

**APPEAL NUMBER 06/15**

**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**

B

**Respondent**

## **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 B had
  - i. breached the code of ethics for chartered professional engineers
    - i. by ignoring the recommendations of a chartered structural engineer
    - ii. by undertaking engineering work based on a 'one word' instruction from his employer
    - iii. by undertaking engineering activities not within his competence
    - iv. by not disclosing conflicts of interest to (Mr and Mrs P), financial or otherwise, that is likely to affect his or her judgement on any engineering activities he or she is to carry out for that employer or client;
  - ii. performed engineering services in a negligent or incompetent manner
    - i. by ignoring the recommendations of a chartered structural engineer
    - ii. by undertaking engineering work based on a 'one word' instruction from his employer
    - iii. by undertaking engineering activities not within his competence.
3. Mr and Mrs P also allege that Mr B had refused to answer seven questions that had been put to him, and had instead offered to talk to the P's 'off the record'. By declining to answer these questions, Mr and Mrs P considered that Mr B is in breach of Section 45 of the Rules: that is to act with honesty, objectivity and integrity.
4. Mr and Mrs P further allege that Mr B had breached professional ethics by choosing to ignore the recommendation made by a structural engineer based on a report completed by that engineer, and moreover that he had performed engineering services in a negligent or incompetent manner by choosing to rely on a 'one word instruction' from the firm that commissioned him to do the work, who Mr and Mrs P refer to as Mr B's 'employer'.
5. 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).

6. 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 B should be dismissed on the grounds in Rule 57 (a) and (c) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ('the Rules') that (i) there are no grounds for discipline and (ii) that the complaint had not been made in good faith.
7. 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 is about all of the decisions of the CIC, and 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**

8. 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.
9. 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'.
10. 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. Mr B is Principal Engineer at E (and previously G), and is a chartered professional engineer.
11. E Ltd was then, and remains, engaged as one of a panel of engineering consultancies that are appointed to assist the insurer as advisers on earthquake claims matters. E Ltd has a contract for this overall engagement with [the insurer]. Their instructions from [the insurer] in respect of particular assignments appear to be brief i.e. an instruction on a periodic Excel spreadsheet as to which properties are to be investigated and why.
12. Mr and Mrs P had by that stage already engaged their own structural engineer [EDC], to conduct a technical assessment of the property. The EDC report was completed on 31 October 2012. This report stated (page 6) that:
 

'The foundations have sustained damage which exceeds the tolerances specified in the DBH guidelines, and re-building of the foundations is required. Geotechnical investigation is recommended to enable the appropriate rebuild solution to be identified'.

Mr P forwarded the EDC report to G Ltd on 6 November 2012, along with some other material, and drew this (and his own concerns about damage to his property) to their attention.
13. G Ltd provided reports to [the insurer] on its investigation, on 29 November 2012. This comprised two documents:
  - i. Geotechnical Recommendations
  - ii. Geotechnical Investigation

The Recommendations document states (second paragraph) that the factual geotechnical report (the Investigation document) was reviewed by G Ltd "... in order to determine appropriate geotechnical recommendations for the proposed repair" (our underlining). It later states:

"We recommend repairing the foundation in line with section 4 and Appendix A1 of the DBH guidelines. A static geotechnical Ultimate Bearing Capacity of 150 kPa can be assumed for material (beneath the topsoil/fill layers) within the upper metre."

"We note that if structures on the site are to be rebuilt instead of repaired we recommend you contact G for guidance."

14. The G Ltd investigation report also noted that as part of their investigation they reviewed the structural building damage report that had been prepared by EDC.
15. Mr P received a copy of the G Ltd investigation and recommendation reports on 29 November, and was clearly not happy with them given the reference to 'repair' of the foundations of the house rather than 'rebuild'. He spoke to a representative of G Ltd the same day, and sent them a further version of the EDC report, asking that G reconsider their recommendations and communicate with A Ltd.
16. The G Ltd reports were reissued on 30 November. Some minor modifications were made to the Investigation report. These are described further in paragraph below. In addition, the Recommendation report was changed. It states (second paragraph) that the factual geotechnical report was reviewed by G Ltd.

"... in order to determine appropriate geotechnical recommendations for the proposed perimeter footing replacement and packing and/ or replacement of shallow piles (our underlining), in accordance with the Department of Building and Housing (DBH) guidelines."

Later, it states:

"we consider the following foundation solution to be suitable for the proposed perimeter footing replacement and replacement and/ or packing of piles....."

17. It is the nature of these two reports, and the subsequent exchanges of email correspondence with Mr B, that are the subject of Mr and Mrs P's complaint.

## **Process**

18. Mr and Mrs P's Notice of Appeal was received by the Council on 14 May 2015. Simultaneously, they filed a separate appeal against another engineer who had been engaged at a later date than those set out above to undertake a peer review of the G Ltd report and also a separate geotechnical report completed by a different company, each relating to Mr and Mrs P's property.
19. 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.
20. 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.

