

**In the matter of the Chartered
Professional Engineers of New Zealand
Act 2002**

Appeal 01/22

AND

**In the matter of an appeal to the
Chartered Professional Engineers Council
pursuant to Section 35**

Between

**Mr and Mrs A
Appellants**

And

**Mr B
CPEng, CMEngNZ, IntPE(NZ)
Respondent**

**Decision of the Chartered Professional Engineers Council
Dated 18 October 2022**

1. Mr and Mrs A (“Mr and Mrs A”) have appealed a decision, made by a Chair of Investigating Committees acting as Adjudicator (‘the Adjudicator’), to dismiss their complaint about Mr B [BOD p114-115].
2. The appeal panel of the Chartered Professional Engineers Council (“the Panel”) has been provided with a two-volume paginated Bundle of Documents file held by the Registration Authority (“the RA”) in relation to the case. References to specific documents within this file are annotated “[BOD Vol n, Pnnn]”.

The Legislation

3. The right of appeal is contained in s35 of the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”) and s37 of the Act sets out the how the hearing is to be conducted, including the scope of determinations that the Council is entitled to make.
4. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 (“the Rules”) that were enacted pursuant to s40 of the Act.
5. The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”) set out the requirements pertaining, amongst other matters, to the hearing and deciding of appeals.
6. Appeals to the Council are by way of rehearing (s37(2) of the Act). The appeal panel is entitled to confirm, vary or reverse a decision (s37(5)(a)) and may make any decision that could have been made by the decision authority (s37(5)(c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, the panel is entitled to take a different view from the RA, but the Appellant carries the burden of satisfying the panel that it should do so.
7. S21 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 practice engineering; or

- (b) has breached the code of ethics contained in the rules; or*
- (c) has performed engineering services in a negligent or incompetent manner; or*
- (d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -*
 - (i) either orally or in writing, made any declaration or representation knowing it to be false and misleading in a material particular; or*
 - (ii) produced to the authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or*
 - (iii) produced to the authority or made use of any document knowing that it was not genuine."*

8. The facts and evidence clearly demonstrate that the criteria established under sections 21(1)(a), and (d) of the Act do not apply in this case. The panel is therefore tasked with considering whether there is a prima facie case that Mr B:
- (a) has breached an aspect of the code of ethical conduct as set out in the rules 42(A)-42(I) as amended in 2016; and/or
 - (b) has performed engineering services in a negligent or incompetent manner.

Correspondence and submissions

9. The correspondence, communications and submissions which are associated with this appeal are listed in Schedule 1.

Grounds of appeal and outcome sought

10. In the Notice of Appeal from Mr and Mrs A dated 07 January 2022, the following is stated as the Grounds of Appeal [BOD Vol 1 p114-p115]:

"We engaged the services of Mr B on 24/10/2019, to design and submit the BC for a boundary retaining wall- fence project that ended up taking an extended amount of time to obtain BC, (19/10/2020).

The grounds of our appeal are :

- 1. Mr B did not demonstrate competence and was negligent in his work, this can be demonstrated in the initial design that he submitted to Council on our behalf. The design had multiple breaches that council clearly summarized but he failed to address these concerns in an adequate, professional and competent manner which resulted in ongoing unnecessary delays and extra costs to us.*
- 2. He was negligent as he did not request to view the property file prior to submitting the application and thus could not establish if (Right of Use) existed in this case.*
- 3. He did not ask us to engage a planner at any stage of the BC process what so ever until we ourselves frustrated from the delays and complications that arose contacted council senior planner and he advised that an independent planner can help. He gave us the names of three planners and we contacted one. At that point we asked Mr. B if he can recommend a planner he has worked with to assist in obtaining a resource consent and he did.*
- 4. Misconduct is apparent the design did not correlate to the geotechnical investigation that he undertook. The geotechnical report was not submitted to council it was too shallow (did not go deep enough as we were told by another engineer), to establish if there is substandard soil that justifies his initial extensive design. By overengineering the retaining wall He put his personal interest over ours the client realising there would be a more practical less expensive alternative, The initial plan was for (2.2 M high), wall while the consented plan was for (1.4 M high). Correspondence between us and more than one structural engineer who o . [sic] investigation.*
- 5. False or misleading advertisement by claiming the office is experienced in subdivision, while he lacked Knowledge in driveway width and height and levelling or slop requirements for future subdivision. By applying the most stringent requirements even though they were not necessary.*

6. *The engineer did not act competently as he had to revise and repeat the plans to council Five times – Three times plans were given to the rear and side neighbouring properties to sign off.*
11. The outcomes sought by the appellant as set out in the Notice of Appeal were as follows:
- *“Reversal of the decision to dismiss the complaint and a proper investigation taking place to establish if the design is consistent with the geotechnical investigation findings. Accordingly, a new geotechnical investigation carried out and new amended plans submitted to council.*
 - *As we have lost trust in the engineer we request the service fees we paid to Mr. B awarded back so we can engage another professional for the above tasks.*
 - *The extra cost paid to council as a consequence to Mr. B substandard service.”*
12. The panel notes that the outcomes which it can determine under the appeal are as set out in Paragraph 6 above.

