

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

**Appeal 05/21**

**AND**

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

**From**

Ms A

**Appellant**

**Against a decision of**

Mr B - CPEng

**Respondent**

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Decision of the Chartered Professional Engineers Council

Dated 15 September 2022

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## Introduction

1. This appeal is an appeal against the Registration Authority's decision - Engineering Complaint 523.

## The Legislation/Appellate Approach/ Professional Disciplinary

2. The legislation considered by the appeal panel is presented in Schedule 1.
3. Appeals under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act") are carried out by the Chartered Professional Engineers Council ("the Council"). They proceed by way of rehearing. The appeal panel must form its own view of the facts and determine the appeal accordingly. The appeal panel may make any decision that could have been made by the Registration Authority, and may confirm, vary, or reverse the Registration Authorities decision<sup>1</sup>.
4. Following *McMullen J in May v May* [1982] NZFLR 165,170 the appellant must show that in the original decision, the decision maker acted on a wrong principle, failed to take into account some relevant material, took into account some irrelevant material, or was plainly wrong.
5. Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, if the appeal panel comes to a different view from the original decision maker on the evidence, the original decision maker will be deemed to have erred and the appeal must be allowed.
6. The decision being appealed is an adjudicator's<sup>2</sup> decision. The outcomes available to the appeal panel are to uphold the adjudicator's decision and dismiss the complaint or to overturn the adjudicator's decision, uphold the appeal and refer the complaint back to the Registration Authority to place it before an investigating committee.

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<sup>1</sup> S37(5)(a)

<sup>2</sup> A chair of an investigating committee acting as an adjudicator

7. Following *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, professional disciplinary processes are “*designed to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future*”.
8. The professional disciplinary processes do not exist to punish an individual for their conduct<sup>3</sup> or to appease those who are dissatisfied with the professional services they received.
9. The purpose is to ensure professional standards are maintained so that clients, the profession and the broader community are protected.

### **Chronology, Submissions and Correspondence**

10. The Registration Authority have provided the parties a paginated Bundle of Documents file [BOD pages 1 to 808], including a complaint chronology<sup>4</sup>.
11. Correspondence and submissions relating to the appeal process are listed in Schedule 2.

### **The Original Concern/Complaint**

12. In January 2019, Ms A raised concern<sup>5</sup> with the Registration Authority about Mr B’s professionalism and conduct in relation to his provision of engineering services between 2012 and 2017.
13. Ms A considered during his engagement, Mr B produced an unreasonable stormwater design and engaged with her in an unprofessional manner; and that he failed to communicate to her the financial implications of the design, design revisions, and construction observations.

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3 In *Re A Medical Practitioner* [1959] NZLR 784

4 [BOD 1 & 2]

5 [BOD 462]

14. The Registration Authority summarised these matters to be:
  - a. Whether Mr B's designs fell short of what is expected of a reasonable engineer;  
and
  - b. Whether Mr B's conduct breached the code of ethical conduct.

### **The Decision being Appealed**

15. The decision being appealed is the Registration Authority's Engineering Complaint 523 - dated 17 February 2021.
16. An adjudicator dismissed the complaint under rule 57(ba) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ("the Rules"), on the basis that the alleged misconduct is insufficiently grave to warrant further investigation.

### **Grounds of Appeal and Outcome Sought**

17. The basis of Ms A's appeal is set out in her letter dated 31 March 2021.
18. The grounds of appeal are summarised by the appeal panel as, the Adjudicator erred in his decision by:

#### Competence

- 1(i) accepting the first floor level 36.75 as a purposeful and appropriately considered decision from Mr B's 2008 client and was not a mistake;
- 1(ii) relying on Dr C ("the expert") review because his letter stated he had not reviewed structural elements of the right of way, the overland flow path, or the retaining walls as these are outside his area of expertise. Ms A says the right of way and storm water design are her main areas of concern;

#### Ethics

- 2(i) concluding there were no shortcomings in Mr B's professional behaviour when the expert found Mr B had adopted the peak flow from CBA's flood report without checking its validity;

- 2(ii) concluding there were no shortcomings in Mr B's professional behaviour when the expert found Mr B's decision to adopt a culvert based design had resulted in a complex engineering design with associated significant construction costs;
  - 2(iii) concluding there were no shortcomings in Mr B's professional behaviour when Mr B had told Ms A to engage another surveyor to amend the FFL;
  - 2(iv) concluding there were no shortcomings in Mr B's professional behaviour when the Adjudicator found Mr B could review how he communicates with lay clients in future to ensure they understand the design plan and implications;
  - 2(v) relying on Mr B's statement the previous owner asked him to build the culvert. Ms A notes the previous owner died in 2010 and there is no way to verify this information.
17. The remedies sought by Ms A are:
- a. Mr B to be held to account for his mistakes, unprofessional behaviour and lack of ethics, and
  - b. Mr B should make a formal apology to Ms A in writing and make a refund of the fees paid.
18. The outcomes this panel can determine under the appeal process are referred to in paragraph 6 above.

