

**APPEAL NUMBER 05/15**

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

**AND**

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

**Between**

Mr and Mrs P

**Appellants**

**And**

A

**Respondent**

## Decision of the Chartered Professional Engineers Council dated 21 December 2015

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### The Appeal

1. This decision relates to 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 of a decision of the Chair of Investigating Committees (‘the CIC’) acting as Adjudicator, dated 12 May 2015.
2. The Appeal relates to a complaint made by Mr and Mrs P to the Registration Authority (‘the RA’) under cover of a letter dated 16 March 2015. Mr and Mrs P alleged that Mr A had
  - i. breached the code of ethics for chartered professional engineers:
    - a. by reviewing another engineer’s work without taking reasonable steps to inform them and investigate; and
    - b. by not obtaining or making the scope of the review available to Mr and Mrs P;
    - c. by not acting honestly and with objectivity and integrity in the course of his engineering activities;
    - d. by not undertaking engineering activities only within his competence;
    - e. by not disclosing conflicts of interest to Mr and Mrs P, financial or otherwise, that are likely to affect his or her judgement on any engineering activities that he is to carry out for that employer or client;
  - ii. performed engineering services in a negligent or incompetent manner:
    - a. by reviewing another engineer’s work without taking reasonable steps to inform them and investigate; and
    - b. by not obtaining or making the scope of the review available to Mr and Mrs P;
    - c. by not undertaking engineering activities only within his competence.
3. The Complaints Research Officer of the RA (‘the CRO’) completed an initial investigation report on 14 April 2015, which was then considered together with all of the documentation (a 35 page email to the RA and 24 attachments, as well as links to three drop-box locations containing further information) by the Chair of Investigating Committees (CIC).
4. The CIC, in his adjudication report of 12 May 2015, considered the CRO’s report, as well as all of the referenced documentation. He considered the grounds of discipline under the Act and decided that the complaint against Mr A should be dismissed on the grounds that there are no applicable grounds for discipline under section 21 (1) (a) to (d) of the Chartered Professional Engineers of New Zealand Act 2002 and also under CPEng Rule 57(c) that the complaint is not made in good faith.

5. The decision was sent to Mr and Mrs P by letter from the Chief Executive of IPENZ dated 12 May 2015. Upon receipt of the letter on 14 May 2015, Mr and Mrs P filed an appeal (that day) with the Chair of the Council. Their appeal seeks a decision from the Council that all of the original complaints be referred for consideration to a full Investigating Committee of the RA.

### **Background and context for the appeal**

6. Mr and Mrs P own and live in a house on their property at [ ] Christchurch, which was damaged in the earthquake sequence beginning in September 2010, and continuing in February 2011. The damage has particularly affected the foundations of their home.
7. Since that point, Mr and Mrs P have been in an ongoing dialogue with their insurer [ ], about the nature and extent of the repairs to be required especially in respect of the foundation. Mr P described the current state of dialogue with [their insurer] to us during the hearing as being 'constructive'.
8. On 4 October 2012, A Ltd, a project management consultancy acting on behalf of [their insurer], instructed E Ltd (then named G Ltd) to undertake a full geotechnical investigation of the site.
9. G Ltd provided a report to [the insurer] on its investigation, on 29 November 2012. This comprised two documents:
  - i. Geotechnical Recommendations;
  - ii. Geotechnical Investigation.
10. The G Ltd reports were reissued on 30 November, with some modifications to the Investigation report, and also some changes to the Recommendations Report following representations made by Mr P to A Ltd about the instructions they had given to G Ltd. Mr and Mrs P have, separately, made a complaint to the Registration Authority against the engineer that approved those reports. That is also the subject of a separate appeal to CPEC.
11. Mr and Mrs P decided to complete their own geotechnical investigation, and engaged K Ltd to do this. That report is dated 9 August 2013. Given that there were now reports from two geotechnical engineers relating to the same property, [the insurer] appointed GA Ltd to undertake a peer review of both reports. Mr A is employed by GA Ltd and he authored the peer review entitled "[ ]—Geotechnical Review of Proposed Foundation Repair Solutions". This was dated 17 February 2014.
12. There was subsequently some correspondence between Mr P and Mr A seeking clarification on exactly which of the G Ltd Reports (and Recommendations) had been the subject of the GA Ltd peer review. This led to Mr A revising and reissuing the peer review on 13 June 2014. Mr and Mrs P subsequently made a complaint to the Registration Authority about the nature of disclosure of information that Mr A had been supplied with before undertaking the peer review. That complaint has been dealt with, and was also the subject of an earlier appeal to this Council.
13. This complaint, and appeal, is a new one but essentially is based on the same circumstances. In deciding to consider this appeal, the Council and this Appeal Panel, has been careful to distinguish between what is essentially new material and what has previously been considered and determined.

