IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2015-009-002458
[2017] NZDC 19270

UNDER THE	THE CHARTERED PROFESSIONAL ENGINEERS OF NEW ZEALAND ACT 2002
BETWEEN	DONALD EDWARD BRUGGERS Appellant
AND	INSTITUTE OF PROFESSIONAL ENGINEERS NEW ZEALAND INCORPORATED First Respondent
AND	CAMERON AND WENDY PRESTON Second Respondent

Hearing: 18, 19 and 20 January 2017

Appearances: Mr W Palmer and Ms P Moran for the Appellant
Ms M Neill for the First Respondent
Mr M Smith for the Second Respondents

Judgment: 27 September 2017

JUDGMENT OF JUDGE R E NEAVE ON APPEAL FROM A DECISION OF THE CHARTERED PROFESSIONAL ENGINEERS COUNCIL

Introduction

[1] Following the disastrous earthquakes of 2010 and 2011, many residents of Christchurch found themselves enmeshed in complex disputes with their insurers. As often as not, those disputes have involved significant disagreements between professionals in many fields as to the appropriate manner of providing cover under the relevant insurance policy.

[2] As a result, the engineering profession has found itself in the spotlight as never before and also at the heart of many disputes between those with damaged or destroyed homes and their insurers.

[3] In this case the Appellant, Mr Bruggers, has found himself the subject of a complaint about his professional competence and performance from Mr and Mrs Preston.

[4] In the circumstances I will discuss below, in a decision dated 18 December 2015, the Engineers Council referred the complaint against Mr Bruggers to an investigating committee of the Registration Authority for consideration. Mr Bruggers now appeals to this Court against that decision.

[5] The disciplinary structure in relation to engineers is complex and will need to be discussed in some detail below. However, it is important to set out the background before beginning to discuss the particular issues in this case.

History

[6] Mr and Mrs Preston owned a home at 27 Stapletons Road in Christchurch. That home suffered serious damage in the earthquakes, and, like many Christchurch residents, they found themselves in a protracted discussion (to use a neutral term) with their insurers.

[7] Their insurance claim ultimately became the responsibility of Southern Response. Southern Response in turn engaged Arrow International (New Zealand Limited) ("Arrow") a project management consultancy. Arrow in its turn, instructed ENGEO (then named Geoscience Consulting (NZ) Limited) ("Geoscience") to undertake a full geotechnical investigation of the site. Mr Bruggers was principal engineer at Geoscience and a chartered professional engineer. Although engaged by Arrow, Geoscience's contract was with Southern Response.

[8] It seems Geoscience's contract with Southern Response was a fairly rudimentary arrangement. Instructions in relation to the enquiries Geoscience were

being asked to make were essentially contained in a spreadsheet of the type of properties to be investigated, and which contained the reasons why investigations were required.

[9] Mr and Mrs Preston had wisely engaged their own structural engineers, namely Engineering Design Consultants ("EDC") to conduct its own technical assessment of the property. EDC's report was completed on 31 October 2012. That report stated inter alia at page 6:

> "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 re-build solution to be identified."

[10] Mr Preston forwarded that report to Geoscience on 6 November 2012 together with other material, and also drew his own concerns together with EDC's to the attention of Geoscience.

[11] On 29 November 2012, Geoscience provided a report to Southern Response which comprised two documents, namely:

- A report of its geotechnical investigation; and
- Geotechnical recommendation.

[12] I do not understand at any stage there to be any dispute or complaint over the geotechnical investigation. There was no suggestion that this was anything other than carried out in a responsible and professional manner, and nowhere in the argument before me, nor in the voluminous materials I have perused, does there appear to be any suggestion that the investigation was faulty or substandard. The problem appears to have arisen in the recommendations document. However, it is appropriate to look at the introduction to the investigation report. The first three paragraphs read as follows:

> "Geoscience Consulting (NZ) Limited ("Geoscience") was requested by Arrow International (NZ) Limited) ("Arrow") to undertake a geotechnical investigation of the above property (hereinafter referred to as "the site") as part of the Southern Response project.

> We understand the dwelling at the site sustained damage as a result of the recent earthquakes and that you require geotechnical foundation recommendations suitable for the proposed repair.
>
> Our Scope of works specifically excluded assessment of the structural integrity of the dwelling."

[13] The recommendations then went on to recommend a foundation solution said to be suitable for the proposed repair. In other words Geoscience answered the question it thought had been posed. However, immediately following that recommendation is the comment:

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

[14] When these documents were seen by Mr Preston he was alarmed because it had been his understanding that the insurers were investigating the replacement of the foundations, rather than simply the repair of them. There were obviously significant consequences for the nature of the work to be undertaken and the integrity of the house, depending upon the type of work carried out on those foundations.

[15] It seems that the misunderstanding was brought to the attention of Geoscience and the recommendations were reconsidered, and a further report issued the following day 30 November, making recommendations suitable for the proposed replacement of the perimeter footing and packing and/or replacement of piles. Both the recommendations of 29 November and 30 November referred to the report that had been completed by EDC and noting the foundation damage described in that report.

[16] More by way of background, it should also be noted that when the reports were prepared, Mr Bruggers was on holiday in the United States and it was members of his staff that dealt with some of the issues, including the discussions with Mr Preston whereupon the error was pointed out as to the basis of the report (namely replacement rather than repair). It seems in evidence that was given before the Appeal Committee that Mr Martin (one of Mr Bruggers' staff) having had the matter pointed out to him by Mr Preston, made some enquiries and clarified that there had

been an error in the instructions received by the engineers, and the report was changed accordingly once Mr Bruggers had the opportunity to check it.

[17] As a result of this history, complaints were levelled against Mr Bruggers. Whilst it will be necessary to consider the statutory framework in a little more detail suffice it to say that the initial complaints were investigated by a complaints research officer, who determined that there were no grounds for a complaint against Mr Bruggers and that the complaint should be dismissed. This was confirmed by an adjudicator. Mr and Mrs Bruggers were dissatisfied with these conclusions and appealed to the Engineering Council who allowed the appeal and determined that the matter should be the subject of further investigation. It is that last decision which is the subject of Mr Bruggers' appeal.

[18] To this day, I still struggle to see any detriment having been suffered by Mr and Mrs Preston as a result of any actions taken by Mr Bruggers. It seems to me a vast amount of ink and paper has been expended to very little purpose.

Statutory Framework

[19] The relevant statute is the Chartered Professional Engineers of New Zealand Act 2002 (the "Act"). The purpose of the Act is set out in s 3:

> **3 Purpose of Act**
>
> The purpose of this Act is to reform the law relating to the registration of engineers and to establish the title of chartered professional engineer as a mark of quality; and, to those ends, this Act—
>
> (a) establishes a registration system for chartered professional engineers, under which persons who wish to be chartered professional engineers must meet minimum standards to be, and continue to be, registered:
>
> (b) requires a code of ethics and a complaints and disciplinary process to apply to chartered professional engineers:
>
> (c) requires a professional body to carry out the functions relating to the registration system, the code of ethics, and the complaints and disciplinary process, and establishes a statutory body to oversee aspects of those functions:
>
> (d) repeals the Engineers Registration Act 1924.

[20] The Act provides for the maintenance of a register and for a Registration Authority which is the Institution of Professional Engineers New Zealand Incorporated ("IPENZ").

[21] In the part of the Act subheaded "Disciplining of Chartered Professional Engineers", s 20 provides for a complaints procedure. The section states:

> **20 Complaints on chartered professional engineers**
>
> (1) Any person may complain to the Registration Authority about the conduct of a chartered professional engineer in accordance with the rules.
>
> (2) The Registration Authority must, as soon as practicable after receiving a complaint, investigate the complaint and determine whether or not to proceed with it.
>
> (2A) If the Registration Authority determines not to proceed with a complaint because the matter relates to a building practitioner who is licensed under the Building Act 2004, the Registration Authority must refer the complaint to the Registrar of Licensed Building Practitioners appointed under that Act.
>
> (3) A complaint or inquiry, and any decision on the complaint or inquiry, may relate to a person who is no longer a chartered professional engineer, but who was a chartered professional engineer at the time of the relevant conduct.