## **Evidence Considered**

19. Under s15 of the regulations, the appeal panel may receive any evidence that the Registration Authority would have been entitled to receive on the decision being appealed.
20. The evidence considered by the appeal panel in arriving at this decision includes:
- a. Ms A's Letter ( Notice of Appeal) 31 March 2021;
  - b. The Registration Authority's paginated Bundle of Documents [BOD 1 – 808];
  - c. Submission from Ms A dated 27 June 2021;
  - d. Lawyer D submission on behalf of Mr B dated 14 July 2021;

- e. Submission from the Registration Authority dated 14 July 2021;
- f. Ms A's Submission in Response dated 26 July 2021; and
- g. The virtual hearing conducted on 17 December 2021.

## **Background**

- 21. While this complaint involves two parties, the appeal panel notes two owners and multiple consultants have been involved in this project from inception to build.
- 22. In 2008, the then owner of Address E, engaged Company F to assist in obtaining City G Council's approval to his proposed 3 residential lot subdivision. Company F were engaged to investigate and prepare a flood report<sup>6</sup> and to provide a response to City G Council's request for further information<sup>7</sup>.
- 23. Company F were provided a copy<sup>8</sup> of the submitted design and drawings; pre-application minutes; and a digitised site plan by Surveyors G<sup>9</sup>;
- 24. Included in the brief was the removal of a large detention tank; demolition of two existing garages; demolition of a swimming pool; retention of the existing house; new double carparking on lot 1, separate access from the road to lot 2, a new right of way providing access to lots 1 & 3, and diversion of the stormwater by the provision of a culvert under the right of way. The design nominated the design floor levels of the retained residence on Lot 1 and the habitable floor levels of the proposed residences on Lots 2 and 3, providing freeboard for the 1 in 100 year flood event, with no worsening of flooding to any neighbouring properties. The general arrangement of the proposed layout including the Lot 1 & 3 right of way and stormwater overland flow is shown on Company F's Drawing S01 Rev B<sup>10</sup>.

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<sup>6</sup> [BOD 51]

<sup>7</sup> [BOD 96]

<sup>8</sup> [BOD 22]

<sup>9</sup> [BOD 281], prepared in Oct 2009, and amended in October 2009

<sup>10</sup> [BOD 277]

25. Mr B, a director of Company F and a Chartered Professional Engineer prepared the flood report and submitted it to City G Council.
26. City G Council approved the resource consent (SUB 2007-1723 and LUC 2007-1722 in 2009<sup>11</sup>.
27. In July 2012, Ms A & Mr I purchased the property, and took over the previous owner's development plans, and the project management of the development.
28. In December 2012 Ms A & Mr I engaged Company F to carry out the design of structural elements associated with their proposed build on Lot 3, including beams, posts, bracing, pipe bridging, foundations, and modifications to the retaining between Lot 1 and 3, and discussed the ROW and culvert.
29. Mr B advised Ms A a redesign required amendment to the earlier consents.
30. In May 2013, Ms A engaged Company J to carry out surveying, revise the 2012 design and submit a S 127 amendment to the 2009 consent.
31. The design altered<sup>12</sup> the alignment of the access to lots 1 & 3, allowed for the retention of the existing garage and carpark on lot 1, re-orientated and provided a larger footprint to Lot 3 residence, realigned the lot 1/3 boundary; and provided a larger footprint for the proposed residence on lot 2.
32. An amendment was submitted to Council in June 2013. Council issued requests for further information in July & December 2013 and recommended the submission be withdrawn on the basis of non-compliance with the relevant requirements.
33. Company J approached Mr B for his consideration of the wastewater connection and driveway formation allowing for the driveway areas to drain to a grass swale adjacent to the driveway.

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11 [BOD 471]

12 [BOD 121] Drawing RC02.