## Process

14. Mr and Mrs P's Notice of Appeal was received by the Council on 14 May 2015. Simultaneously, they filed a separate appeal against the engineer who had authorised the E Ltd reports.
15. The parties were informed by letter dated 21 May 2015 from the Principal of the Appeal Panel, that a single panel had been appointed to hear both this appeal and the separate appeal relating to the P's property. By email dated the same day, Mr and Mrs P responded that they were not happy with this and formally requested that two panels be formed. A further series of email exchanges transpired, but not specific to this appeal, so we do not comment further here.
16. By letter dated 5 June 2015, the Principal of the Appeals Panel wrote again to the parties to this appeal, to confirm the process to be followed. The letter set out a timetable for further submissions, and commented briefly on other matters that had been raised in email correspondence by Mr P relating to this appeal.
17. By email dated 5 June, Mr P wrote to the panel, seeking an extension of time to submit their appeal submission by three months. He advised that he and Mrs P would be travelling to Europe to see family for 6 weeks from 3 July 2015, and would require time to prepare their submission upon their return.
18. The extension of time was granted, and following consideration of the availability of panel members, a new timetable for submissions and the hearing was established for September and October 2015.
  - i. Mr P to make his submission by 18 September 2015
  - ii. Mr A to respond by 2 October 2015
  - iii. Mr P to comment again in reply by 9 October 2015.

The Registration Authority was also given the opportunity to make a submission if it wished to do so.

19. The Panel held a hearing in Wellington on Friday 30 October 2015. Both Mr P and Mr A were present. Each was given an opportunity to address the panel in support of their written submissions. The hearing was audio- recorded and a full transcription has been made available to the parties.

## Hearing and consideration of the appeal

20. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5) (a)). We may make any decision that could have been made by the decision authority (section 37(5) (c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee but the appellant carries the burden of satisfying us that we should do so.
21. In hearing the Appeal the Panel has considered whether there are any grounds for discipline under section 21 of the Act, and whether the CIC's decision to dismiss the complaint was correct i.e.

## Section 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—

(a) has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering; or

(b) has breached the code of ethics contained in the rules; or

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

(d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person),—

(i) either orally or in writing, made any declaration or representation knowing it to be false or misleading in a material particular; or

(ii) produced to the Authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or

(iii) produced to the Authority or made use of any document knowing that it was not genuine.

22. Clearly, the criteria established under Sections 21 (1) (a), and (d) of the Act do not apply in this case. The question that the Panel has therefore considered is whether there is prima facie evidence that Mr A:

a) Has performed engineering services in negligent/incompetent manner.

b) Has breached an aspect of the Code of Ethical Conduct set out in the Rules (43-53 respectively).

23. It is important to note that the Appeal Panel is not investigating the complaint. The Appeal Panel needs to determine if there is sufficient prima facie evidence to warrant further investigation.

## Findings

24. The Appeal Panel has carefully read all of the submissions and supporting documents provided by the appellants and the responses to them by the respondent, as well as the original submissions to the RA and subsequent report by the CRO and CIC. We have also reviewed the transcript of the hearing that was held.

25. We deal with each of the parts of this complaint respectively:

*i. reviewing another engineer's work without taking reasonable steps to inform them and investigate.*

26. In their original complaint, Mr and Mrs P allege that Mr A did not contact Mr B prior to the completion of his peer review of their property, instead choosing to speak to him much later, indeed after the original complaint from them had been made. This point was repeated in their subsequent submissions for this appeal.

27. In his submission for this appeal, Mr A states that:

"A Ltd has confirmed to me that they ensured E/G was aware that I had been asked to review two of their reports as is their normal practice. The written confirmation is provided at the end of this submission.

The panel received and noted the confirming email from A Ltd attached to Mr A's submission.