Jurisdictional Issues

13. Under the statutory framework in which the Council may hear an appeal, it cannot hear matters that relate to the actions or processes of the RA. It must address the actual decision that the RA has issued. In this regard, issues relating to the processes or procedures of the RA are not relevant and, if appropriate, they are addressed by the rehearing.
14. The panel notes similarities between this appeal and Appellant v Council¹ in which the Council determined that it does not have jurisdiction to consider procedural issues.
15. In the decision from the Adjudicator [BoD Vol 1 p104 – p113], under the heading of “Grounds to dismiss the complaint” the following is stated:
- “The complainants have sought financial redress from Mr B and advise that “the matter would be resolved by a refund”, but they have also acknowledged, correctly, that*

¹ CPEC Appeal 1/19

Engineering New Zealand “has no jurisdiction over financial compensation”. For completeness, I (the Chair of Investigation Committees acting as Adjudicator (CICA)) also note that this process is not a mechanism for peer review of any design or advice provided by Mr B.” [BoD Vol 1 p110].

16. The panel agrees with the above position of the CICA regarding contractual matters and further note that we (the Panel) also do not have the jurisdiction to consider contractual matters, such as whether a client has met their commercial or contractual obligations”.
17. Where the grounds of appeal include matters of process or procedure, or are of a contractual nature, the Panel acknowledges that, while they may provide some context for the appeal, they do not contribute to the substantive determinations.
18. For the reasons outlined in 13 to 17 above, the Panel is limited in the extent of the determinations that it is able to make. Further, in respect of the outcome sought at Paragraph 11, Bullet Point 1, the panel can only determine whether or not the matter complained of should be referred to an investigating committee, and, if it were to be referred to an investigating committee, that could only occur in the context of alleged misconduct referred to Paragraph 8 above.
19. The Panel does not have jurisdiction to consider, or make a ruling on, either of the sought outcomes referred to in bullet points two and three of Paragraph 11 above.

The original complaint

20. On 14 July 2021 Mr and Mrs A filed a Concerns Submission Form, with attachments, relating to dissatisfaction with consultancy services provided to them by Mr B [BOD Vol 1 p5-p10].
21. Mr and Mrs A’s concerns relate to the design and consent application process for a retaining wall that was to run along the northern boundary (with Property C) and part of the eastern boundary (with Property D) of the residential property at Property C. This new retaining wall was to replace an existing structure that had failed. The new wall was to be designed to meet current design codes and support additional driveway

and traffic surcharge loads associated with future subdivision of the property at Property C

22. The Panel considers that the key elements of Mr and Mrs A's complaint comprise the following:
- Mr and Mrs A believe that Mr B was negligent and has breached the code of ethical conduct as he did not act competently in his engineering design work or communicate effectively with them. [BOD Vol 1 p11-p12, p50, p45, p114-p115]
 - Mr and Mrs A do not believe Mr B responded adequately to their concerns during the design and consent application process. [BOD Vol 1 p11-p12, p50, p45, p114-p115]
 - Mr and Mrs A believe that Mr B is responsible for significant program delay and additional costs that were incurred during the building consent application process. [BOD Vol 1 p11-p12, p50, p45, p114-p115].
 - Based on feedback they received from contractors, Mr and Mrs A believe Mr B's final consented design is not practical, is difficult to execute, and requires unnecessarily expensive materials. [BOD Vol 1 p50].

Decision being appealed and evidence considered

23. The decision under appeal is the 9 December 2021 decision of a Chair of Investigating Committees acting as Adjudicator, to dismiss Mr and Mrs A's complaint about Mr B. [BOD Vol p104-113, p114-115]
24. Under s15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
25. The evidence which has been considered by the Panel in arriving at its decision is listed in Schedule 1.

Hearing

26. With the prior agreement of all parties, this CPEC hearing was completed on the papers.

Discussion and Findings

27. The Panel understands that Mr and Mrs A own the residential property at Property C.
28. On 24 October 2019 Mr A signed a short form agreement to engage Company E to complete the following tasks for a new timber pole retaining wall at Property C : [BOD Vol 1 p11, p30]
- “....
1. *Geotechnical investigation for ground conditions for existing site for proposed retaining wall.*
 2. *Timber pole retaining wall design.*
 3. *Building consent application on behalf.*
 4. *Construction observation by engineer (each) for construction only.*
 5. *Final construction completion PS4 for construction only”*
29. The new retaining wall at Property C was to run along the northern boundary with the neighbouring property and part of the eastern boundary with Property D. [BOD Vol 1 p38]
30. The final version of the short form agreement for provision of the above consulting services did not include planning or resource consent application services. [BOD Vol 1 p30, p96].
31. Mr B was the lead designer, primary representative and point of contact between Company E and Mr and Mrs A during the above engagement.
32. Drawings held on Council file records indicate that the original existing building at Property C was permitted during 1964. [BOD Vol 2 p179]
33. The new retaining wall, which has been designed by Mr B, was to replace an existing timber post wall that had failed. The 1964 drawings show sloping ground at the location of the existing failed retaining wall and new retaining wall which is the subject of this appeal. No evidence has been found on Council file records to confirm that the existing

failed retaining wall was appropriately designed and permitted / consented prior to it being constructed [BOD Vol 2 p179], nor is the Panel aware that there was any definitive statement as to the existence or otherwise of an existing use consent.

