



## Determination 2020/023

# Regarding the refusal to issue a code compliance certificate for building work at 6 Harper Way, Whakamarama

### Summary

This determination considers the authority's decision to refuse to issue a code compliance certificate for a new dwelling because it was not satisfied that the completed work complied with the Building Code. The compliance decision rested on the authority's view it was unable to accept producer statements from an engineer who had inspected the completed work; the statements are in respect of the verification of the ground bearing and the completion of a surface water soakage trench.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2 The parties to the determination are:
  - B Cameron, who was the chartered professional engineer involved with the building work and is the applicant in this determination ("the applicant")
  - L and V De Koster, who are the owners of the property where the building work that is the subject of this determination was carried out ("the owners")
  - Western Bay of Plenty District Council carrying out its duties as a territorial authority or building consent authority ("the authority").
- 1.3 The determination concerns the authority's refusal to issue a code compliance certificate for the building work on the basis that it could not be satisfied on reasonable grounds that the building work complied with the building consent.
- 1.4 Accordingly, the matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers of decision in refusing to issue the code compliance certificate for the building work.

<sup>1</sup> The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry is available at [www.building.govt.nz](http://www.building.govt.nz).

<sup>2</sup> Under section 177(1)(b) and 177(2)(d) of the Act.

- 1.5 In making my decision, I have considered the parties' submissions and the other evidence in this matter. I have not considered the compliance of any other aspects of the building work other than those directly related to the matter to be determined.

## 2. The building work

- 2.1 The owners' property is a flat section in a rural residential area close to Tauranga. The building work that is the subject of this determination involved constructing a single-level four-bedroom dwelling on the property. The floor slab is a commonly-used specifically-engineered proprietary reinforced concrete foundation system comprising expanded polystyrene formers located on a 1.2m two-way grid.
- 2.2 A geotechnical assessment report, which formed part of the consent documentation, limits the ultimate limit state (ULS) bearing strength of the site to 125kPa. The dwelling was designed to have a ULS bearing of 300Pa. The report noted no concerns with respect to slope stability and potential hazards for this site, and also noted that surface water could be dealt with by way of onsite soakage.
- 2.3 The building work was carried out pursuant to a building consent (No. BC92252), issued by the authority on 17 January 2019.
- 2.4 As part of the consented plans and specifications for the consent, on 24 October 2018 the applicant issued a Producer Statement – Design ("PS1") in respect of the 'Civil Design of the on-site storm-water management and disposal system'. The applicant was a chartered professional engineer, registered as a chartered member with Engineering New Zealand ("Engineering NZ"), at the time that the PS1 was issued.
- 2.5 Accompanying the consented plans was a memorandum by the authority advising the owners of the inspections required. This included an inspection of 'the clear ground or the excavated ground and ground condition of the building platform' before the formwork and hard fill for the house floor and foundations were carried out.
- 2.6 On 8 February 2019, the applicant issued a Producer Statement – Construction Review ("PS4") in respect of the 'Building foundation ground preparation construction investigation and certification', certifying its compliance with Clause<sup>3</sup> B1 Structure of the Building Code. The site inspection record attached to the PS4 noted that the applicant had inspected the building platform and found that there was 'good ground', with '[Ultimate] Bearing > 300kPa'; and confirmed that it was 'OK to proceed with construction'. Plans and photographs of the building work were also attached to the PS4. According to the authority, this PS4 was required because the owners had failed to call for an inspection of the building platform, as required by the consent; it does not ordinarily require a PS4 to verify ground bearing. The authority inspected and passed the concrete floor of the dwelling on 20 February 2019.
- 2.7 On 25 March 2019, the applicant issued a PS4 in respect of 'On-site [surface water] management / disposal system construction investigation and certification', certifying its compliance with Clause E1 Surface water. The site inspection record attached to the PS4 noted that the applicant had inspected the surface water system, and observed 2.0m(w)x1.2m(d)x2.2m(l) trench, with a 'clean natural sandy/silt subgrade', a fabric filter wrap, and 200mm drainage rock, in accordance with the PS1 of 24 October 2018; and confirmed that it was 'OK to proceed'. Plans and photographs of the building work were also attached to the PS4. (For ease of

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<sup>3</sup> Unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

reference, I will refer to the first PS4 of 8 February 2019 as the “PS4 – Ground preparation”; and the second PS4 of 25 March 2019 as the “PS4 – Soakage trench”. The applicant was still registered as a chartered professional engineer at the time that both PS4s were issued.)