28. Mr A also noted that

"It is normal practice within the [the insurer]/A Ltd/GA Ltd/E Ltd (formerly G Ltd) team for each consultant's technical report to be passed to each other for either review or use in our work. We are all aware that that can happen at any time as part of the necessity of working together. A Ltd, as the Project Management Organisation engaged by [the insurer] administer these claims, "directs the traffic" between GA Ltd and E Ltd. This happens on a daily basis so frequently that it is impractical to try and contact a particular report author every time we are passed reports to either review or use in our work. My practice has been, as happened in this case, to contact the author if something is not clear seeking clarification. Otherwise if I'm happy with the report contents then it is simply adding to a heavy workload to personally make sure the specific author has received notification of the report before I start my work. In some cases the primary author will not be an engineer".

29. Mr A has confirmed that he contacted Mr B in person

"when neither myself nor lawyer Mr P (*who was acting for [the insurer]*) could understand what point Mr and Mrs P were trying to make about the G Ltd reports in their emails I did contact Mr B to see if he could clarify what the issue was. He did not know either and the matter was left at that".

30. Mr A also stated in his submission that:

"I did contact K Ltd in February 2014 to advise them that I would be reviewing their 9 August 2013 report, a strong indication that I have sought to follow this aspect of the code of ethics. K Ltd had been engaged by Mr and Mrs P to review the two G Ltd reports and a report of GA Ltd for [different address] as part of the K Ltd report for the Ps on their property.

31. This Appeal Panel is satisfied that Mr A has met his obligations in respect of advising other engineers that he had been engaged to review their work.

32. Mr and Mrs P also allege that Mr A did not fulfil his obligation to investigate the matters concerned before providing his report. Moreover they claim in their submission for this appeal that:

"The substance of this complaint relates to the actions of Mr A in peer reviewing an early "draft" version of a Mr B's report on the repair of our foundations.

Once caught peer reviewing the wrong report, Mr A reissued his peer review in order to cover his tracks. Then we believe he has, possibly at the request of his client [ the insurer], pressured Mr B into validating that "draft" report dated 29 November 2012 which was provided to Mr A for peer review." (Page 1 Appeal Submission)

33. Mr A rebutted that allegation in his submission:

"Mr B in his letter dated 5 February 2015 (pages 121 & 122/344) states that the insurance responses of both repair of the existing house foundation or its complete replacement, as indicated in G Ltd's 29 and 30 Nov 2012 letters/reports, are equally valid and available to [ the insurer]. This evidence confirms that there was no "draft" report as claimed by the Ps. Therefore I cannot have peer reviewed a "draft" report and the basis for their claim can only be vexatious and without substance or at best trivial.

34. We also note that there was no evidence provided by Mr and Mrs P that would indicate that Mr A had put any pressure on Mr B in relation to the 29 November report.

35. Finally we note again that question about incorrect referencing in Mr A's (GA Ltd) peer review relating to the E/G geotechnical reports of 29 and 30 November have been dealt with in the earlier complaint and appeal from Mr and Mrs P (CPEC Appeal Decision 23 January 2015).

*ii. not obtaining or making the scope of the review available to Mr and Mrs P*

36. Mr and Mrs P have made several references in their complaint and subsequent submissions to the need for the full disclosure (to them) of all of Mr A's specific brief/ instructions/ proposals/ scope/standard in terms of the peer review report that he undertook of other geotechnical reports relating to their property.

37. Mr A responded in his own submission that:

"Mr and Mrs P are well aware that they developed the brief for my work by telling Mr P (of [ law firm, acting for the insurer]) via email what information I was to review, that it was to include anything written about their property (without exclusion of the 29 Nov 2012 G Ltd report). [The law firm] confirmed to them prior to my review that my brief would include review of all the documents available".

[The law firm]'s instruction to G Ltd was confirmed in their email to Mr and Mrs P dated 20 January.

He further stated:

"The P's are not my client. They have been told that if they wish to locate the 'brief' they believe exists they must take that matter up with [ ], their insurer. Mr and Mrs P will be well aware that under the ethics (Clause 50 (1)) I cannot disclose client information without client approval (see also supporting clause 34 of 337/344 in the bundle). In any case I am not aware of any separate brief of instructions other than those the P's agreed with [ the law firm, acting for the insurer] before my review (see example of correspondence above). Therefore, even if a separate "*proposal/term agreement/brief/instruction*" did exist, the P's know I cannot disclose confidential client information...".

