

APPEAL NUMBER 01/15

**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 A CPEng, MIPENZ, IntPE(NZ)

And

Mr B and Ms C

**(Note: Both parties have separately
appealed the decision. Accordingly parties
are referred to by name and not as
Appellant/Respondent)**

Decision of the Chartered Professional Engineers Council dated 6 August 2015

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 of a decision of the Disciplinary Committee (DC) dated 4 February 2015.
2. The DC found that there were grounds for discipline under S (21)(b) of the Act.

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—

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

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

3. The DC found that Mr A had:

- a. Contravened Rule 45:

45 Act with honesty, objectivity, and integrity

A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.

- b. Contravened Rule 48:

48 Inform others of consequences of not following advice

(1) A chartered professional engineer who considers that there is a risk of significant consequences in not accepting his or her professional advice must take reasonable steps to inform persons who do not accept that advice of those significant consequences.

(2) In this rule, significant consequences means consequences that involve—

(a) significant adverse effects on the health or safety of people; or

(b) significant damage to property; or

(c) significant damage to the environment.

4. Following receipt of submissions the DC made the following decision with respect to penalty and costs:
 - a. Mr A be censured and pay a fine of \$1,000.
 - b. That the particulars of the case be published in *Engineering Dimensions* with all names removed.
 - c. Mr A contribute to costs in the sum of \$12,500

Mr B's/Ms C's Appeal

5. Notice of Appeal and appeal documents dated 5 March 2015 were received by the Council. This is one day outside the 28 day period allowed for appeals under Section 35 of the Act. The Appeal Panel has determined that this is not a significant enough delay for the appeal not to be considered.
6. Mr B and Ms C appealed:
 - a. The failure to make an order for Mr A to provide them with details of his indemnity insurer.
 - b. The decision to suppress Mr A's name when the findings were published.
 - c. The amount of fine imposed on Mr A.
7. In their 10 April 2015 submission Mr B and Ms C added "The failure to make a finding of negligence" to their appeal. Whilst this was not noted in the original notice of appeal, the Panel considered that Mr A had opportunity in his subsequent replies to address this issue.

Mr A's Appeal

8. Notice of Appeal and appeal documents dated 9 March 2015 were received by the Council. Whilst this is outside the 28 day period allowed for appeals under s35 of the Act. Mr A had previously emailed the Council on 17 February 2015 indicating his intention to appeal. The Appeal Panel has determined that the appeal cannot be dismissed under s 35 (3) of the Act for being received out of time.
9. Mr A appealed:
 - a. The finding by the DC that he had breached the objectivity requirement of Rule 45 by not disclosing details of his insurer.
 - b. The findings of the DC that he had breached any other requirement of objectivity or any other ethical obligations.
 - c. The finding of the DC that he had breached Rule 48.
 - d. That the findings of the DC be published in *Engineering Dimensions*.
 - e. The penalties imposed
 - f. The order of costs.

10. The parties were informed by letter dated 26 March 2015 of the receipt of the appeals and of the appointment of an appeal panel consisting of *Jon Williams as Principal, Anthony Wilson and Chris Harrison as members.*
11. The 26 March 2015 letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. Both parties were offered the opportunity for a hearing to be held in person if required. Both parties (after further submissions) agreed to the matter being considered on the papers.
12. The Council received the submissions from all parties:
 - a. From Mr A dated
 - i. 10 April 2015 – submission
 - ii. 1 May 2015 – response to Mr B/Ms C submission
 - iii. 15 May 2015 – reply
 - b. From Mr B and Ms C:
 - i. 10 April 2015 – submission
 - ii. 1 May 2015 – response to Mr A's submission
 - iii. 15 May 2015 – reply
13. Mr A also raised concerns with performance of the Registration Authority (RA) and of the manner in which the complaints process was managed. The Panel's letter of 25 May 2015 confirmed that neither the Council nor CPEC had powers to take action directly against the Registration Authority. The matters have been brought to the attention of the CEO of the RA. They are considered no further under this appeal.
14. The Panel met via phone conference on 14 July 2015 to consider the appeal.

Background

15. There is little disagreement between the parties relating to the chronology of the major events leading to the complaint.
 - a. Mr A provided engineering input in to the house being built by Mr B and Ms C on Kawau Island commencing in late 2004.
 - b. The project was granted Building Consent by Rodney District Council. A Code Compliance Certificate was issued for the property on 8 July 2008.
 - c. A heavy rain event on 29 January 2011 resulted in damage to the property.
 - d. A further adverse weather event occurred in March 2012 which resulted in further damage to the property.
 - e. A decision was made to relocate the house back from the original site.