- 2.8 Construction of the rest of the owners’ house then proceeded and was completed by August 2019. The owners applied for a code compliance certificate on 22 August 2019. Included with the application were the two PS4s issued by the applicant. The authority conducted a final inspection of the building work on 27 August 2019.

### **3. Background**

- 3.1 On 25 June 2019, the applicant was removed from the chartered professional engineers register. The applicant has not given the reason for his removal from the register, but has stated that the removal is ‘currently under appeal’ (as at 4 May 2020).
- 3.2 In late July 2019, the authority became aware (through events unrelated to this determination) that the applicant was no longer registered as a chartered professional engineer. The authority subsequently approached Engineering NZ to find out why the applicant had been removed from the register, but was advised the reason was confidential. The authority also asked the applicant and the applicant’s solicitor for the reason, but received no reply.
- 3.3 At this point, the authority had numerous active building consents (unrelated to the current determination) where the applicant had provided either a PS1 or a PS4, or other professional input, in relation to the consents. The authority was concerned about the status of these producer statements and any risk associated with accepting work submitted by the applicant and sought legal advice. The authority formed the opinion that it could no longer rely on these producer statements to help it ‘reach a decision on whether a code compliance certificate could be issued or not’. This was because the applicant was no longer a chartered professional engineer and so, in the authority’s opinion, no longer ‘held the status required to issue producer statements in New Zealand’.
- 3.4 The authority considered a code compliance certificate could be issued in such situations if it also inspected the building work certified by the applicant, or if the applicant’s producer statements were peer reviewed by an independent chartered professional engineer.
- 3.5 On 8 August 2019, the applicant’s solicitor wrote to the authority advising that although it was accepted that the applicant could no longer practice as a chartered professional engineer, there were no defects with his producer statements and the authority should accept them unless it can prove that the work is non-compliant. The authority responded that, in the absence of an explanation for why the applicant had been removed from the register, the ‘only reasonable inference to draw is that [the applicant] no longer meets the standard required of a chartered professional engineer’.
- 3.6 Following this, peer reviews were obtained for approximately 20 PS4s that the applicant had issued when he was still a registered chartered professional engineer, but which had not been presented to the authority until after he had lost his registration. In all of these cases, the peer reviewer confirmed the validity of the PS4s and the authority proceeded to issue a code compliance certificate on this basis.

- 3.7 On 17 September 2019, the authority wrote to the owners declining to issue the code compliance certificate for their dwelling. The grounds given for this decision were that the applicant had ‘recently been removed from the [Engineering NZ] register’ and that as a result the authority could not ‘be satisfied on reasonable grounds that the building work subject to the [PS4 – Ground preparation] complies with the building consent’. The letter suggested various ways that the owners could resolve the issue, including applying for a determination, and arranging to have the PS4 peer reviewed and the building work’s compliance confirmed by a registered chartered professional engineer.
- 3.8 On 11 March 2020, the applicant wrote to the authority querying this decision. The authority replied in an email dated 12 March 2020, which confirmed (in essence) that it would not accept the applicant’s PS4 – Ground preparation and that as the matter remained unresolved, it could not issue a code compliance certificate.
- 3.9 On 18 March 2020, the applicant applied for a determination about the authority’s decision to refuse to issue the code compliance certificate. The Ministry requested further information from the parties and, in response to their replies, the application for determination was broadened to also take into account the PS4 – Soakage trench. The application was accepted on 29 April 2020.