21. 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.
22. 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 B 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.

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

### **Hearing and consideration of the appeal**

24. 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.
25. 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.

26. 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 B:

- 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).

27. It is important to note that the Appeal Panel is not investigating the complaint. This is for the Investigating Committee of the RA. The Appeal Panel needs to determine if there is sufficient evidence to warrant further investigation.

## Findings

28. 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.

29. A first consideration for the panel was what was the nature of Mr B's role in respect of these reports. We established during the hearing that Mr B was actually on a visit to the United States when the investigation work was done and the reports prepared by G Ltd staff. He explained as follows at the hearing (page 28 of the transcript):

"I was on holiday in the States celebrating Thanksgiving, which is the end of November. Like professionals, we work over our holidays, and thus M and C, the two lead personnel from our staff, were working on this project. I am the CPEng engineer that did the final principal review of the document, consulted on the work that went on and questioned what was going on. So my name is on there, and I'm responsible for the documents. I acknowledge that as the CPEng engineer."

30. It was clear from the documentation and submissions provided to us that there was more than one geotechnical report prepared by G Ltd. relating to the P's property. An initial investigation report, accompanied by a separate recommendation letter/report, was dated 29 November 2012. Then, in response to some questions that Mr P asked of G Ltd relating to that report, his further representations to G Ltd, and A Ltd's revised instruction to G Ltd, those two reports were reconsidered by G Ltd, and the further versions prepared that were dated 30 November 2012.

31. Mr B confirmed exactly what had happened in his verbal submission at the hearing (page 34 of the transcript):

"We first received instructions to do a repair. When it was pointed out, and A said "Yep, we gave you the wrong directions, we want you to reissue the report as a rebuild", we went back. We revised and updated and issued a second report with basically rebuild recommendations. We did not have to go back and do any other investigation work because we had done all the sufficient data in the first place. So it was a fairly straightforward process to supplement or reissue a report with rebuild recommendations. And that's the nature of the two reports. And at that particular time we were issuing reports for [ the insurer] as one it was a factual report and then one it was a report with recommendations, because that's how they had asked us to produce the results of our work".

32. To be absolutely sure on this matter, the panel asked Mr B about the nature of his two reports – one dated 29 November, the other dated 30 November. He was asked to confirm whether they are indeed two reports: one based on a repair assumption and the second based on a rebuild assumption. Are they to be read as alternatives by the insurer or whoever is making the next decision? By contrast, Mr P's understanding was that the 30 November report is effectively a replacement report and is therefore the only report that can be relied on.
33. Mr B responded as follows ( page 35 of the transcript):
- “Your (the Appeal Panel's) interpretation is correct. The reports are separate, stand-alone reports. The report dated the 29<sup>th</sup>, which has recommendations in there related to a repair, may be utilised by a structural engineer to design the repair methodology if the structural engineer deems that that's appropriate to do, and it can be used by [ the insurer] to price a repair methodology, if they deem it so to do. And what they would do then is take the information – basically our recommendation is to refer to section 4 of the guidelines where a whole list of options are available for the geotechnical aspects of repairing foundations, and structural aspects, but we are not recommending the structural part; it is just focused on the geotechnical. But use that methodology in section 4 if you're going to be doing a repair. The other report is related to rebuilding the foundations and, if that's the case, then refer to section 5 of the guidelines, and it provides varying capacities for the design of shell of foundation repairs. So they are two separate stand-alone reports, but both relevant and stand on their own, depending on which direction it's about to go. But that's not our decision to make as a geotechnical engineer. That's the decision between the insurer and the structural consultant and other people”.
34. We note that the reference to 'guidelines' in the quote from Mr B referred to above is to the then Department of Building and Housing, now MBIE, Guidelines...
35. Mr and Mrs P had by contrast submitted to this Appeal Panel that they were not clear about the nature of the two G Ltd reports until the hearing earlier this year on an earlier separate complaint and appeal that they had made relating to a different engineer, but also relating to the same sequence of issues. It was that information that had caused them to make this complaint against Mr B.
36. This Appeal Panel looked at both reports and noted that there was no explanation or clarifying statement in the reissued report(s) dated 30 November as to why the (additional) reports had been undertaken. Nor was there any statement in the 30 November report linking it back to that of 29 November. The relationship between the two reports was therefore not clear to a third party in the absence of the sort of explanation provided to the panel by Mr B. We are therefore of the view that this aspect of Mr and Mrs P's complaint needs to be referred to an Investigating Committee for consideration as to whether there are any questions of culpability ( and possible negligence) raised.
37. Mr and Mrs P also allege that Mr B had ignored the recommendations of a chartered structural engineer. This complaint relates to the EDC report dated 31 October 2012. This report was provided to G Ltd by Mr P on 6 November 2012, and is referenced in both the G Ltd investigation reports dated 29 and 30 November 2012. The EDC report states that 'Based on the evidence collected on site, a foundation rebuild is required'. However the instruction provided to G Ltd from A Ltd (page 182/344) clearly indicates that G Ltd was to prepare their report based on the assumption of a 'repair' of the foundation and G Ltd accordingly prepared their report on that basis. The G Ltd report noted that the EDC report had been reviewed and it then went on to list the foundation

damage described in that EDC report. There is however no discussion about the impact of the EDC report on the G Ltd staff view.

