IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-000115
[2017] NZHC 3300

BETWEEN	WOJCIECH KLEPACKI (VOYTEK KLEPATSKI) Appellant
AND	INSTITUTION OF PROFESSIONAL ENGINEERS NEW ZEALAND Respondent

Hearing:	29 June 2017 and 11 October 2017
Appearances:	The Appellant in Person M Broad for the Respondent
Judgment:	22 December 2017

JUDGMENT OF HINTON J

This judgment was delivered by me on 22 December 2017 at 5.00 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Kensington Swan, Auckland

Party:
The Appellant

Introduction

[1] This is an appeal from a decision of Judge Cunningham, which was in turn an appeal from a decision of the Chartered Professional Engineers Council (the Council) in a disciplinary proceeding brought against Mr Klepacki.

[2] The question on appeal is whether the District Court correctly upheld the decision of the Council that Mr Klepacki had breached r 48 of the Chartered Professional Engineers of New Zealand Rules.

[3] Rule 48 has since been amended, but it provided as follows:

> **48 Inform others of consequences of not following advice**
> (1) A chartered professional engineer who considers that there is a risk of significant consequences in not accepting his or her professional advice must take reasonable steps to inform persons who do not accept that advice of those significant consequences.
> (2) In this rule, **significant consequences** means consequences that involve–
> (a) significant adverse effects on the health or safety of people; or
> (b) significant damage to property; or
> (c) significant damage to the environment.

[4] Mr Klepacki can only appeal on a point of law.

Background

[5] This matter has a lengthy background. It all began back in 2004 when Mr Klepacki, who is a chartered professional engineer, was engaged to provide engineering services to a Mr Stone and a Ms Jones for the design of their house on Kawau Island. Mr Klepacki undertook the structural design and prepared the building consent drawings. The scope of Mr Klepacki's engineering services was not formally agreed. Another engineer, Dr John Hawley, was engaged as a geotechnical engineer to produce a design for the house's wastewater treatment and disposal system. Mr Klepacki at all points disavowed any instruction as a geotechnical engineer and made it clear he had no relevant qualification.

[6] Mr Klepacki stated that he believed the design he produced complied with the relevant provisions of the Building Code, subject to verification of the site's ground

conditions. A building consent was issued for the property, subject to a requirement that Mr Klepacki's firm certify that the foundation excavations "either comply with the design or have been amended to suit the on site conditions". Mr Klepacki made it clear to the clients that he could not, and would not, provide that certification. At some point he told them they needed to engage a geotechnical engineer. No geotechnical investigation of the site's ground conditions occurred and Mr Klepacki did not revise his design assumptions in respect of the ground conditions.

[7] The house was built very close to a cliff. Following some very heavy rainfall events and damage to the house, it was moved five metres back from the cliff.

[8] In September 2013, Mr Stone and Ms Jones laid a complaint with the Institute of Professional Engineers of New Zealand against Mr Klepacki, alleging that he had breached his obligations under the Chartered Professional Engineers of New Zealand Act 2002 and the Chartered Professional Engineers Rules in respect of his involvement in the design and construction of their house.

[9] In February 2015, a disciplinary committee found that Mr Klepacki had contravened r 45 of the Code of Ethical Conduct of Engineers on two bases and also breached r 48.[1] (Rule 45 provided that a chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activity.)