## **4. The parties’ submissions**

### **4.1 The applicant**

- 4.1.1 The applicant made a submission with his application for a determination. The submission outlined the issue and set out the applicant’s view that:
- the PS4 – Ground preparation showed ‘on reasonable grounds’ that the building work complied with the building consent
  - the PS4 was provided at the appropriate time in the construction process and met all of the authority’s requirements
  - it was unreasonable for the authority to now require further proof of compliance.
- 4.1.2 Arrangements had been made by the builders on several projects constructed over the same period as covered by the applicant's PS4 to be independently reviewed for the express purposes of signing off the construction of their consented buildings. The applicant noted:
- These 20 independent reviews have not found any reason [the authority] cannot accept the PS4s completed by the suitably qualified CPENG Engineer [the applicant] for the foundation preparation ground checks that were undertaken in the same manner as this in question under this determination.
- 4.1.3 The applicant concluded that the authority had failed to correctly apply the requirements in the Act and to ‘reasonably satisfy itself’ that the building work complied with the building consent.
- 4.1.4 With the submission, the applicant enclosed copies of:
- the consented plans for the building work
  - correspondence between the parties
  - the PS4 – Ground preparation

- a geotechnical report relating to the subdivision where the owners' property is located
- independent reviews by a third-party engineer of 20 other PS4s that the applicant had issued between August and November 2019.  
Note: these reviews concluded that for all 20 cases no reason was found why these PS4s should not be accepted by the authority.

4.1.5 The applicant made two further submissions dated 19 and 26 May 2020 in response to the authority. The main additional points made in these submissions are as follows:

- The applicant has been working as a professional engineer for nearly 30 years, undertaking both structural and geotechnical engineering work.
- The authority has already allowed 'subsequent dependent building work to proceed' based on the applicant's PS4s, and had allowed the owners to rely on these.
- The applicant had not refused to disclose the reasons for his removal from the register; the authority had been advised these reasons were confidential and under appeal.
- The 20 peer reviews had been completed for 'separate builds for the same standard of works and found to have been fully compliant with the Building Code'.
- The authority's requirement that the PS4s in the current case be peer reviewed 'was not reasonable or appropriate'.
- The applicant has not represented himself as a chartered professional engineer since being removed from the register and provided an example of a PS1 for another property as evidence of this. The PS1 was accompanied by an inspection schedule, sketch plans, and the form "Memorandum from licenced building practitioner"  
(I note that the PS1 form provided has a 'box' by the CPEng number field that was not 'ticked', but the field includes the applicant's CPEng registration number.)
- "This determination hinges on whether [the authority] is reasonable to impose an additional arbitrary sanction retrospectively now, upon the acceptance of a Producer Statement. Particularly given the evidence provided in other similar requested *reviews*, that the sanction is of no effect."

## 4.2 The authority

4.2.1 The authority made a submission received on 18 May 2020 (but dated 7 May 2020). The submission set out the background to the dispute, and summarised the authority's past relationship and dealings with the applicant in his professional capacity as a chartered professional engineer. These dealings had been extensive, and included building consent and code compliance certificate applications, unrelated to the present matter. The authority acknowledged that the applicant was known to them, and prior to the events that had given rise to the determination application, was a chartered professional engineer and it had relied on his 'advice, expertise and design' in relation to the owners' building work and for similar work elsewhere.