[22] The grounds for discipline are set out in s 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.

(2) The Registration Authority may make the order whether or not the person is still a chartered professional engineer.

(3) The Registration Authority must comply with the applicable procedures under section 25 before making an order.

[23] Decisions of the Registration Authority may be appealed to the Council under s 35 which provides:

35 Right of appeal

(1) The person to whom the decision relates or, if it is a disciplinary matter, the complainant may appeal to the Council against a decision of the Registration Authority under this Part.

(2) The Registration Authority, the person to whom the decision relates, or, if it is a disciplinary matter, the complainant may appeal to the District Court against a decision of the Council under this Part.

(3) The appeal of a decision must be made by written notice to the Council or District Court (as the case may be) within—

(a) 28 days after the person receives notice of the decision from the decision authority; or

(b) any further time that the Council or District Court (as the case may be) allows on application made to it before the expiry of the 28-day period.

[24] As can be seen decisions of the Council may then be appealed to the District Court. The statute provides for a final appeal to the High Court on questions of law under s 38.

[25] The Act also provides for the Registration Authority to set professional standards. Complaints against engineers obviously need to be considered against the standards imposed under rules empowered by the Act.

[26] Under s 25 the Registration Authority must comply with procedures prescribed by the rules made under the Act and the Council is required to comply with any regulations made under s 65 of the Act which is a standard regulation making power.

[27] The relevant rules are the Chartered Professional Engineers of New Zealand Rules No. 2 2002 ("the Rules").

[28] Part 3 of the Rules as they stood at the relevant time is headed "Code of Ethical Conduct". The Code prescribed obligations under the following headings:

- General Obligations to Society (Rules 43 to 45)
- General Professional Obligations (Rules 46 to 49)
- Obligations to Employers and Clients Rules (Rules 50 to 52)
- Obligations owed to other Engineers (Rule 53)

[29] The relevant rules[1] which were engaged in the complaint against Mr Bruggers are the following:

> **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.
>
> *General professional obligations*

[1] The Rules were significantly altered in 2016 but not in any way which is material to this appeal.

46 Not misrepresent competence

A chartered professional engineer must—

(a) not misrepresent his or her competence; and

(b) undertake engineering activities only within his or her competence; and

(c) not knowingly permit engineers whose work he or she is responsible for to breach paragraph (a) or paragraph (b).

52 Disclose conflicts of interest

A chartered professional engineer must disclose to an employer or client any financial or other interest 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.

[30] In addition, obviously it is necessary for engineers to act in a way which does engage the grounds for discipline set out in s 21.

[31] Part 4 of the Rules provides for the discipline process. Rule 54 provides :

54 How to complain about chartered professional engineers

(1) A person may complain to the Registration Authority about the conduct of a chartered professional engineer or former chartered professional engineer in accordance with this rule.

(2) The complaint must be made in writing and contain the complainant's name and contact details.

(3) The Registration Authority must give all reasonable assistance that is necessary in the circumstances to enable a person who wishes to make a complaint to put the complaint in writing.

[32] Rule 55 authorises own motion enquiries in the following terms:

55 Registration Authority may inquire into matters on own motion

(1) The Registration Authority may inquire into any matter on its own motion under this Part if it has reason to suspect that a chartered professional engineer or former chartered professional engineer may come within any of the grounds for discipline in section 21 of the Act.

(2) If subclause (1) applies, the Registration Authority may—

(a) carry out an initial investigation of the matter in accordance with rules 58 and 59 (other than notifying the complainant under rule 59(a)) as if it were a complaint; or

(b) if a complaint on that matter has already been made, continue to inquire into the matter even if the complaint is subsequently withdrawn.

[33] The procedure appears to be that once a complaint is received, as soon as practicable, the Registration Authority must carry out an initial investigation in accordance with Rule 58. The Authority has two options. It may either dismiss the complaint on one of the grounds listed in Rule 57 or refer the complaint to an Investigating Committee in accordance with Rule 59(b).

[34] The Registration Authority may dismiss a complaint without referring it any further if the Chairperson of an Investigating Committee decides under Rule 57 that:

57 Grounds for not referring complaint to investigating committee

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

(a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or

(b) the subject matter of the complaint is trivial; or

(ba) the alleged misconduct is insufficiently grave to warrant further investigation; or

(c) the complaint is frivolous or vexatious or is not made in good faith; or

(d) the person alleged to be aggrieved does not wish action to be taken or continued; or

(e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or

(f) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.

[35] Rule 58 provides the manner in which the Registration Authority must investigate the matter before reaching a conclusion under Rule 57. Particularly under Rule 58(b) a Complaints Research Officer must carry out an initial investigation and recommend to the Chairperson of a Committee whether or not the complaint should proceed or be dismissed in terms of Rule 57. Once the Complaints Research Officer's recommendation is received, the Chairperson may explore

conciliation, mediation or any other dispute resolution process, and if the dispute is not resolved, the Chairperson must then decide whether the complaint should be referred on to an Investigating Committee under rule 59(b) or dismissed on the ground in Rule 57. Once that threshold is reached, the Registration Authority must notify the complainant and the person complained about, of the decision and the reasons for it, and should appoint an Investigating Committee under Rule 84 and refer the complaint to that Committee, unless the Chairperson of the Investigating Committee has decided the complaint should be dismissed.

[36] If the matter is referred to an Investigating Committee, it is then required to determine whether or not to refer the matter to a Disciplinary Committee or similarly dismiss the matter on one of the grounds in paragraphs (a) to (f) of Rule 57.

[37] The matter, if it is to be considered by a Disciplinary Committee, is required to follow the procedure in Rules 66 to 69. This matter has yet to proceed past an appeal against the decision of the Council allowing an appeal from the decision of the Chairperson of the Investigating Committee.

[38] The procedure adopted is anything but stream-lined. Any number of decisions appear to be capable of an appeal first to the Council then to this Court, and finally to the High Court on a matter of law. It seems to me decisions susceptible to review may be made at four points along the way, although two of those are effectively connected.

[39] There is:

(a) A decision of an investigating officer whether or not the complaint is justified.

(b) That decision is then confirmed or otherwise by the Chairperson of the Complaints Committee.

(c) If the matter is referred on, the matter is sent to an Investigating Committee who must determine whether or not to refer the matter on further and

(d) Finally, the substantive matter is considered by a Disciplinary Committee if the proceeding has ventured that far.

[40] It would be theoretically possible for a matter to involve 12 separate enquiries, including nine appeals before it reached its ultimate conclusion. That is without the complication of any judicial review proceedings which may arise along the way.

[41] The issue also arose at the hearing as to the standard against which these various assessments need to be measured. The procedure has some similarities with the criminal process that operated in the days when depositions hearings were held.

[42] In those days there would be an assessment by a prosecuting authority of whether there was evidence to support a charge. This would be followed by an assessment of whether there was, in essence, a prima facie case which could be reviewed at a number of stages in the process. Finally, the decision would need to be made as to whether the charge was proven beyond reasonable doubt. Clearly, the further along the chain the more rigorous the enquiry became.

[43] In a professional disciplinary proceedings, the standard of proof is the civil standard flexibly applied. The more serious the allegation the stronger the evidence that is required before the case was proven.[2]

[44] In a case involving the disciplinary process for architects, Collins J had to consider a very similar disciplinary regime.[3] He had to consider the threshold for an Investigating Committee in determining whether to refer a matter to a disciplinary

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2 See *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. This is an approach not entirely free from conceptual difficulties. See for example the dissenting judgment of the Chief Justice. However, the Supreme Court's decision is authoritative on this issue.

3 *McLanahan and Tan v New Zealand Registered Architects Board and McDougall* [2016] NZHC 2276.

committee. In his view given the extensive powers of the Investigating Committee which are in very similar terms to Rule 61 in the Rules I have to consider this meant the test was more than simply a prima facie case. Notwithstanding the earlier decisions of Goddard J in *Owen v Physiotherapy Board*[4] and Ronald Young J in *Dallison v Complaints Assessment Committee*[5], His Honour concluded that the test was whether there was a real prospect of success.[6]

[45] Given the similarity between the disciplinary schemes, I consider the same approach is mandated in the present case.

