

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

Appeal 04/22

AND

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

Between

Mr A
Appellant

And

Council B
Complainant

Decision of the Chartered Professional Engineers Council
Dated 22 March 2023

Introduction

1. Mr A (“the appellant”) has appealed a decision made by a Chair of Investigating Committees (“the CIC”) of the Registration Authority (“the RA”) [BOD 199-206] to refer a complaint about him by Ms C of Council B to an investigating committee.
2. The appeal panel of the Chartered Professional Engineers Council (“the Panel”) has been provided with a Bundle of Documents held by the RA in relation to the case. References to specific pages within this bundle are annotated “[BOD nn]”.
3. The RA was granted leave by the Panel to be heard and provided submissions in this matter.
4. With the agreement of the parties and the RA, the Panel conducted the hearing on the papers. Key correspondence and submissions relating to this appeal are listed in Schedule 2.

The Legislation

5. This appeal is brought under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”), from which the Council derives its power to hear and determine appeals of decisions of the RA (being the Institution of Professional Engineers of New Zealand Incorporated trading as Engineering New Zealand).
6. The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”) set out the requirements pertaining, amongst other matters, to the hearing and the deciding of appeals.
7. The Rules under which the appealed decision was made are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 (“the Rules”), enacted pursuant to s 40 of the Act.
8. Appeals to the Council are by way of rehearing.¹
9. The Panel is entitled to confirm, vary or reverse a decision and may make any decision that could have been made by the decision authority.² 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.

¹ s37(2) of the Act

² s37(5)(c) of the Act

10. Relevant extracts from the Act and the Rules are set out in Schedule 1.
11. For clarity, the Panel notes that references made to the Engineering New Zealand Code of Ethical Conduct, the Engineering New Zealand Complaints Resolution and Disciplinary Regulations, and the Engineering New Zealand Rules in the CIC's decision and/or in submissions to the Panel, relate to membership of Engineering New Zealand and are not relevant to this appeal.

Background

12. Mr A is a Chartered Professional Engineer and was engaged by Mr D, who was also the main contractor, to complete engineering design work on the latter's property ("the Property").³
13. Mr A's CPEng registration had been suspended for three months, for reasons unrelated to the matter now being appealed. Mr A's suspension ended with his reinstatement on the register on 3 September 2021.
14. On 25 January 2021 Ms C raised concerns about Mr A. The three elements of the complaint were that he had (i) used an outdated PS1 producer statement template, (ii) issued a PS1 while his CPEng registration was suspended, and (iii) allowed work to proceed on site without the appropriate consents in place.⁴
15. The CIC dismissed the complaint in respect of Mr A's use of an outdated PS1 template but referred the two other elements of the complaint to an investigating committee.

Decision being appealed

16. The matter being appealed is the part of the 4 October 2022 decision of the CIC⁵ to refer the complaint by Ms C, specifically *"Allowing unconsented building work" – failing to advise his client in writing of needing to obtain consent before proceeding with building works.*⁶ to an investigating committee.
17. The Panel notes that Mr A is not appealing the decision of the CIC to refer the matter of *"Signing the Producer Statement while suspended from CPEng.."* to an investigating committee and notes that this latter element will be considered by an investigating committee, irrespective of the findings of the Panel on the matter referred to in 16 above, which has been appealed.

³ Appellant submissions para 1

⁴ BOD 2-11

⁵ BOD 199-206

⁶ Notice of Appeal para c)

Evidence received

18. Under clause 15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
19. The evidence considered by the Panel in arriving at its decision included:
 - (a) Notice of Appeal dated 7 November 2022
 - (b) The paginated Bundle of Documents [BOD 1 to 207]
 - (c) Submissions of counsel for Mr A dated 21 December 2022
 - (d) Submissions of Ms C dated 25 January 2023
 - (e) Submissions of the RA dated 27 January 2023
 - (f) Reply submissions of counsel for Mr A dated 10 February 2023

Grounds of appeal and outcome sought

20. Mr A's Notice of Appeal dated 7 November 2022 cited five grounds of appeal, as follows:

".....

