EDITORIAL NOTE: NO SUPPRESSION APPLIED

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2015-004-001273
[2016] NZDC 26199

IN THE MATTER OF	CHARTERED PROFESSIONAL ENGINEERS OF NEW ZEALAND ACT 2002
BETWEEN	WOJCIECH KLEPACKI (VOYTEK KLEPATSKI) Appellant
AND	INSTITUTION OF PROFESSIONAL ENGINEERS NEW ZEALAND (AS THE REGISTRATION AUTHORITY) Respondent

Hearing: 14 December 2016

Appearances: Appellant appeared in Person
M Broad for the Respondent

Judgment: 22 December 2016

RESERVED JUDGMENT OF JUDGE P A CUNNINGHAM

Introduction

[1] This is an appeal from a decision made by the Chartered Professional Engineers Council ("CPEC") dated 6 August 2015. That was the last step in a complaints process, a complaint made by the owners of a cliff-top property on Kawau Island.

Background

[2] In 2004, Mr Klepatski, who is a chartered professional engineer was engaged to provide engineering services to Mr Andrew Stone and Ms Gillian Jones for the

design of their house at Lot 18, 15 Elizabeth Point Road, South Cove, Kawau Island.

[3] Mr Klepatski undertook the structural design and prepared the building consent drawings. A geotechnical engineer, Dr John Hawley, produced a design for the wastewater treatment and disposal system.

[4] Mr Klepatski and Mr Stone went together to lodge the building consent with the Rodney District Council. The Council issued a building consent on 25 January 2005. There were two alternatives for the laying of the foundation. I will come back to this issue later.

[5] On 8 July 2008, the Rodney District Council issued a Code Compliance Certificate for the work covered by the building consent.

[6] On 29 January 2011, there was a heavy rainfall event as a result of Cyclone Wilma. This is because damage to the house and surrounding property was noticed by the owners after 29 January 2011. A claim was made to the Earthquake Commission and on 16 February the engineering firm Tonkin & Taylor inspected the property. The Earthquake Commission declined the claim on the basis that the damage was not caused by a natural land slip or a natural disaster.

[7] Following another adverse weather event in March 2012, further damage was noticed. This involved movement in the house, in particular the deck. Ashby Consulting engineers issued a report in May 2012 and, as a result of that report, a decision was made to move the house five metres back from the cliff.

[8] The Auckland City Council issued a building consent to re-site the house in January 2013 and the work has been concluded.

Complaint – Background

[9] On 30 September 2013, a complaint from Mr Stone and Ms Jones was received by the Institute of Professional Engineers of New Zealand against Mr Klepatski. The complaint process took the following steps. —

[10] It was initially assessed by a complaints research officer ("CRO") who recommended that the complaint should be referred to an investigating committee ("IC").

[11] On 22 November, Adjudicator Bunting produced a report agreeing with the CRO's recommendation that the complaint should be referred to an IC.

[12] On 3 December 2013, an IC was appointed.

[13] The IC's preliminary report was sent to both parties for comment and further submissions.

[14] On 9 June 2014, the IC produced its final report which determined that the complaint should be referred to a disciplinary committee ("DC"). A DC was formed and the hearing took place over two days on 4 and 5 December 2014.

[15] On 4 February 2015, the DC released its decision.

[16] The decision of the DC found that:

(i) Mr Klepatski had contravened rule 45 of the Code of Ethical Conduct of Engineers. Rule 45 stated that:

> A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activity.

This related to Mr Klepatski not providing the details of his indemnity insurer to the owners.

(ii) The DC also found that Mr Klepatski's threat regarding the status of the Code Compliance Certificate ("CCC") were inappropriate for a chartered professional engineer and that his walking off the building site so that would compel his clients to engage a geotechnical engineer could also be considered a breach.

(iii) The DC found the rule 48(1) was also breached. That requires:

> 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 the advice of those significant consequences.

This relates to an allegation that Mr Klepatski did not take reasonable steps to inform Mr Stone and Ms Jones about the consequences of not engaging a geotechnical engineer.

[17] Mr Klepatski appealed to the CPEC. CPEC did not uphold either breaches of rule 45. However, it upheld Mr Klepatski's failure to comply with rule 48.

[18] The penalties of the DC were to censure Mr Klepatski and fine him $1000 and require him to make a contribution of $12,500, being approximately 50 percent of the actual costs incurred by the Chartered Professional Engineers Institute. The DC decided not to publish the names of the parties.

[19] The CPEC upheld these penalties and costs orders but made a decision that when publishing the decision on the websites of the Council and the Registration Authority, that the parties names should be published.

[20] Mr Klepatski appealed to this Court.

