CPEC
Chartered Professional Engineers Council
Kāhui Kaiwetepanga Ngaio Whaimana

APPEAL NUMBER 04/18

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

Dr A, CPEng

Appellant

And

Mr B, CPEng

Respondent

And

Mr C, CPEng

Respondent

CPEC
Chartered Professional Engineers Council
Kāhui Kaiwetepanga Ngaio Whaimana

Decision of the Chartered Professional Engineers Council

I. This decision relates to an appeal to the Chartered Professional Engineers Council ("the Council) under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"), the Chartered Professional Engineers of New Zealand Rules (No2) 2002 ("the Rules") and the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 ("the Regulations).

II. The Appeal is of a decision of the Chair of Investigating Committees ('the CIC") acting as the Adjudicator, dated 22 August 2018.

Background and Context

1. Dr A, Mr B and Mr C are registered chartered professional engineers.

2. Dr A is a past employee of Business D. Dr A's employment as a structural engineer with Business D ceased in June 2016.

3. Mr B and Mr C are currently employed as structural engineers with Business D.

4. In 2014, whilst an employee of Business D, Dr A prepared a detailed seismic assessment report (DSA) of a historical building (Building E) in Alexandra [BoD 5-40[1]]. The DSA was reviewed and approved by Mr B.

5. The Building E was assessed in two parts; the original build (built in the 1880's), and the single-story addition (built 1983). The original build was scored at 35% new building standard (NBS) and the addition at 58% NBS, subject to an assumption that the original cavity wall rubble-fill within the stone walls have no cohesion or bond to the stone and that the mortar condition was good. The DSA also provided recommendations for strengthening works to improve the NBS to 67%. These works included:
   - repointing the lime mortar
   - anchoring the stone walls to the upper concrete floor and the roof framing
   - replacing damaged roof framing

6. Further to the DSA, Dr A prepared the seismic strengthening design [BoD 41-209].

7. During the seismic strengthening design phase, Mr C ordered an internal quality assurance review of Dr A's DSA, calculations, drawings and design concepts.

8. This review was carried out in early February 2016 by Mr F, another employee of Business D. Between 16-24 February 2016, Mr F issued a series of Technical Review Records (TRR) [BoD 211 -217].

[1] BOD ## denotes the Bundle of Documents page/s referenced

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9. On 29 February 2016, Mr B issued the producer statement for the design (PS1) of the strengthening works to the Building Owner. [BoD 210].

10. On 29 June 2016, Dr A's employment with Business D was terminated.

The Complaint

11. On 7 September 2017, Dr A submitted his complaint to the Registration Authority (RA) [BoD 1-4].

12. He considered Mr B and Mr C performed engineering services in an incompetent, negligent, malpractice and lacking professionalism manner:
    I. In their handling of the QA/peer review process
    II. In specifying the replacement of damaged mortar to be designed by others, with a 15 year completion date;
    III. In specifying the repair of the rotting roof timber by the Owner with a 15 year completion date;
    IV. In Mr B signing a PS1 for the strengthening works, which included Dr A's name, without his knowledge, and stating that the project had been completed without addressing the public safety and health raised in the QA process;
    V. In the lack of engagement they had with Dr A in resolving his concerns

13. In support of his complaint Dr A provided copies of the DSA [BoD 5-40], the 5% calculations [BoD 41-110], the 90% calculations [BoD 111-209]; the PS1 dated 29 February 2016 [BoD 210] and the TRR's dated 16/02/16 to 24/02/16 [BoD 211-217].

14. On 16 October 2017 the RA phoned and emailed Mr B and Mr C seeking clarification on several questions.

15. On 2 November 2017 [BoD 218/219] Mr B responded on behalf of himself and Mr C, advising:

    "a) Dr A was the senior structural engineer on the project.

    b) the internal QA procedure was followed, we are comfortable the appropriate verification was carried out. There were iterations of the review between Dr A and Mr F, and we are confident that the correct file was reviewed.

    c) We do not share Dr A's "serious concerns" with the safety of the building……..the specification of the mortar for the project was discussed with our client and it was agreed the client would obtain independent expert advice……it is noted on the drawings that the mortar repair would be reviewed by Business D during the strengthening work to ensure that it complied with the design assumptions made.

    d) the PS1 was prepared by Dr A, and as he was absent from the office when it was to be issued, he sent an email to me (dated 29 February 2016) with the following "the technical review of the calculations for the above referenced building has been successfully complete so you may distribute the PS1 and design statement to the client"

    e) I, (Mr B) was very familiar with the project and had spent considerable time overseeing it. I felt comfortable signing the PS1 and did so clearly identifying that I am the CPEng who signed, by quoting my registration number for identification purposes.