34. The Panel understands that Mr B was instructed to design the new wall to support an additional future driveway, traffic surcharge and vehicle impact loads associated with future subdivision of the property at Property C. It also appears that Mr and Mrs A initially desired a 1.8m high fence be installed along the top of the new retaining wall to provide additional privacy. [BOD Vol 2 p163, p179]
35. The first building consent submission drawings that were lodged for the new wall had a maximum design retained height of 1.6m and 1.8m high fence on top of the wall. This retained height included consideration of the future driveway and vehicle loads, a 0.5m thickness of uncontrolled fill / topsoil immediately in front of the wall, and the likely need to construct future buried services and their associated fall and connection to the existing Council network. [BOD Vol 2 p163]
36. The final consented drawings have a revised alignment and height profile, and amended fence height, to address the planning issues that were raised by Council and the Planner who was engaged by Mr and Mrs A during the resource consent application process.
37. A significant issue, that became apparent as the wall design and consenting process advanced, was existing use rights. It appears that at the start of the design and building consent application process Mr B reasoned that existing use rights may be granted for the new retaining wall due the presence of the existing failed retaining wall.
38. After the initial building consent application had been submitted, Council confirmed that existing use rights could not be granted as a permit or consent for such wall was not held on file records. [BOD Vol 2 p175] This triggered a need to submit both a building consent application and a resource consent application.
39. On 8 May 2020, and within 30 minutes of receiving email confirmation from Council that existing use rights would not be granted for the proposed wall, Mr B recommended to Mr and Mrs A that they engage a Planner to help secure a resource consent for the new wall. [BOD Vol 2 p175]

40. The Panel considers that, up until receipt of the above email from Council on 08 May 2020, Mr B and Mr and Mrs A were both anticipating confirmation of existing use rights for the failed retaining wall. The above communications suggests that Mr B recommended a Planner be engaged in a timely manner.
41. As a result of the existing use and other resource consent issues, between four and five rounds of changes were made to the drawings to enable both the building consent and resource consent approvals to be secured. Such changes required some of the design features and outcomes, initially specified by Mr and Mrs A, to be abandoned. [BOD Vol 2 p163, p179]
42. The first building consent application for the subject wall was submitted to City Council by Mr B on 24 February 2020 [BOD Vol 1 p11]. This submission was based on the key assumption that existing use rights would apply to the new wall as it replaced an existing wall with a similar purpose, location, retained height and extent. [BOD Vol 1 p47]
43. The Panel considers that it was not unreasonable to explore if existing use rights would be granted by Council before embarking on the more complex and time-consuming resource consent application process.
44. Mr and Mrs A engaged Mr F, a Professional Planner, on or about 27 July 2020, [BOD Vol 2 p184] after the initial building consent application had been submitted and correspondence from Council had confirmed that a Resource Consent would be required for the new retaining wall. The planner liaised with Council and assisted Mr B to develop a refined new retaining wall design that was acceptable to City Council from both an engineering (building consent) and planning (resource consent) perspective.
45. Mr B correctly states that both a building consent (consent number G) and a Deemed Permitted Boundary Activity Notice (DEPBAN) (consent number H) were issued for the subject new retaining wall. [BOD Vol 1 p56]
46. The above statement is confirmed as being correct by Council. [BOD Vol 1 p21-23 Bullet Point 2 Paragraph 1]
47. Mr and Mrs A appear to incorrectly claim that the final design did not require a resource consent. [BOD Vol 1 p11 Paragraph 9]

48. Council state that they “received the last final version of the plans with satisfactory, complete and adequate information “ on 16 September 2020. [BOD Vol 1 p87]
49. The resource consent for the final retaining wall design was granted by Council on 16 September 2020, [BOD Vol 1 p93-94] which is contrary to Mr and Mrs A’s statement referred to in para 47 above.
50. The building consent for the final retaining wall design is inferred by the Panel, from the lapsing consent notice, to have been granted by Council on 19 November 2020. [BOD Vol 1 p101-p102]
51. In response to questions from Mr B regarding their final invoice, Council confirmed via email that their costs were for processing of both the resource consent and building consent. Council went on to state that the planning and consent issues which were associated with this project were “not that simple”. Council further provided a relatively detailed explanation of the site and project specific planning and resource issues which required them to expend considerable additional time and input to address. [BOD Vol 1 p86-p88]
52. The Panel considers that most of the issues and delays described by Council [BOD Vol 1 p86-p88] were due to planning related issues and not directly due to any significant fault or inappropriate action of Mr B. Most, if not all, of the design delay and re-work appears to have primarily stemmed from the decision by Council not to grant existing use rights. [BoD Vol 2 p175] The reason for this was that the failed wall was not permitted or recorded on council records.
53. The Panel understands that, to date, construction of the subject new retaining wall has not commenced [BOD Vol 1 p11, p104].
54. Mr and Mrs A have stated the following:

“The approved plans were not practical, complicated and expensive.”, [BOD Vol 1 p11].

“The plans were not practical, difficult to execute, and the materials were unnecessarily expensive.” [BOD Vol 1 p12].

The Panel consider that in making the preceding assertions, Mr and Mrs A have not established the credentials of the sources of their comments and accordingly, the Panel give them little weight.

55. The Panel further notes that many of the design amendments which have been suggested by tendering Contractors, and/or which have been instructed by Mr A to reduce construction costs [BOD Vol 2 p144-p145, p160, p190], may mean that some aspects of the original design brief are not met.
56. The credentials and standing of the sources referred to in paragraph 54 above by Mr and Mrs A have not been established so the Panel is not in a position to consider them as evidence.

Ground of Appeal 1.

Incompetence.

