CPEC Chartered Professional Engineers Council

Te Kāhui Hangahanga Ngaio Whaimana

APPEAL NUMBER 4/13

In the Matter of the Chartered Professional Engineers of New Zealand Act 2002

AND

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

Between

Mr B CPEng IntPE(NZ) MIPENZ

Appellant

And

The Registration Authority

Respondents

CPEC Chartered Professional Engineers Council
Te Kāhui Hangahanga Ngaio Whaimana

Decision of the Chartered Professional Engineers Council dated 6 January 2014

Chartered Professional Engineers Council

The Appeal

1. This is an appeal to the Chartered Professional Engineers Council ("the Council") under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"). The appeal is of a decision of the Disciplinary Committee ("DC") dated 2 July 2013. The DC found that Mr B had performed engineering services in a negligent manner being a ground of discipline ~~negligence~~ under s 21 (1) (c) of the Act.

2. The DC ~~decided~~ held that Mr B should ~~be ordered to~~ pay a fine of $1,500 and contribute $4,800 plus GST to the costs. ~~Also,~~

3. In addition ~~T~~the DC determined that Mr B should be named and an article published in Engineering Dimension on its decision.

4. Mr B's Notice of Appeal and appeal documents dated 30 July 2013 were received by the Council on 1 August. The Appeal Panel has determined that the appeal cannot be dismissed under S 35 (3) for being received out of time.

5. The parties were informed by letter dated 20 September 2013 of the receipt of the appeal of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Andrew Hazelton, Mr Roly Frost and Ms Jane Nees as members.

6. The 20 September 2013 letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. All parties were offered the opportunity for a hearing to be held in person if required. The Registration Authority (RA) requested an amendment to the timings via email dated 30 September 2013. After further clarifications the amended timings were accepted by Mr B. All parties agreed to the matter being considered on the papers.

7. Mr B made his Submission on Appeal dated 24 October 2013. The RA responded on 8 November 2013. Mr B made a Submission in Reply dated 15 November 2013

8. The Panel met via phone conference on 13 December 2013 to consider the appeal.

Background

9. The Appeal relates to an inquiry instigated by the RA on its own motion relating to the collapse of the roof structure ~~i~~of the Wren Building in Invercargill. Mr B was the structural designer of the building.

10. The Complaints Research Officer referred the matter to the Chair of an Investigating Committee. The final findings of the Investigating Committee were issued on 19 November 2012. As a result the matter was referred to a Disciplinary Committee which made the decision and imposed the penalties noted in 2 and 3 above.

Notice of Appeal

11. Mr B is not appealing the conclusion reached by the DC that he had ~~breached the ground of negligence~~undertaken engineering services in a negligent manner ~~under s 21 (1) (c) of the Act~~. His grounds for appeal relate to the wording contained in the DC's decision. In particular Mr B objects to the inclusion of sentences in paragraph 4.13 and 6.2 of the decision as follows:

> *"(a) This is a particular concern because of possible public safety implications if this were a systemic problem"*
>
> And
>
> *"He made a mistake which only became apparent when a roof collapsed although there continues to be an uncertainty that other similar errors on other projects could remain undiscovered".*

~~11.~~12. Mr B is also seeking indemnity of costs for the Appeal from the RA as he notified the RA of his concerns about the content of the decision but the DC refused to amend this. The RA stated that they could not change the DC's decision and that the only avenue was for Mr B to appeal. This is disputed by Mr B.

~~12.~~13. The relief sought by Mr B is that:

a. The wording of the DC's decision is amended.

b. No publication is made of the decision with the current wording.

c. Indemnity of costs for the appeal.

Process

~~13.~~14. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee or the Disciplinary Committee, but the appellant carries the burden of satisfying us that we should do so.

~~14.~~15. In hearing the appeal the Panel has considered.

a. Was the RA correct in directing that any review of the DC's decision needed to be made via an appeal to the Council?

b. Is the decision of the DC consistent with the evidence presented?

c. Under s 35 (6) of the Act the Council can only review the part of the decision to which the appeal relates. So in this case Panel has considered; "Does the evidence presented indicate the presence of any systemic problems with the work of Mr B."

d. Is it appropriate for the appellant to have indemnity of costs for this appeal?

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Findings

Was the RA correct in directing that any review of the DC's decision needed to be made via an appeal to the Council?

~~15.~~16. The appellant advanced a number of basis on which he considers that the Disciplinary Committee had power to recall and correct its own decision in this matter:

a. That the decision was analogous with an Environment Court decision of Re Campaigners Against Toxic Sprays (No2) ENV-2007-CHC-39, a case where the Environment Court recalled an earlier judgment to amend it to correct an erroneous impression that others might have otherwise taken from the judgment;

b. There is a sentence in paragraph 25 of the submissions that the common law jurisdiction was developed to allow decision making bodies to enable them to act effectively;

c. Section 13 of the Interpretation Act 1999 which reads:

The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is generally not capable of being exercised more than once.

~~16.~~17. On the facts the decision in Re Campaigners is similar to this case in that the party was seeking to have the judgment amended to remove what they considered was a misconception that a third party reading the judgment might take from it.

~~17.~~18. The Court in that case amended its judgment by reference to Rule 12 of the District Court Rules, the "slip rule". That rule is not available to the Disciplinary Committee, so while the decision might be analogous to what the appellant seeks on the facts, procedurally it is of no assistance.

~~18.~~19. We also reject any notion that the common law is of some assistance. No serious argument was put forward that this was the case, and as the appellant noted in his submissions, the Disciplinary Committee (and this Council) is a creature of statute bound by the statute and subordinate legislation.