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16. On 27 November 2017 the RA further emailed Mr B and Mr C to request a copy of the email referred to in Mr B's response and asking where the project was at now [BoD 219].

17. On 4 December 2017, Mr B provided a copy of the email[2] [BoD 220] and signed PS1, advised the project was on hold, and advised that Business D does not currently have a commission for the next stage [BoD 219].

18. On 14 December 2017 Dr A submitted [BoD 221-248]:
    I. *Mr B's responses dated 2 November and 8 December did not resolve his concerns;*
    II. *His concern with building safety had been referred to Central Otago District Council on 11 December 2017;*
    III. *The PS1 was invalid, and requests that it be withdrawn; on the basis of a lack of appropriate QA process; the guidelines used in assessing the building were not appropriate; the degree of project knowledge Mr B had; the email was dictated by Mr B and issued following his issuing the PS1; he was in the office on 29 February 2016; the apparent disregard of the contents of the DSA which states " the result is 35%NBS for the original two storey stone building constructed in 1883… This estimate is based on an assumption that the stone and that the mortar is in good condition. However the mortar is weathered so the capacity of the buildings cannot be calculated precisely", and "the severely rotted roof diaphragm of corrugated iron over slender rotted timbers needs review and discussion" and "the foundation system appears to have failed"; and the current use of the building.*

19. On 31 January 2018, the RA contacted Mr B and Mr C requesting further information on the mortar, and the signing PS1's on behalf of others. [BoD 249]

20. On the 8 February 2018, Mr B provided a response [BoD 249-253]. In relation to the mortar, Mr B advised that it was agreed with the client that the mortar was a specialist item, and that the client would consult with experts on this matter, allowing for the works to include repointing to the extent that the stone would match the design assumptions in the calculations for the seismic strengthening. In relation to the PS1, Mr B provided a copy of Dr A's email of 26 February 2016 which included the design features report and the unsigned PS1 prepared by Dr A, and noted Dr A's email 29 February 2016[3], advising the information including the PS1 could be released to the client. Mr B advised he had overseen the project for a long time; knew all of the details; had reviewed the drawings; and that Mr C had checked the calculations; they had discussed the issuing of the PS1; and had the acknowledgment of Dr A on the PS1.

21. On the 16 March 2018, Dr A requested a copy of the approval PS1 email [BoD 254].

22. On the 23 March 2018, Dr A provided a further response [BoD 255-260], highlighting the timeline of the correspondence between the Owner request on the 17 February 2016, the QA review process; the issuing of the PS1; potential inconsistencies in the QA process; potential omissions in the PS1; and potential lack of detailing in the construction documentation, and requesting an adjudicator be appointed to make a legal determination

[2] The email from Dr A to Mr B and copied to Mr C
[3] There is no date on this email

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regarding building safety issues and malpractice issues.

23. On the 13 August March 2018, Dr A provided a further response to the RA [BoD 261-262] querying the status of his complaint and highlighting his concern that the Adjudicator was considering only two issues raised in the DSA:

    - Whether Mr B and Mr C confirmed with the client's requirements to use cement mortar over lime mortar, and if so, whether this was reasonable, and

    - Whether Mr B issued a PS1 for the property in Dr A's name without his permission, and if so whether this was reasonable.

    Dr A also requested that the RA note that his complaint concerned four caveats identified in the DSA: the condition of the mortar, the condition of the roof timbers, the connection of the walls to the roof and the connection of the walls to the upper concrete floor; and also noted the PS1 had to date been issued to the Owner not CODC.