[10] I note that the disciplinary committee recorded in its decision that "the damage to the house may still have occurred even if Mr Klepatski (sic) had fulfilled his professional obligations and ensured that appropriate advice was obtained regarding the ground conditions on the site. There is no incontrovertible evidence to demonstrate what caused the movement and subsequent damage to the structure".[2]

[11] Mr Klepacki appealed to the Chartered Professional Engineers Council, which did not uphold the breaches of r 45, but did uphold the breach of r 48. The Council

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1 *Stone & Jones v Klepacki* (Disciplinary Committee, 4 February 2015).
2 At [5.93].

imposed relatively small penalties of censoring Mr Klepacki, fining him $1,000 and requiring him to make a contribution of $12,500 to costs.[3]

[12] Mr Klepacki appealed to the District Court. Judge Cunningham upheld the finding, but reduced the fine. She also reduced the costs award.[4]

This appeal

[13] Appeals from the District Court to this Court under the Chartered Professional Engineers of New Zealand Act 2002 are limited to questions of law.[5]

[14] An error of law is made out if the decision-maker failed to take into account a relevant matter, took into account an irrelevant matter, failed to apply a statutory provision correctly, or the decision-maker made a finding of fact that is so clearly untenable that the only reasonable conclusion contradicts that finding. [6]

[15] The burden of proof in a disciplinary proceeding rests on the disciplinary body. The standard of proof is the civil standard, which is that facts must be proved on the balance of probabilities.

[16] For there to be a breach of r 48, the following matters have to be proven against Mr Klepacki:

(a) that he told the complainants they should engage a geotechnical engineer;

(b) that he knew the complainants had not accepted that advice;

(c) that there was a risk of significant consequences for the complainants in not accepting that advice; and

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3 *Klepacki v Stone & Jones* (Chartered Professional Engineers Council, 6 August 2015).
4 *Klepacki v Institution of Professional Engineers New Zealand* [2016] NZDC 26199.
5 Chartered Professional Engineers of New Zealand Act 2002, s 38(1).
6 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]-[26].

(d) that he failed to take reasonable steps to inform the complainants of those significant consequences.

[17] In terms of (a), it is undisputed that Mr Klepacki told the complainants they should engage a geotechnical engineer.

[18] Mr Klepacki's position in terms of (b), (whether he knew the complainants had not accepted that advice) is somewhat equivocal, amongst other things because he considered they had engaged a geotechnical engineer, namely Dr Hawley. But I am satisfied for all material purposes that he did know the complainants had not accepted his advice. Further, it is not particularly material because of my finding on the next point.

[19] Mr Klepacki's position as to (c) is quite firmly that he did not accept there was a risk of significant consequences from not obtaining a geotechnical report.

[20] Mr Klepacki's evidence before the Council seems to have been much as his submission to me (once I had understood it), which was that he initially considered there was a risk, although not a significant risk, because his own view was that the ground was stable. His initial concerns were assuaged by receipt of a report from Dr Hawley, who is, as earlier recorded, a geotechnical engineer. Dr Hawley recorded in his report as follows:

> 3.2 Site Stability:
>
> Is expert evaluation necessary? **No.**
> If NO why not? **Strong Greywacke soils with reduction of surface and groundwater flows by house upslope, raised bed minimising effluent entry into in situ soils, and planar topography.**

[21] Dr Hawley's report was only in respect of on-site waste water disposal, so one would have to be sceptical as to whether that would be sufficient, but returning to the requirements of the rule, Mr Klepacki's evidence and argument is that he did not consider there was a risk of significant consequences after he received the Hawley report.

[22] The disciplinary committee in its decision did not make any actual finding as to (c) above, namely that there was a risk of significant consequences for the complainants in not accepting Mr Klepacki's advice to engage a geotechnical engineer.

[23] The Engineers Council did specifically deal with that matter as follows:

> 72. The Panel considers that the lack of appropriate geotechnical input into the design and construction of a cliff edge property could reasonably be expected to have "significant consequences" to both the safety of people and damage to property.

[24] No reasons are given as to that finding in the decision.

[25] In the District Court, Judge Cunningham repeated that there were significant consequences. She said there were two reasons why obtaining a geotechnical appraisal of the property was necessary, the first being that there was clay on the land and clay can expand when it gets wet. The second was that there were trees all over the property and tree roots can cause problems with foundations. The Judge said that because the house was on a cliff top, if the foundations failed, the likelihood of there being an adverse effect on the health or safety of people or the prospect of damage to the property was obvious.[7]

[26] I asked counsel for the respondent to take me to such evidence as there was that might have enabled Judge Cunningham (or the Engineer's Council) to make the finding that there was a risk of significant consequences if a geotechnical engineer was not engaged. This could be, for example, expert evidence, or evidence of a concession by Mr Klepacki.