34. In April 2014, Company J submitted a new resource consent application.
35. In May 2014 Council issued a request for further information.
36. Company J later withdrew this application and Company J's services were discontinued in May 2014.
37. Ms A again approached Mr B to revise his report and design.
38. Mr B submitted an amended design in August 2014.
39. This 2014 design included Company F's September 2013 flood risk report, retention of the garage on Lot 1, gradient change to the right of way and surrounding ground; and removal of the box culvert.
40. Council approved the changes in December 2014 and issued a resource consent to cover these changes in February 2015.
41. Works commenced in 2015.
42. On 25 September 2015, Council requested a producer statement for construction monitoring from geotechnical engineers<sup>13</sup>.
43. In late September 2015, Ms A requested a PS4<sup>14</sup> from Mr B. He advised her he could not issue a PS4 because he had not carried out construction observation<sup>15</sup>.
44. In April 2016 Council requested further information to process the certificate of code compliance.

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13 [BOD 225 & 227 ]

14 [BOD 30]

15 [BOD 30]



45. In May 2016<sup>16</sup> the surveyor confirmed the scope of their works was limited to carrying out the land transfer survey for the 3 lot subdivision including pegging, 223 approval, and LINZ approval.
46. Following a site visit and having given consideration to the survey information provided in 45 above, Mr B advised the driveway had not been formed in accordance with Company F's design, noting omission of the raised kerb and a variance in the ground levels.
47. Following remedial works Mr B further observed the works in Jan 2017 and issued a confirmation letter covering the overland flow path over the driveway and over Lot 3 as existing and allowing for its completion during construction of house 3.
48. In June 2017 Ms A provided Mr B with another Council letter dated April 2017 requesting further site observation records.
49. By the end of 2017, Mr B considered two of the three items in that letter had been addressed, and that one item was the responsibility of others.

## **The Hearing**

50. Ms A requested a hearing in person. Mr B preferred the hearing be heard on the papers.
51. It is CPEC's policy to generally hold a hearing in person if requested by a party.
52. In consideration of health, logistical restrictions and guidance relating to the Covid pandemic, the panel proposed a virtual hearing via Zoom.
53. A hearing date of 3 June 2021 was set.

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<sup>16</sup> [BOD 144]

54. Prior to the hearing date, Ms A requested an interpreter be present to assist her, if needed, during the hearing. This request was granted, and a new hearing date, 17 December 2021 was set.
55. Present at the hearing were the appeal panel members, the appellant Ms A, her interpreter Mr K; the respondent Mr B and his Counsel Ms L, and legal representatives for the Registration Authority, Ms M and Ms N.
56. The background to the appeal is provided in 21 to 49 of this decision.
57. Key elements of oral submissions are discussed below.

#### Ms A

58. Ms A spoke to her submission, summarised the timeline of events between 2012 and 2017, and provided reference to the BOD.
59. She noted the timeline of the works approved prior to her engagement which included the Oct 2009 resource consent<sup>17</sup>; the approved April 2012 engineering plan; and the approved June 2012 subdivision and building consent<sup>18</sup>.
60. Ms A considered the 2012 design<sup>19</sup> was wrong, and the 2014 design was not an alternative design, but rather a correction of Company F's error, as no additional input was required from others.
61. She noted Mr B had misunderstood the ground level from the beginning of the project, and felt Mr B should have based his 2012 design on the approved 2009 Surveyor H information<sup>20</sup>.

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17 [BOD 489] dated 30 Oct 2009

18 [BOD 490-494]

19 [BOD 314-324]

20 [BOD 489] – Surveyors H plan 1871 dated October 2009

62. She noted there is was no evidence to support Mr B's claim, the design utilising the first-floor level was instructed by the late Mr O.
63. Ms A also said Company F had not assisted her in the project.
64. She considered earlier knowledge of the construction observation requirements would have benefitted the process.
65. She spoke of Mr B offering then retracting his offer to issue confirmation of the construction<sup>21</sup>, and raised concern about being charged for the 2014 design.
66. Ms A said the expert review<sup>22</sup> was based on the incorrect ground floor level and lacked consideration of the overland flow structures.
67. She spoke to feeling blackmailed into paying Company F's invoices and spoke to the stress, project delays and other money spent.