24. On the 16 August 2018, Mr B provided a response (BoD 263) to the RA describing the proposed wall/roof connection; acknowledging the roof framing condition and the importance of its condition; referred to the notes, drawing and design features report forwarded to the client for the purpose of building consent which noted that "roof timbers must be repaired"; discussion with and the clients awareness of the condition of the roof framing; and noting the schedule of works prepared by the contractor for the seismic upgrade works of 2016, which included items for roof repairs. Mr B noted Business D's commission ceased in 2016, and the scope of works undertaken since then was unknown. He considered he and Mr C had behaved in a professional manner and had given the client the correct advice.

25. The complaint and documentation was forwarded to Mr G, CPEng FEngNZ IntPE(NZ), in his role as adjudicator, to consider the complaint in accordance with Rule 58 of the Rules.

Adjudicators' Decision

26. The adjudicator issued his decision to dismiss the complaint on 22 August 2018. [BoD 265 - 270]

27. The Adjudicator noted he had considered all of the information provided to him in relation to the complaint in deciding to dismiss the complaint.

28. Adjudicator noted Dr A's concerns with regards to building safety, specifically referencing:
    a) The mortar specification;
    b) The timing of the decayed roof repairs.

29. The adjudicator dismissed the building safety (mortar/roof framing) complaint under Rule 57(a) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002, on the basis "there was no applicable ground of discipline".

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30. The Adjudicator also noted Dr A's concerns with regards to the PS1 for the strengthening works.

31. The adjudicator dismissed the PS1 process complaint under Rule 57(ba) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002, on the basis the alleged misconduct "is insufficiently grave to warrant further investigation".

32. The adjudicator considered Mr B and Mr C acted reasonably by referring to others for the extent and specification of the mortar and by ensuring that the roof repairs were noted in the design documentation and construction scope of works.

33. The adjudicator also considered that Mr B acted reasonably in his signing off of the PS1.

34. The adjudicator noted that there appeared to be a communication breakdown and encouraged the parties to reflect on how this could be avoided in the future and encouraged the parties to review the Engineering NZ Practice Note "Guidelines on Producer Statements".

35. On receipt of the decision [BoD 273-274], Dr A requested a copy of the contractors' scope of works [BoD 273].

The Appeal

36. Dr A emailed a notice of appeal to the Council on 18 September 2018 [BoD 283-286].

37. On 18 September 2018, the Council acknowledged receipt of the notice of appeal.

38. On 1 October 2018, the Council emailed the parties, outlining the hearing process, noting a request to the RA for the preparation of a bundle of all documentation considered by the adjudicator in reaching his decision and providing a timeline for submissions. [BoD 281-283].

39. On 12 October 2018, the RA provided a bundle of documents [BoD 1-286] complete with a covering letter and contents page.

40. An appeal panel was selected by an exchange of emails between the Council members. The appointed panel consists of:
    - Ms Sandra Hardie – Appeal Panel Principal
    - Mr Jon Williams – Appeal Panel Member
    - Ms Rebecca Knott – Appeal Panel Member

41. On 19 October 2018, the parties were advised by emailed letter, the names of the appeal panel; provided with the two possible outcomes from the appeal panel decision, and a revised timeline for submissions.

42. The parties agreed to the hearing being on the papers.

43. Dr A's grounds for appeal are set out in his email dated 18 September 2018 [BoD 283-285]. They are summarised below:

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(a) Dr A's evidence was not properly reviewed
(b) The respondents evidence was not properly reviewed
(c) The RA's process was flawed
(d) The respondents have provided false or misleading information

44. The remedy sought by Dr A was the reissuing of the DSA without the caveats. The appeal panel notes that this is not an option available to them. In 41, above, the Council advised the parties that Dr A's complaint and the subsequent appeal are disciplinary processes, and that the only outcome the Council can effect are those contained within the Act.

45. The parties were given the opportunity to provide a submission to the appeal panel. Submissions from all parties were received.