[46] The two enquiries prior to the decision of the Council do not articulate which particular test is adopted. However, it seems to me that it was essentially found by Mr Boyt and Mr Wilmott that there was not a prima facie case to and they also considered the case should not proceed for interests of justice reasons. If there was no prima facie case there would certainly not be a real prospect of success.

[47] It follows that the Council's decision, if it were to overturn the earlier decisions, needed to articulate what evidence there was identifying an applicable ground of discipline, and the test against which that evidence was being measured. It did not do either of these things. At best the Council raises questions and it certainly does not articulate any basis on which it could be argued that there was a reasonable prospect of the complaint or complaints succeeding.

The complaints

[48] It is not entirely easy to discern exactly what is the problem, as far as Mr and Mrs Preston are concerned, in relation to Mr Bruggers. However, the complaint lodged with the Institute alleges that Mr Bruggers has breached s 21(1)(b) namely breaching the Code of Ethics contained in the rule by:

(a) Ignoring the recommendations of a Chartered Structural Engineer;

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[4] [1997] 3 NZLR 600.
[5] H/C Wellington CIV-2003-484-2183, 10 November 2005.
[6] See also *R v General Medical Council* ex parte Toth [2000] 1 WLR 2209 Lightman J

(b) Undertaking engineering work based on a "one word" instruction from his employer;

(c) By undertaking engineering activities not within his competence; and

(d) By not disclosing conflicts of interests to Mr and Mrs Preston, financial or otherwise, that were likely to have affected his judgment on any engineering activity that he was to carry out for an employer or client.

[49] Further, it is alleged that he had, in terms of s 21(1)(c), performed engineering services in a negligent or incompetent manner:

(a) By ignoring the recommendations of a Chartered Structural Engineer;

(b) Undertaking engineering work based on a one word instruction from his employer; and

(c) By undertaking engineering activities not within his competence.

[50] By the time the complaint was lodged, there had been considerable correspondence and discussion between the Prestons and Mr Bruggers, including correspondence in which the Prestons posed a series of seven questions to Mr Bruggers in respect of which they required an answer. This seems to have given rise to a separate allegation that by refusing to provide the answers sought Mr Bruggers was not acting honestly and with objectivity and integrity in the course of his engineering activities.

Additional Complaint

[51] It should also be noted that prior to the matter reaching IPENZ, Mr and Mrs Preston engaged another firm of engineers Kirk Roberts Engineering ("Kirk Roberts") to conduct their own geotechnical investigation. They produced a report in August 2013.

[52] In turn Southern Response sought to have the reports of both Geoscience and Kirk Roberts peer reviewed and Golder Associates (NZ) Limited were appointed. Mr Clive Anderson carried out the peer review. Unfortunately, this process was bedevilled with the same confusion over the two reports that lie at the heart of the complaint about Mr Bruggers.

[53] Mr Anderson's report differed in some respects from both Geoscience and Kirk Roberts, however, it was clear that these differences were within a range of possible professional opinion. Further, such distinctions between the reports that existed were within a very small range.

[54] Again, Mr Anderson seems initially to have proceeded on the basis of the 29 November report but once the error in that respect was pointed out, he clearly considered all relevant material.

[55] Mr Preston proved equally dissatisfied with Mr Anderson's conclusions and made a complaint about him to IPENZ as well. Similarly it was determined at the earliest stage that there was no applicable grounds for disciplining Mr Anderson and the complaint was dismissed under Rule 57(a).

[56] Mr Preston appealed that decision to the Council which had little difficulty in finding that the appeal was without merit and dismissed it in January 2015.

[57] It is interesting to note Mr Preston's arguments on that appeal. He was clearly concerned that Mr Anderson must have been focussing on the 29 November report rather than that of the 30 November and that subsequent efforts to clarify the position amounted to a cover-up. The grounds of his complaint are set out in paragraph 29 of the Council's decision:

> 29 Mr Preston's submissions on this deserve quoting in full:
>
> > 35. I believe that Mr Anderson's late admission that he reviewed the Geoscience report dated 29 November 2012 as well as the referenced report dated 30 November 2012 is an attempt to "cover-up" this ethical breach either for his client (Arrow), his client's client's (Southern Response and Wynn Williams), himself or all four.

36. I believe that Mr Anderson's primarily [sic] duty is to the inhabitants and owners of the property he is reviewing – not to protect the interests of his client or their many related parties.

37. I hold [out] the Mr Anderson peer reviewed the Geoscience report dated 29 November 2012, but referenced the report dated 30 November 2012 in his peer review, and his continuing inability to acknowledge that fact is a breach of ethics.

38. I hold [out] that any reasonable comparison of the reports in question would lead to the same conclusion. No technical training is required to spot this.

39. Mr Anderson has tried to retrospectively reissue the peer review and advise that the person who "handed" him the original instruction and "reports" for the peer review is no longer employed by Arrow.

40. An admission that he was supplied with the wrong report originally by Arrow would suffice to bring this matter to an end.

41. Mr Anderson appears to also be trying to apply financial pressure and intimidate my family, particularly my wife, in order to try and bully us out of this Appeal process. We will not be intimated.

[58] The Council went on to consider these arguments in the following terms:

DISCUSSION

30. It is apparent that Mr Anderson reviewed the reports of both 29 November 2013 and 30 November 2013 prepared by Geoscience.

31. Mr Anderson did not reference the report of 29 November 2013 in his report of 17 February 2014.

32. We have seen no evidence and no reason for Mr Anderson to have realised the significance to Mr Preston of the difference between the 29 November 2013 and 30 November 2013 reports at the time he was writing his report of 17 February 2014.

33. That appreciation became clear once Mr Preston contacted Mr Anderson. At that point, Mr Anderson might have been clearer in his recollections, and sooner corrected his report references. However, it is clear to us that Mr Anderson did see both reports, and he has confirmed this. Mr Anderson also confirmed that his instructions were to review all reports, including reports from other engineers, which he did.

34. We do not accept Mr Preston's submission that Mr Anderson's primary duty is to the people whose house he is inspecting. It is not

really a question of primary duties. Mr Anderson has the obligations imposed on him by his contract to his employers, and by the rules he has to observe by reason of being a Chartered Professional Engineer. Neither of these is "primary", both exist and must be observed. At times these obligations may conflict, and this is when a Chartered Professional Engineer must exercise judgment in how to discharge those obligations.

35. However, in this matter we have seen no evidence at all that would support a finding that Mr Anderson had somehow acted in bad faith to "cover up" the actions of his employer.

36. Mr Anderson submitted, and we accept, that he considered all documentation that was put before him. It is not for Mr Anderson to say whether the "right or wrong" information was reviewed by him. All he can say, and has clarified, is what he did review. Mr Preston now knows that both Geoscience reports were reviewed by Mr Anderson.

37. While Mr Preston was quite correct in pointing out the discrepancy in Mr Anderson's report of 17 February 2014, we accept that this was due to Mr Anderson not properly referencing that report. Indeed any other explanation on the basis of the material before us would be pure speculation.

38. Finally, we have seen no evidence of Mr Anderson trying to apply financial pressure to Mr and Mrs Preston.

OUTCOME

39. That the appeal is declined. The adjudicator's determination is upheld. In this case a detailed examination of the material before us leads us to the conclusion that there is no evidence to support a complaint that Mr Anderson breached the code of ethics, even on a prima facie basis. Accordingly we agree that there is no applicable ground of discipline under section 21(a) to (d) of the Act. The complaint is confirmed as dismissed under rule 57(a).

[59] It is worth noting that the same fundamental issues underlying the complaint against Mr Bruggers are at the heart of the complaint against Mr Anderson. Essentially Mr Preston argues that notwithstanding the contractual relationship with Southern Response the engineer's primary duty is to the policy holder whose property is under consideration. Further, it is also alleged that the misunderstanding about which report is being considered somehow is a ground of complaint.

[60] Unsurprisingly Mr Palmer draws my attention to the apparently inconsistent approaches of the differently constituted Councils to the issues.