- 4.2.2 In its submission, the authority also explained how it had become aware of the applicant's removal from the register, and of other matters that in its view cast doubt on the applicant's professional competence as an engineer. This led the authority to seek legal advice concerning its ongoing dealings with the applicant and whether it needed to adopt a 'more prudent stance' in relation to the applicant's producer statements.
- 4.2.3 The authority set out what it saw as the main issue in the current matter, namely that it was being asked to rely on PS4s signed by the applicant when he was still a registered chartered professional engineer, but not provided to the authority until after his registration had been removed.
- 4.2.4 The submission went on to consider the law that applies to authorities when considering applications for code compliance certificates, and the role that 'assistance from engineers' plays in helping the authority discharge its responsibilities under section 94 of the Act. The authority stated that, with respect to producer statements, it referred to Engineering NZ's Practice Note 1: Guidelines on Producer Statements<sup>4</sup>. It also followed the advice of the High Court<sup>5</sup>, where the court set out the types of factors that an authority should consider when deciding whether to rely on or accept a producer statement.
- 4.2.5 With respect to the applicant's failure to advise why he had been removed from the register, the authority considers that the 'reasonable inference' was that it was because of disciplinary or quality issues, and this in turn gave the authority 'reasonable and justifiable concern' that the applicant's work to establish compliance, and the PS4s certifying it, might not be 'accurate' or 'reliable'. In these circumstances, the authority considered that:
- ... if the [authority] issued a code compliance certificate simply in reliance on [the applicant's] statements without any consideration whatsoever of the expertise, qualifications or circumstances behind the issuance of that statement, then the [authority] does not consider it would properly be discharging its duties and obligations under the Act ... the [authority] has not and did not accept the producer statement without question. It has reasonably and appropriately challenged the accuracy of the statement given [the applicant's] removal from the register of chartered professional engineers.
- 4.2.6 The authority concluded that it had acted 'reasonably and appropriately' in refusing to issue the code compliance certificate, in light of the applicant's removal from the register of chartered professional engineers and his refusal to explain that removal; and that if the applicant's PS4s were peer reviewed, it would accept the findings of the peer reviewer.
- 4.2.7 With its submission, the authority supplied copies of:
- the property file for the owners' property
  - correspondence with the owners and the applicant's solicitor
  - media articles mentioning the applicant
  - Engineering NZ's guidance on producer statements.
- 4.2.8 The authority made a further submission dated 21 May 2020, in response to the applicant's further submissions. Additional points made in this submission were that:

<sup>4</sup> Engineering NZ and the Association of Consulting and Engineering New Zealand (2014) *Practice note 1: Guidelines on producer statements* Version 3, January 2014.

<sup>5</sup> *Body Corporate 326421 v Miller & Ors [2015] NZHC 862*

- the authority still had not been provided with the reasons for the applicant’s removal from the register which did not help its assessment
- the processes put in place have allowed the applicant to continue to provide engineering services.

## **5. The draft determination and responses received**

5.1 A draft of this determination was issued to the parties for comment on 10 July 2020.

5.2 The applicant accepted the draft with non-contentious comments on 23 July 2020. The applicant noted corrections to the draft and advised that the foundation system was “designed to have an un-factored ULS of 300kPa” and noted that he did not arrange the independent reviews as this was arranged by the builders for the respective building consents.

5.3 The authority did not accept the draft. In a response dated 23 July 2020, the authority noted (in summary):

- the authority does “not ordinarily require a PS4 for ground bearing” and it “accepts statements of expert opinion”
- the authority’s concern was not only on the status of the producer statements, it also “covered the risk of accepting work submitted by the [applicant]”. The authority referred to the process it had followed which included evidence “in the community” and how the issue was being considered by a neighbouring authority; the neighbouring authority had adopted a similar approach to the authority
- the authority’s “process was adopted as a last resort and after careful consideration of various sources as well as after obtaining legal advice” and it had provided options to the parties on how to resolve the matter
- had the applicant disclosed the reasons for his removal from the register, the authority “could have considered those reasons to determine whether the grounds for removal are ... relevant” to an assessment of compliance. The authority had been “maintaining a review of all work submitted by the [applicant] prior to his removal from the register”
- the authority “has not interpreted the [Engineering NZ] guidelines to mean that only registered chartered engineers are able to provide producer statements”, but rather the guidelines provided a sound basis for the acceptance of such statements.