16. Mr B and Ms C engaged Ms D to project manage the design and construction of the house. (Transcript 1284/1508). There is some debate recorded in the transcript (1286/1508) on the nature of Ms D's role on the project and her qualifications (1286/1508).
17. Mr A was recommended to Mr B and Ms C by Ms D. There is no signed contract and no signed scope of works. Mr B and Ms C had no written contract with Ms D or with Mr E who subsequently constructed the house. (Transcript 1285/1508).
18. The expectations of Mr B were (transcript 1287/1508):
"that Mr A would do what was required to do. What he's required to do. We were not...I say it again, this is our first house. He was – and we assumed that whatever the engineer for this process was required to do, then he would do it".
19. Mr A produced drawings for the house (191-193/1508) noted as Rev A and dated 5 January 2005. He signed a Producer Statement - PS1- Design dated 30 November 2004 (321/1508) and produced calculations (323-355/1508).
20. The Producer Statement confirmed that FGH Consultants (Mr A's business) had been engaged to provide engineering design services in respect of the requirements of part of Clause B1 of the Building Regulations 1992, with respect to bracing, roof beams and rafters, lintels, bearers, foundations, steel portal frames – refer attached calculations for extent of FGH's involvement.
21. The Producer Statement was subject to the site verification of the following assumptions: "good ground" in terms of NZS 3604.
22. This assumption of "good ground" is noted on the drawings (193/1508) and on the covering page of Mr A's calculations (322/1508).
"Ground Conditions: assumed "good ground" in terms of NZS 3604, to be confirmed on site"
The drawing also notes:
"Ensure by probe drilling or Scala penetrometer probing that there are no tree roots within 1.5m beneath the proposed foundations"
23. FGH Consultants are noted as the service name and address for contact during the application process on the Project Information Memorandum (PIM) and Building Consent Application (217/1508) dated 3 December 2004.
24. The Project Information Memorandum issued by Rodney District Council dated 25 January 2005 (198/1508) stated:
"The site is recorded by Council as being located in the vicinity of land containing expansive soils which may not meet "good ground" criteria as defined in NZS 3604:1999....."
"...you may choose to adopt the following Alternative Solution and amend your drawings accordingly, or you may wish to engage the services of a suitably experienced and qualified Geotechnical Engineer..."

25. The Requirements of Building Consent issued by Rodney District Council dated 25 January 2005 (195/1508) state:

“Producer Statement Construction Review (PS4) is to be submitted by FGH Consultants for the observation of foundation excavations and Certification that those either comply with the design or have been amended to suit the on site conditions.”

26. The site inspection notes, Form/BF001 have an entry dated 16 February 2005 (274/1508) stating:

“Foundations. Siting (sic) as per plan all pile hole into good ground at 500mm deep x 450mm diameter with anchor pile at 1000mm deep all as per plan deck piles 350 diameter. OK to pour.

This note is signed “I”. This is assumed to be Mr I the Council building inspector.

27. The site inspection notes, Form/BF001 have an entry dated 24 April 2008 (277/1508) repeating the requirement for FGH Consulting to issue a PS4 for the observation of the foundation excavations. This note is signed by Mr I.

28. FGH consultants issued a Producer Statement - PS4 – Construction Review dated 20 May 2008 (received by Rodney District Council on 6 June 2008) (182/1508). This states that FGH provided

“construction review of selected items: steel portal frames, lintels, roof framing, floor framing.”

It also notes:

“This construction review is for the specifically requested construction observations only and is additional to inspections by Rodney District Council”

It is noted that bracing and foundations that were listed on the PS1 are not included on the PS4. It is also noted that they were not shown as stated exclusions, which given the significance might have been a prudent action.

29. A Code Compliance Certificate for the house was issued by Rodney District Council dated 8 July 2008.

The Appeal

30. 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.

31. There is a considerable volume of documentation relating to this matter including the transcript from the 2 days of the disciplinary hearing. In considering this appeal the Panel has reviewed this documentation. We have however focused on documentation that relates specifically to the matters under appeal.

32. The Panel agrees with the DC as noted in paragraph 5.62 of their findings:

There are two aspects to the complaint. The first concerns the design and certification of the foundations and whether the appropriate advice was given in respect of geotechnical inputs and the second concerns allegations of unethical conduct by Mr A after the house had sustained damage.