- (i) *The appellant did make clear to the client that building consent was required prior to proceeding with any building works.*
- (ii) *The applicant [sic] did advise the client of adverse consequences of not following this advice.*
- (iii) *There is no requirement under the rules or code for the warning to be given "in writing" to a client even if the Rule 42G and Clause 6 of the Code of Ethical Conduct (Code) were triggered.*
- (iv) *The client has accepted that the appellant verbally advised him building consent had to be granted before any building work could proceed. The client, however proceeded with the work at his own discretion.*
- (v) *Rule 4G [sic] and Clause 6 of the Code only require that an engineer who becomes aware that the engineer's professional advice may not be followed, and who considers that a failure to observe that advice may have adverse consequences, must inform the recipient of the advice of those adverse consequences. Here it has not been shown that the appellant engineer was aware that his advice would not be followed, or that such a failure would lead to any adverse consequences. Accordingly, he was not required to do anything further as far as the client was concerned in this situation."*

21. Mr A is seeking that *“the part of the decision to refer the complaint of allowing unconsented building work be quashed and instead that this particular complaint should be dismissed.”*
22. Mr A is also seeking costs.

Discussion and Findings

23. The process and way in which the decision is to be made are set out in rules 56, 57 and 58 of the Rules. The decision of a CIC is the first, and preliminary stage of decision-making in what can be a three-stage disciplinary process. If a matter progresses, the subsequent stages are an investigation by an investigating committee and ultimately, if not dismissed by an investigating committee, determination by a disciplinary committee.
24. Rules 56 to 58 are set out in full in Schedule 1 to this decision. The Panel notes that, in relation to rule 57(a), the applicable grounds of discipline under s 21(1)(a) to (d) of the Act include a breach of the Code of ethics (‘Code of ethical conduct’) which are contained in part 3 of the Rules.
25. The appropriate rule against which the Panel must consider the evidence relating to Mr A’s conduct is rule 42G, which states *“A chartered professional engineer who becomes aware that the engineer’s professional advice may not be followed, and who considers that a failure to observe that advice may have adverse consequences, must inform the recipient of the advice of those adverse consequences”*
26. It is not the role of the Panel to determine whether or not Mr A has breached his obligations under rule 42G, but rather, whether or not the element of the complaint being appealed can be dismissed under a ground in rule 57(a) to (f).
27. If the Panel determines that no ground is proven under rule 57 to dismiss the element of the complaint being appealed then the matter must be referred to an investigating committee.

Specific elements of the appeal

28. The various elements of the matter being appealed are addressed below against the respective grounds, in the order presented in the Notice of Appeal (set out at paragraph 20 above). The Panel notes that there is some overlap in the content of the five stated grounds.

Ground 1 – “The appellant did make clear to the client that building consent was required prior to proceeding with any building works.”

29. Submissions on behalf of Mr A first established that he was engaged by Mr D to provide engineering design work and that a building consent application for the dwelling related work, of which Mr A’s work formed a part, was filed by Mr E, director of Company F.⁷

30. Counsel for Mr A submitted *“In late August 2020, the client informed the appellant that the pool had been excavated and the ground needed to be inspected. Over the phone call, the appellant advised the client that consent was needed to be granted for works to commence.”*⁸

31. Then, counsel for Mr A submitted *“In any event, the client has confirmed by way of a letter that the appellant had verbally advised him about the need to obtain consent before commencing any building works. The client, however, proceeded with the work at his own discretion. This is accepted by the client in his letter”*⁹ referring to a copy of the client’s letter.¹⁰

32. The client’s letter referred to in para 31 above is not dated, nor does it indicate the date on which Mr A provided the client with the advice as claimed.

33. The absence of dates within the client’s letter, the fact that the letter was not dated and the absence of any other clear evidence in support of Mr A’s counsel’s assertions contained in the ground, mean that the Panel has no reasonable basis to conclude that Mr A advised his client verbally about the need to obtain consent before commencing any building works.