57. In the notice of appeal Mr and Mrs A state the following: [BOD Vol 2 p117]
“Mr B did not demonstrate competence and was negligent in his work, this can be demonstrated in the initial design that he submitted to Council on our behalf. The design had multiple breaches that council clearly summarized but he failed to address these concerns in an adequate, professional and competent manner which resulted in ongoing unnecessary delays and extra costs to us.”
58. The Appellants engaged Mr B to provide geotechnical investigation, design and building consent application services for a new retaining wall to replace an existing failing retaining wall. [BOD Vol 1 p30]
59. Unfortunately, as the project design and building consent application process advanced, the design and consenting process was found to be a more complicated than originally envisaged.
60. The available evidence indicates that the primarily complicating factors, and most significant reasons for the consenting program delays and higher than expected costs, are that the new wall involved resource management and consent issues (potential for existing use rights, interpretation of the Unitary Plan standards), property issues

(including the wall location in relation to the property boundaries), and engineering issues (design of the wall to a higher standard to allow for ease of future subdivision).

61. It is also noted that some relatively minor drafting errors were identified by Council during the latter stages of the consenting processes that necessitated the final round of updates, authorisation by the neighbouring landowners and resubmission to Council prior to issue of the Resource and Building consents for the project.
62. The issues discussed in paragraphs 58 to 61 above, which were progressively identified by Council and addressed by Mr B and/or the Project Planner as the application process advanced, resulted in five versions of the project drawings, of which three appear to have been issued to neighbouring landowners and/or Council.
63. The Panel considers that that Mr B attempted to work collaboratively with the Council and his clients to resolve the planning and engineering issues as they emerged. He offered the name of a planner when requested by the Appellants and adjusted his designs accordingly in response to the planning advice [BOD Vol 1 p111, Vol 2 p217].
64. The Panel notes that engineers frequently work closely with other professionals in other disciplines, a point that was also made by the Adjudicator. This does not equate to engineers working beyond their competence. [BOD Vol 1 p111, Vol 2 p217].
65. The Panel has seen no evidence that Mr B carried out his work for the Appellants in a manner that was not consistent with the reasonable expectations of an engineer who is practicing in the same situation.
66. Based on the discussions which are outlined in paragraphs 58 to 65 above, the Panel concludes that this ground has not been proven.

Ground of Appeal 2.

Negligence.

67. In the notice of appeal Mr and Mrs A state the following: [BOD Vol 2 p117]

“He (Mr B) was negligent as he did not request to view the property file prior to submitting the application and thus could not establish if (Right of Use) existed in this case.

68. The Panel considers the evidence indicates that initially there was an assumption, by Mr B and his clients, that as the wall would replace an existing structure, existing use of rights could be granted by Council.
69. The Panel consider that the decision, as to whether existing use rights applied for the proposed retaining wall, was ultimately for Council to make. After considerable research, assessment and communications Council determined that existing use rights did not apply in this case. Subsequently, the neighbour’s approval and Resource Consent for the proposed retaining wall was obtained through the DEPBAN process.
70. The RA has stated the following: *“The Registration Authority submits, in accordance with the Adjudicator’s decision, that Mr B was not negligent in this regard. He did advise the Appellants to undertake further research into the existing use of rights and did recommend seeking planning advice [BoD p175 – 176]. The Adjudicator’s decision was correct in finding that Mr B had acted competently.”* [BOD Vol 2 p 217]. Based on a review of the relevant evidence, the Panel generally agrees with this assessment.
71. The Panel has seen no evidence of negligence on the part of Mr B and accordingly finds that this ground has no merit.

Ground of Appeal 3.

Failure to recommend that a Planner be engaged.

72. In the notice of appeal Mr and Mrs A state the following: [BOD Vol 2 p117]

“He (Mr B) did not ask us to engage a planner at any stage of the BC process what so ever until we ourselves frustrated from the delays and complications that arose contacted council senior planner and he advised that an independent planner can help. He gave us the names of three planners and we contacted one. At that point we asked Mr. B if he can recommend a planner he has worked with to assist in obtaining a resource consent and he did.

73. The Panel concludes that Mr B generally worked collaboratively with the Council and Mr and Mrs A.
74. As discussed under Ground One, in Paragraph 63 and 64 above, Mr B offered the name of a planner in a timely manner. [BOD Vol1 p61]
75. The panel finds that this ground has not been proven.

Ground of Appeal 4

Misconduct and inappropriate investigation and design.

76. In the notice of appeal for this case Mr and Mrs A state the following: [BOD Vol 2 p118]

“Misconduct is apparent the design did not correlate to the geotechnical investigation that he undertook. The geotechnical report was not submitted to council it was too shallow (did not go deep enough as we were told by another engineer), to establish if there is substandard soil that justifies his initial extensive design. By overengineering the retaining wall He put his personal interest over ours the client realising there would be a more practical less expensive alternative, The initial plan was for (2.2 M high), wall while the consented plan was for (1.4 M high). Correspondence between us and more than one structural engineer who o . [sic] investigation.
77. In assessing grounds such as Ground 4, the role of the Panel is to consider evidence presented that relates to the ground. It is not the role of the Panel to complete its own technical review.
78. Concerns about the geotechnical investigation and report were not raised in the original complaint by Mr and Mrs A. That information was not before the Adjudicator and accordingly was not considered when she made her decision.
79. Mr B’s geotechnical evaluation report (dated 15 December 2019) was not provided to the RA until 23 May 2022, ten days after the Appellants made their submissions to the Panel.
80. The RA has assessed that the above information is unlikely to have altered the Adjudicator’s decision to dismiss the complaint. [BOD Vol 2 p219]