#### The Registration Authority

68. Ms M spoke on behalf of the Registration Authority's submission.
69. She advised she would not be speaking to the concerns raised at the outset of the investigation which are outside the Registration Authority's and CPEC's jurisdiction. These included Ms A's allegations of blackmail, breach of contract and a desire for monetary compensation.
70. She described the function of the Registration Authority, as being to investigate complaints and where appropriate discipline engineers who have fallen short of professional standards.
71. She described the adjudicator's role as being to recommend whether the complaint should be referred to an investigation committee or dismissed under rule 57, and

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21 [BOD 159 & 160]

22 [BOD 199]

noted the Registration Authority considered the adjudicator reached a fair and reasonable decision based on the evidence and consideration given to the expert report.

72. Ms M further described the standard against which a chartered professional engineer is measured as the standard of a reasonable body of the engineer's peers.
73. Ms M said the remedy sought by Ms A, the formal written apology from Mr B, was not explored in the adjudicator's decision because during the initial stages of the complaint the Registration Authority worked with both parties to try to resolve the matter through mediation. Ms A had declined mediation.
74. She said the Registration Authority considered two aspects of the 2012 design. Whether the 2012 design followed standard practise and whether the box culvert was unnecessary.
75. She said the "*insufficiently grave to warrant further investigation*" finding suggests there are grounds for improvement, which is reflected by the educative comment provided by the adjudicator around the way Mr B communicates with lay clients in future to ensure they understand the design plan and implications. However, she noted the adjudicator did not consider the shortcoming would meet the threshold of discipline if the matter progressed to a disciplinary committee.

#### Ms L for Mr B

76. Ms L said the complaint has been thoroughly addressed in the submission filed on Mr B's behalf, which was prepared for the appeal being heard on the papers.
77. Ms L referred to the allegations of blackmail for fees charged, and fee payment timing as commercial practise.
78. She highlighted a clear misunderstanding by Ms A about what Mr B could provide for the fees and the process involved in the subdivision.

79. She also highlighted the variance between the engineering approval completion certificate (EACC), a certificate issued by Council, and the statement of certification engineering approval<sup>23</sup> (SCEA), a certificate completed by an Engineer, following the engineer's observation of the works during construction.
80. She noted in this instance Mr B could not complete the SCEA, but could and did issue a letter for Council, for their consideration, and in addition to the letter Mr B provided Ms A with options, in the event Council did not accept the letter.
81. Ms L submits Mr B did everything he could to assist Ms A to gain the EACC, in the absence of his observation, which resulted from a combination of lack of invitation and Ms A's understanding of the process.
82. Ms L submits whilst the concern was raised by the drainlayer, the drainlayer is not competent to comment on the competency of Mr B's design.
83. Ms L also submits none of the issues that form the basis of Ms A's complaint relate to the structures.
84. She submits it is important to note that Company F was not engaged by Ms A until November 2012, and that in her initial complaint Ms A recognises that. She did not become the registered proprietor until July 2012, by which time resource consent had been issued and EPA documents had been lodged, and issued. The design in place was carried out by Company F under the engagement by Mr O the registered proprietor at that time.
85. Ms L also noted the survey data used for the design had been carried out prior to Company F's engagement.
86. Ms L submits there was no error, the matters Ms A complains about are matters of alternate design.

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23 [BOD 568]

### Ms A in Response

87. In her reply Ms A spoke in part via her interpreter to invoicing and payment timing related to the construction phase.
88. She spoke to conflicting information between Mr B's confirmation letter and his correspondence to her the following day<sup>24</sup>.
89. She objected to Ms L's suggestion that Mr B assisted her in the later stages of the project and considers there is no evidence to support this. She considers his actions made it difficult to obtain Council's final approval.
90. Ms A also objected to the lack of consideration given to discussions between herself and Mr B in regard to changes made in the 2012 design.
91. Ms A made further reference<sup>25</sup> to the Oct 2009 approved subdivision drawing for design levels.
92. Ms A stressed that whether the basement was legal or not, it did not change the impact of the higher 2012 design ROW and the resulting loss of the existing basement access.
93. She referred to, photos<sup>26</sup> of the 2014 design construction in support of 92 above and drawing D02 Revision D<sup>27</sup>.
94. Ms A stressed there was no language barrier between her and Mr B, or a lack of understanding on her part with the interpretation of Mr B's emails.