38. When Mr and Mrs P had challenged the basis of the recommendation in the 29 November G Ltd report, to G Ltd staff, the G Ltd staff member had discussed the question with A Ltd, who gave a new instruction to G Ltd to prepare revised recommendations based on a 'rebuild' assumption. The investigation report was subsequently modified and a further report was issued. There was no change however to that part of the investigation report referring to the EDC report having been reviewed.
39. While therefore it is probable that the EDC recommendations were not ignored by G Ltd staff, it is not entirely clear to this appeal panel how they had influenced or been taken into account in the G Ltd work, and indeed whether they should have been more explicitly discussed. We are therefore of the view that this question too should be subject to further investigation by an Investigating Committee.
40. A further aspect of the complaint that drew the attention of the hearing panel was the allegation that Mr B had undertaken engineering work based on a 'one word' instruction from his employer. The nature of the contractual relationship between E Ltd ( i.e. formerly G Ltd) and its ' employer' [ the insurer] ( acting through A Ltd, its agent), had been the subject of considerable email exchanges between Mr B and Mr and Mrs P in the period since the 30 October 2012. Mr and Mrs P had sought clarification about the nature of G Ltd's instructions in relation to their property, and the contractual relationship between G Ltd and [the insurer]. The P's had also sought to obtain details about any other 'scope of works' that was relevant to the G Ltd investigation.
41. From this exchange of emails, and also the submissions made for this appeal, the Panel has established following facts:
  - i. E Ltd (formerly G Ltd) is engaged by [the insurer] in terms of a Master Agreement that was dated 23 October 2012 (as provided to us with Mr B's submission of 2 October 2015). We have assumed that this was likely not the first such engagement but may be a renewal of a previous arrangement. The IPENZ/ ACENZ Short Form Agreement for the Engagement of Consultant Services is attached to this Master Agreement as an Appendix.
  - ii. That master agreement, at Clause 1.7 states that,

"For each particular agreement, for the provision of services, for a particular project the following will apply.

The details of

    - i. The project
    - ii. The location of the project
    - iii. The scope and nature of the services to be provided by the Consultant ("Services")
    - iv. The programme for the Services
    - v. The fees and timing of payments for the Services; and
    - vi. Any information for services to be provided by [ the insurer]

will be recorded in written communications between the Consultant and [the insurer]'s agent".



- iii. Mr and Mrs P have repeatedly sought to obtain details from G Ltd, and Mr B, of the services that A Ltd requested from G Ltd that would correspond to the those points specified above, but have been advised in response that such details do not exist.
  - iv. The only written instruction to G Ltd in relation to the P's property at [ ] appears to have been conveyed on an Excel spreadsheet dated 4 October 2012 (page 182/344).
  - v. There was no other more detailed scope of works relating to this property.
42. Mr and Mrs P have moreover asked whether G Ltd (and Mr B, as Principal Engineer) regard themselves as having any duty of care to them as owners of the property, and as clients. Mr B has responded that his duty of care exists to [the insurer] (and their agent) only, as it is that firm that is his client. From the panel's perspective, whether there is any duty of care, and if there is, the extent to which it applies in this particular case is not clear and needs to be determined by a more detailed investigation.
43. The Consumer Guarantees Act (CGA) is also likely to have some bearing here. Mr and Mrs P have a contract with their insurance company, [ ], which is governed by the terms of that insurance contract and the CGA. The engineers have a contract with the insurers which is governed by their specific contract. Clause 3 of the Short Form contract specifically excludes the CGA, but clause 1.1 of the Special Conditions makes it clear that [the insurer] is obtaining the services of the engineers for the benefit of the homeowner.
44. The obligations (or otherwise) that Mr B and his employer E/G owe to Mr and Mrs P should be determined by the Investigating Committee, who may need to seek legal advice.
45. In the light of these findings, and the conclusion we have reached, we have not made a determination on each of the points of complaint made by Mr and Mrs P. We consider that all of these matters can be dealt with in the course of the work of the Investigating Committee.

## **Outcome**

- 1. The Appeal is upheld, and the complaint is referred to an Investigating Committee of the Registration Authority for consideration.

## Costs

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

Dated this 18<sup>th</sup> day of December 2015



Mr Ross Tanner  
Principal

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Mr Jon Williams

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Mr Anthony Wilson

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