81. In his response submissions dated 30 May 2022, Mr B has provided further background to the geotechnical investigation and reporting that was completed under his supervision.[BOD Vol2 p165]
82. Assertions have been made by Mr and Mrs A regarding over-design of the proposed retaining wall. The credentials and/or relevant experience of the people making comments to this effect have not been presented in the evidence. As such, the Panel has no basis to conclude that the wall design, which has been produced by Mr B, was inappropriate for the site circumstances and design brief.
83. The Panel has considered the information which is contained in the bundle of documents and in the appeal submissions. It concludes that insufficient evidence has been presented to support this ground.
84. The Panel concludes that this ground is not proven.

Ground of Appeal 5

Misleading advertisement.

85. In the notice of appeal Mr and Mrs A state the following: [BOD Vol 2 p118]:

“False or misleading advertisement by claiming the office is experienced in subdivision while he lacked knowledge in drive way width and height and levelling or slope requirements for future subdivision. By applying the most stringent requirements even though they were not necessary.”

86. In their response of 8 June 2022, the Appellants provided a copy of Mr B’s business card which indicates the core skill areas of Designport comprise:

“.....

- *Structural.*
- *Geotechnical.*
- *Civil & Fire.*
- *Subdivision.*

- *Building & Resource Consent.*”

87. The above information was not submitted and was not considered by the Adjudicator during her consideration of this case.
88. The RA has made the following statement with respect to the issue of misleading advertising and the additional information submitted by Mr and Mrs A *“The Registration Authority submits that this information is unlikely to have altered the Adjudicator’s decision to dismiss the complaint. The Adjudicator found the work was within Mr B’s assessed areas of competence as a chartered professional engineer.”* The Panel generally agrees with this assessment.
89. Based on an assessment of Mr B’s practice area description as stated above in Paragraph 74, and his communications regarding the engagement of a Professional Planner on this project once it became clear that existing use rights would not be granted by Council [BOD Vol 2 p175 – p177, p182], the Panel consider that Mr B did not stray outside his field of expertise and into the field of Professional Planning.
90. Mr B’s actions, which are related to Resource Consent issues, all appear to be in response to requests or advice provided by Council and/or the project Planner.
91. Further to discussion at paragraphs 85 to 90 above, the Panel concludes that no evidence has been presented to suggest that Mr B claims to possess a wide breadth and depth of experience in the field of Resource Consents.
92. Like many Chartered Professional Engineers, Mr B has demonstrated some experience and knowledge in the impacts that Resource Consent rules and conditions have on engineering designs. He has amended his engineering designs, on the advice of Planning Professionals, to address Resource Consent issues.
93. No evidence has been presented to demonstrate that Mr B strayed outside of his area of expertise and/or deliberately tried to mislead Mr and Mrs A with respect to his skills and/or competence in the field of Planning and Resource Consent application.
94. The Panel concludes that this ground has no merit.

Ground of Appeal 6:

Incompetence demonstrated by excessive reiteration of designs.

95. In the notice of appeal for this case Mr and Mrs A state the following: [BOD Vol 2 p118]
- “The engineer did not act competently as he had to revise and repeat the plans to council Five times – Three times plans were given to the rear and side neighbouring properties to sign off. “*
96. The Council planner acknowledged *‘the interpretations of the definition of a retaining wall as a building is not very comprehensive under the AUP [Council Unitary Plan]’* [BOD Vol 1 p87].
97. From the information provided it appears that, at the start of this design and consent application process, both Mr B and Mr and Mrs A were progressing on the key assumption that existing use rights would be granted by Council.
98. The time and cost to secure the Building and Resource Consents for the new wall, and the number of design iterations, would have been greatly reduced had existing use rights been proven. The Panel concludes that Council did not determine and confirm whether an existing use right existed before the building consent application had been submitted.
99. Although Council identified some discrepancies between the building consent and DEPBAN plans, the inconsistent drawing details that were issued by Company E under the direction of Mr B appear to have been relatively minor and were rectified promptly once they were identified.
100. The Panel notes there had been five iterations to the designs and associated drawing pack as the project advanced. Such iterations incorporated changes to address planning issues or relatively minor design errors or inconsistencies. In the case of changes to address the design errors and inconsistencies, the Panel concludes that Mr B demonstrated some lack of attention to detail rather than incompetence.
101. The role of the complaints process is to assess Mr B’s actions against what is reasonable practice, not best practice. The Panel concludes that some aspects of the service provided

by Mr B could have been handled better. However, the Panel has not seen any evidence that demonstrates his work was inconsistent with reasonable practice.

102. Mr and Mrs A have claimed the excessive reiteration of designs has caused them ongoing delays and costs. Comment on this issue is beyond the scope and authority of the RA and the Panel as it relates to contractual or commercial aspects.
103. In consideration of the information summarised in paragraphs 96 to 102 above, the Panel concludes that Mr B has not breached the Code of Ethics in his behaviour or level of professionalism and has not failed to act as a reasonable engineer would have in the same situation and that no evidence has been presented of shortcomings which are sufficiently grave to warrant further investigation.
104. No evidence has been presented under this ground to demonstrate that Mr B has acted in an incompetent manner and this ground is found to have no merit.