[27] Mr Broad, on behalf of the respondent, to support the finding that there was a risk of significant consequences, points to the simple fact that the house was built in a cliff-top location and that the site was recorded by Rodney District Council as being located in the vicinity of land containing expansive soils which may not meet "good ground criteria" as defined in NZS3604:1999. He points to the fact that Mr Klepacki refused to approve foundations at a site visit on 4 February 2005 and to various concerns that Mr Klepacki did express in his evidence. He submits that there was

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7 *Klepacki v Institution of Professional Engineers New Zealand* [2016] NZDC 26199 at [35]-[38].

clearly a risk that significant consequences could arise out of the lack of appropriate geotechnical input.

[28] These matters do not amount to evidence that there was a risk of significant consequences in not obtaining a geotechnical report. (I note, although it is a somewhat different point, that there was no incontrovertible evidence to demonstrate what caused the movement and subsequent damage to the structure.)

[29] Mr Broad also made the point that Mr Klepacki must have considered there was a risk of significant consequences, because why else would he have persistently advised the complainants and the project manager to obtain geotechnical input? Mr Klepacki's answer to this, consistent with the record, was that he considered geotechnical input was necessary to comply with the building consent and he was not prepared to be given the responsibility of sign-off for that consent when he did not have that specialist expertise. That did not mean he considered there was a risk of significant consequences for the complainants in not accepting that advice. He was very clear that he did not. He was concerned rather that the complainants properly comply with the terms of the building consent and that the wool not be pulled over the Council's eyes, or words to that effect. He was very much concerned that he not be at risk of liability when he had made it plain from the outset that he was not a geotechnical engineer and any work he did must fall outside those terms of reference.

[30] Mr Klepacki argued that the test under r 48 is subjective and I accept it is worded that way. Disciplinary rules should clearly signal the basis on which they are to be complied with. However, I accept the respondent's submission that the test must be objective, not subjective. In these circumstances, it makes no difference. There is no clear evidence that non-engagement of a geotechnical engineer would lead to a risk of significant consequences. On that basis, I consider that Judge Cunningham made an error of law.

[31] As a consequence, I consider that the disciplinary orders must be overturned.

[32] I should add further that no criticism should be made of Mr Broad, whose submissions were impeccable. I also make no criticism of the Institution of

Professional Engineers New Zealand. They have proceeded on the assumption that Mr Klepacki accepted there was a risk of significant consequences, when he did not, and so no evidence has been called to that effect. I have had to work through the mire of Mr Klepacki's submissions to clearly understand his position, which it was very difficult to glean from those submissions. He raised, as I recorded in my Minute of 20 July 2017, a very large number of points of appeal which clearly did not amount to a question of law, nor were they points that were going to make any material difference to the judgment for the very great part.

[33] In addition, I do not accept Mr Klepacki's submission that the Council has misled the Court, or any submission to that effect. I have no reason to consider that the Council has behaved other than entirely properly.

[34] As I said at the hearing, Mr Klepacki has not clothed himself in glory in this matter. He has been dragged into a professional commitment which operated in a very unprofessional way, inter alia, in the sense that nothing was put in writing (or very little), and he stood by, even when he knew that the clients were not doing things properly, albeit it would seem he told them that. He then walked away thinking that would force their hand.

[35] Given the disciplinary orders cannot stand, I quash all of the orders made, including those for costs.

[36] As Mr Klepacki is self-represented, he is not eligible for any order as to costs, other than disbursements. The respondent is to pay disbursements actually incurred by way of Court filing and hearing fees**.**

Hinton J