38. Mr and Mrs P's impression that there must by some other form of instruction to GA Ltd and/or to Mr A seems to be based on their reading of the Report Limitations that were set out at the end of the GA Ltd report dated 17 February 2014, which referred to GA's 'proposal'. Mr A has, above, confirmed there was no separate proposal from or written instruction to him in relation to this project.

39. The Appeal Panel has decided to accept Mr A's assurance. There is no evidence to the contrary. We do not consider that there is any value to be gained in this point of complaint being referred for further investigation.

*iii by not undertaking engineering activities only within his competence*

40. Mr and Mrs P claim that the conclusions reached in Mr A's report concerning whether the recommendation made in both the G Ltd and K Ltd reports would meet the current MBIE requirements for foundation repair or rebuild demonstrate that he has misrepresented his stated competence, which is listed as "geotechnical management, assessment design and review". The Adjudicator in this instance found that it is clear

from the register, and from his position on working parties relating to the earthquake, that his competence is appropriate to this engagement. Mr and Mrs P have adduced no additional evidence which would lead us to question this point.

*iv. not disclosing conflicts of interest to Mr and Mrs P, financial or otherwise, that are likely to affect his or her judgement on any engineering activities that he is to carry out for that employer or client*

41. Mr and Mrs P had complained that the extent of Mr A's (and GA Ltd's) engagement with [the insurer], based on the number of projects for which they have and continue to be involved in, and the purportedly high total of fees that they would be receiving, means that this is a conflict of interest which should have been fully disclosed to Mr and Mrs P. Moreover they claim that the impact of this engagement implies that [the insurer] may well be putting pressure on GA Ltd (and Mr A) in terms to what they put in their reports, to satisfy their employer.

42. Mr A responded in his submission that:

"Mr and Mrs P were well aware from their emails back and forth with [the law firm, acting for the insurer] prior to February 2014 that a geotechnical engineer engaged by [the insurer] would be reviewing the reports on their property. That was clear in the extensive email exchange. E.g. "*Thank you for confirmation that your clients [sic] experts have received all raw data and are able to use it if they see fit ...*" (Extract from email by Mr and Mrs P to the lawyers [ ] dated 29 January 2014 before his review). The "*client experts*" being referred to are GA Ltd. The "*client*" being referred to is [ the insurer]".

He adds that:

"Mr and Mr P were well aware of who my client was so that if they believed I had a conflict of interest regarding them then it was clearly disclosed and apparent to them. Additional disclosure, even if it was required, was not necessary".

43. It was also made clear in the evidence both before the RA, and to this appeal panel, that GA Ltd was on a panel list of approved engineering consultants for work in Canterbury to be engaged as required by [ the insurer]. The adjudicator comments that this is a normal commercial arrangement and gives added pressure to those on the list to perform with honesty and integrity.

44. Mr and Mrs P did not provide any further evidence to back up their claim of a potential of actual conflict other than to draw attention to a transcript of evidence from a different judicial process and case relating to the number of projects his firm was handling and the cost per project. They have not provided any evidence of undue influence being created. The allegation remains unsupported.

*v. not acting honestly and with objectivity and integrity in the course of his engineering activities*

45. Mr and Mrs P maintain that all of their evidence and the complaints they have mean that Mr A has not been acting honestly and with objectivity and integrity in the course of his engagement relating to their home and property. Indeed, during the course of preparation for the appeal hearing, and the considerable exchange of emails that has

transpired, Mr P has in several emails, made some highly critical and personal comments about Mr A's character and professionalism. We have found these comments most unfortunate, and indeed unwarranted.

46. We have found no evidence to support Mr and Mrs P's complaint in this respect.

### **Outcome**

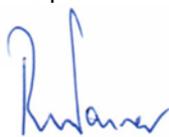
47. The Appeal is declined, and the decision of the Chair of Investigating Committees acting as Adjudicator is confirmed.

### **Costs**

48. The costs incurred by all parties to this appeal will remain where they lie.

Dated this 21st day of December 2015

Mr Ross Tanner  
Principal



Mr Jon Williams



Mr Anthony Wilson