### **Discussion**

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24 [BOD 560]

25 [BOD 489]

26 [BOD 619 and 620]

27 [BOD 316]

95. Mr B's engagement on the project commenced in late 2008 with another client, Mr O. Resource and building consents were obtained for this work in 2009.
96. Mr B's engagement with Ms A and Mr I commenced in late 2012 and ended in 2017.
97. The grounds for discipline of a Chartered Professional Engineer are set out in Section 21(a) to (d) of the Act.
98. Sections 21(a) and 21(d) are not relevant to this complaint.
99. The appeal panel must therefore consider whether Mr B has:
- a. s21(b) - breached the code of ethics contained in the Rules; and/ or
  - b. s21(c) - performed engineering services in a negligent or incompetent manner.
100. In consideration of 99(a) above and the timing of the alleged misconduct, the appeal panel must consider rules 43 to 53<sup>28</sup> for interaction and/or engagement prior to 1 July 2016 and rules 42B to 42I for interaction and/or engagement post 1 July 2016.
101. Rules 43, 44, 47, 48, 49, 50, 52 and 53 and Rules 42B-D, and 42G-I are not relevant to this complaint.
102. The appeal panel must therefore consider Section 21 (b) and (c) with regard to Rules 45, 46, 42E, and 42F. Specifically, the appeal panel must consider whether Mr B:
- failed to act with honesty, objectivity and integrity prior to 1 July 2016, in accordance with Rule 45, and/or failed to behave appropriately post 1 July 2016, in accordance with Rule 42F(a)(i); and/or
  - has performed engineering services in a negligent or incompetent manner prior to 1 July 2016, in accordance with Rule 46, and failed to undertake engineering

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28 Revoked in July 2016

activities in a careful and competent manner, in accordance with Rule 42E(a)(iii) post 1 July 2016.

103. The appeal panel considered each ground in order.

**Ground 1(i) The Adjudicator erred in his decision by accepting the detail of FFL 36.75 as used in the original design, together with the associated implications, was a purposeful and appropriately considered decision from Mr B's original client and was not a mistake**

104. Ms A submits Mr B's use of the existing residence's first floor level as the design level was an error.

105. Ms A considers Mr B should have used Lot 1 residence ground floor level in his 2012 design, noting both the finished floor level and the ground floor level are clearly identified in the approved October 2009 resource consent documentation, and the ground floor level was used in the 2014 design.

106. In the high-level expert review<sup>29</sup> commissioned by the Registration Authority Dr C noted the adoption of the 2012 culvert design based on the first floor level resulted in a complex engineering design with associated construction costs, but considered overall, *"the proposed OLFP design generally complies with accepted standards"*.

107. Mr B submits there were valid reasons for a more complex and expensive design. The design was specific to Company F's (2008)<sup>30</sup> client, who *"sought a design complying with Council's requirements without notification and with consent gained quickly"*. He noted during the design the surveyor and the client had instructed changes to be made, and also noted *"the client was very happy .....knowing and accepting that the less than 2m stud height basement is an unauthorised conversion and cannot be a habitable floor at the time.....he also commented that it is a better access to the*

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29 [BOD 199-203]

30 2008 added by appeal panel in reference to Company F's 2008 design for clarity



*existing house by building a timber bridge or stair from the carpark to floor (FFL 36.75) having less steps into the house”<sup>31</sup>.*

108. Mr B also submits this 2008 design was purposeful.
109. He describes the design changes to the earlier application by others as including re-routing the overland flow path towards the southern boundary to maintain the original entrance and exit points from the site and avoiding altering the effect on the neighbours; redesigning the driveway and reducing the gradient to avoid changes to the proposed residence on Lot 3.
110. He also notes these changes were approved by City G Council in Dec 2009.
111. Mr B submits he considered these changes to be accepted by his client, and noted the design was lodged in 2008, and consented in Dec 2009.
112. Ms A disputes this design assumption was to an instruction of the previous owner and submits *“in any case there is no way to verify this information as the previous owner is deceased”*.
113. Whilst Mr B acknowledges a discussion in 2012 about potential alternatives to the OLFP design, he submits there had been no indication Ms A or Mr I were unfamiliar with the design, that they were unhappy with the culvert, or that they wanted an amendment to be included with the revision made in 2012, which included changes to Lots 2 and 3.
114. Mr B submits “there was no reason to change the design”, based on the 2012 changes.
115. The appeal panel accept Mr B’s design assumption utilising the FFL of the existing residence on Lot 1 was a considered design assumption recognising the requirements

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31 [BOD 23]

of Company F's 2008 client, with consideration given to accepted standards and a prompt approval by City G Council.