46. Dr A provided his appeal submission on 26 October 2018. He submits that the evidence provided to ENZ[4] shows that Mr B's and Mr C's performance of engineering services on the Building E project involved "negligence, malpractice, incompetence, and/or unprofessional practice". The grounds for the appeal are listed below (the numbering is ours):

(a) The *Adjudicator should have considered the actions of Mr B and Mr C whilst undertaking an QA review, including:*

- ensuring all works reviewed are undertaken in accordance with appropriate professional and technical standards and practices and met the companies QA programme, as required by Dr A's employment contract;

- ensuring QA reviews were carried out at the required project noted frequency, as per the project requirement;

- ensuring the appropriate works are reviewed;

(b) The Adjudicator did not review all the evidence properly, as indicated by:

- The level of standard of care considered was incorrect. *"ENZ rules state: …..a higher standard applies if the engineer represents that he has greater or less skill or knowledge than that normally possessed by members of the profession, such as by a principal, project manager, supervisor, team leader."*

- The reasoning for dismissing the PS1 complaint was incorrect, as the DSA not the PS1 was submitted to CODC;

- The lack of consideration to all of the caveats identified in the DSA, the calculations and Dr A's email 13 August 2018 [BoD 261-262].

(c) Mr B knowingly issued a PS1 for an incomplete design.

(d) Mr B and Mr C failed to address all the caveats in the DSA.

[4] The panel reads this reference to be the RA rather than ENZ

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(e) The DSA is incorrect and Mr B and Mr C have incorrectly relied on it.

(f) Mr B and Mr C failed to ensure the strengthening works to achieve 67%NBS were undertaken.

(g) Mr B and Mr C have incorrectly asserted to the CODC that the NBS rating is 35%.

(h) The Owners have applied an unsuitable coating of plaster mortar without consent by Council and Mr B and Mr C have taken no action in response to this.

(i) Engineering NZ did not distribute all relevant documents to Dr A.

(j) Mr C admitted he never reviewed the DSA.

(k) Mr C made repeated miscalculations and demonstrates misunderstanding of the Building code requirements while testifying to the Employment Relations Authority.

(l) Business D issued a DSA for Building H which also demonstrates incompetence.

(m) A peer review by others shows the building is EQ prone.

47. Ben Duckworth, (Mr B and Mr C's legal Counsel) provided his submission on appeal on 15 November 18 (updated with paragraph numbering on 17 November 2018), in support of the adjudicator's decision; presenting his take on the lead up to the Dr A's complaint of 7 September 2017; asserting Business D's cooperation and that at its roots this complaint is an employment rather than engineering issue.

48. The Registration Authority provided their appeal submission on 16 November 2018. We have summarized this as:

I. The Adjudicator has given due consideration to the information available and reached the correct decision on the complaints put to him.
II. Complaints 46 (d) to ((h) and (j) to (m) are new complaints with new evidence and cannot be considered by CPEC on appeal.
III. Complaint 46 (i), the RA's process is outside the CPEC's jurisdiction and cannot be considered on appeal.
IV. QA and employment issues are the responsibility of firm management and are outside the RA's complaints jurisdiction.
V. The evidence indicates that Mr B and Mr C did not disregard the recommendations in the DSA regarding mortar and the decayed roof framing
VI. Mr B and Mr C regarded the mortar
VII. No evidence has been provided that suggests the PS1 and DSA were not of an adequate standard.
VIII. Mr B and Mr C acted reasonably by addressing the recommendations set out in the DSA.
IX. Business D did not have a commission for the construction phase of the project. They were engaged to issue a DSA and issue a design for seismic strengthening to bring the buildings NBS from 35% to 67%.
X. Engineers may make recommendations for works which should be carried out but, provided there are no safety risks triggering a legal response, whether these works

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are carried out is the clients decision. In this case, the DSA notes that the NBS rating is 35% and not EQ prone regardless of whether the recommendations are carried out. In these circumstances whether the client carried out the recommendations to bring the NBS rating up to 67% is their decision. Mr B and Mr C could not force the client to carry out their design.

49. Dr A provided his final submission on 8 December 2018, reiterating his earlier submission and adding:
    a. ENZ's submission is contradictory and demonstrates a confused ENZ.
    b. The adjudicator was misled by false claims of fabricated, forged or falsified documentation.
    c. The PS1 was issued negligently and incompetently.
    d. Any reference to the ERA is excluded from CPEC considerations.
    e. I have only released Business D's documentation under the guidance of ENZ.
    f. Ben Duckworth has presented new evidence in his submission under the heading safety issues.
    g. Detailed design to July 2017 guidelines confirm the error in the design.
    h. My compliant to ENZ is the only complaint I have ever made against an engineer.
    i. The references to my being a serial litigant and or falsifying documentation is incorrect.