33. Linking this to the grounds for appeal noted in paragraphs 5 – 9 above. The Panel needs to consider:
- a. Does Mr A have an obligation to provide Mr B and Ms C details of his indemnity insurance? (Paragraph 6a above).
 - b. With respect to the design, documentation and advice provided by Mr A associated with the foundations; has he performed engineering services in a negligent or incompetent manner? (Paragraph 7 above).
 - c. With respect to Mr A's conduct both during the construction of the house and following it sustaining damage; has he breached the code of ethical conduct? (Paragraphs 6a, 9a, 9b and 9c above).
 - d. Given the findings of the DC; are penalties and costs appropriate? (Paragraphs 6b, 6c, 9d, 9e and 9f above).

Process

34. 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 Discipline Committee but the appellants carry the burden of satisfying us that we should do so.
35. 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

36. The DC noted in paragraph 5.28 that the informal approach to business was common amongst the Kawau Island community. The Panel considers that this informality and the lack of documentation is a significant factor in causing the problems that have generated this complaint. Documentation would normally be expected for:
- a. The engagement of individuals associated with the design and construction of the project.
 - b. The agreed scope of services and demarcation of responsibilities between the parties.
 - c. Records of discussions and decisions made during the design process.
 - d. Records of discussions and decisions made during the construction process.

37. Whilst the consumers of professional services have some obligations to ensure that they are engaging correctly with the profession, the onus must be with the professional to appropriately manage this relationship.
38. The DC noted in paragraph 5.73 Mr A's actions demonstrated a lack of "professionalism". Whilst the Panel agrees with this sentiment, "professionalism" is not defined in the Act or the Rules. Any findings of grounds for discipline for a Chartered Professional Engineer need to be linked to s21 of the act.
39. The design, construction and sign off of the house occurred between 2004 and 2008. The complaints process commenced 2013. There is much documented debate over what was or wasn't said and who was at various meetings. The Panel has placed little weight on these discussions. Individuals' recollections of events that occurred 5-9 years earlier may be both inaccurate and subjective. The Council has substantively based its findings on the physical evidence that has been provided or in some cases the lack of physical evidence.
40. Mr A has provided a significant amount of documentation in the course of the complaint and subsequent appeal. Some of the language used is considered to be inflammatory and "intemperate". During the disciplinary process, the DC noted in paragraph 5.97

"The DC is not impressed by these aspects of the complaint against him and found them unhelpful".

And in paragraph 8.14 that:

".. the manner in which Mr A engaged with the disciplinary process contributed significantly to the high level of costs"

41. The Panel agrees with the DC on this matter. However, in our findings we have only considered the actions of the parties prior to the complaint being submitted. The submissions have been reviewed and our decisions based on the facts and not the emotion.

Findings of the Appeal Panel

Does Mr A have an ethical obligation to provide Mr B and Ms C details of his indemnity insurance? (Paragraph 6a above).

42. Most forms of contract for engagement of engineers contain a requirement for the engineer to hold and endeavour to maintain a certain level of professional indemnity for the duration of the project and for a specified period after its completion.
43. The purpose of this requirement is to give the customer a level of comfort that:
 - i. should the engineer breach the obligations of the contract, and
 - ii. be found to have caused the client a financial loss, and
 - iii. the engineer has insufficient funds to cover this loss

then the insurance policy will respond subject to the engineer meeting the contractual requirements of the policy, the engineer paying the excess/deductible and any limitation on liability contained in the contract.

44. It is reasonable for the client to request the engineer to provide proof of his professional indemnity insurance cover prior to signing the contract.
45. In this case there is no contract. Mr A has no obligation to Mr B and Ms C to hold or maintain insurance.
46. The Producer Statement - PS1 - signed by Mr A requires that he hold current (at the time he signed the statement) Professional Indemnity insurance of not less than \$200,000. The BCA could have requested confirmation of this policy being in place.
47. The presence of an insurance policy may give a client a level of comfort, however, the policy is for the financial protection of the engineer. The client needs to legally seek to recover any loss from the engineer. It is for the engineer to decide if he meets this loss from his own funds or seeks recovery from his insurance company.
48. The DC found in paragraph 5.88:

“..that Mr A’s conduct following the complainants request for details of his indemnity insurance demonstrated a lack of objectivity and was a clear breach of Rule 45.”
49. The Panel disagrees with the DC that Mr A is under any obligation to provide details of his insurer to Mr B and Ms C, the key being the absence of any associated contract provision.