~~19.~~20. The strongest argument that the appellant raises that the Disciplinary Committee had power to amend its own decision is based on s13 of the Interpretation Act. The appellant says that this is "'buttressed" by Rule 72 of the Rules which allows the Disciplinary Committee to regulate its own procedure as it sees fit.

~~20.~~21. Dealing with this point first, we do not think it adds to the section 13 argument. The Disciplinary Committee can only regulate its own procedure if it has jurisdiction to do so, in this case it had made its decision and was functus officio once it perfected its decision and communicated this to the appellant and the Registration Authority (see for example Goulding v Chief Executive of Ministry of Fisheries CA256/02). Therefore there was no procedure to regulate. We do not think that Rule 72 assists the appellant in its argument.

~~21.~~22. There have been a number of cases on the interpretation of section 13. One of the more recent is Ellipse Institute Ltd v New Zealand Qualifications Authority [2012] NZHC 2083. In that decision the Court cited with approval from Goulding:

The section is clearly intended to allow for revision of administrative decisions which, under the general law, would not be open to revision. But the power of revision is a limited power and one the exercise of which is judicially reviewable. The power could not, for example, be exercised simply because the decision maker had changed his/her mind. …

~~22.~~23. In the decision itself the Court in Ellipse stated:

[63] …However, it is clear that s13 was intended to have a narrow scope and should not be applied in situations where it would result in a change of decision [that] would cause significant hardship to the plaintiff or applicant.

~~23.~~24. In Ellipse, the Court considered that a change in the quantum of a figure in a decision made by a party was "at the extremity of the power to correct errors" (paragraph 68).

~~24.~~25. In considering the authorities in this matter we have come to the conclusion that the amendment requested by the appellant to the decision of the Disciplinary Committee is too broad to fall within any discretion that might exist under section 13.

~~25.~~26. We therefore consider that the Disciplinary Committee was correct in refusing to amend its decision. We do not consider that it had the power to do so.

Is the decision of the DC consistent with the evidence presented? Does the evidence presented indicate the presence of any systemic problems with the work of Mr B?

~~26.~~27. The appellant has appealed the decision. It is clear that the appeal is against the findings contained in paragraphs 4.13 and 6.2. We consider it would be wrong to simply dismiss the appeal because there was no power for the Disciplinary Committee to amend its decision. After all we could remit the matter back to the Disciplinary Committee with a direction to reconsider these paragraphs, should we consider that appropriate.

~~27.~~28. Rather than do that, we think it sensible to consider on the merits the passages complained of, and to assess whether there was any evidence that might substantiate the comments made, if so, then the comments should stand, if not, then this appeal decision can be read in conjunction with the Disciplinary Committee decision as appropriate.

~~28.~~29. The error made by Mr B was in the transposition of details from a calculation spreadsheet to a specification template. The template used was not blank but contained information from a previous project. Thus an incorrect chord size was specified rather than no chord size. This error was not picked up in the subsequent checking of the drawings produced.

~~29.~~30. The above actions contribute to the negligence of Mr B in this instance. They are not in themselves systemic issues.

~~30.~~31. The IC could have requested copies of other designs undertaken by Mr B. These could have been used to confirm or otherwise the possibility of wider systemic issues. This was not done.

~~31.~~32. The DC was also concerned about possible systemic issues. They asked the specific question "Is there anything in the nature of the mistake made that would lead you to think that there might be a systemic issue with what you were doing?". Mr B's response was "Absolutely not". The DC was concerned that this was just Mr B's opinion and that he had done nothing to check that this was this case, a fact that Mr B confirmed in response to direct questioning on the subject. The DC could have returned the matter to the IC for further investigation as noted in item 34 above. This was not done.

~~32.~~33. There was no evidence presented to the IC or DC that indicated a systemic problem.

~~33.~~34. Whilst not specifically relevant to this appeal. Mr B noted that he has learnt from the experience and has changed his process to always use blank template sheets. H R (Mr B's employer at the time of the design) also noted that their processes have been amended to reduce the chance of similar errors going unnoticed. The IC has altered IPENZ of possible industry wide issues relating to changes in the design snow loading for structures.

Findings of the Appeal Panel.

~~34.~~35. Mr B performed a negligent act and has been appropriately fined. No evidence has been presented that systemic problems existed in the actions of Mr B. There ~~should be~~is no ~~implication~~ evidence and hence no implication that systematic problems exist with his work.

~~35.~~36. The ~~published~~ prefected decision of the DC cannot be amended directly by this Panel. The Panel can return the decision to the DC with instructions to review the wording. The DC could then return the case to the IC for further investigation. The Panel does not consider this course of action ~~to be in the best interests of either party~~would result in the timely and cost effective resolution of this complaint~~.~~

~~36.~~37. Therefore the Council finds that t~~T~~he DC's decision ~~will stay as published. However it will need to be read in conjunction with the findings of this appeal~~should be read in conjunction with this Appeal decision and in particular paragraph 35 above.

~~37.~~38. The RA followed the correct process in requiring any further consideration of this matter to be undertaken by an Appeal panel.

Outcomes

~~38.~~39. The Appeal Panel finds no evidence of systemic issue with Mr B's work.

~~39.~~40. The DC decision ~~remains as published~~should be published, but in conjunction with the findings of this Appeal decision. ~~but is to be read in conjunction with these findings.~~

~~40.~~41. The RA was correct in its processes and indemnity from costs of appeal is not granted.

Costs

~~41.~~42. The costs incurred by all parties to this appeal will remain where they lie.

Dated this 6 January 2014

Mr Jon Williams ……
Principal

Mr Andrew Hazelton …… ……

Ms Jane Nees ……

Ms Rolly Frost ……