Complaint Research Officer's Report

[61] An initial investigation report was carried out by Mr Wilmott, a professional engineer in his capacity as a Complaints Research Officer. His report was dated 14 April 2015. He records Mr Preston's complaints on the grounds set out above.

[62] In relation to the complaint that Mr Bruggers had ignored the recommendations of a chartered structural engineer, the investigation identified, correctly in my view, two essential issues. Namely, whether Mr Bruggers was required to take notice of the recommendations of another engineer and secondly, whether he did so or not. The complaint is not clear, but Mr Wilmott assumes, correctly I think, that Mr Preston is complaining about an alleged failure to take into account the EDC report to which I have referred earlier. Mr Wilmott noted that the report from EDC stated that geotechnical input would be required to determine a site-specific foundation solution. The EDC report concludes that on the evidence collected by them, a re-build of the foundations was required. Mr Bruggers letter attached to his report of 29 November notes that if the structures on the site are to be re-built, then Geoscience would need to be contacted for guidance as to the nature of the re-build foundation. A similar point is made in a covering letter of 30 November 2012. Mr Wilmott concluded that the decision on what remedial work required was not Mr Bruggers to make, nor did he make a recommendation. Mr Wilmott states at paragraph 5.11:

> "His report was factual and non-judgmental in regard to a re-build."

[63] Mr Wilmott makes the point that ultimately the decision as to whether there was to be a re-build or repair was a Southern Response decision, not that of Geoscience. Two reports addressing two different options did not amount to a breach of professional ethics or the rules. Both reports were valid. Mr Wilmott concluded that Mr Bruggers was asked to provide his views on two different options and did not ignore the recommendations of another expert. Indeed, it is clear that Mr Bruggers did refer to the EDC's report. Mr Wilmott also concluded that even had Mr Bruggers reached a different conclusion from that reached by another engineer, that that would not amount to failing to act with honesty, integrity and objectivity, or performing his duties in a negligent or incompetent manner. With

respect that must be correct. All professional advisers are engaged in the exercises of judgment. In many cases, there may be any number of possible solutions to a particular issue or problem. Responsible experts may hold different opinions as to the solution. The mere fact that two experts disagree, does not mean either of them acted negligently or incompetently. Mr Wilmott concluded that this complaint was unfounded.

[64] In relation to the allegation that the engineering work was based on a one-word instruction, Mr Wilmott was unable to locate the alleged one-word instruction, as am I. It is assumed the phrase is to be metaphorical. Essentially, Mr Preston's point appears to be that Mr Bruggers was told to make a report on the repair or re-build and to provide clarification when it was determined that the report of 29 November proceeded on an erroneous assumption. Mr Wilmott concluded :

> 5.17 "With respect, that is a matter between Mr Bruggers and his employer. It is of no concern to Mr Preston or to the Registration Authority how Mr Bruggers receives his instructions regarding his engineering activities. Mr Bruggers' employers have told Mr Preston that the scope of Mr Bruggers' commission is 'commercially sensitive.' If Mr Bruggers then disclosed that scope he would indeed be in breach of CPEng Rule 50. I do not consider this issue can be a matter of misconduct by Mr Bruggers."

[65] Whilst I agree with those comments, it could be the case in certain circumstances that it would be negligent for an engineer to proceed to consider matters with insufficient information or instruction. However, there is absolutely no evidence here that Mr Bruggers had received insufficient information, on the facts of this case, to prepare an appropriate report.

[66] The spreadsheet was produced in Court. It contained headings for the type of investigation required. The scope of the services, the level of detail required in the report, additional notes, and the purpose of the report. Any instructions, no matter how concise, were obviously to be read in conjunction with the detailed written instructions.

[67] Even if Mr Bruggers' instructions consisted of simply the word "repair" or "rebuild" they had to be read in the light of the spreadsheet. There is no evidence

that Mr Bruggers departed from those instructions, or that somehow his report is tainted because he proceeded on instructions he knew to be inadequate.

[68] In relation to the allegation that work was performed outside Mr Bruggers' competence, it is noted that the complaint is unclear as to the manner in which this is said to have occurred. There is no evidence to suggest Mr Bruggers was doing anything other than the work he was employed to do and for which he was eminently qualified. He was a geotechnical engineer providing advice on geotechnical issues. This allegation seems to me to have absolutely no merit, and Mr Wilmott essentially came to the same conclusion.

[69] In relation to disclosing conflicts of interests, Mr Wilmott noted that on a strict interpretation of Rule 52, as Mr Preston was not Geoscience's employer or client, there was no application of the rule. Mr Wilmott recognised there may be situations in which disclosure to persons not clients or employers is appropriate and should be required. He did not consider this to be one of those situations. His conclusions were that this part of Mr Preston's complaint was equally misconceived and unfounded.

[70] Essentially, his recommendations were that he could find no evidence of anything incompetent or negligent on Mr Bruggers' part. Nor could he find any misconduct at all on Mr Bruggers' part. His recommendation was that the complaint should be dismissed on the grounds in Rule 57(a) that there was no applicable ground of discipline under s 21(1)(a) to (d) of the Act.

Adjudicator's decision

[71] Having received the report from Mr Wilmott, the matter was referred to Mr Boyt a member of the Institute acting as adjudicator and chair of the Investigating Committee. He agreed with the conclusions of Mr Wilmott. His decision is succinct and essentially he considered the following matters:

(a) That Geoscience's client was Southern Response and not the Prestons.

(b) He was satisfied that Mr Bruggers took into consideration the recommendations in the EDC report.

(c) He was satisfied that Mr Bruggers instructions consisted of more than just one word.

(d) He considered Mr Bruggers clearly competent to undertake the geotechnical investigations and make recommendations given his registration.

(e) The matters of ownership, structure and Geoscience it was concluded, could not constitute any conflict of interest in regard to this engagement.

[72] For the same reasons he was quite satisfied it could not be said that Mr Bruggers had performed engineering services negligently or incompetently. Further, he concluded that Mr Bruggers had in fact provided answers to all the questions by Mr Preston and that if anything, Mr Bruggers had gone beyond expectations in responding to these matters. He determined that the recommendation of the Case Review Officer should be confirmed and that Mr Bruggers had not done anything incompetent or negligent. He said:

> 3.4 "I interpret that Mr and Mrs Preston are disenchanted with the outcome of their insurance settlement and they have attempted to blame Mr Bruggers for that outcome – I cannot find any evidence that supports their claim."

[73] Mr Boyt went further than Mr Wilmott and determined that not only should the complaint be dismissed on the grounds there were no disciplinary grounds made out, he also was of the view that the claim had not been made in good faith.

Appeal to the Council

[74] Unsurprisingly, Mr and Mrs Preston were dissatisfied with this conclusion and the matter was appealed to the Engineers' Council. The material prepared by the Prestons for the appeal seem to have shifted the ground somewhat. Much of the focus of their complaint now seemed to be on the provision of information to

Mr Anderson in relation to his review of the report. Furthermore, the Prestons seemed to have become extremely concerned to obtain the details of whatever instructions were given to Mr Bruggers by the insurers. All this seems to confirm the point made by Mr Boyt that the Prestons were attempting to ascribe the unsatisfactory nature of their dealings with the insurance company to Mr Bruggers. As I observed, from memory, on more than one occasion during the hearing, the target of the Prestons' ire seems to have been significantly misplaced.

[75] The Prestons' material in relation to the appeal contains the following paragraph which I suspect is significant:

> "It appears to us that a major issue which is required to be settled by all parties is to confirm exactly what the brief/instruction from SR (via its contract to Arrow) in fact was, whether it contained a term agreement/contract or/and whether a bespoke brief for our property was included."

[76] To a large extent, the rest of the material repeats the complaints made earlier.

[77] The Prestons also stated the following:

> "This matter complaint can be quickly resolved by Mr Bruggers simply providing:
>
> 1. An explanation as to whether the report of 30 November 2012 is a revision of the report dated 29 November 2012 and therefore supersedes and why or why not?
>
> 2. Supplying the full brief or instructions Mr Bruggers was given by SR (via Arrow or otherwise) for the investigation services they undertook on our property.
>
> 3. Confirmation from Mr Bruggers of both reports (intended use) and standard to which he was instruct (sic) (i.e., what is 'satisfactory' and was he brief (sic) they rely on the MBIE's guidance."