50. On 13 December 2018, Kensington Swan, acting on instruction from Mr Duckworth, forwarded an email to the appeal panel principal which contained a redacted copy of an Employment Relations Authority determination between an Engineering Consulting Firm and PQR. The email advised the determination was related to the parties and contained relevant information that the appeal panel should be aware of, referring to paragraph 115. The appeal panel principal advised the parties of receipt of the email, and confirmed that the document had not been read and its contents would not be considered in this appeal process. The parties did not raise this matter further.

The hearing

51. The appeal was heard on the papers via telephone conference on 14th December 2018.

52. Appeals to the Council are by way of rehearing (section 37(2) of the Act). Council are entitled to confirm, vary or reverse a decision, or part of a decision, to which the appeal relates (section 37(5)(a)). The Council 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 Council are entitled to take a different view from the CIC but the appellant carries the burden of satisfying us that we should do so.

53. Rule 56 requires the RA to forward a complaint to an investigating committee unless there are grounds for not doing so, as set out in Rule 57, which states:

    57 Grounds for not referring complaint to investigating committee

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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.

54. Under S 37 (6) of the Act the Council has no power to review any part of the decision other than the part to which the appeal relates.

55. The Council cannot conduct its own investigation.

56. If the complaint had not been dismissed it would have proceeded to an Investigating Committee. If the adjudicator's decision is confirmed, the appeal will be dismissed. If the decision is reversed, then the only relief that can be granted is for the Council to send the matter to an Investigating Committee.

57. In hearing the appeal, the appeal panel has considered whether there are any grounds for discipline under section 21 of the Act, and whether the adjudicator's decision to dismiss the complaint was correct.

58. Section 21 of the Act states:

"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 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

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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."

59. The criteria established in section 21 (1) (a) and (d) of the act do not apply in this case. The panel therefore considers whether Mr B and Mr C have breached an aspect of the Code of Ethical Conduct set out in Rules 42-53; or have performed engineering services in a negligent or incompetent manner, as they relate to the complaint.

60. Rule 42(B-I) of the code of ethics requires a Chartered Professional Engineer to:

42B Take reasonable steps to safeguard health and safety
42C Have regard to effects on environment
42D Report adverse consequences
42E Act competently
42F Behave appropriately
42G Inform others of consequences of not following advice
42H Maintain Confidentiality
42I Report breach of code

61. Rules 43-53 were revoked in 2016 and are therefore not considered further.

62. The evidence suggests the complaint subject matters are not trivial; the complaint is neither frivolous or vexatious, the complainant wishes action to be taken; and the complaint can still be investigated. Therefore Rules 57 b) to f) do not apply.

63. This leaves the appeal panel to consider whether Rule 57 a), no grounds for discipline under section 21 of the Act, applies. Or Rule 57 ba,) the alleged misconduct is insufficiently grave to warrant further investigation.

64. In previous findings of the Council, the standards for judging negligence and incompetence have been provided. It is found that negligence is the lower of the two bars. An individual may be found negligent but not incompetent, whereas it is unlikely that a person who is incompetent is not also negligent.

65. In *Graeme Robinson v IPENZ* as Registration Authority (Appeal Ruling 29) this Council traversed the standards to be expected of a Chartered Professional Engineer in detail from paragraph 23 to 40. Council consider that the standard enunciated at paragraph 40(b) of that decision is the standard by which an allegation of negligence against a Chartered Professional Engineer is considered under the Act. The standard is:

Whether engineering services have been performed in a negligent manner is a question of whether there has been a serious lack of care judged by the standards reasonably expected of a Chartered Professional Engineer. That standard may be informed by whether reasonable members of the public would consider such act or omission, if acceptable to the professional, were to lower the standards of the profession in the eyes

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of the public.

66. It is important to note that the appeal panel is not investigating the complaint. The appeal panel needs only to determine if there is sufficient evidence to warrant further investigation.

The Findings

67. The panel considered whether Mr B and Mr C have breached an aspect of the Code of Ethical Conduct set out in Rule 42; or have performed engineering services in a negligent or incompetent manner.

68. The panel has considered each of the grounds for appeal given in Dr A's appeal submission of 26 October 2018, with consideration to his summary of 3 December 2018.