With respect to the design, documentation and advice provided by Mr A associated with the foundations; has he performed engineering services in a negligent or incompetent manner? (Paragraph 7 above).

50. In previous findings of the Council, standards for judging negligence and incompetence have been given. It is found that negligence is the lower of the two bars. An individual may be found negligent but not incompetent, whereas it is unlikely that a person who is incompetent is not also negligent.
51. In previous decisions of this Council we have derived assistance from Canterbury District Law Society v W ([2009] NZLR 514). In that case a lawyer appealed disciplinary findings made against him which alleged he had been negligent so as to tend to bring the legal profession into disrepute. In that case a full bench of the High Court stated:

[82] ... We do think it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable.

[91] In our view it was negligence of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public

would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

In Appeal No.2 of 2010 the Council stated:

So here, we consider that we have to assess whether the Disciplinary Committee was correct in making a finding that the appellant's conduct was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Put slightly differently, would the acts complained of if acceptable tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?

52. Mr A's practice areas in 2004 were described as (63/1508):

"Structural engineering of low & middle rise building structures; drainage design."

53. The Panel can see no evidence that the designs and documentation produced by Mr A are not of an acceptable standard when the above test is applied. Mr A's stated assumption of "good ground in terms of NZS 3604; to be confirmed on site" is a reasonable assumption for a structural engineer to make.

54. It is usual for a structural engineer to expect that his assumptions of ground conditions would be checked by a suitably qualified engineer. Should the geotechnical review reveal different conditions, then the structural engineer would amend their design accordingly.

55. Mr A did not include a reference to foundation design on the Producer Statement - PS4 – Construction Review subsequent to Rodney District Council requiring an alternative design for the foundations due to ground conditions. This is reasonable as Mr A does not see himself as qualified to assess the ground conditions as an input for a revised design.

56. Mr A attended a meeting on site on 4 February 2005. The parties disagree as to who was present at this meeting. There is no evidence (meeting minutes, site notes etc.) to confirm the attendance of Mr B or Ms C. There appears to be agreement that Mr A, Ms D and Mr E were present.

57. At this meeting Mr A states he refused to approve the foundations. He also states that he discontinued his involvement with the project. However, there is no evidence (meeting minutes, site notes etc.) to confirm if these statements were made or not.

58. The Panel finds no reason not to take Mr A at his word that these statements were made.

59. The Panel considers that it was appropriate for Mr A to consider that Ms D was the clients' Project Manager. By making the statements referred to above to the Project Manager it was reasonable for Mr A to assume that they would be passed on to his clients. However, the Panel is concerned that these important discussions were not recorded by Mr A and reconfirmed to his clients in writing.
60. The Panel finds that the technical work undertaken by Mr A was acceptable and cannot be considered to be performed in a negligent or incompetent manner.
61. The Panel is concerned about the lack of documentation relating to all aspects of this project. Whilst this appears to have been accepted as the norm by Mr B and Ms C and their Project Manager. The Panel considers that Mr A as a chartered professional engineer should have performed to a higher standard. However, given the informal way in which Mr A was commissioned and the role of the Project Manager, the Panel does not consider that lack of documentation is sufficient cause to find Mr A to have been negligent or incompetent.
62. The Panel agrees with the DC that there has been no breach of S21 (1) (c) of the Act.

With respect to Mr A's conduct both during the construction of the house and following it sustaining damage; has he breached the code of ethical conduct? (Paragraphs 6a, 9a, 9b and 9c above).

63. The DC found that Mr A had breached Rule 45 (paragraph 5.88) and Rule 48 (paragraph 5.90).
64. Breach of Rule 45 with specific reference to declining to provide details of his insurance policy is discussed above.
65. There is much discussion over what transpired during the design and construction of the property. Most of this is based on individuals' recollection of conversations from 4 – 8 years previous. There is no documented evidence. In the initial period following the damage to the property Mr A appeared to be assisting Mr B and Ms C with the technical aspects of dealing with their insurers. The Panel can find no evidences of any behaviour or action/inaction on Mr A's part that could be considered a breach of Rule 45 up to the period of the complaint being lodged.
66. The DC notes (paragraph 5.96) that some of some of Mr A's communications with IPENZ during the complaints process have contained a number of allegations against the process and at times used "intemperate language". The Panel agrees with the DC that these allegations and this behaviour are for IPENZ to consider.
67. The Panel has considered Mr A's email to Mr B (his client) dated 11 October 2012 (pg 183/1508). This email was in response to an email from Mr B dated 21 September 2012. The Panel considers that Mr B's comments and requests in his email were reasonable. At this point had Mr A taken a more objective approach to communication, the Panel considers that it is possible that this complaint would not have arisen.