Discussion

105. The Panel does not have jurisdiction to consider or make a ruling on either of the outcomes sought by Mr and Mrs A in bullet points two and three of Paragraph 11 above, which relate to refunds of fees and costs. The Panel therefore makes no ruling on these matters.
106. The Panel has the jurisdiction and duty to consider, and if it deems appropriate based on the evidence presented, reverse the Adjudicator's decision to dismiss the complaint by Mr and Mrs A.
107. The Panel does not have the jurisdiction to direct that a new investigation be carried out or that new amended plans be submitted to council, as Mr and Mrs A have sought as an outcome (refer paragraph 11, bullet point one above).
108. Further to paragraphs 105 to 107 above, the Panel's decision is confined to whether or not the decision of the Adjudicator should be reversed.
109. The Panel has found that none of the six grounds of appeal have been proven and whilst under Ground Six, the Panel commented on relatively minor errors and some lack of attention to detail on the part of Mr B, it concluded that such apparent shortcomings were insufficiently grave to warrant further investigation.

Outcome of Appeal

110. The decision of the panel is to uphold the decision of the Adjudicator and dismiss the appeal.
111. In accordance with s35 of the Act, either party may appeal this decision to the District Court within 28 days.

Costs

112. The panel rules that any costs incurred by the parties to this appeal shall lie where they fall.

Dated 18 October 2022

Signed by the Appeal Panel

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Anthony Fairclough (Panel Principal)

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Alan A Winwood

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Chris J Harrison

Schedule 1

Key correspondence and submissions

(a) Paginated documentation pack provided (115 pages) provided by RA, containing:

- (i) Email from Mr and Ms A dated 16 July 2012 raising concerns. [BOD p3 to p4]
- (ii) “Raising concerns about an Engineer” submission form dated 14 July 2021. [BOD p5-p10]
- (iii) Letter from Mr and Mrs A detailing concerns and attaching emails undated. [BOD p11-p12]
- (iv) Email from Council to Mr and Mrs A dated 16 March 2020. [BOD p12-p14]
- (v) Email from Mr A to Mr B dated 3 April 2020. [BOD p14]
- (vi) Email from Council to Mr and Mrs A dated 1 April 2020. [BOD p15]
- (vii) Email from My B to Council dated 12 August 2020. [BOD p15].
- (viii) Email from Council to Mr and Mrs A and Mr B dated 13 August 2020. [BOD p16 to p17]
- (ix) Email from Mr B to Council dated 8 September 2020. [BOD p17]
- (x) Email from Council to Mr and Mrs A and Mr B dated 14 September 2020. [BOD p18 to p19]
- (xi) Email from Council to Mr B dated 15 September 2020. [BOD p19 – p20]
- (xii) Email from Mr B to Council dated 18 September 2020 re fees invoice. [BOD p20]
- (xiii) Email from Council to Mr B to dated 19 September 2020 re fees invoice. [BOD p21 – p24]
- (xiv) Email from Mrs A dated 16 July 2021 enclosing more information. [BOD p25]

- (xv) Short form agreement for engagement - draft version dated 22 July 2019. [BOD p26 – p27]
- (xvi) Short form agreement for engagement - second draft version dated 22 July 2019. [BOD p28 – p29]
- (xvii) Short form agreement for engagement - final signed version dated 24 October 2019. [BOD p30 – p31]
- (xviii) Drawing Sheets [BOD p32 – p34]:
- S101 first issue dated 05 December 2019,
 - S102 first issue dated 05 December 2019 and
 - S103 first issue dated 07 November 2019.
- (xix) Drawing Sheets [BOD p35 – p37]:
- S101 Rev B dated 04 August 2020,
 - S102 Rev A dated 04 August 2020, and
 - S103 Rev B dated 14 September 2020.
- (xx) Drawing Sheets with additional clouded notes and stamped “Approved Resource Consent” and “Building Consent” by Council [BOD p38 – p40]:
- S101 Rev B dated 04 August 2020,
 - S102 Rev A dated 04 August 2020, and
 - S103 Rev B dated 14 September 2020.
- (xxi) Council invoice and breakdown of charges dated 16 September 2020. [BOD p41 – p44]
- (xxii) Emails from Mrs A to Engineering New Zealand dated 29 July 2021. [BOD p45 – p46]
- (xxiii) Email from Council to My B re fees invoice dated 19 September 2020. [BOD p46 – p49]

- (xxiv) Email from Mrs A to Engineering New Zealand dated 9 August 2021. [BOD p50]
- (xxv) Email from Mr B to Ms A dated 28 June 2021. [BOD p51]
- (xxvi) Email from Engineering New Zealand to Mr B re concerns dated 12 August 2021. [BOD p52 – p54]
- (xxvii) Email from Mr B to Engineering New Zealand dated 31 August 2021. [BOD p55 – p60]
- (xxviii) Letter from Mr B to Engineering New Zealand undated responding to concerns. [BOD p61 – p63]
- (xxix) Short form agreement for engagement - final signed version dated 24 October 2019. [BOD p65 – p66]
- (xxx) Email chain between Council and Mr B timestamped various times between 16 March 2020 and 3 April 2020. [BOD p67 – p70]
- (xxxi) Email chain between Mr B and Mr and Mrs A re planner - timestamped various times between 19 and 29 May 2020. [BOD p71 – p72]
- (xxxii) Email chain between Mr B, Mr and Mrs A, Mr F and Council timestamped various dates between 8 and 10 June 2020. [BOD p73 – p75]
- (xxxiii) Email chain between Mr and Mrs A and Mr B, timestamped various times between 29 July and 3 August 2020. [BOD p76 – p78]
- (xxxiv) Email chain between Mr B and Council re final version of plans, timestamped various times between 8 and 14 September 2020. [BOD p79 – p82]
- (xxxv) Email chain between Mr B and Council re consents, timestamped various times between 8 and 14 September 2020. [BOD p83 – p84]
- (xxxvi) Email chain between Mr B and Council re fees invoice, timestamped various times between 18 and 19 September 2020. [BOD p85 – p88]