5.4 The owners accepted the draft determination without comment on 27 July 2020.

## **6. Discussion**

### **6.1 General**

6.1.1 The applicant has applied for a determination about the authority’s refusal to issue a code compliance certificate, and specifically about whether the PS4 – Ground preparation dated 8 February 2019 provided ‘reasonable grounds to demonstrate compliance with the Building Code’. In response to a request from the Ministry, the determination has been extended to also take into account the PS4 – Soakage trench

- 6.1.2 The dispute arises because the authority has refused to issue a code compliance certificate for the building work, on the grounds that the PS4s issued by the applicant were submitted to the authority as part of the code compliance documentation after the applicant had ceased to be registered as a chartered professional engineer. In the authority's view, this means it is unable to rely on the PS4s, and hence it does not have reasonable grounds to be satisfied that the building work complies with the building consent, as required by section 94.
- 6.1.3 Accordingly, the question I must consider is whether the authority was correct to refuse to issue the code compliance certificate on this basis. In deciding this, I must also consider the status of the PS4 certificates, including the impact that the applicant's loss of registration had on their validity, and whether the authority had other evidence available to it on which to assess the compliance of the completed building work.
- 6.1.4 The relevant section of the Act is section 94, which sets out the matters that a building consent authority must consider in deciding whether or not to issue a code compliance certificate. The relevant provision in the current case is section 94(1)(a).
- 94 Matters for consideration by building consent authority in deciding issue of code compliance certificate**
- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
- (a) that the building work complies with the building consent; and ...
- 6.1.5 In my view, the authority's refusal to accept the PS4s as evidence of compliance raises two main issues. The first is a general issue about the status of PS4s and what matters an authority should consider when it has concerns about whether a PS4 should be relied on. The second is the weight attached to the PS4 in the current case and what other considerations and evidence, if any, the authority should have taken into account in making its decision under section 94.

## 6.2 The status of producer statements

- 6.2.1 Turning to the first issue concerning the status of PS4s, the applicant's solicitor has correctly identified (in its correspondence with the authority) that PS4s do not hold any particular status under the Act. Although an authority may request a PS4, it cannot require that one be provided, and cannot refuse to issue a code compliance certificate just because one has not been supplied (provided of course that there is other evidence of compliance available). Likewise, an authority is not obligated to accept a producer statement just because one has been provided.
- 6.2.2 In practice PS4s are widely relied upon by building consent authorities in exercising their powers in relation to both building consents and code compliance certificates, and form a vital part of consenting and compliance processes. The authority has helpfully referred to Engineering NZ's guidelines on producer statements, which provide useful information for authorities on accepting producer statements and the degree of reliance that authorities should place on them.
- 6.2.3 So, for example, in paragraph 6, the guidelines consider the degree of reliance that authorities should place on PS4s when issued by chartered professional engineers and the relevance of the PS4s author's registration in this process<sup>6</sup>:

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<sup>6</sup> Engineering New Zealand and Association of Consulting and Engineering New Zealand. (2014). *Practice note 1: Guidelines on producer statements*. Version 3, January 2014: p. 11.

These notes are principally for guiding the BCAs and building practitioners who are required to review and, if appropriate, accept PS1s, PS2s and PS4s that have been issued by Chartered Professional Engineers.

- To assess what appropriate level of reliance they should place on producer statements, BCAs should have a systematic approach to:
  - Assessing the nature, complexity, risk and importance of the work
  - Confirming the competence of the author of the producer statement
  - Considering the form and content of the producer statement
- When dealing with Chartered Professional Engineers BCAs should use the relevant statutory register to help:
  - Confirm a current competence and good ethical standing, as determined by the registration authorities
  - Identify whether registration has been suspended or placed in abeyance
  - Identify disciplinary actions taken against an author
- The term Chartered Professional Engineer is a statutory professional title with its use controlled by a Registration Authority. To use the title the professional must have been assessed with regard to their qualifications, experience, self acknowledged competency and ethical behaviour. ...
- BCAs are encouraged to use information on these statutory registers to help assess producer statement authors' competence and suitability.

6.2.4 The authority has interpreted these guidelines as providing a sound basis for the acceptance of producer statements. Producer statements can be issued by a wide-range of construction professionals, and there are no particular restraints around the qualifications or registrations that those professionals must have; producer statements can be accepted from people other than registered chartered engineers.