(a) The *Adjudicator should have considered the actions of Mr B and Mr C whilst undertaking a QA review.*

Whilst the panel consider a company's internal QA/peer review process, and employment matters fall outside of the scope of the RA and CPEC, the panel consider the actions of a CPEng, undertaking an engineering review can be considered.

Dr A says the wrong file was reviewed, that the design basis of the file reviewed was the 2013 guidelines and practices, and 2014 calculations, whereas what should have been reviewed was the design based on the 2015 guidelines for parts and portions for unreinforced masonry which was available at the time [BoD 2].

Mr B *says "an internal QA procedure was followed, we are comfortable the appropriate verification was carried out".*

The Adjudicator considered *"The job of reviewing the technical details to quantify any safety risks sits with the regulatory authority (CODC), and I note Dr A has lodged his concerns with CODC".*

Whilst it is unclear what specific files were reviewed, the Panel finds the final design output including the issuing of the PS1 is appropriate.

The panel finds there are no grounds for discipline.

The panel does note however, that prior to 2016, the rules included Rule 53[5] which required a CPEng to inform others before reviewing their work. This provided the opportunity for the review to include all relevant information, some of which the reviewer may not have been aware of but may have been known to the original designer or author. Whilst this rule has been removed from the code of ethical conduct, it is still considered within the industry to be a professional courtesy.

(b) The *Adjudicator did not review all the evidence properly.*

[5] Rule 53 to not review other engineers work without taking reasonable steps to inform them and investigate.

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(I) Dr A submits that Mr B and Mr C should be subject to a higher standard of care than normal, based on an ENZ Rule.

The RA and the appeal panel's consideration is limited to consideration to the Act and the Rules (Rule 42-53), in making their decisions. Dr A's reference to an ENZ rule is not available to CPEC for consideration, and not applicable in this instance.

The panel finds no relevance of this ground to the appeal.

(II) Dr A submits that the reasoning for dismissing the PS1 complaint was incorrect, as the PS1 was not submitted to CODC.

Mr A in his complaint [BoD 4] said *"the PS1 and drawings were submitted to the client and BCA",* and later advised in his 13 August 2018 email *"…please note the PS1 has been issued to the owner but has not been issued to the Territorial Authority" [BoD 262].* In his decision the adjudicator provided an example reference only *" ……for example, if the PS1 was considered to cover work that was unsuitable it could have been withheld or withdrawn from CODC"* [BoD 269].

In considering this matter the panel have considered the PS1 form [BoD 210]. The form is issued by the design firm, to the Owner or Developer for the purpose of supplying it to the BCA, and as noted at the lower section of the form "…this statement shall only be relied upon by the BCA named above". The panel considers in the context used, the reasoning provided by the adjudicator was appropriate.

The panel finds no relevance of this ground to the appeal.

(III) Not all of the caveats identified in the DSA, the calculations and Dr A's email 13 August 2018 [BoD 261-262] were considered.

In his complaint Dr A referred to the TRR concerns, [BoD 4], specifically those related to allowing 15 years to repair the severely deteriorated stone mortar, and allowing 15 years to repair the decayed and rotting timber.

On 13 August 2018, in his email to the RA [BoD 261-262], Dr A advised the RA that *"…his complaint concerns the disqualification of the DSA because of three other caveats, the rotten roof framing, the stone wall connection to the roof, the wall connection to the upper concrete floor"* and that the DSA 35%NBS rating was based on these repair works being carried out now or in the near future.

Mr B advised he and Mr C did not share Dr A's "serious concerns" with the safety of the building [BoD 218]. *In respect to the matters he raises, the specification of the mortar for the project was discussed with the client and it was agreed that the client would obtain independent expert advice. Further it was noted on the drawings that the mortar repair would be reviewed by Business D during the strengthening work to ensure that it complied with the design assumptions made"* [BoD 218].

Dr A queried Mr B's knowledge of the project and his technical knowledge. He also advised [BoD 225] the *"foundation system appears to have failed… and so another*

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subtraction from the assigned 35% NBS DSA" [BoD 227].

The panel notes the Adjudicator has specifically addressed Dr A's complaint concerns which directly relate to the mortar and the rotten roof framing (BoD 265].