[78] It is clear from that and other material that Mr and Mrs Preston were attempting to use the complaint process to obtain information as to the nature of the advice and nature of the instructions given by their insurer to the insurer's engineers. The first point to note here is that if the insurers gave inadequate or inappropriate instructions, that cannot be Mr Bruggers fault. Secondly, the complaint proceedings

were by now essentially being used as some kind of discovery process, it had become something of a fishing expedition.

[79] The Prestons also submitted to the Council that :

> "We believe Mr Bruggers followed such instructions in his and his company's financial interests, and in his client's interests, and we do not accept the adjudicator's view that Mr Bruggers' primary obligation was to SR as his client."

[80] The Prestons also filed further lengthy submissions prior to the appeal before the Council hearing which I do not consider added anything to the issue.

[81] The appeal hearing took place on 30 October 2015 before an Appeals Panel consisting of apparently three engineers, although it may have had a lay member or members. Mr Preston was given the opportunity to provide information and he spoke at length about the difficulties involved in his insurance claim.

Decision of the Council

[82] The Council noted at paragraph 24 of its decision the following:

> 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] 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."

[83] The Panel considered that the question they had to determine was whether there was prima facie evidence that Mr Bruggers had performed engineering services in a negligent or incompetent manner, or that he had breached an aspect of the Code of Ethical Conduct set out in the Rules. It noted that the Appeal Panel was not investigating the complaint. To that extent, that is correct. Unfortunately, the Panel did not follow their own direction. It was for the Appeal Panel to determine whether the decision that there was nothing to refer, made by Mr Wilmott, should have been reviewed.

[84] Notwithstanding the Appeal Panel's discussion of its role at paragraph 24, it made, for the most part, no decision on the merits or otherwise of the conclusions drawn by the Investigating officer and the adjudicator. At paragraph 36 the Panel stated:

> 36. "This Appeal Panel looked at both reports [of Mr Bruggers] 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 Bruggers. We are therefore of the view that this aspect of Mr and Mrs Preston'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."

[85] The Panel then went on to discuss the allegation that Mr Bruggers had ignored EDC's recommendations. The Panel concluded at paragraph 39:

> 39. "While therefore it is probable that the EDC recommendations were not ignored by Geoscience staff, it is not entirely clear to this appeal panel how they had influenced or been taken into account in the Geoscience 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."

[86] The Panel then went on to state in relation to the issue of conflict of interests:

> 44. "The obligations (or otherwise) that Mr Bruggers and his employer ENGEO/Geoscience owe to Mr and Mrs Preston should be determined by the Investigating Committee, who may need to seek legal advice."

[87] The Panel concluded at paragraph 45:

> 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 Preston. We consider that all of these matters can be dealt with in the course of the work of the Investigating Committee."

[88] As a result, the appeal was allowed and the complaint was referred to an Investigating Committee of the Registration Authority for consideration.

[89] It is clear from the above recitation that the Panel has not specifically dealt with the various complaints made by Mr and Mrs Preston but instead determined that there were matters that needed enquiry, essentially on an own motion basis. This is notwithstanding the one finding they did appear to make, namely that Geoscience had not ignored the EDC report.

Submissions of the appellant

[90] For Mr Bruggers Mr Palmer submitted, essentially for the same reasons contained in the Investigating Officer and Adjudicator's reports, that the grounds of complaint relied upon had not been made out. Furthermore he submits the Appeal Committee failed to address the argument that the reports in which the specific complaints were dismissed disclosed no error on the part of those Officers which could justify overturning their respective decisions, or justify the matter being referred to an Investigating Committee. He submitted, to the contrary, it is implicit in the Council's decision that the CROs' and CRCs' findings on these specific issues were accepted.

[91] He further submitted that the Council had erred in relying on the additional matters I have already identified, as these were not in fact part of the complaint. He submitted it was fundamentally unfair to require the appellant to incur additional time and cost involving a fresh investigation process, when the appeal decision did not disturb the reasons for dismissing the complaint already given.

[92] He further submitted that the Appeal Committee's decision had no adequate reasons for referring the matter to an Investigating Committee and that, essentially it was unfair for the Appeal Committee to introduce at this stage three further grounds.

[93] Insofar as the Council relied on alleged failure to provide information as to the contract between Geoscience and Southern Response, by the time the matter proceeded to the Council, most if not all the relevant contractual documents seem to have been before the Council. There had been difficulty in obtaining some of the contractual material because it required the insurance company to release it. That

was eventually done, but it was certainly not Mr Bruggers' fault that it took some time before the insurer agreed to release the contractual document.

[94] The Agreement for Services is headed up "Agreement for Services (to be used for engineers and other consultants where there is no work to be paid for separately by the homeowner)" and is an agreement between Southern Response and Geoscience. Under the heading "Background" clause D states:

> D "In order to meet its obligations to its insured homeowners ("Homeowners") Southern Response wishes to contract out investigation services, design and consultancy services, and the repair and rebuild construction works for affected residential properties."

[95] In addition, there were various special conditions to the agreement, some of which do have some relevance. Clause 1.1 provides:

> "Unless specifically recorded otherwise, the homeowner is the owner of a home used for residential purposes located in Canterbury that was insured by Southern Response on the terms and conditions contained in the relevant insurance policy... The homeowners home has been damaged by earthquake, Southern Response owes the homeowner obligations under its insurance policy with the homeowner. Southern Response is obtaining the service for the benefit of the homeowner."

[96] Clause 4.1 provides:

> "The service and all designs and documentation provided under this Agreement will:
>
> (a) Provide solutions which are consistent with Southern Response's obligations to the homeowner under the relevant insurance policy (as advised to the consultant by Southern Response)." (my emphasis)
>
> (b) "Provides solutions which do not require any resource consent to implement unless specifically agreed by Southern Response."

[97] It is clear from other clauses in the contract that Southern Response retain control of the settlement process at all stages.

Arguments for the Prestons

[98] For Mr and Mrs Preston, Mr Smith argues that all the complaints made against Mr Bruggers have some substance.

[99] In relation to the claim that Mr Bruggers ignored the recommendations of a chartered structural engineer, his argument I think is summarised at paragraph 32 of his submissions where he says:

> "Both the 29 and 30 November reports refer on page 2 to the EDC report, in a short section headed "Review of Previous Reports". There both reports summarise "foundation damage" it is said the EDC report "notes". But the EDC report conclusion – that "foundation rebuild is required" – is nowhere referred to, on page 2 or subsequently. The two page "Geotechnical recommendations" documents that accompany the 29 November report and the 30 November report are similarly silent. Those documents can also be noted for not including the EDC report, on page 1, amongst the "References" of documents that are referred to there."

[100] He submits further there is an important follow-on question of why was the conclusion in the EDC report that foundations needed to be rebuilt not explicitly discussed in the 29 November report which proposed geotechnical solutions for a repair and posed the rhetorical question, should it have been? With respect, simply posing the question provides its own answer. To me the reason why rebuild strategies was not discussed in a report, detailing solutions for a repair seems to me to be blatantly obvious. Mr Smith's submissions acknowledge Mr Bruggers' explanation that he was instructed to provide two reports, one based on a foundation repair and one on a foundation rebuild. This explanation seems to me to be unanswerable. The Prestons ask the question why these reasons were not referred to in either of those reports? The simple answer is it does not need to be. It is clear from the face of the reports the purpose for which they were being prepared, and the other point to note is the reports had not been prepared for the Prestons, they were being prepared for Southern Response, in answer to questions posed by Southern Response. Mr Bruggers simply answered the question he was asked. A complaint cannot possibly be justified in those circumstances.

[101] Mr Smith further submits at paragraphs 41 and 42:

> 41 "The purpose of the Act is "to establish the title of chartered professional engineer as a mark **of quality**. This purpose is better promoted by requiring an engineer to explicitly identify material inconsistencies between his recommendations and those of an independent engineer he is aware of, and to transparently explain the reasons for the inconsistencies. As noted, this practically will not be an onerous obligation. And it will promote the interests of

consumers of engineering services, who as a general rule will want to know about such inconsistencies and the reasons for them."