34. The preceding statement does not mean that Mr A did not advise his client, merely that thus far there is no clear evidence to support that assertion.

⁷ Appellant submissions paras 1-5

⁸ Appellant submissions para 6

⁹ Appellant submissions para 33

¹⁰ BOD 207

35. In summary, the Panel has not seen any adequate evidence in support of the submission in 30 and 31 above, by counsel for Mr A, and notes that RA has made similar submissions on the point.¹¹
36. The Panel concludes that this ground is not proven but considers that the facts relating to Mr A making clear that building consent was required prior to proceeding with any building works, should be readily able to be established, one way or the other, by investigation conducted by an investigating committee.

Ground 2 – “The applicant [sic] did advise the client of adverse consequences of not following his advice.”

37. Counsel for Mr A submitted that for there to be a breach of rule 42G and clause 6, it would need to be proven that Mr A knew his advice would not be followed, and that such a failure would lead to adverse consequences, asserting that the burden of proof rests on the disciplinary body, and that the decision fails to correctly consider the elements of rule 42G and clause 6.¹²
38. Clause 6 referred to in para 37 above is a provision in the Engineering New Zealand Code of Ethical Conduct, for which the Panel has no jurisdiction, although the Panel notes that the two documents are similar. The Panel’s deliberations are confined to rule 42G.
39. The RA submitted *“There are uncertainties over whether the appellant complied with his obligations under the Code of Ethical Conduct. While the appellant claims he did, he has [not] produced any evidence in support of his claim. As a result, the Adjudicator correctly decided he could not dismiss this part of the complaint under rule 57(a) (no applicable grounds of discipline) and referred this part of the complaint to an investigating committee for further investigation.”*¹³
40. In response to the RA’s submissions counsel for Mr A has submitted *“The respondent [RA] submits that the Adjudicator had not seen any evidence that the appellant had advised his client of any adverse consequences and therefore the Adjudicator’s reasoning was correct. ... It is submitted that the finding that there was ‘no evidence’ is incorrect as there is no requirement for the appellant to provide further evidence in support of his position other than that he did advise the client not to proceed with building works prior to consent issuing.”*¹⁴

¹¹ RA Submissions para 11.4-11.6

¹² Appellant submissions paras 18-21

¹³ RA submissions para 11.12

¹⁴ Appellant reply submissions paras 34 and 35

41. In addressing this ground, including consideration of the arguments advanced by the RA and counsel for Mr A in 39 and 40 above, the Panel faces the same difficulty addressed in respect of ground 1 in 32 to 35 above. That is, the absence of documentary evidence to support the ground. Not only is there no evidence to support the assertion that Mr A did make clear to the client that building consent was required prior to proceeding with any building works, but the same situation also applies in respect of the assertion that he did advise the client of adverse consequences of not following his advice.
42. The question at the centre of this ground follows from the complaint by Ms C and the Panel is puzzled that counsel for Mr A asserts that “..*there is no requirement for the appellant to provide further evidence in support of his position other than that he did advise the client...*” when to have provided evidence rather than just an unsupported statement, may potentially have resolved the matter in his favour. The Panel refers to paragraph 9 above, in particular to the principle that 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 (*Austin, Nichols*¹⁵).
43. The Panel concludes that this ground is not proven but considers that the facts relating to Mr A advising the client of adverse consequences of not following his advice, should be readily able to be established, one way or the other, by investigation conducted by an investigating committee.