Ben Duckworth submits *"by any reading of the DSA, the 'caveats' do not require work to be done before the DSA rating of 35% is achieved. Mr C submits that it would be unethical to make a DSA conditional on any strengthening as a DSA is a snapshot in time of the building's seismic strength. The wording of the DSA itself expressly records this."*

The RA acknowledges and apologises for not forwarding the 13 August 2018 email to the adjudicator prior to his decision, but submits *"..the Adjudicator was aware of recommendation (b)[6] as it was discussed in the DSA which was provided to him"*, and also submits *"that if the Adjudicator was concerned about Mr B's response to recommendation (b), he would have addressed it within his decision".* The RA notes *"the DFR addresses recommendation (b)"*, as well as the DSA, which the client has a copy of. The RA further submits "*the evidence provided to the Adjudicator indicates that the recommendations in the DSA were addressed by Mr B and Mr C in their work on the Building E".*

The Panels reading of the DSA is:

> *"The building……. has been assessed to have a capacity of 35%NBS and is not Earthquake prone; ….the original two storied build is rated at 35%NBS, based on an assumption that the original cavity wall rubble fill within the stone walls have no cohesion or bond to the stone and that the mortar is in good condition. The mortar is weathered so the capacity of the building cannot be calculated precisely [BOD 8];*
>
> *"… the building, after all the strengthening recommendations are implemented, will have a capacity of approximately 67%NBS"*
>
> *The strengthening recommendations included:*
>
> - *Repair weathered mortar*
> - *Install stainless steel anchorages or helifix screws from the upper concrete floor to the stone walls located around the perimeter of this floor on all four sides of the two storey area as shown in Appendix B on plan B1, according to the detail sketch in Figure B2.*
> - *Replace damaged original roof framing of the 1883 building at the time when the roofing iron is due for replacement, and within 15 years for the one storey 1183 section, but now or in the near future for the two storey stone section*
> - *Install new steel anchorages between the top of the two storey stone wall and the roof framing… add 12mm ply over the repaired roof framing at the time of roof iron replacement. The installation of the anchorages from the repaired roof to the top of the one-storey stone wall section is of lower priority compared with the two storey section…."*

[6] install wall anchorage at roof and first floor and brace the tall parapets

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The panel's reading of the DFR is that it is restricted to structural strengthening above the foundation level, bracing to tall parapets and anchorage of the stone and brick walls at the roof and upper floor.

The panels reading of the documentation is that the DSA 35%NBS includes an assumption for the mortar condition, but assumes no specific repair, maintenance or strengthening of any other component of the building.

The panel finds that whilst the adjudicator did not specifically refer to all of the repair and strengthening works proposed in his decision, the evidence does not support Dr A's claim that the Adjudicator did not consider the documentation in full, or specifically did not consider the strengthening works proposed.

(c) Mr B knowingly issued a PS1 for an incomplete design

Dr A claimed Mr B knowingly issued a PS1 for an incomplete design to the client and the BCA (CODC).

In response to queries from the RA, Mr B advised:

"the PS1 was prepared by Dr A, and as he was absent from the office when it was issued, he sent an email to me (dated 29 February 2016) with the following: "The technical review of the calculations for the above referenced building has been successfully complete so you may distribute the PS1 and design statement to the client". He also advised he "was very familiar with the project and had spent considerable time overseeing it, I felt comfortable signing the PS1, and did so clearly identifying that I am the CPEng who signed, by quoting my registration number for identification purposes" [BoD 218].

Mr B emailed a copy of the said email and signed PS1, and advised *"the project is currently on hold……. Business D does not currently have a commission for the next stage"* [BoD 219].

In response Dr A queried the extent of Mr B's knowledge of the project, knowledge of strengthening design, relevant design training [BoD 222], and the appropriateness of the approval email [BoD 223]. He referenced a MBIE statement on PS1 and PS2's raising concern that the PS1 did not include an accurate design review statement, and claimed that the PS1 was not valid as it *"does not comply with stated NZSEE guidelines for buildings of this type"*, and requested that the PS1 be formally withdrawn because it can not be relied upon [BoD 226].