42. "That desire is likely to be stronger still in an insurance context like the present, where the insured homeowner will or may have their entitlements under their policy determined, at least in part, by engineering analysis. The very fact that Southern Response has attempted to make elections under the insurance policy in this case, relying on Mr Bruggers' reports, to the detriment of the Prestons, underscores the importance of transparency."

[102] He submits that this shows that Mr Bruggers has not been acting with honesty, objectivity and integrity. I will return to these submissions later.

[103] In the alternative, it is alleged that Mr Bruggers owed a duty of care to the Prestons and that he was in breach of that duty by failing to address the EDC Report conclusions. The questions of the duty of care and breach will be dealt with below.

Problems with the Decision of the Council

[104] When the matter reached the Chartered Professional Engineers Council, the complaints previously identified had to be considered. The decision under appeal in fact did not purport to address any of the complaints made by the Prestons and which had been rejected by the Investigating Committee procedure. They made various findings which I will turn to below. They concluded at paragraph 45:

> "In the light of these findings, and the conclusion we have reached, we have not made a determination of each of the points of complaint made by Mr and Mrs Preston. We consider that all of these matters can be dealt with in the course of the work of the Investigating Committee."

[105] Accordingly, the appeal was upheld. The difficulty with this approach is that the Council has clearly stepped outside the role it is required to adopt under the statute. They were required to make findings about whether the Prestons' complaints had any substance. The Council's decision at no stage indicates that there is any evidence of an applicable ground of discipline. In essence, the decision articulates no evidence of an applicable ground but suggests if the matter is looked at again, one might (my emphasis) be found. That is not a finding that the earlier decisions which concluded there were no such grounds were wrong.

[106] Effectively what the Council have done is to initiate some kind of own motion complaint requiring further investigations. They have failed to undertake the statutory task. The appeal related to the determination of the Investigating Committee that no charges should be laid in respect of the particular complaints. It seems to me that the Council was therefore required to focus on those complaints and determine whether or not the Investigating Committee erred in its conclusion that there was nothing to investigate. It is clear from s 37(5) of the Act that the powers of both the Council and the District Court on appeal are very much related to the decision under appeal. It should also be noted that s 37(6) provides:

> "Nothing in this part gives the Council or the District Court the power to review any part of the decision other than the part to which the appeal relates." (my emphasis).

[107] While s 37 gives the Council the power to make any decision that could have been made by the decision-making authority, it does not in my view give the Council the power to construct a new or further ground of complaint and refer that on to an Investigating Committee.

[108] The Council was reviewing the decisions of the Investigating Officer and the Adjudicator. Their powers are governed by Rule 57. Given the very careful process set out in the statute and the Rules I do not think it is open to the Council on appeal to short-cut that approach.

[109] As noted, what the Council appears to have done is to initiate an own motion complaint. I do not consider this is provided for under s 37. Such complaints should be initiated by the Registration Authority which is the Institute of Professional Engineers of New Zealand itself. It seems to me to be entirely outside the scope of the Council's powers on appeal to use such a hearing as an opportunity to initiate a further complaint of its own motion. In any event, the Council has not even done that in the sense that it has simply referred these fresh issues to an Investigating Committee without the proper institution of the complaint procedure. Such a course deprives Mr Bruggers of the screening process provided in the Rules. Furthermore, the Council has failed to engage with the actual grounds which required consideration and have made no findings directly relating to the issues under appeal.

[110] A similar issue arose in the case of The *Complaints Assessment Committee v R* and the *Medical Practitioners Disciplinary Tribunal* CA 282/01, 20 June 2002. While the legislation considered in that case was obviously different it seems to me the overall scheme is similar. At paragraph 27 Fisher J writing for Court said :

> "... the jurisdiction of the Committee is delineated by the particular complaint referred to it under s 87. The complaint is not an omnibus onto which further allegations can climb as it proceeds along its path. Everything turns on the scope of the original complaint."

[111] I consider that an apt analogy to the present case.

[112] Further, this by-passes the conciliation and mediation process provided for in Rule 58(d) which is supposed to be considered before referring the matter to an Investigating Committee. Given the storm in a tea-cup nature of this whole process it cried out for a mediated resolution had there been an issue of substance. The by-passing of this much simpler (and obviously less expensive) stage of the process by the reference of matters to an Investigating Committee was of considerable detriment to Mr Bruggers, and, I believe, the Prestons.

[113] An additional point to note is that decision-making bodies, particularly those acting in a judicial or quasi-judicial manner should give reasons for their decisions. Those reasons need to be adequate to the occasion and will vary according to the nature of the decision. In this case on the key issues the Council has given no reasons why the conclusions it was reviewing were in error and why it considered that the questions they did pose ought to be referred on for investigation.

[114] The Council has raised a number of issues which it considered required further investigation. At paragraph 36, as noted above, they state that the relationship between the reports of 29 and 30 November was not clear in the absence of the explanation provided to the Council. They do not conclude that this somehow, in some unexplained fashion, might amount to negligent or culpable conduct. The possibility that it might need to be investigated is floated but without any indication of what possible failure there could be arising from a lack of explanation which would have been unnecessary to <u>the client</u> (my emphasis). In any event the

existence of two reports it appears to have been Southern Response's mistake not Mr Bruggers and I fail to see how he can have any responsibility in this regard.

[115] The Council concludes that 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 Bruggers. However, nowhere is it identified on what basis Mr Bruggers had any such duty to an unidentified third party. The reports were to be provided to his client namely, Southern Response. Those reports were provided in response to a request from the client to provide such reports. There is no suggestion the reports were anything other than clear and to the extent that two reports were necessary, it was because of a mistake by Southern Response, not by Mr Bruggers. It cannot possibly be the case that an engineer can be responsible for confusion as to the nature of his report arising from misapprehension which he did not create. His primary responsibility is to his client and I do not see anything in the rules or Code of Conduct which would require a wider duty in circumstances such as this. Furthermore, any lack of clarity was immediately cleared up when the insurer's error was pointed out. I cannot see how any of the general professional obligations set out in the Code of Ethical Conduct under the Rules could possibly be breached in these circumstances.

[116] The Council asks whether there are any questions of culpability, but this raises the question, culpability as to what? Furthermore the decision lacks any indication of how Mr Bruggers might be culpable.

[117] As can be seen above, at paragraph 39 of the Council's decision it concluded that it was probable that the EDC recommendations were not ignored by Mr Bruggers. This conclusion I think was entirely justified. The complaint had been that the EDC recommendations were ignored. In spite of this finding the Council went on to raise the issue of the extent to which EDC's report should have influenced or more explicitly discussed in Geoscience's report. This is an entirely new ground which has never been raised or considered at any stage of the procedure. The Council gives no basis for indicating why this should be so and any alleged in this respect failure clearly does not fit within any of the obligations under Part 3 of the Rules.

[118] Presumably therefore, the Council is suggesting Mr Bruggers in this respect has performed his engineering services in a negligent or incompetent manner. There is absolutely no evidence that any of Mr Bruggers' conclusions themselves were in fact in error. There is no evidence or even suggestion that somehow Mr Bruggers' work is inconsistent with that of EDC. Further, it is clear that the material had been considered by Mr Bruggers. At the end of the day his instructions were to prepare reports on possible options in relation to the work to be carried out on Mr and Mrs Preston's home. As Mr Bruggers points out, it was not for him to make decisions in this respect but, rather, to provide the advice that was sought. That is what he did. There is no suggestion that the conclusions that he reached were somehow wrong or not ones that could have been held by any competent engineer. It must not be forgotten that Mr Bruggers' work was peer reviewed by Mr Anderson who found no fault so the only evidence on the point is in favour of Mr Bruggers.

[119] Finally, the Council seems to have rolled together two issues namely, the extent to which there may be some form of generalised duty of care to the owners of the property and secondly, the extent of the instructions received from Southern Response. This is summed up at paragraph 44 in the following way:

> 44 "the obligations (or otherwise) that Mr Bruggers and his employer ENGEO/Geoscience owe to Mr and Mrs Preston should be determined by the Investigating Committee, who may need to seek legal advice.