Ground 3 – “*There is no requirement under the rules or code for the warning to be given “in writing” to a client even if the Rule 42G and Clause 6 of the Code of Ethical Conduct were triggered.*”

44. Counsel for Mr A submitted “*The decision notes that the appellant “said he did this (i.e. advise client that consent is required before undertaking any building works) verbally several times and assisted his client to make the site safe until such time as building consent was granted.” However, the decision maker then holds against the appellant on the basis that such advice was not given in writing. The decision states there were no ... “emails recording this advice and no note in his site inspection report to that effect”... there is no requirement under the Rules or Code for the advice to be given “in writing” to a client even if the r 42G and cl 6 were triggered. The decision provides no reasons as to why it is necessary to give such advice in writing when the Rules and the Code do not explicitly place such an obligation on the professional.*”¹⁶

¹⁵ Austin, Nichols & Co Inc. v Stichting Lodestar [2008] 2 NZLR 141

¹⁶ Appellant submissions paras 35, 36

45. The RA submitted *“Practice Note 8, published on Engineering New Zealand’s website, provides guidance for engineers in interpreting the Code of Ethical Conduct. Section 3 of this practice note outlines the obligation to report adverse consequences. Section 6 deals with the duty to inform others of the consequences of not following advice. Section 6 says that when an engineer gives important engineering advice, they must use their judgement to assess whether it will be followed. If an engineer assesses their advice will be ignored and this could cause harm to people or environment, then the engineer must take action. Section 6 provides: You must take every reasonable step to communicate the harmful consequences to those ignoring advice. Your advice should be in writing, setting out why you are concerned and what the consequences could be. This ensures that you have a record of what action you took if you need it in the future.”*¹⁷
46. Further the RA submitted *“The Adjudicator said no evidence was provided by the appellant to support his claim that his client had been advised of the adverse consequences if he were to proceed with building without consent. Although the Code does not expressly state advice must be given in writing, it does place an obligation on the engineer to actively advise the client of the adverse consequences of ignoring the engineer’s advice. Practise note 8 clearly states that advice should be given in writing. The Adjudicator’s role is to assess what a reasonable peer would have done in the same situation, in other words what would be reasonable practice. It is reasonable to expect that a reasonable engineer will follow the guidance given it is the engineers professional obligation to do so under the Code.”*¹⁸
47. In responding to the RA, counsel for Mr A submitted *“...the Practice Note is simply a guidance document and does not place any legal obligation and/or requirement on the appellant. Furthermore, the Practice Note does not override the statutory framework enshrined in the Code, Rules and the Act. The Rules and Code are the higher order documents and take precedence. There is no requirement under the Rules or Code for the advice to be given “in writing” to a client even if the r 42G and cl 6 were triggered. The decision provides no reasons as to why it is necessary to give such advice in writing when the Rules and the Code do not explicitly place such an obligation on the professional....The respondent submission at [11.15] notes that Practice Note 8, section 6 says ‘advice should be given in writing’. The use of the word ‘should’ indicates that it is not ‘mandatory’. Giving advice in writing may well be best practice if the grounds in section 6 have to be made out but the*

¹⁷ RA submissions para 11.13

¹⁸ RA submissions 11.14, 11.15

*test here is 'reasonable practice'.*¹⁹

48. Counsel for Mr A has stated (47 above) that the appropriate test in regard to advice being given in writing is *"reasonable practice"*. The Panel notes that the RA agrees (46 above) that reasonable practice aligns with a reasonable engineer following guidance and links its statement to the guidance, specifically Practise Note 8.
49. The Panel agrees that there is no explicit requirement under the Rules for advice or a warning in the context of the subject matter of this ground of appeal to be in writing. However, having such matters in writing is in the Panel's view clearly sound professional practice and practice which would be expected of a reasonable professional engineer. In any event, the Panel considers that for such communications not to be in writing is simply unwise.
50. In this instance, the Panel considers that the absence of advice or warnings to the client in writing has prevented the CIC, and now the Panel, from determining the facts. Furthermore, had Mr A been able to present written evidence of his advice and warnings, or had a letter or submission from the client been more detailed, depending on the content, it may have avoided the CIC's decision to refer the matter an investigating committee.
51. While the Panel agrees with the principle of the ground that *"there is no requirement under the rules or code for the warning to be given "in writing"* material addressed in relation to the ground does not provide the Panel with a basis to overturn the element of the decision being appealed.

Ground 4 – "The client has accepted that the appellant verbally advised him building consent had to be granted before any building work could proceed. The client, however proceeded with the work at his own discretion."