In a further response to questions from the RA, Mr B advised:

"I had overseen the project for a long time and knew all the details, Mr C had checked the calculations and I had discussed them with him and was satisfied that the design

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was correct. I had also reviewed the drawings myself. I was therefore in a position to be able to sign the PS1 but believed that Dr A should be noted for working on a reasonably prestigious project" & "we do not have a policy on signing PS1's when the Engineer is not present simply because it is a very unusual situation and does not normally occur. In this particular case it was important to get the information to the clients as quickly as possible. Although Dr A was absent he was well aware of the signing" [BoD 249]

The panel finds that there are no applicable grounds for discipline under s21 (1) (A)-(d) of the Act.

(d) Mr B and Mr C failed to address all the caveats in the DSA.

Mr B advised that Business D's commissioning was limited to designing the seismic strengthening, not the mortar. *……",*

Mr B and Mr C regarded the mortar issue as a specialist item which would be dealt with by experts in consultation with the NZHPT and the CODC. This is confirmed by drawing sheet S08 which included a statement saying:*" all damaged stone, mortar and repointing shall have repair designed by others, as per the Owners request, refer to specifications". " ...our advice is to have the property carefully inspected by a suitability qualified and experienced stonemason in consultation with the NZHPT and CODC and repointed to the extent that the stone work would match the design assumptions in the calculations for the seismic strengthening"* [BoD 249].

Mr B advised that they notified the owner that the roof would need to be checked and any rotten timber replaced at the time of doing the seismic upgrade [BoD 265]. The notes sheet of the Business D design documentation incorporated requirements for repairs. Mr B and Mr C received a copy of the scope of work from Business I which includes replacement of rotten framing and installation of plywood diaphragm (BoD 271-272).
Both the DSA and the DFR cover the need for connection of the walls and the bracing of the tall parapet.

The evidence indicates that Mr B and Mr C did not disregard the recommendations in the DSA regarding mortar, decayed roof framing, or wall connections.

The panel finds the evidence does not support Dr A's claim and finds there are no applicable grounds for discipline under S21 (1) (a)-(d) of the Act.

(e) the DSA is flawed, Mr B and Mr C have incorrectly relied on it, the building is EQ prone.

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Whilst Dr A first raised the disqualification of the DSA on the basis of the inclusion of caveats on 13 August 2018, the panel consider his reference to the DSA being flawed and the building being EQ prone to be a new complaint.

The panel finds no relevance of this ground to the appeal.

(f) Mr B and Mr C failed to ensure the strengthening works required to achieve 67%NBS were undertaken.

The panel consider this complaint to be a new complaint. The panel finds no relevance of this ground to the appeal.

(g) Mr B and Mr C have incorrectly asserted to the CODC.

The panel consider this complaint to be a new complaint. The panel finds no relevance of this ground to the appeal.

(h) The Owners have applied an unsuitable coating of plaster mortar without consent by Council and Mr B and Mr C have taken no action in response to this.

The panel consider this complaint to be a new complaint. The panel finds no relevance of this ground to the appeal.

(i) Engineering NZ did not distribute all relevant documents to Dr A.

CPEC have no jurisdiction over the RA's complaint process. The panel notes the RA has offered to discuss the process outside the CPEC appeal. The panel finds no relevance of this ground to the appeal.

(j) Mr C admitted he never reviewed the DSA.

The panel consider this evidence to be new evidence. The panel finds no relevance of this ground to the appeal.

(k) Mr C made repeated miscalculations and demonstrates misunderstanding of the Building Code requirements while testifying to the Employment Relations Authority.

The panel consider this evidence to be a new evidence. The panel finds no relevance of this ground to the appeal.

(l) Business D issued a DSA for Building H which also demonstrated incompetence.

The panel consider this evidence to be a new complaint. The panel finds no relevance of this ground to the appeal.

(m) A peer review by Others shows the building is EQ prone.

The panel considers this evidence to be new evidence. The panel finds no relevance

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of this ground to the appeal.

Outcome

69. The panel declines the appeal on the basis outlined in paragraph 68.

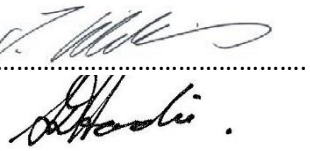
70. The panel considers that all costs associated with this appeal should fall where they lie.

Dated this 26 day of February 2019

Ms Sandra Hardie ……
Principal

Ms Rebecca Knott ……

Mr Jon Williams ……



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