- (xxxvii) Drawing Sheets with additional clouded notes and stamped “Approved Resource Consent” and “Building Consent” by Council [BOD p89 – p92]:
 - S101 Rev B dated 04 August 2020,
 - S102 Rev A dated 04 August 2020, and
 - S103 Rev B dated 14 September 2020.

- (xxxviii) Resource Consent Certificate from Council dated 16 September 2020 [BOD p93 – p94].

- (xxxix) Email chain between Mr B and Mr and Mrs A re concerns timestamped various times between 27 and 28 June 2020. [BOD p95 – p96]

- (xl) Email chain between Engineering New Zealand and Mr and Mrs A re concerns timestamped various times between 27 and 28 June 2020. [BOD p97 – p98]

- (xli) Email from Mr and Mrs A to Engineering New Zealand dated 25 October 2021 re upcoming lapsing of consents [BOD p99] and associated email and letter from Council dated 19 October 2021. [BOD p99 - p102]

- (xlii) Email from Engineering New Zealand to Mr and Mrs A dated 26 October re drafting of Adjudicators decision. [BOD p103]

- (xliii) Adjudicators decision letter dated 9 December 2021. [BOD p104 - p113]

- (xliv) Notice of Appeal from Mr and Mrs A dated 07 January 2022. [BOD p114 – p115]

- (b) Email dated 13 January 2022 from the CPEC Chair to Mr and Mrs A, Mr B, and Engineering New Zealand confirming receipt of the Notice of Appeal and outlining the panel, submissions, and communications processes going forward.

- (c) Email dated 15 February 2022 from the CPEC Chair to Mr and Mrs A, Mr B, and Engineering New Zealand confirming the bundle of documents weblink and the CPEC Appeal Panel members.

- (d) Email with letter attachment dated 21 February 2022 from the CPEC Appeal Panel Principal to all parties confirming twiyhamhe final agreed submission schedule and contact details for all parties.
- (e) Submission email from Mr and Mrs A received 13 May 2022 with the following attachments:
- (i) Email dated 18 October 2020 from Person I file name "complicated design.pdf". [BOD p144, p145]
 - (ii) Email dated 06 June 2020 from Person J to Mrs A re opinion on Council dispute points (content censored in part) - file name "Person J note Person K.pdf". [BOD p140 -p141]
 - (iii) Email dated 19 May 2020 from Mr B to Person L requesting a quote for LUC planning services - file name "Mr B suggesting Person L.pdf". [BOD p138]
 - (iv) Email chain timestamped various times between 16 March 2020 and 19 May 2020 between Person L, Mr and Mrs A and Mr B outlining the proposed wall design, Council comments and estimate to provide planning services - file name "Mr B contacting Person L 19_5_2020.pdf". [BOD p139]
 - (v) Email dated 14 July 2020 from Person L to Mr B and Mr and Mrs A re cost to provide planning services – file name "Person L S37 MAY 2020.pdf". [BOD p142]
 - (vi) Email chain timestamped various times between 27 June and 17 July 2020 between Company M and Mr and Mrs A re preliminary assessment of boundary/consenting issues and proposal - file name "Emails from Person N engineer.pdf". [BOD p137]
 - (vii) Geotechnical Evaluation Report for Boundary Wall Reinstatement at Property C dated 15 December 2019 by Company E. File name "Geotechnical Investigation Report for Property C.pdf". [BOD p123 -p136]
 - (viii) Undated Quotation from Company O - file name "Small job quotation Form for Company O(2).docx". [BOD p143]

- (ix) Covering letter from Mr and Mrs A to the CPEC Appeal Panel dated 11 May 2022. File name CPEC Submissions letter.pdf".

- (b) Second submission email from Mr and Mrs A received 23 May 2022 with the following attachments:
 - (i) Email dated 11 October 2020 from Mr and Mrs A to Mr B re fence design feedback and service complaint – file name "Follow up complaint letter.pdf". [BOD p149]
 - (ii) Email dated 12 October 2020 from Mr B to Mr and Mrs A in response to their email of 11 October 2020 – file name "Mr B reply to complaint.pdf". [BOD p161]
 - (iii) Letter from Mr and Mrs A to Mr B dated 06 April 2021 outlining a refund of Council costs – file name "complaint letter one April 2021.pdf". [BOD p148]
 - (iv) Email chain between Mr and Mrs A, Mr B and Person P (surname unknown), a Contractor, timestamped various times between approximately late January 2021 and 14 February 2021 re proposed design amendments and clarifications from the Contractor and reply from Company E – file name "Person P builder.pdf". Email chain may be partially censored. [BOD p156 -p161]
 - (v) Email chain similar to above between Mr and Mrs A, Mr B and Person P (surname unknown), a Contractor, and Mr Q (Company E) timestamped various times between approximately late January 2021 and 14 February 2021 re proposed design amendments and clarifications from the Contractor – file name "Person Q.pdf". Email chain may be partially censored. [BOD p162]
 - (vi) Email from Mr R (Council) to Mr and Mrs A dated 23 September 2020 re City consent application costs – file name "council blaming professional engaged.pdf". [BOD p150 – p151]
 - (vii) Email from Person S (Company S) to Mr A dated 17 August 2020 re preliminary review of retaining wall design comments – file name "Engineer email reg design.pdf". [BOD p153]