6.2.5 With respect to engineer's producer statements, the author's registration as a chartered professional engineer (or the lack thereof) will affect the reliability of the statement and the weight that an authority will afford it in making its overall assessment of compliance. However, it will not affect the engineer's ability to issue the statement in the first place. (So, for example, the applicant in the current case can continue to provide PS4s even though he is no longer registered. What he cannot do is represent that he is providing the PS4 as a registered chartered professional engineer.)

6.2.6 The Ministry's own guidance on producer statements reinforces the advice given by Engineering NZ that authorities must use their judgement in deciding whether to accept producer statements and how much weight to place on them. This will include looking to the credentials, experience and competence of the author<sup>7</sup>.

Producer statements can help support building consent applications (and code compliance certification) so long as the [authority] accepts them as accurate and reliable...

In considering whether to accept a producer statement, [an authority] will normally assess the credentials of the author to ensure that person has the appropriate experience and competence in their particular field of expertise and make their own inspections of the building work.

Producer statements are typically used for specialist work, such as engineering, or where there is a proprietary product which is installed by appointed contractors.

<sup>7</sup> Ministry of Business, Innovation and Employment. (2015). *Producer statements*. Retrieved from: <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/>

Aspects of this work will be outside the [authority's] in-house expertise and a producer statement can assist the council when they are determining whether the building work complies with the Building Code. [Authorities] will use their judgement when considering producer statements and how much weight to give them.

6.2.7 This question of whether or not to accept a producer statement is one that authorities should turn their minds to for every producer statement, not just those where, as in the current case, there may be reasons to question their reliability. This was recognised by the court in *Body Corporate 326421 v Miller & Ors*, as cited in the authority's submission, where the court stated<sup>8</sup>:

It would not be appropriate for a territorial authority to accept any producer statement without question. The extent to which a particular producer statement should be relied on in considering whether code requirements had been met would depend on all relevant circumstances. These would include, for example, the skill, experience and reputation of the person providing the statement, the independence of the person in relation to the works, whether the person was a member of an independent professional body and subject to disciplinary sanction, the level of scrutiny undertaken and the basis for the opinion. The territorial authority would also need to consider any other information relevant to whether the works had been carried out to an appropriate standard and could be expected to meet code requirements.

This would include the skill, experience and reputation of the party carrying out the works, the complexity of the works, the likely consequences of noncompliance and whether any concerns had arisen regarding the quality of the works. Ultimately, the territorial authority was only entitled to issue a code compliance certificate if it was satisfied on reasonable grounds that the building works complied.

6.2.8 I have cited the High Court's judgment and the Ministry's and Engineering NZ's guidance at some length, because from them a useful list emerges of the types of matters that authorities may consider when they have doubts about a particular producer statement, either because of concerns about the competence of the statement's author, or for other reasons. The list is not definitive, but is a good starting point that authorities can add to depending on the circumstances in which the assessment is required. An authority should not reject a producer statement outright (or the compliance of the work it certifies), merely because of a perceived flaw in the statement or issue with its author. Instead, what is required is a consideration of everything that is known about the producer statement, its author and the underlying work, including:

- the credentials of the producer statement's author, including their qualifications, professional memberships and registrations, experience, competence, skills and areas of expertise
- other information about the author, including any concerns, as well as positive examples of their work, their reputation and independence in relation to the certified work
- the reasons for the disciplinary action, where this is a factor and is known
- the risk if the producer statement is incorrect, including risk to the owner, the authority and persons using a building etc
- the availability of a peer review
- the author's Q&A procedures and records, the level of scrutiny undertaken and the basis for the opinion

<sup>8</sup> *Body Corporate 326421 v Miller & Ors* [2015] NZHC 862: para. 115.