116. The appeal panel also accepts this portion of the design was not altered directly by the changes made to the design under Company F's 2012 engagement with Ms A and Mr I, nor did it require changing as a consequence of changes made under this engagement.

117. The appeal panel consider this ground has not been proven.

**Ground 1(ii) The adjudicator erred in his decision by relying on Dr C's ("the expert") review because his letter stated he had not reviewed structural elements of the right of way, the overland flow path, or the retaining walls as these are outside his area of expertise.**

118. Ms A objects to the Adjudicator's reliance on Dr C's review.

119. She considers the review to be incomplete and notes the 2012 structural components of the right of way (ROW), overland flow path, or the retaining walls were not reviewed.

120. The Registration Authority engaged Dr C to provide a high level expert review of the 2012 engineering design by Mr B and asked him to provide an opinion on whether there are any significant issues with the 2012 design; whether the design met accepted standards, and if not, how significant a departure from accepted standards he considered had occurred.

121. He summarised his findings under 8 points: overland flow path geometry; overland flow path flow rates; earthworks; structure types and geometry; scour protection; Lot 1 basement height; Councils' review and approval; acceptable driveway slopes.

122. He concluded *"Overall, I consider that the proposed OLFP design generally complies with accepted standards"*.

123. The Registration Authority submits both parties were provided opportunity to read and respond to Dr C's review prior to the Adjudicators decision, in accordance with the *audi alteram partem* rule of natural justice.
124. In response<sup>32</sup> to the report by Dr C, Mr B provided a copy of his calculations, prepared in support of Company F's 2008 design and reports; an explanation for the variance in culvert size between drawings, a drafting error and reasoning for the 2012 design. He also described the 2014 variance, and provided his take on the discussion around construction observation.
125. In her Oct 2020 response to the report & Mr B's, Ms A asked<sup>33</sup> the Registration Authority to analyse the necessity of raising the ROW; raising the public SW manhole and building the culvert design and other associated elements.
126. She also noted the later 2014 design met Council's requirements without the need to raise the ROW, the manhole or include a culvert.
127. Mr B's Counsel submits<sup>34</sup> "*no structural issues were raised by Ms A*".
128. The scoping of the expert's opinion and the Adjudicator's reliance on the report is a procedural matter which falls outside the jurisdiction of the appeal panel.
129. The appeal panel acknowledge no structural issues were raised by Ms A in her initial complaint. The concern queried the height of the OFP and the inclusion of the culvert.
130. The panel consider this was addressed by consideration to the geometry in the experts report.
131. The appeal panel consider this ground has no merit.

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32 [BOD 199-211]- 15 May 2019, 7 July 2020

33 [BOD 603] letter dated Oct 2020

34 Mr B's submission paragraph 43

**Ground 2(i) The adjudicator erred in his decision in concluding there were no short comings in Mr B's professional behaviour when the expert found Mr B had adopted the peak flow from CBA's flood report without checking its validity erred in his decision.**

132. Ms A submits Mr B deliberately misled her by repeating work to defraud money.
133. She says Mr B adopted CBA's overland flow data in his report, he repeated work and he advised his client Council had declined the resource consent application due to a problem with the overland flow path.
134. Mr B's Counsel submits<sup>35</sup> this is a new allegation not previously raised.
135. The appeal panel accept this is a new allegation, and considers it relates to Company F's 2008 client.
136. The appeal panel consider this ground to be outside its jurisdiction.

**Ground 2(ii) The adjudicator erred in his decision in concluding there were no short comings in Mr B's professional behaviour when the expert found Mr B's decision to adopt a culvert based design had resulted in a complex engineering & associated construction costs.**

137. As noted in 106 above in his review<sup>36</sup> Dr C noted the adoption of the 2012 culvert based design based on the FFL resulted in a complex engineering design with associated construction costs, but considered overall, *"the proposed OLFP design generally complies with accepted standards"*.
138. Mr B accepts the design is complex, and refers to the requirements of Company F's 2008 client as reasoning for this.
139. The appeal panel considers this ground has no merit.