52. Mr A appears to rely on the letter from his client, Mr D, in support of this ground.²⁰
53. As addressed by the Panel in respect of ground 1 at 35 above, the client's letter referred to above is not dated, nor does it indicate the date on which Mr A advised the client, as claimed. For these reasons the Panel's deliberations are not assisted by the letter.
54. The RA submitted *"The Adjudicator was not given any evidence at the time he made his decision to suggest the appellant's client was made aware and fully comprehended the adverse consequences that might occur if he proceeded with*

¹⁹ Appellant reply submissions paras 36, 37

²⁰ BOD 207

the building works without consent. As a result, the Adjudicator could not determine with any certainty whether the client was advised and understood the consequences of proceeding with the building work. Therefore, the Adjudicator referred this question onto the investigating committee for further investigation. The Adjudicator's decision to do this was correct."²¹

55. In response to the RA's submissions, counsel for Mr A submitted "*The respondent submissions at [11.17] and [11.18] ignore the issue that the Adjudicator had wrongly applied the onus requirements. As submitted above it is not for the appellant to disprove the allegation, instead it is for the party making the allegation or presenting a position to substantiate that position.*"²²
56. With regard to the point raised by counsel for Mr A in 55 above, the Panel refers to its statement in 26 above. It was not the role of the CIC, nor is it now the role of the Panel to determine whether or not Mr A has breached his obligations under rule 42G, but rather, whether or not the element of the complaint being appealed can be dismissed under a ground in rule 57(a) to (f).
57. Ground 4 as stated relates to an element of the complaint which read "*The engineer should have known that the siteworks could not proceed until such time as the relevant building consent was issued...*"²³ Accordingly this was a legitimate matter for the CIC to address and also a matter that Mr A had the opportunity to respond on, allowing his viewpoint to be considered by the CIC in establishing whether or not a ground exists under rule 57 to dismiss the complaint.
58. As established in 9 above, in bringing the appeal, the onus is on Mr A to demonstrate why the decision being appealed should be overturned. In respect of this ground the Panel does not consider that Mr A has provided adequate reasoning or evidence.
59. The Panel finds, in a similar manner to its finding in respect of ground 1, that without clear evidence that Mr A's client has accepted that Mr A verbally advised him building consent had to be granted before any building work could proceed and that he had proceeded with the work at his own discretion, ground 4 has not been proven and therefore does not provide a basis to overturn the part of the decision being appealed.

²¹ RA submissions paras 11.17, 11.18

²² Appellant reply submissions para 39

²³ BOD 10 – para 1

Ground 5 – “Rule 4G [sic] and clause 6 of the Code only require that an engineer who becomes aware that the engineer’s professional advice may not be followed, and who considers that a failure to observe that advice may have adverse consequences, must inform the recipient of the advice of those adverse consequences. Here it has not been shown that the appellant engineer was aware that his advice would not be followed, or that such a failure would lead to any adverse consequences. Accordingly, he was not required to do anything further as far as the client was concerned in this situation.”

60. The Panel has considered this ground against the requirements of rule 42G, being the provisions applicable to a Chartered Professional Engineer and which read - **“42G Inform others of consequences of not following advice - A chartered professional engineer who becomes aware that the engineer’s professional advice may not be followed, and who considers that a failure to observe that advice may have adverse consequences, must inform the recipient of the advice of those adverse consequences.”**
61. Two questions arise under this ground – (i) was the appellant aware that his advice would not be followed? and (ii) were there adverse consequences?
62. Citing *G²⁴*, counsel for Mr A submitted *“the burden of proof in a disciplinary proceeding rests on the disciplinary body. The standard of proof is the civil standard, which is that facts must be proved on the balance of probabilities. In the present case, the decision fails to correctly consider the elements that are required to prove a breach under r 42G.”*²⁵
63. The Panel acknowledges the finding of the High Court cited at 62 above but notes, as an important distinction, that the finding of the Court in respect of Mr G concerned a decision of a disciplinary committee, whereas the appeal brought before the Panel by Mr A concerns a decision of the CIC.
64. As addressed in 26 above the role of the CIC is limited to determining whether or not the element of the complaint being appealed can be dismissed under a ground in rule 57(a) to (f). The CIC does not have the role of determining whether or not a breach alleged by the complainant has been proven, nor in fact does an investigating committee have that role.