- the complexity of the works, the likely consequences of noncompliance and whether any concerns have arisen regarding the quality of the works
- any construction monitoring information, records, photos etc
- the records of other parties, such as the builder etc, regarding the work that is the subject of the producer statement
- the skill and experience of the other professionals and building practitioners involved
- guidance and practice notes regarding producer statements from Engineering NZ and other professional bodies.

### 6.3 The producer statements issued in the current case

6.3.1 I turn now to the second issue raised in the current case, namely the weight attached to the applicant's PS4s and the other considerations the authority should have taken into account in making its decision under section 94.

6.3.2 I have considered this question of the weight that an authority should afford to a particular producer statement, and what impact that has on the overall compliance decision, in a previous determination: Determination 2019/030<sup>9</sup>. In that determination, the producer statement in question (a PS1) had been issued in relation to an application for a building consent. The authority was not satisfied with the scope and wording of the PS1, and hence refused to issue the building consent.

6.3.3 In reversing the authority's decision, the determination said:

[Para 7.4.3] The weight to be given to a producer statement should be considered in the context of what is known about the author of the producer statement ..., and is distinct from the facts that are established by that producer statement.

and,

[Para 7.5.2] ... Once the authority is satisfied that the practitioner providing an opinion on compliance has the requisite skills, qualifications, experience, knowledge and expertise in the particular field, it should proceed to carry out the usual checks on the compliance of the proposed building work. This will include checking information provided to support the application of Standards, Acceptable Solutions, Verification Methods, or other design documents used.

[Para 7.5.3] However, if the building consent authority has doubts about proposed building work, or about an opinion provided, or the ability of its own officers to properly assess it, its role requires it to take further steps to properly assess the adequacy of information submitted. This may include:

- seeking more information from the building consent applicant, including requesting a peer review of technical information
- engaging technical expertise itself to assist with assessing the application.

6.3.4 In that determination, I found that there was no evidence that the authority had considered either 'the substance of the proposed building work or the weight it should give to the design engineer's opinion.' Accordingly, I reversed the authority's decision, because 'the authority did not consider relevant matters or take the relevant steps to assess the consent application'.

6.3.5 That is not the case here. In the current determination, the authority has identified matters it believes impact on its ability to accept the applicant's producer statements,

<sup>9</sup> Determination 2019/030 Regarding the refusal to issue a building consent for invasive investigation of structural steel in an apartment complex (28 June 2019).

including the removal of the applicant's professional registration, and has taken steps to try and find the facts and circumstances behind that removal. The applicant's refusal to divulge the reasons for the removal are not helpful, and in my opinion, his assertion that the matter is confidential is disingenuous. The applicant is freely able to disclose, in confidence, the reasons he is no longer registered.

- 6.3.6 Although I consider that the authority was correct to ask the applicant why he was no longer registered, and entitled to draw negative inferences from his refusal to answer, I do not think it was fair to infer from this refusal that the applicant's work no longer meets the standard of a chartered professional engineer (as the authority did in its submission – refer paragraph 3.5). The authority has provided no evidence, either in relation to the owners' building work or any of the many other construction projects where it is, or has been, involved with the applicant, that his work is in any way substandard or defective. On the contrary, the authority has stated that it has a long history of working with the applicant and of relying on his professional judgement. The authority's concerns are based wholly on things that it has read and heard about a construction project it is not involved in.
- 6.3.7 In these circumstances, I would have expected to see a more balanced consideration of what the authority did know about the applicant and his work, against the potential reasons for the removal of his registration. In my opinion, this should have included the authority's track record of working with the applicant, its knowledge of the standard and consistency of his work, his professional reputation in relation to construction projects of the type and scale being undertaken for the owner, and the incidence and scale of any problems that had arisen from the applicant's professional services in the past, which the authority had direct involvement with.
- 6.3.8 The authority could also have taken into account the 20 recent peer reviews of the applicant's work, that were undertaken at the authority's request in relation to similar building work. These reviews would not guarantee that the applicant's work was correct in the current case, but they would indicate that in general, over this period, he was carrying out similar work professionally and competently.
- 6.3.9 Had these matters been taken into account, they may well have indicated to the authority that despite the applicant's later removal from the register, he was still competent to carry out the work covered by the PS4s at the time they were issued.
- 6.3.10 On this point, I also consider it material that the PS4s were issued before the applicant's registration was removed, as was the design and work they certified. It is the applicant's competence at the time the PS4s were issued that is most relevant, rather than at a later date, such as when they were submitted. Similarly, the fact that the authority had itself already relied on these PS4s, by accepting them as evidence that the subsequent building work dependent on them could proceed, and in doing so had also allowed the owners to act in reliance on them, must speak against the statements now being considered inadequate. Presumably, the authority had already made an assessment as to the PS4s' reliability at this earlier point, and not found them wanting.
- 6.3.11 What the authority should have done, when faced with PS4s about which it had reservations, is looked at the other information available to it, and used this to make its risk-based assessment of compliance of the work in question under section 94. It does not appear from the evidence I have been provided with that the authority has done this. The authority has placed too much reliance on the PS4s, and related matters, and has not given sufficient weight to the other evidence available to it to