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<sup>35</sup> Mr B's submission paragraph 35

<sup>36</sup> [BOD 199-203]

**Ground 2(iii) The adjudicator erred in his decision, Mr B told Ms A to engage another surveyor if she wanted to amend the FFL: because Surveyors H would not provide the new floor level.**

140. Ms A says<sup>37</sup> Mr B told her Surveyor H had provided an incorrect floor level and to engage another surveyor.
141. Ms A says<sup>38</sup> Surveyor H provided the basement level GL of 34.43 at the left of topography plan dated October 2009<sup>39</sup>.
142. The appeal panel accepts Surveyor H's provided reduced levels<sup>40</sup> for the existing residence on lot 1 in October 2009.
143. Mr B states<sup>41</sup> when he was instructed to remove the culvert in late 2012, he advised Ms A further consideration of the basement level would be required.
144. Mr B states Ms A approached Surveyor H and later advised him she had engaged another surveyor.
145. Mr B's Counsel<sup>42</sup> reiterated Mr B's earlier response *"Ms A is mistaken that Mr B believed there was an error in the survey carried out by Surveyors H. The design was to first floor level... The discussion about the levels came about as a result of Ms A's instructions for the culvert to be removed. Without instruction, Ms A proceeded to instruct further consultants to carry out a number of designs and reports which led to considerable delay"*.
146. The appeal panel considers the evidence does not support the assertion that Mr B advised Ms A the surveyors had provided incorrect levels, or to engage another.

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37 [BOD 605]

38 [BOD 472]- paragraph 4

39 [BOD 468]

40 [BOD 468] section XX & Y-Y: RL 36.75, GFL 34.43 & 34.45 and GL 34.43 & 34.26 respectively

41 [BOD 26]

42 [BOD 584] Letter dated 22 October 2020

147. The appeal panel considers this ground has no merit.

**Ground 2(iv) The adjudicator erred in his decision, concluding there were no short comings in Mr B's professional behaviour when the Adjudicator found Mr B could review how he communicates with lay clients in future to ensure they understand the design plan and implications.**

148. Whilst it is a sound consultancy practise for a Chartered Professional Engineer to ensure their client understands a design plan and the implications of the design plan, there is no associated rule, and therefore no related ground for discipline for an engineer's failure to do so.

149. In addressing the matter referred to in 148 above, the panel notes that the closest rule was (prior to 1 July 2016) Rule 48, now Rule 42G, which outlines the obligations of a Chartered Professional Engineer should they consider their advice may not be followed. This is not the case here.

150. Whilst this appeal panel encourages Mr B to review how he communicates with lay clients in future, to ensure they understand the design plan and implications, the appeal panel consider this ground has no merit.

**Ground 2(v) The adjudicator erred in his decision in relying on Mr B's statement the previous owner asked him to build the culvert.**

151. Ms A submits the previous owner died in 2010 and there is no way to verify this information.

152. The appeal panel notes the design incorporating the culvert was approved by City G Council in 2009, two years prior to the 2012 design.

153. The appeal panel considers that Ms A has not provided evidence in support of this ground and therefore concludes that it has not been proven.

## **Conclusion**

154. This appeal has highlighted the complexity of a subdivision, with multiple clients, especially when the process has extended over a number of years.
155. Ms A claimed Mr B made design mistakes; had acted unprofessionally and was lacking with regard to his ethical conduct.
156. Ms A also claimed Mr B had invoiced for repeated work, had required payment for revisiting the 2012 design and works associated with the construction phase.
157. The appeal panel accept the complaint has been thoroughly investigated within the scope of the Act, noting contractual matters as described in 156 above, fall outside CPEC's and the appeal panel's jurisdiction.
158. None of the grounds of appeal have been proven.
159. It has not been shown on the balance of probabilities that Mr B breached his code of conduct obligations under s21(1)(b) of the Act, by failing to act with honesty, objectivity or integrity in accordance with Rule 45<sup>43</sup> or that he has failed to behave appropriately in accordance with Rule 42F.
160. It has also not been shown on the balance of probabilities, that Mr B breached s21(1)(c) of the Act by performing engineering services in a negligent or incompetent manner in accordance with Rule 46<sup>44</sup> or by failing to undertake engineering activities in a careful and competent manner in accordance with Rule 42E(a)(iii).

## **Outcome**

161. The appeal is dismissed.
162. The adjudicator's decision stands.

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<sup>43</sup> Prior to July 2016

<sup>44</sup> Prior to 1 July 2016

163. In accordance with s35 of the Act either party may appeal this decision to the High Court within 28 days.

### **Costs**

164. A ruling on costs was not an outcome sought in the Notice of Appeal from Ms A.

165. Neither party has made submissions in respect of costs, and the panel's decision is that costs shall lie where they fall.