The appeal to this Court

[21] Appeals against decisions of CPEC must be conducted by way of a re-hearing (see s 37(4) Chartered Professional Engineers of New Zealand Act 2002 and District Courts Rules r 18.19). That means that I must consider the evidence presented in the previous proceedings as it appears on the record and any other evidence admitted in the course of the appeal. There was no further evidence admitted in this Court.

[22] Mr Klepatski has the onus of satisfying me that I should differ from the decision of the CPEC (see *Austin, Nichols & Co Inc v Stichting* Lodestar.[1])

[23] A Project Information Memorandum from the Rodney District Council dated 25/01/05 addressed to Mr Stone and Ms Jones stated as follows:

> If the site is otherwise suitable for foundations designed in accordance with the requirements of NZS 3604:1999 (with respect to stability, etc), you may choose to adopt the following alternative solution and amend your drawings accordingly, or you may wish to engage the services of a suitably experienced and qualified Geotechnical Engineer to carry out a geotechnical appraisal of the site and specific engineering foundation design.
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> Alternative Solution 1: Standard NZS 3604 type footings founding the greater of a minimum of 600mm depth below finished ground level or 450mm depth below cleared ground level with a minimum width of 300mm.

Hearing before the Disciplinary Committee

[24] Mr Andrew Stone gave evidence to the DC. He said:

> …Mr Klepatski did not insist that we get a geotech or spell out the consequences of ignoring his advice.

[25] Mr Klepatski made a submission to the DC and also to me that he had told the client many times that they needed to get a geotechnical assessment in relation to the foundations.

[26] In a statement Mr Klepatski made to the DC at the beginning of the second hearing day he said:

> …from the very first meeting onsite with the involvement of Don and Maxine (Dunning) and both complainants. I very clearly declined, declared that I was not a geotechnical engineer and declined geotechnical involvement.

He went on to say:

> Now what I offered them and what was expected from me was that I would work with them to economise on the project. He referred to the cost of building inspections as an example. To make sure as much as possible was achieved at each inspection to minimise cost.

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[1] [2007] NZ (SC) 103.

[27] Later on Mr Klepatski stated:

> …I emphasised that the stability part was outside the area of my expertise and had to be verified by an expert geotechnical engineer… . I undertook to take part in discussions with the Council to convince them to depart from the strict procedure of requiring a geotechnical report upfront and to allow onsite amendments without additional building consent application…

[28] On 4 February 2005, Mr Klepatski went to the site at the request of the project manager, Ms Dunning, (who was the architect and project manager for the construction of the house) at which he refused to issue a Producer Statement in relation to the foundations. He says that both Mr Stone and Ms Jones were at the meeting when he stated that they needed to get a geotechnical report.

[29] Mr Stone said that neither he nor Ms Jones were present that day. Ms Jones said that she did not recall being there, but accepted that she could have been.

[30] It is clear from the evidence that Mr Klepatski never professed to be a geotechnical engineer and that his opinion was that geotechnical advice should be obtained in relation to the foundations. Even if this was unclear to the owners, it appears from his evidence to the DC that Mr Klepatski made this known to Ms Dunning. Mr Klepatski signed off on the building structure of the house but the producer statement he signed omitted to include the foundations (p 54 received by RDC 6/6/2008).

[31] Much was said at the appeal hearing before me by Mr Klepatski about telling Ms Dunning and/or the owners that, in his view, geotechnical advice was necessary for the foundations. When I asked him precisely what he said about this part, his response was to tell me that he told them that they needed to get a geotechnical appraisal of the site.

[32] The problem with that response (if I accepted Mr Klepatski's evidence on this point) is that it does not comply with rule 48.

[33] Rule 48 says:

> (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.

[34] By his own account, Mr Klepatski did not take any steps to inform Mr Stone or Ms Jones of the consequences of not accepting his advice to obtain geotechnical input into the design of the foundations. (emphasis added)

[35] There were two reasons why a geotechnical appraisal of this cliff top property was necessary.

[36] The first is that there was clay on the land that was the building platform. Clay can expand when it gets wet. This is what is known as an expanding soil.

[37] The next was that there were trees all over the property and tree roots can cause problems with foundations. Indeed, Mr Klepatski told me that what happened in this case is that in one or more parts of the foundation, tree roots rotted which resulted in movement.

[38] This was a residential house on a cliff top. That meant that if the foundations fail in some way, the likelihood of there being an adverse affect on the health or safety of people or the prospect of damage to the property is obvious.

[39] As I understood his position, Mr Klepatski accepted that in another circumstance he would put his views in writing. Having said that, he disagreed that r 48 required his advice to be in writing.

[40] In my view, it does and it is a shame that the rule does not say so. Mr Klepatski told me that a subsequent new version of the rules, which is less than six months old, still does not have a requirement for the advice to be in writing.