²⁴ G v Institution of Professional Engineers New Zealand [2017] NZHC 3300 at [15]

²⁵ Appellant submissions paras 20 and 21

Was the appellant aware that his advice would not be followed?

65. Counsel for Mr A submitted that there was no evidence before the RA establishing that Mr A knew his advice would not be followed by the client²⁶ and that it appears Council B took Mr A's site visit on 31 August 2020 to mean that he "*somehow authorised and/or intentionally allowed the unconsented earthworks to remove the swimming pool.*" Counsel also asserts that Mr A was not privy to the consent documentation at that stage and noted that the building consent application was submitted by Company F.²⁷
66. Counsel for Mr A submitted "*The decision considers that the appellant had an obligation to advise his client of any adverse consequences of not following his professional advice. However, this ignores the key element that any such obligation only arises if the appellant knew that his advice would not be followed.*"²⁸
67. The RA submitted "*On 11 February 2022, Mr A said in an email to the Registration Authority "... necessary recording of works undertaken and as a duty of care to the client..." [BoD, pp, 205]. The Adjudicator said in his decision that this seems to be acknowledgment from the appellant that he was aware his advice might not be followed.*"²⁹
68. Counsel for Mr A countered "*The respondent submissions at [11.20] are unclear and do not prove the point that the appellant was aware that his advice would not be followed. Simply because the appellant had made a recording of necessary works undertaken or to be undertaken at the time of the site inspection does not prove that he knew his advice would not be followed.*"³⁰
69. The Panel considers there is insufficient evidence available to determine whether or not Mr A was aware that his advice would not be followed. Investigation by an investigation committee would allow the matter to be established on a factual basis.
70. Because of the absence of documented evidence the Panel is not able to form a view as to when Mr A advised his client that work could not proceed without a building consent and, importantly, whether in fact he offered that advice as soon as he became aware that the client may have been going to start work without consent. This matter should be easily able to be established by an investigating committee and a properly informed decision made as to whether or not the element of the complaint being appealed can be dismissed under any of the grounds

²⁶ Appellant submissions para 22

²⁷ Appellant submissions para 24

²⁸ Appellant submissions para 26

²⁹ RA submissions para 11.20

³⁰ Appellant reply submissions para 40

contained in rule 57(a) to (f).

Were there adverse consequences?

71. Adverse consequences are defined in rule 42A as *“(a) significant harm, or an unacceptable likelihood of significant harm, to the health or safety of people; or (b) significant damage, or an unacceptable likelihood of significant damage, to the environment”*
72. Counsel for Mr A submitted *“it was not shown that any such failure to inform (if found) would lead to any adverse consequences.”*³¹
73. The RA submitted *“It is clear significant harm, or the likelihood of significant harm, would be the consequences of client’s actions to proceed with building works without consent. These consequences pose a real risk to cause significant harm to the health and safety of the contractors and homeowners involved in the building works. Without consent granted, it is to be expected that issues of health and safety would arise. Any reasonable engineer would anticipate this risk, and the likely outcome that adverse consequences would arise without having the appropriate consent granted before building work commenced. The risk could have been mitigated by consent, and it is a consideration that the appellant should have factored into his advice to his client.”*³²
74. The RA further submitted *“The appellant had an obligation to advise the client of these adverse consequences once he knew or suspected that building work had commenced without consent.”*³³
75. In response, counsel for Mr A submitted *“The respondent’s submissions at [11.23] in regard to significant harm or the likelihood of significant harm are general and speculative. The adverse consequences may or may not arise if the works are undertaken in contradiction to the Building Act. However, the obligation on an engineer to advise about the adverse consequences is only triggered if he/she becomes aware that his/her advice may not be followed, and he/she considers that a failure to observe that advice may have adverse consequences. Neither was the case here on the evidence.”*³⁴

