 KPa working) which is stipulated as the minimum soil strength for NZS 3604 ‘good ground’. This result was also confirmed by Cook Costello as referred to in the affidavit of Edward Dowdall 13 b), at a depth of about 400mm (360mm in the Cook Costello report) which also accounted for the expansive nature of the soil. Therefore our design footing depths were acceptable. .... The producer statement also referred to the requirement for confirmation of suitable soil, as soil strengths may vary over a site. In reference to 12 of the affidavit our specific footing design accounted for the particular type of soil. There is no deficient structural design of the building led by inadequate soil testing”*.
  - iii. Also in the response referred to in i above the Appellants commented *“I believe RS were negligent in not doing full tests.”* In response the Respondents noted *“R&S carried out soil testing above the existing dwelling to verify the slope soil strength. A geotechnical report was not instructed and therefore not carried out.”*
- b. [4b above] Deficient Structural Design for initial building consent -
- i. The Appellants note in their email of 13 July 2015 *“The design for the central post is inadequate. Please see Fraser Thomas report 18 June 2009 based on information sent by F.N.D.C far North District Council they did not visit the site. Page 2 ‘I agree that better load distribution under the central post to the garage steel beam is required than can be provided by a post sitting directly on an unthickened concrete slab’ ... RS did not provide adequate structural support in their original design submitted for building consent. This was negligent”*. In response the Respondents noted *“R&S calculation design included the footing, however unfortunately the central pad footing had been left off the building consent plans. This has been agreed previously. The more recent plans by PK show a new footing in a new location, therefore with an increased beam span”*.
  - ii. The Appellants also note in the same email *“It seems the original bracing calculations made by RS were inadequate”* to which the Respondents commented *“R&S bracing design calculations were in accordance with New Zealand Structural Design Actions Standard AS/NZ 1170.”* In a letter dated 3 September 2015 to the Chairman, CPEC and copied to the

Appellants, the Respondents noted that the foundation for the intermediate post in the garage had been designed by R S Ltd but not included in the House Company's drawings. While acknowledging partial responsibility for this omission the Respondents' employer has offered to meet the full cost of retrofitting the designed foundation pad, commenting that despite the omission there is no evidence that there was any failure or distress of the concrete floor section that supported the post.

- c. [4c above] Unnecessary change to the slab concrete block wall incurring additional cost for the clients –
  - i. The Appellants commented in their 13 July 2015 email – *“RS had a duty of care to check with us as their primary client that the unnecessary and costly footing redesign at the junction of the slab and block wall was authorised by us IT WAS NOT.”* The Panel considers that this point should more properly have been taken up by the Appellants with the House Company on the basis that R S Ltd had no contractual agreement with the Appellants.
  - ii. In a letter from the Respondents dated 3 September 2015 following a meeting between Mr. S and the Appellants, the Respondents noted that the change in the blockwork retaining wall to omit a step at the slab should have potentially saved cost. They also noted that the change was requested by their client, the House Company and expressed the view that it had no structural or water proofing ramifications.
- d. [4d above] Not itemising the account to inform clients fully of work carried out – As the Respondents' client was the House Company and not the Appellants, there was no requirement by the Respondents to provide an itemised account to them. The panel has seen no evidence as to whether an itemised account was provided to the Housing Company.

## Summary

29. The Panel finds:
- a. No evidence has been presented which would indicate negligence or incompetence on the part of either Respondent.
  - b. Sufficient evidence has been made available to, and reviewed by, the Panel to enable the Panel to make a decision other than to refer the complaint back to the Registration Authority for further consideration by an Investigating Committee.
  - c. The Respondents have no contractual relationship with the Appellants in regard to the Complaint to which the Appeal relates.
  - d. The Respondents acting for their employer have acknowledged being partly responsible for omission of a structural element, albeit with no associated damage or distress, and have offered to the Appellants on their employer's behalf to address, at their employer's cost, two particular structural issues.
  - e. The alleged shortcomings of the Respondents are not considered to be sufficiently serious to warrant further investigation by the Registration Authority.

- f. There would be merit in the Parties further exploring the offer of the Respondents/their employer to review the design of changes to the bracing at no cost and meet the full cost of retrofitting the designed foundation pad.
- g. With regard to costs the Panel considers that the Parties should be responsible for their own respective costs in relation to the Appeal.

**Outcomes**

30. The Panel:

- a. Dismisses the Appeal under CPEng Rule 57(ba) on the basis that the alleged misconduct is insufficiently grave to warrant further investigation.
- b. Determines that the Parties will be responsible for their own respective costs.

Dated this 2<sup>nd</sup> Day of October 2015

Chris J Harrison  
CPEng, FIPENZ, IntPE(NZ)  
Principal



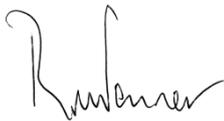
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Jane Nees  
BSc, DipLibr, DipIS, CMIInstD



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Ross Tanner  
MA(Hons), MPA(Harvard), CFInstD, Deputy Chair CPEC



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