[120] The first point to note is that I consider the Consumer Guarantees Act can have no application. The consumer is at all times Southern Response. Further, the agreement between Southern Response and Mr Bruggers' company expressly excludes the Consumer Guarantees Act. I do note that clause 1.1 of the Special Conditions of the contract is in such terms that it is highly likely that clause will bring in operation the Contracts (Privity) Act 1982. I do not consider that avoids the problems of the approach of the Council.

Discussion

[121] The whole complaints process in this case seems to proceed on a fundamental misunderstanding of the nature of Mr Bruggers' responsibility under the contract for professional services under which he was operating.

[122] Much of the argument in this case boils down to how one analyses the relationship that exists between Mr Bruggers and Mr and Mrs Preston. A number of points need to be made. The first point is that neither Mr Bruggers (nor the company for which he works) have a contractual relationship with Mr and Mrs Preston. The contractual relationship Mr Bruggers has is with Southern Response, and his first obligation is to carry out the instructions he receives from that client in accordance with the duties imposed on him under the Rules, and the Act.

[123] A conflict of interest may arise in a number of settings. The primary circumstance in which it may arise is in the context of a fiduciary relationship but it may arise in other circumstances. Primarily it involves the concept that person X with an obligation to person Y must not allow the interests of person X on those of any third party to influence any decisions or actions carried out for person Y.[7]

[124] The primary obligation of Mr Bruggers was to his client (Southern Response). Providing he carries out the tasks requested of him in a manner that complies with professional standards of competence, I can see nothing in the circumstances of this case that could cast any wider obligation on him. This is not a case where he has assumed any responsibility to take active steps to advance the cause of the Prestons'. In cases where liability is imposed on professionals, it is often an assumption of responsibility which lies at the heart of the duties the professional may be found to owe.[8]

[125] The starting point for any consideration of Mr Bruggers' conduct in preparing reports must be what he was asked to do by his client. The scope of any such reports

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7 There may be cases where person X owes duties not only to person Y but also to Z. Such conflicts need to be disclosed and managed. For example, solicitors who act for both borrowers and lenders. The position in relation to engineers is covered by Rule 52.

8 For a perhaps surprising example of the case with which such an assumption of responsibility may arise see *Macalister Mazengarb v Annan Law* [2014] NZCA 554

is determined by the client. I do not see how Mr and Mrs Preston can complain because Mr Bruggers did not carry out work he was not contracted to do, and for which Mr and Mrs Preston were not paying. If Mr Bruggers had exceeded the brief he had received from Southern Response, I have no doubt that Southern Response would have said we are not paying for work we did not commission. In those circumstances, I fail to see how Mr Bruggers can be criticised for carrying out the work he was contracted to do, or more to the point failing to carry out work he was not asked to do. It might be different if he could only follow his instructions by breaching one of the ethical rules or the code of conduct. That is not the case here.

[126] At the end of the day, the obligations of the engineer remain the same. The approach of the Council seems to meld together potential contractual, or tortious liability that might flow to the Prestons (without articulating any basis for such an allegation) with the standard required of a professional engineer under s 21(c) of the Act. By its reference to questions of duty of care, the Council is importing notions from the tort of negligence into an enquiry about professional competence. It is likely that the two concepts will have a significant overlap, but it is unhelpful in considering the question of a departure from professional obligations. It is ultimately for a Court to determine whether in a particular situation, policy considerations require the imposition of a duty of care, and whether or not a plaintiff has suffered a loss which may be recoverable in tort or contract. An engineer may be negligent in a tortious sense, without necessarily falling foul of s 21. As against that, an engineer may be in breach of s 21(1)(c) yet not be liable in negligence for a variety of reasons.

[127] Mr Palmer submitted that there is nothing in the Act requiring an equation of tortious liability with the statutory tests of negligence or incompetence. I agree and nor do I see anything in the Rules which would have that effect.

[128] He relies first on the Council's own decision in *Robinson v IPENZ* dated 10 July 2015 which noted the distinction between negligence and misconduct. That

decision relied in turn on the decision of Judge McElrea in *Beattie v Far North District Council* District Court, Whangarei, 14/11/2012, CIV-2011-088-313. At paragraph 74 and 75 of Mr Palmer's submissions in reply he says:

> 74 This position is confirmed in CPEC's *Robinson* decision. In that case CPEC cites *Beattie v Far North District Council*[9] in stating that the common law test of negligence is not applicable to the disciplinary procedures under the CPEng Act. *Beattie* involved an appeal from the Licenced Building Practitioners Tribunal in relation to a complaint that a licenced building practitioner had "*carried out or supervised building work...**in a negligent or incompetent manner,**"* analogous to the terminology in section 21 of the CPEng Act.
>
> 75 In *Beattie,* Judge McElrea held that the complainant had misconstrued the word "negligence" as it arose in the context of the legislation by applying the tortious common law concept of negligence. The Court adopted a definition of negligence as meaning a manner of working *"that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners.* Judge McElrea emphasised that disciplinary sanctions should only be applied when there is a serious issue about a professional's practice that needs to be addressed.

[129] Although that appeal was decided under the Building Act in relation to the conduct of the appellant as a licensed building practitioner, the issues are very similar.

[130] At paragraph 41, His Honour said:

> [41] "I agree with the Council that the Board has misconstrued the word "negligent" in s 317(1)(b) of the Act by applying the concept of negligence from the law of torts. The absence of damage can be relevant to penalty (as I have just stated) but is not determinative of liability. I accept the submissions made on this point by Mr McKay. There are no previous cases relating to s 317 of the Act but in a case cited by Mr McKay decided under a similar provision of the Heath [sic] Practitioners Competence Assurance act 2003, it was held that the common law concept of negligence is not applicable:"
>
> > It is highly unlikely the drafters of s100(1)(a) HPCA Act envisaged those prosecuting health practitioners would need to prove all criteria required by the common law to establish negligence on the part of a health practitioner. In the Tribunal's view, the term "negligence" as used in s100(1)(a) of the HPCA Act ['amounts to malpractice or negligence"] focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes

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[9] *Beattie v Far North District Council CIV-2011-088-313, Whangarei DC, 11 May 2012*

> negligence in s100(1)(a) of the HPCA Act requires, as a first step in the analysis, a determination of whether or not, in the Tribunal's judgment, the practitioner's acts or omissions fall below the standards reasonably expected of a health practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against the standards of a responsible body of the practitioner's peers.

[131] It is also important to note the caveat expressed by his Honour in paragraph 42 where he said:

> [42] ...
>
> > However, in a case brought to my attention by Mr Corkill, Gendall J stressed that not all negligence or malpractice amounts to professional misconduct but only "behaviour that falls seriously short of what is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness". While the legislation I am considering does not require a finding of "professional misconduct", this is a timely reminder that disciplinary sanctions should not be applied unless there is a serious issue being addressed. (The fact that no loss or damage has occurred can be very relevant in that context but is not determinative of the matter.)"

[132] His Honour noted that the terms negligent or incompetent are clearly not synonymous and he noted that the phrase appeared to have been taken from the Act I have to consider. He noted that the difference between them is difficult to state but considered that one concept described the manner of the carrying out of the work, whereas the other related to the skills of the engineer (as in the present case). He concluded at paragraph 44 :

> 44. "In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficit in the required skills) judged by the four areas of design competence[10] in Schedule 1 of the Licensed Building Practitioner Rules 2007."

[133] At paragraph 46 he expressed the distinction between "negligent" and "incompetent" in the following manner:

> 46 "The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a

[10] These are described as "competencies" in the Rules.

> manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[134] The Council in the earlier case of *Robinson v Registration Authority Chartered Professional Engineers Council* 10 July 2015 articulated the test as "whether there has been a serious lack of care judged by the standards reasonably expected of a chartered professional engineer." Such standards are obtained by considering "whether reasonable members of the public would consider such an act or omission, if acceptable to the profession, were to lower the standards of that profession in the eyes of the public."[11]

[135] The submissions I received from the First Respondent were to the effect that the *Robinson's* case recognition of a test for negligence under s 21(c) which was distinct from the test for the tort of negligence was consistent with the purposes underlying the different concepts. Counsel for the Institute submitted at paragraph 3.7 of her submissions:

> "IPENZ's view is that Robinson's recognition of a test for negligence under section 21(c), which is distinct from the test for the tort of negligence, is consistent with the purposes underlying each of these concepts. The *Robinson* test for negligence under section 21(1)(c) centres on public expectations of practitioners, which is consistent with the central purpose of the Act's disciplinary regime, namely the protection of the public.[12] This can be contrasted with the tort of negligence, which is designed to compensate individuals for loss incurred as a result of another's actions, and therefore focuses on the defendant's relationship with the plaintiff and any loss caused to the plaintiff by virtue of this relationship.

[136] I agree with this analysis.

[137] By focussing on notions of duty of care the Council has fundamentally misconceived the nature of the enquiry. At no stage does the Council's decision identify any respect in which it could be said that Mr Bruggers has failed to act in accordance with the standards expected of practitioners. There is no evidence that anything Mr Bruggers has done or not done has the potential to lower the profession in the eyes of the public, nor is there any suggestion of him carrying out his duties in an unprofessional manner. The high point is the suggestion that somehow

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[11] The decision in the Anderson complaint clearly proceeded on the same basis.
[12] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [128].

Mr Bruggers has ignored the EDC recommendations which was a conclusion essentially dismissed by the Council on the appeal. Furthermore, at the end of the day, I do not understand anyone to be suggesting that Mr Bruggers' work was in any way substandard. In terms of what he was requested to do, his work was an appropriate response to the request.

[138] Much of the argument in this respect I think also can be traced to a further fundamental misapprehension of the nature of the relationship between Mr Bruggers and the Prestons. I note that in the appeal decision in relation to Mr Anderson, a differently constituted Council observed at paragraph 34:

> "We do not accept Mr Preston's submission that Mr Anderson's primary duty is to the people whose house he has inspected. It is not really a question of primary duty. Mr Anderson has the obligations imposed on him by his contract to his employers, and by the rules he has to observe by reason of being a chartered professional engineer. Neither of these is "primary", both exist and must be observed. At times these obligations may conflict, and this is when a chartered professional engineer must exercise judgment in how to discharge those obligations."

[139] I agree with this analysis.

[140] Any professional person may find themselves in a situation where their professional obligations require them to act other than in accordance with the instructions they have received from their client. Those instructions can never override the need to ensure that a professional person abides by the standards of his or her profession. I agree with Miss Neill's submissions that the existence of such examples of concurrent obligation can only be determined by reference to the facts of particular cases.

[141] IPENZ have asked for the Court's assistance in bringing clarity to the relationship between an engineer and homeowners in cases where an engineer is engaged by an insurer. For the reason just given it is difficult to give a blanket answer.

[142] One of the difficulties in cases such as this is that the scope of the engineer's duties are to a large extent dependent upon the scope of the insurer's obligations to the insured under the terms of the policy in question. If it is somehow being

suggested that an engineer has an obligation to become an advocate for the insured then that is going too far. Apart from anything else it is likely to place an engineer in breach of the obligation to the client (i.e. the insurer). It needs also to be remembered it is not for an engineer to start making decisions or advising upon the extent of the insurer's obligations. The engineer is not a lawyer and is not engaged to give legal advice and would be exceeding the role of an engineer if he or she did so, and would then clearly be subject to discipline for exceeding his or her competence.

[143] I can foresee a situation where an engineer becomes aware that an insurer is not acting in good faith. Such situations may well have occurred in the present climate. Even without the contractual provisions operating here, that might place an engineer in a very invidious position (particularly if the information was confidential and Rule 50 offered no protection). In such a circumstance an engineer may be required simply to refuse to act any further. Fortunately such circumstances, while conceivable, are likely to be rare. Needless to say there is absolutely no evidence that the present case is an example.

[144] Beyond that I doubt it is possible to go by way of generalised statements. It seems to me that providing an engineer carries out work to a competent standard in accordance with his or her brief, and in accordance with the Rules, in the absence of something putting him or her on notice of other obligations or of the engineer somehow assuming responsibility for a third party there should be no grounds for complaint. The fact that the insurance company's contract with Geoscience provides that any services are for the benefit of the homeowner adds nothing to the enquiry. Mr Bruggers assumed no responsibility for the Prestons and at the end of the day he did what he was asked to do in a competent manner. I can see nothing in this case suggesting any default by Mr Bruggers in his professional dealings with Mr and Mrs Preston.

[145] That being said, the extent of a professional person's responsibilities will however be significantly determined by the instructions that have been received. If those instructions are carried out, unless those instructions somehow cause the engineer to act in breach of his professional obligations (as opposed to his

contractual ones), or somehow fall below the level of competence required, there can be no ground for complaint. Mr and Mrs Preston were unhappy, in effect, with the instructions that were given to Mr Bruggers and the confusion that resulted from an error in what he was being asked to prepare. That is not Mr Bruggers' fault, nor does it give rise to any grounds for discipline. The reports that were prepared were entirely in accordance with his instructions and it was not for him to second-guess what instructions he ought to have been receiving from the insurance company.

Arguments for the Prestons'

[146] On the appeal before me the Prestons' arguments appeared to expand even further. At the heart of many of the points is the Prestons' desire to hold Mr Bruggers to account for Southern Response's mistake in its instructions to Mr Bruggers. As will be plain I can see no merit in such an argument.

[147] There was some discussion at the hearing about the distinction between Geoscience and Mr Bruggers. This is a red-herring. Any obligations owed as a professional engineer are clearly owed by Mr Bruggers personally regardless of any issues of liability in fact or contract.

[148] Further, it was argued that Mr Bruggers was required to disclose a conflict of interest to the Prestons that might affect his judgment on engineering activity. This essentially related to an allegation that Mr Bruggers was obliged to disclose the contract between him and Southern Response. The first point to note about this is that this was confidential business information, which he could only disclose with the leave of Southern Response. Further, as he was at all times engaged by the insurers, I fail to see how he had any obligation to disclose this to the Prestons, it was in any event obvious that the Prestons were not his client. The fact that he was engaged by the insurer gave rise to no conflict of interest with Mr and Mrs Preston because he had no duty to them beyond acting competently and professionally. He was obliged to act independently and with competence, but also within his instructions. The Prestons at all times knew that he was instructed by Southern Response. There is nothing in this point.

[149] Further, the Prestons argue he had not only a duty to refer to the structural engineers report but to identify its recommendations. Again, this ignores the fundamental nature of Mr Bruggers' task. He was asked to prepare a report based on certain assumptions by the insurer. If the insurer has made a mistake, that is a matter to be sorted out with the insurer. It is not Mr Bruggers job to second-guess instructions he received. The Prestons' insistence in pursuing this argument completely misunderstands the nature of the task Mr Bruggers was required to undertake. As noted above, it is not his job to become an advocate for the Prestons. It is further abundantly clear from his report that he was well aware that the circumstances may change, depending upon the nature of the work that was carried out on the Prestons' property, and that the information he was providing was based on the questions he was asked. This view was confirmed by Mr Anderson's peer review.

[150] I believe I have answered the other points raised by the Prestons in the course of the discussion above.

Conclusion

[151] It therefore follows that the decision-making process of the Council significantly miscarried. At no stage has there been evidence on which it could be said that the complaint or complaints have a real prospect of success. In my view not even a prima facie case is established. The decision of the Council is quashed and the decisions of the Adjudicator and the Chairman are restored. The Prestons' complaints against Mr Bruggers are therefore dismissed on the grounds that no applicable ground of discipline is established. I am also of the view that any alleged misconduct – even if it were established – is insufficiently grave to warrant further investigation.

[152] If the parties wish to be heard as to costs a memorandum of no more than four pages is to be filed by the Appellant within 21 days of this decision being delivered with any similar reply within 21 days after that.

R E Neave
District Court Judge

Signed this 27th day of September 2017 at 12.53 ~~am~~/pm

Reserved decision delivered by me
this 28 day of September 2017

Deputy Registrar
A.L. McDonald