[41] One obvious benefit of the advice being in writing is that there is no mistake about what was said by the engineer. Putting such advice in writing literally puts it in black and white to the people who receive the advice. A formal step such as an advice letter reinforces the seriousness of the consequences of not following the advice.

[42] In a situation such as this, the detail of the advice of the consequences of not having a geotechnical appraisal would be technical in nature, at least in part. One could not expect a lay client to understand the detail, unless it was in writing. That written material should explain the technical aspects in lay language as far as possible.

[43] I therefore find that, based on Mr Klepatski's own statement of what he said to the clients, he did not comply with rule 48 and I agree that CPEC's decision in this regard was correct.

[44] Mr Klepatski stated that he believed that the owners had obtained a geotechnical engineering advice because of something that occurred at the site inspection on 4 February 2005. He referred to a document he had prepared entitled Part B2 – submission dated 27/04/14 (which I assume was prepared before the IC's final report).

> The Building Consent was impatiently awaited for by all involved, as they were very keen to start construction (some works had been already carried out). I was asked by Gillian Jones to send the documents to Maxine. I refused and on my insistence Gillian collected the consents from my office and I clearly and strongly advised her that I had not and would not agree to any role and involvement to do with the ground conditions and unless their geotechnical engineer or someone else adopted the alternative solution it was the time to carry out a geotechnical investigation.
>
> Gillian assured me that it would be taken up with the counsel and there was no need for me to do it myself.
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> A few days later Maxine came to my office and asked me to come to the island and inspect the excavations for the foundations. It transpired that none of what I discussed with Gillian was conveyed to Maxine and Don. I refused and explained my reasons again. Maxine got frustrated, said that she had no influence on Andrew to spend money on a geo engineer, that the works were now in limbo and insisted that I come to the site, mainly for an opportunity for us all to meet again and sort things out, but also she asked for my on site structural decisions to do with changes to spans and some

> bearers in order to bridge them over tree slumps. And she asked me to lend Don the ground probing equipment. I reluctantly agreed to go to Kawau Island the next day. Most of shallow footings had been already excavated, as per the Building Consent drawings, without reference to the requirements of the PIM. The machine *"had been and gone"*. I reiterated that I was not signing anything and specifically not adopting the alternative solution, as it would have automatically made me say that the site was stable, which I was not prepared to do. Also, I pointed to a huge pile of earth deposited to the East of the house, on the edge of the cliff. I asked why it was there. The answer offered by Gillian was that it was to rise the ground there. To my question whether their geotechnical engineer had seen it and was happy with it her answer was yes. Andrew was standing next to her and didn't contradict her).

[45] Mr Klepatski claimed that this statement by Gillian Jones meant he did not have to comply with rule 48 because the owners had obtained geotechnical input.

[46] There are some difficulties with this statement as follows:

(a) Mr Stone's evidence is that he was not present at the meeting onsite on 4 February 2005;

(b) Ms Jones did not recall being there;

(c) Mr Klepatski knew the date before that Mr Stone would not listen to Ms Dunning's advice to obtain the services of a geotechnical engineer. Accordingly how could a geotechnical engineer have been engaged and made the appropriate appraisal overnight;

(d) Mr Klepatski declined to sign off on the foundations in 2008. He did not say this was because he believed a geotechnical engineer had signed off on them.

[47] For the foregoing reasons, I do not accept that Mr Klepatski believed that the owners had engaged a geotechnical engineer in relation to the foundations.

The penalties and costs

The $1000 fine

[48] This was imposed by the DC for two breaches of rule 48 and the breach of rule 45. It was a modest fine for those breaches in my view (the maximum is $5000).

[49] CPEC gave no reason for not decreasing the fine although it allowed the appeal on the rule 48 issues.

[50] There should be a reduction. Taking into account the less seriousness nature of the rule 45 breaches compared to the more serious nature of the rule 48 breach, I reduce the fine to $750.

Costs

[51] Following the same logic, the costs should also be reduced. $10,000 is a sufficient contribution to costs.

Publication

[52] I agree with the decision of CPEC on the publication issues, for these reasons:

(a) There have been no suppression orders made in this appeal and therefore Mr Klepatski's name is already in the public domain;

(b) The Authority is required to record the fact Mr Klepatski has been disciplined and his name is therefore in the public domain;

(c) To not name Mr Klepatski may cast suspicion on other engineers;

(d) To publish Mr Klepatski's name is consistent with the clear purpose of rule 48 which is protection for the public who use the services of a professional engineer.

Result

[53] The appeal is allowed in part to reduce the fine to $750 and the costs to $10,000. In all other respects the appeal is dismissed.

Dated at Auckland this day of December 2016 at am/pm.

P A Cunningham
District Court Judge