**Dated 15 day of September 2022**

Signed by the Appeal Panel



Sandra Hardie – Principal



Manjit Devgun – Member



Sue Simons – Member



## **Schedule 1: Legislation**

### **Chartered Professional Engineers Act 2002 (“the Act”)**

1. S21 of the Act sets the grounds for discipline of CPEng.
2. S25-s27 of the Act provides the decision-making functions and powers and procedure of the Registration Authority and the Council in making decisions relating to S20 complaints about engineers.
3. The right of a party to appeal a decision by the Registration Authority is contained in s35 of the Act.
4. The hearing and determination of an appeal is contained in s37. In particular the scope of the Council’s jurisdiction, which is to deal with the matter by way of rehearing.
5. The Council has no power to review any part of the decision other than the part to which the appeal relates (the Act s 37(6)).
6. S45 of the Act covers the Council hearing appeals on decisions of the Registration Authority.

### **Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”)**

7. The rules are enacted pursuant to S40 of the Act.
8. Part 3 sets the code of conduct required by a Chartered Professional Engineer under the Act.
9. Up to 30 June 2016 the relevant rules were:
  - Rule 43 – take reasonable steps to safeguard health and safety
  - Rule 44 – have regard to effects on the environment
  - Rule 45 – act with honesty, objectivity, and integrity
  - Rule 46 – not misrepresent competence

Rule 47 – not misrepresent chartered professional status

Rule 48 – inform others of consequences of not following advise

Rule 49 – not promise, give, or accept inducements

Rule 50 – not disclose confidential information

Rule 51 – not misuse confidential information for personnel benefit

Rule 52 – disclose conflicts of interest

Rule 53 – not review other engineers works without taking reasonable steps to inform them and investigate.

10. Post 1 July 2016 the relevant rules are:

Rule 42B – take reasonable steps to safeguard health and safety

Rule 42C – have regards to effects on the environment

Rule 42D – report adverse consequences

Rule 42E – act competently

Rule 42F – behave appropriately

Rule 42G – inform others of consequences of not following advise

Rule 42H – maintain confidentiality

Rule 42I – report breach of code

11. Rule 56 provides for the Registration Authority to dismiss the complaint on a ground in rule 57

12. Rule 57 provides dismissal of the complaint by a chair of an investigating committee under rule 58

13. Rule 58 describes the procedure for consideration to referral to an investigating committee or dismissal
14. Rule 59 the Registration Authority must notify and implement the decision.

## **Schedule 2: Correspondence and Submissions**

15. Receipt of Ms A's Notice of appeal dated 14/31 March 2021.
16. 1 April, 17 April email letter issued by CPEC to the parties acknowledging receipt of the Notice of Appeal and instructing the Registration Authority to prepare a paginated bundle of documents.
17. 12 April 2021 Email from the Registration Authority providing a link to the parties and the appeal panel to the paginated bundle of documents.
18. 4 June 2021 email issued by CPEC appeal panel principal to the parties advising the names of panel members, the process and submission timelines.
19. Receipt of Ms A's submission dated 27 June 2021;
20. Receipt of Mr B's submission dated 14 July 2021;
21. Receipt of the Registration Authority's submission dated 14 July 2021;
22. Receipt of Ms A's Submission in Response dated 26 July 2021;
23. 27/07/2021 – email issued by the appeal panel principal to the parties requesting confirmation of preference for hearing on the papers or in person.
24. 03/09/21 - email received from the Registration Authority advising they are happy for the hearing to be on the papers, and if required will attend a zoom or an in- person hearing.
25. 03/09/21 – email received from Mr B acknowledging preference for hearing on the papers.
26. 06/09/21- email from Mr B's Counsel reconfirming Mr B's preference.
27. 30/09/21 – email from Ms A acknowledging preference for in person hearing, whilst noting difficulties associated with attending in person hearing in Wellington.
28. 14/09/2021 – email from the Registration Authority confirming attendance.

29. 17/09/2021 – email request from Ms A seeking interpreter attendance and a revised hearing date.
30. 1/10/21 – email to the parties confirming acceptance from the panel for an extension.
31. 1/12/2021 – email from appeal panel principal to the parties setting the hearing date at 17/12/2021.
32. 2/12/21 – 9/1/21 – acknowledgement from all.