³¹ Appellant submissions para 29

³² RA submissions para 11.23

³³ RA submissions para 11.25

³⁴ Appellant reply submissions para 41

76. The Panel agrees with counsel for Mr A, that the RA's submissions in regard to significant harm are general and speculative. The RA's statement is too sweeping in the view of the Panel.
77. Counsel for Mr A also submitted *"The respondent's argument at [11.24] that "in addition to any potential harm or damage to people and property, the unauthorised work could also have had serious legal and financial consequences for the appellant's client" must fail on the basis that legal and financial consequences are not part of the statutory definition provided under r 42A.*"³⁵
78. The Panel also agrees that references to serious legal and financial consequences addressed in 77 above fall outside of the provisions of rules 42A and 42G.
79. Ms C submitted *"I also note in Mr A's submission (refer paragraphs 30-31) that he considers there were no adverse consequences. I question this statement on the basis that while there were no concerns in respect of health and safety at the time the Council visited the site and issued the Notice to Fix, this does not account for circumstances that could have been present during the siteworks: also noting that Mr A's site notice is silent on the matter of health and safety.*"³⁶
80. Ms C also submitted further to the preceding paragraph *"when reviewing the site photographs, the site is located up a right of way, and it is clear that no site fencing or hoarding was provided to the site boundary (refer 95 of document bundle and Mr A's site notice). At the time the works were undertaken the adjacent land was being developed and subdivided, while there was site fencing to the main road frontage I do not recall any restriction/hoarding/gates or the like across the right of way, as the right of way also served as the main access to 2 existing occupied properties.... Therefore, it is likely that at some point during the siteworks being carried out adverse consequences would have been present."*
81. Counsel for Mr A further submitted that the [appealed part of the] complaint is insufficiently grave to warrant further investigation and therefore, it should have been dismissed by the decision maker, referring again to the letter from the client³⁷ which stated that Mr A had verbally advised him about the need to obtain consent before commencing any building works and that he (the client) had proceeded with the work at his own discretion.³⁸

³⁵ Appellant reply submissions para 42

³⁶ SDC submission page 2, para 4

³⁷ BOD 207

³⁸ Appellant submissions paras 32-34

82. With regard to the statement at 81 above the Panel notes that the matter of the letter has been addressed elsewhere. Further, the lack of specific evidence as to when Mr A advised the client means the Panel is not in a position to make a determination in respect of rule 57(ba) (alleged misconduct insufficiently grave).
83. The Panel considers, on the evidence, that it has not been established that adverse consequences existed. However, the Panel does consider that it is reasonable to anticipate that there may potentially have been health and safety adverse consequences from the work proceeding ahead of issue of a building consent.
84. The existence or otherwise of potentially adverse consequences, and whether or not Mr A advised the client of the (potentially) adverse consequences of not following his advice, are secondary to the question of whether or not Mr A made clear to the client that building consent was required prior to proceeding with any building works. The facts relating to these issues are not able to be clearly established with the evidence available to the Panel but should readily be able to be established by an investigating committee.
85. The Panel concludes that ground 5 is not established as a basis for overturning the part of decision being appealed.

Other considerations

86. The grounds of appeal are addressed in 29 to 85 above. Other matters that are not directly related to specific grounds are addressed below.
87. The RA submitted *“While an investigating committee may find that the appellant did not breach the Code or that the complaint may be dismissed on other grounds, there is insufficient evidence at this stage for a decision maker to reach this conclusion..... The Registration Authority considers this appeal to be made prematurely. The Adjudicator has not determined anything beyond a lack of grounds to dismiss the complaint at this stage of the process. The appellant will have an opportunity to present additional information to the investigating committee to assist it in its decision making.”*³⁹
88. While the RA considers that Mr A's appeal has been made prematurely (87 above), the Panel notes that Mr A was still entitled to file appeal under s 35 of the Act, whether or not it was his best course of action.
89. In response to the RA (87 above), counsel for Mr A submits *“The respondent's [RA's] submissions at [13.1] and [13.2] are also incorrect because there was*