68. The Panel is concerned about the following statements from the 11 October 2012 email. It does not consider these are appropriate as communications between a chartered professional engineer and their client:

“You are however not within your rights to manipulate, deceive or entrap me, which I am under the strong impression that you have been attempting”.

“... but don’t intend to let you frame me into liability for problems caused by your own decisions and inaction.”

A chartered professional engineer must retain objectivity even when dealing with clients who are not happy with their services.

69. The Panel accepts that Mr A was acting in a positive manner in suggesting the Mr B and Ms C refer their concerns to IPENZ. There appears to have been little communication between the parties from this date through to when Mr B and Ms C complained to IPENZ on 29 September 2013 (page 158/1508).
70. Whilst the panel is concerned about the tone of Mr A’s email, it does not consider that this single communication is sufficient to warrant a finding of a breach of Rule 45.
71. With respect to Rule 48:

48 Inform others of consequences of not following advice

(1) A chartered professional engineer who considers that there is a risk of significant consequences in not accepting his or her professional advice must take reasonable steps to inform persons who do not accept that advice of those significant consequences.

(2) In this rule, significant consequences means consequences that involve—

- (a) significant adverse effects on the health or safety of people; or*
(b) significant damage to property; or

72. The Panel considers that the lack of appropriate geotechnical input into the design and construction of a cliff edge property could reasonably be expected to have “significant consequences” to both the safety of people and damage to property.
73. The Panel finds no reason not to accept Mr A’s account of the meeting on 4 February 2005 and that he informed Ms D of his concerns. However, given the seriousness of the implications of inappropriately designed or installed foundations, Mr A should have conveyed these concerns in writing to both Ms D and his clients Mr B and Ms C.
74. The Panel finds that Mr A has breached Rule 48 by his failure to ensure that his clients were aware of the risks of not engaging a geotechnical specialist.

Summary

75. The Panel finds:

- a. That Mr A had no obligation to provide details of his insurer to Mr B and Ms C. In not providing this information he has not breached S21 (1) (b) of the Act.
- b. That Mr A has not performed engineering services in a negligent or incompetent manner. He has not breached S21 (1) (c) of the Act.
- c. That Mr A failed to comply with Rule 48 by not taking reasonable steps to inform others of the consequences of not following his advice. This is a breach of S21 (1) (b) of the Act.

76. With respect to penalties the Panel finds:

- a. The DC was correct in censuring Mr A and that the \$1,000 fine is appropriate.
- b. The DC was correct that particulars of the case be published in Engineering Dimensions.
- c. The decision and this appeal should be published on the Registration Authority's and Council's websites with names of all parties included.

77. With respect to costs the Panel:

- a. Agrees with the DC that costs of processing of upheld complaints should not be carried by the whole profession. The Panel also agrees with the DC that Mr A's actions extended the appeal hearing beyond what would be expected for a case of this nature.
- b. Considers the imposition of costs of \$12,500 being approximately 50% of the actual costs is appropriate.
- c. Finds that additional costs for the appeal should fall where they lie.

Outcomes

78. With respect to the appeal by Mr B and Ms C the Panel:

- a. Declines the appeal that the DC failed to make an order for Mr A to disclose details of his insurance policy.
- b. Declines the appeal that the DC failed to make a finding of negligence.
- c. Upholds the appeal that the parties' names be identified
- d. Declines the appeal that the fine be increased.

79. With respect to Mr A's appeal the Panel:

- a. Upholds the appeal with respect to the disclosure of his insurance company.
- b. Declines the appeal that he had not breached "other ethical obligations" or breached Rule 48.
- c. Declines the appeal that the findings be published
- d. Declines the appeal with respect to penalties

- e. Declines the appeal with respect to the order of costs.

Dated: 6th August, 2015

Mr Jon Williams
CPEng, FIPENZ
Principal



Mr Anthony Wilson
CPEng, IntPE(NZ), FIPENZ, FICE



Mr Chris Harrison
CPEng, IntPE(NZ), FIPENZ