- (viii) Email from Mr and Mrs A to Engineering New Zealand dated 25 October 2021 forwarding the 19 October 2021 email and letter from Council regarding lapsing of the wall Building Consent – file name “email.reg lapsing BC.pdf” [BOD p152]. The attachment to this email is referenced below.
 - (ix) Letter from Council to A Investment Limited dated 19 October 2021 re lapsing of wall building consent (attachment to email from Council dated 19 October 2021) – file name BCO1030860 Lapsing Building Consent 1st reminder letter.pdf”. [BOD p146 – p147]
 - (x) Email from Engineering New Zealand to Mr and Mrs A dated 26 October 2021 in response to the email from Mr and Mrs A dated 25 October 2021 – file name “Gmail – Lapsing Building Consent.pdf”. [BOD p155]
 - (xi) Email from Mr and Mrs A to Mr B dated 27 June 2021 reiterating their concerns regarding the service provided by Mr B. [BOD p154]
- (f) Email submission from the Registration Authority (RA) received 31 May 2022 with the following attachments:
- (i) Covering letter from the RA to the CPEC Appeal Panel dated 31 May 2022.
 - (ii) Paginated document “Bundle of documents, A, May 2022, Volume 2, Appeal documents” – file name “Bundle of documents CPEC – volume 2.pdf”. [BOD p116 – p221]
- Such bundle comprises the following:
- i) Notice of appeal from Mr and Mrs A dated 07 January 2022. [BOD p117-p118]
 - ii) Appellants’ Submission (from Mr and Mrs A) to the CPEC Appeal Panel Principal dated 11 May 2022. [BOD p119-p122]
 - iii) Attachments to the above Appellants’ Submission dated 11 May 2022. [BOD p123-p162]

- iv) Engineers' submission (from Mr B) to the CPEC Appeal Panel Principal dated 30 May 2022. [BOD p163-p166]
 - v) Attachments to the above Engineers ' Submission dated 30 May 2022, various dates during 2020. [BOD p167 - 203]
 - vi) Document "Submissions on Appeal" from Engineering New Zealand and received by the CPEC Appeal Panel on 31 May 2022. [BOD p204 – 221]
- ii) Document "Submissions on Appeal" from Engineering New Zealand received by the CPEC Appeal Panel on 31 May 2022. [BOD p204 – 221]
- (g) Submission from Mr B received by the CPEC Appeal Panel on 31 May 2022 [BOD p163 – p166] including the following attachments:
- i) File 1 – Emails before BC lodgement 12-2019 to 01-2020. [BOD p168 – p169]
 - ii) File 2 – 1st RFI from council planner email and reply 3-04-2020. [BOD p170 – p173]
 - iii) File 3 – 2nd RFI from Council planner for resource consent 8-05-2020. [BOD p174 – p177]
 - iv) File 4 – Client's property plans email 19-05-2020. [BOD p178 – p180]
 - v) File 5 – My recommended planner's quote for the client 19-05-2020. [BOD p181 – p182]
 - vi) File 6 – Client's notice for Mr F planner's involvement from 12-8-2020. [BOD p183 – p188]
 - vii) File 7 – Client's final design instruction 29-07-2020. [BOD p189 – p192]
 - viii) File 8 – Final reply to the council after Mr F planner's involvement from 12-8-2020 [BOD p193 – p196].

- ix) File 9 – Council final planning check notice for approval 15-9-2020.
[BOD p197 – p198]
 - x) File 10 – Council check final plans note for correction 15-9-2020.
[BOD p199 – p201]
 - xi) File 11 – Council consent bill 16-09-2020. [BOD p202 – p203]
- (h) Email submission in response to the RA and Mr B from Mr and Mrs A dated 08 June 2022 including the following attachments:
- i) Letter from Mr and Mrs A dated 08 June 2022 – file name “Our submissions to Mr B response.pdf”.
 - ii) Letter from Mr and Mrs A dated 08 June 2022 – file name “Response to RA submissions.pdf”.
 - iii) Photograph of the business card for Mr B.
- (i) Email from the CPEC Panel Principal to all appeal parties dated 25 May 2022 confirming the request from Mr B and Engineering New Zealand to extend their submission deadline to 31 May 2022 is accepted.
- (j) Email from the CPEC Panel Principal to all appeal parties dated 03 July 2022 confirming that Appeal 01-22 will be heard on the papers only.

The following correspondence has not been considered by the Panel during their assessment of this case as it was received after the relevant submission deadline date:

- a) Email from Mr and Mrs A to the Panel, RA and Mr B timestamped Sunday September 11, 2022 at 11:32pm.
- b) Response to the above email from Mr B to the Panel, RA and Mr and Mrs A timestamped Wed 14/09/2022 4:56 pm.