

APPEAL NUMBER 2/14

**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 K CPEng IntPE(NZ) MIPENZ

Appellant

And

Mr B CPEng IntPE(NZ)

Respondent

Decision of the Chartered Professional Engineers Council dated 13 May 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 Chair of the Investigating Committee (CIC) dated 13 November 2013.
2. The CIC found the complaint was insufficiently grave to warrant further investigation. The CIC dismissed the complaint under Rule 57 (ba).
3. Mr K's Notice of Appeal and appeal documents dated 15 December 2013 were received by the Council on 16 December 2013. The Appeal Panel has determined that the appeal cannot be dismissed under s 35 (3) of the Act for being received out of time.
4. The parties were informed by letter dated 21 March 2014 of the receipt of the appeal and of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Graham Shaw and Mr Ross Tanner as members.
5. The 21 March 2014 letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. Both parties were offered the opportunity for a hearing to be held in person if required. After further clarifications amended timings were accepted by both parties, who also agreed to the matter being considered on the papers.
6. Mr K made his Submission on Appeal dated 10 April 2014. Mr B responded on 23 April 2014. Mr K made a Submission in Reply dated 26 April 2014
7. The Panel met via phone conference on 5 May 2014 to consider the appeal.

Background

8. The Appeal relates to a geotechnical report produced by Mr B for Southern Response/Arrow International for a property owned and occupied by Mr K.
9. In his complaint and attached Brief of Evidence, dated 4 October 2013, Mr K's alleges:
 - a. that Mr B provided advice that is contrary to the MBIE Guidelines (Assessing, repairing and rebuilding foundations in TC3). Whilst not specifically noted in the complaint, it is implied that this may be either negligent or incompetent and thus grounds for discipline under s21 (1) (c) of the Act.

- b. that Mr B acted unethically by making a finding that was favourable to the insurance outcome under the direction of his client thus breaching Rule 46
 - c. that the design resulting from Mr B's report is potentially unsafe thus breaching Rule 44.
10. The Brief of Evidence covers other issues not relating to this appeal.
11. The Complaints Research Officer referred the matter to the Chair of an Investigating Committee. As noted above the CIC found that there were no applicable grounds of discipline of Mr B. under s 21 (1) (a) - (d) of the Act and that the complaint was insufficiently grave to warrant further investigation. The CIC dismissed the complaint under Rule 57 (ba).

Notice of Appeal

12. Mr K's Notice of Appeal reiterates that Mr B:
- a. acted negligently
 - b. acted in collusion with the insurer in recommending a repair methodology.
 - c. omitted to holistically consider hazard risks required by the Building Code and MBIE guidelines.

Process

13. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee but the appellant carries the burden of satisfying us that we should do so.
14. In hearing the Appeal the Panel has considered whether the CIC's decision to dismiss the complaint was correct? i.e.:
- a. is there sufficient evidence of either a breach of the code of ethics or performing services in negligent/incompetent manner to warrant further investigation?
 - b. is any breach sufficiently grave to warrant further investigation?

Findings

In presenting the findings of this Appeal the panel considered it beneficial to outline their interpretation of the events leading up to the complaint.

15. Mr B was commissioned to undertake limited shallow soil testing on the site to determine shallow bearing capacities for foundation design. Mr B team undertook this work he authorized and signed off the report.
16. The report noted an understanding that a deep geotechnical investigation had been undertaken by another party (Golder Associates (NZ) Ltd). On receipt of the report Arrow International advised Mr B that no deep geotechnical investigations had been

carried out. Mr B subsequently removed this reference from his report and reissued it with no other changes.

17. The MBIE guidelines provide an indication via a flow chart of when deep geotechnical investigations are required. Whilst it may not have been in Mr B's scope, he had an obligation to either confirm that the correct level of investigation was undertaken or to provide an appropriate qualification to this effect in his report.
18. Mr B details in his Brief of Evidence dated 31 October 2013 (paragraphs 20-37), the steps that he took to confirm his engineering opinion that a deep geotechnical investigation was not required.
19. Mr K claims in his submission that Mr B only formed this engineering opinion after his report was questioned.
20. Mr K also disputes some of the logic used by Mr B to form his engineering opinion.
21. In his response to this Appeal, Mr B rejects Mr K's findings and stands by his statements that no deep geotechnical investigations are required and that the repair methodology is appropriate.

Findings of the Appeal Panel.

22. The CIC focused his commentary on the contention that the report was first issued containing an incorrect reference to deep geotechnical having been undertaken. The Appeal Panel considers that this was a simple mistake and not worthy of further investigation.
23. The Appeal Panel considers that the main basis for the complaint is not the initial issuing of an incorrect report.
24. The Appeal Panel considers that the complaint focusses on the actions undertaken and decisions made by Mr B between issuing the first report and issuing the second report with only the reference to deep geotechnical testing removed.
25. No evidence has been provided that either proves or disproves Mr K's assertion that Mr B only undertook the further engineering review to justify his report after the report was questioned.
26. No evidence has been provided that either proves or disproves Mr K's assertion that Mr B acted in collusion with the insurer.
27. With respect to above paragraphs 25 and 26, the Appeal Panel takes Mr B at his word on these matters and considers there has been no breach of Rule 45 in relation to "acting with honesty, objectivity and integrity".
28. There is clearly some technical dispute over how the MBIE Guidelines have been applied and the conclusions reached. Moreover, a question that remains to be addressed is whether Mr B's report, upon being reissued, should have addressed the implications (and any potential consequences) of there having been no deep geotechnical testing of the soil conditions on which new foundations would be built under the Mr K's dwelling.

29. The Appeal Panel is not qualified to make a ruling on the technical issues, or to determine whether the manner in which the MBIE guidelines have been applied could be considered negligent or incompetent. This is the role of an Investigating Committee comprising appropriately qualified and experienced engineers.
30. Mr B's report is an input to the design of the foundations for the house. An error in the report could result in an incorrect design. The Appeal Panel considers that this is a sufficiently grave matter to warrant further investigation.

Outcomes

31. The Appeal Panel finds the CIC was wrong to dismiss the complaint.
32. The complaint, these findings, and all documentation provided to the Appeal Panel will be sent to the Registration Authority who will be instructed to form an Investigating Committee.
33. In the interests of time and costs to all concerned, the Investigation Committee will be instructed to hear the complaint on the papers based on the submissions that have been provided to date.

Costs


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

Dated this 13 May 2014


Mr Jon Williams
Principal


.....

Mr Graham Shaw


.....

Mr Ross Tanner


.....