

APPEAL NUMBER 18/14

**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 22 December 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 an Investigating Committee (IC) dated 13 August 2014.
2. The IC found there were no grounds for referring the complaint to a Disciplinary Committee. They dismissed the complaint under Rule 57(a), there being no grounds for discipline under Section 21 a-d of the Act.
3. Mr K's Notice of Appeal dated 19 August 2014 was received by the Council. 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 8 September 2014 of the receipt of the appeal and of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Ms Sharyn Westlake and Mr Ross Tanner as members.
5. The 8 September 2014 letter outlined the timing and process to be followed.
6. Mr K made his Submission on Appeal dated 8 September 2014. Mr B responded on 22 September 2014 and the RA responded on 23 September. Mr K made a Submission in Reply dated 24 September 2014.
7. The Panel met via telephone conference on 18 December 2014 to consider the appeal on the papers.

Background and Notice of Appeal

8. This is the second appeal on this issue. On 13 May 2014 the Council issued its finding on the first appeal, which was:
 - a. The Appeal Panel found the Chair of Investigating Committees acting as Adjudicator was wrong to dismiss the complaint.
 - b. The complaint, the findings, and all documentation provided to the Appeal Panel were to be sent to the Registration Authority who was instructed to form an Investigating Committee (IC).
9. This Appeal is of the decision of this IC.
10. The Appeal relates to a geotechnical report produced by Mr B for Southern Response/Arrow International in respect of a property owned and occupied by Mr K.

11. Mr B's commission was of limited scope. He was requested to complete soil testing at the property to determine shallow bearing capacities for foundation design for Mr K's property. Mr B's client, (Arrow International (NZ) Ltd) was responsible for coordinating and combining the inputs from a number of design professionals and constructors to develop an appropriate repair/rebuild strategy for the insurer.
12. Mr B provided two versions of his report. The first version (dated 13 June 2013) notes an understanding that Golder Associates (NZ) Ltd performed deep geotechnical investigations at the site, which was corrected in the second version (dated 17 June 2013) on being informed (by Arrow International) that no such investigations had been carried out. In his Notice of Appeal Mr K does not accept the following aspects of the IC's decision. Mr K considers:
 - a. That Mr B had an obligation to either confirm the correct level of investigation had been undertaken or provide an appropriate qualification on his report.
 - b. That the IC failed to review the actions of Mr B between the issuing of his 13 June 2013 and 17 June 2013 reports.
 - c. That the IC failed to investigate the basis for the Ultimate Static Bearing Capacity calculations undertaken by Mr B.
13. The Appeal Panel has focussed on the grounds of appeal noted in paragraph 12. There are other details included in the IC's findings and the various submissions relating to damage assessment. These were not within Mr B's scope of work and are therefore not directly relevant to this appeal.

Process

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 but the appellant carries the burden of satisfying us that we should do so.
15. In hearing the Appeal the Panel has considered whether the IC's decision to dismiss the complaint was correct or are there any grounds for discipline under section 21 of the Act. i.e.

Section 21 Grounds for discipline of chartered professional engineers

(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer—

(a) has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practice 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.

16. Clearly 21 1 (a) and (d) are not applicable. The Appeal Panel has therefore considered for each of the grounds of appeal noted above, whether there is sufficient evidence of either a breach of the code of ethics or performing services in negligent/incompetent manner to warrant the imposition of penalties as defined in Section 22 of the Act.

Findings

That Mr B had an obligation to either confirm the correct level of investigation had been undertaken or provide an appropriate qualification on his report.

17. Sections 10.16 – 10.20 of the IC's report provides the context for Mr B's engagement. The Appeal Panel agrees with the concluding statement made in section 10.20, that Mr B could reasonably assume that his brief was only to provide shallow soil testing. All other required inputs would be provided by others under the direction of his client (Arrow International (NZ) Ltd).

18. The Appeal Panel finds that this ground for appeal has no merit.

That the IC failed to review the actions of Mr B between the issuing of his 13 June 2013 and 17 June 2013 reports.

19. Whilst the IC has not commented on the actions of Mr B between the issuing of the two reports, it has holistically commented on the MBIE Guidelines and the process they prescribe.
20. The IC concludes in Section 10.10 that there is no blanket recommendation for carrying out deep site investigations on TC3 sites. The need or otherwise is dependent on a number of factors. Many of these factors are outside of Mr B's scope and would be the responsibility of his client (Arrow International (NZ) Ltd) to determine.
21. When his client noted that he had incorrectly included a reference to deep geotechnical investigations in his report, we consider that it was reasonable for Mr B to correct the report, as he would want it to be correct and with the assumption that his client wanted the report corrected to be consistent with what had occurred on the site. There was no instruction given, or inference, that further investigation or analysis was required and given the nature of Mr B's original instructions, we consider Mr B had not acted inappropriately.
22. The Appeal Panel finds that this ground for appeal has no merit.

That the IC failed to investigate the basis for the Ultimate Static Bearing Capacity calculations undertaken by Mr B

23. The calculation of Ultimate Static Bearing Capacity is a combination of calculations from the tests conducted on site, the application of appropriate design safety factors and engineering judgment.
24. Mr B has provided in section 15 of his submission an explanation of his calculations.
25. The panel finds no evidence that Mr B's specification of the Geotechnical Ultimate Bearing Capacity (this is the terminology used in the reports) is incorrect.
26. The Appeal Panel finds that this ground for appeal has no merit.

Findings of the Appeal Panel.

27. The following are general comments that the Appeal Panel notes:
 - a. Whilst the IC has addressed holistically the issues raised by the previous appeal, and this Council's response to that appeal, it would have assisted the process if it had specifically noted the items raised and addressed their comments to cover these.
 - b. The IC report covers issues that are beyond the scope of Mr B's work, relating to issues including damage assessment and foundation design.
 - c. The IC report makes comments that cannot be backed up by evidence 10.23 and 10.27.1.
 - d. Item 2 of Mr K's submission is incorrect. The Appeal Panel report paragraph 29 notes that it is not qualified to make a ruling on possibility of the interpretation of the MBIE guidelines being a negligent or incompetent act. This does not imply that the Appeal Panel found that there was sufficient evidence of negligence to warrant further investigation.
 - e. The IC dismissed the complaint on the basis of Rule 57 (a). Rule 57 relates to the need for a complaint to be investigated by an IC. If it has progressed to the IC then a determination under Section 21 is all that is required.
28. The Appeal panel finds that there is no merit in any of the grounds for appeal. As noted in paragraph 16, clearly Sections 21 1 (a) and (d) of the Act are not applicable. The Appeal Panel has found there is no evidence of either a breach of the code of ethics or performing services in negligent/incompetent manner.
29. There are therefore no grounds to warrant the imposition of penalties as defined in Section 22 of the Act.

Outcomes

30. The Appeal Panel finds the IC was correct dismiss the complaint.
31. The Appeal is therefore declined.

Costs

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

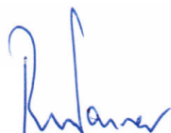
Dated this 22 December 2014



Mr Jon Williams - Principal



Ms Sharyn Westlake



Mr Ross Tanner