establish compliance. The authority did suggest a peer review, but when this was not forthcoming, appears to have refused to issue the code compliance certificate.

- 6.3.12 I note that the authority did have other information available to it on which to base an assessment of compliance. This included the plans, calculations and photographs attached to the PS4s themselves; what the authority knew about the competence of the building practitioners or contractors who carried out the work; and the nature of the work and the risks associated with it.
- 6.3.13 With respect to the question of risk and the PS4 – Ground preparation, the authority could have taken into account the applicant’s assessment (which put the ultimate bearing strength of the site at > 300kPa) and the margin between these and the limit imposed by the building consent of 125kPa (which the dwelling met). The geotechnical assessment report (refer paragraph 2.2) raises no specific concerns in relation to the site with respect to its stability and similar, and it allowed the onsite disposal of surface water. The remainder of the house is considered by the authority to be fully compliant and no specific non-compliance has been raised with respect to the ground on which the building is founded. With respect to the PS4 – Soakage trench; this work is straightforward, and it would appear no specific expertise is required to inspect this work - no specific non-compliance has been raised with respect to this work.
- 6.3.14 The applicant’s track record and expertise, and the peer reviews carried out in relation to similar jobs, would have been relevant in this context too, as they would all have spoken to the likelihood that the work in the current case complied, and lessened the risk that it was sub-standard. The authority could also have taken into account that it had already sought legal advice as to whether to continue to accept the applicant’s producer statements, and been advised that it could; and that the applicant had still been a registered chartered professional engineer at the point that this advice had been given via the PS4s he had issued.
- 6.3.15 Had these broader considerations of compliance been taken into account, it seems likely to me that the authority may have exercised its discretion differently, with respect to the question of whether it had reasonable grounds to be satisfied that the completed building work complied with the building consent.

## **6.4 Conclusions**

- 6.4.1 I consider the authority acted correctly in seeking to understand the reasons that the applicant had been removed from the register, but that when it failed to get an answer or an agreement to peer review from the applicant, it placed too much weight on those reasons. This is especially the case when balanced against the other information about the compliance of the building work that was available to the authority.

## **6.5 Other matters**

- 6.5.1 The applicant contends he is not misrepresenting his status as a Chartered Professional Engineer (refer paragraph 4.1.5, 6th bullet). The PS1 provided by the applicant referred to in that paragraph is filled out to include the applicant’s CPEng registration number, and the form could be easily be misinterpreted to mean that the applicant has forgotten to ‘tick’ the box that confirms his CPEng status. The LBP memorandum form accompanying the PS1 also includes the same number next to the words “LBP or Registration number”.

## **7. The decision**

- 7.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority was incorrect to refuse to issue the code compliance certificate on the grounds provided and accordingly I reverse the authority's decision.
- 7.2 The authority should now make a new decision on whether to issue the code compliance certificate taking into account the matters set out in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 August 2020.

Katie Gordon  
**Manager Determinations**