³⁹ RA submissions paras 13.1, 13.2

*sufficient uncontradicted evidence from the appellant confirming that he had advised his client of the need to obtain consent before commencing any building works. The Adjudicator has failed to correctly consider the elements required to prove a breach of r.42G of the Rules and cl 6 of the Code. Further, the [appealed part of the] complaint is insufficiently grave to warrant further investigation¹⁸ and therefore, it should have been dismissed by the decision maker, a determination that was available to the Adjudicator.*⁴⁰

90. With regard to references made to uncontradicted evidence (89 above) the Panel is able to form its own view. The Panel has read various statements by / on behalf of Mr A regarding his claims to have advised the client that construction could not commence without a building permit and the consequences of the client not following that advice.
91. As has been addressed earlier including at paragraphs 35, 41, 58, 59 and 82, the Panel considers there to be insufficient documented evidence in support of Mr A's claims. Whether these matters were uncontradicted previously or not is immaterial to the Panel forming its view and the Panel notes that simply making a statement and restating it does not establish the subject matter of the statement as a fact.
92. In asserting that the Adjudicator's decision was correct the RA submitted "*The Council's complaint gives rise to questions about the standard of the appellant's work. Further investigation is required to answer these questions.....The Adjudicator could not dismiss the complaint under any ground specified in rule 57. The correct decision was to determine the complaint needed further investigation and refer it to an investigating committee under rule 56, as the Adjudicator decided....The appellant has not been able to identify any error this Council can review in the Adjudicator's decision; he has not sufficiently discharged the onus required for the Adjudicator's decision to be overturned.*"⁴¹
93. In response to the RA (92 above) counsel for Mr A submitted "*The respondent's submissions at 14.1 to 14.4 wrongly place the burden of proof on the appellant. As submitted, the appellant was not required to provide any further evidence in support of his position. Council B was the party making the allegation, therefore it was required to provide evidence to substantiate its position that the appellant has failed to advice [sic] his client. Council B did not provide any such evidence.*"⁴²

⁴⁰ Appellant reply submissions para 44, 45

⁴¹ RA submissions 14.1-14.4

⁴² Appellant reply submissions para 46

94. The Panel has addressed the assertion of counsel for Mr A that the RA wrongly “*placed the burden of proof on the appellant*” when addressing ground 4 (58 above). The Panel also considers that Ms C, in bring the complaint, adequately described her reasons and that it is entirely appropriate for the details to be investigated before any decision is made regarding any alleged breaches by Mr A.
95. The Panel has not seen evidence that is sufficient to enable it to dismiss the element of the complaint being appealed.

Findings

96. The Panel finds that none of the grounds establishes a basis for the Panel to overturn the part of the decision being appealed, the only available avenue for such a decision being a ground under rule 57(a) to (f).
97. The appeal is dismissed and the CIC’s decision to refer the matter to an investigating committee stands.

Costs

98. Counsel for Mr A indicated that Mr A was seeking costs.⁴³
99. Having not been successful in his appeal, Mr A is not entitled to costs.
100. In the absence of any other statements of intention regarding claims for costs, the Panel rules that costs incurred by the parties and the RA respectively shall lie where they fall.

Right of appeal

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

Dated 22 March 2023

Signed by the Panel


Chris J Harrison (Principal)


Anthony Fairclough


Alan Winwood

⁴³ Notice of Appeal f)

Schedule 1 – Extracts from the Act and the Rules

Section 21(1) of the Act:

“21 Grounds for discipline of chartered professional engineers

- (1) *The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer--*
- (a) *has been convicted, whether before or after he or she became registered, by any Court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority’s opinion the commission of the offence reflects adversely on the person’s fitness to practise engineering; or*
 - (b) *has breached the code of ethics contained in the rules; or*
 - (c) *has performed engineering services in a negligent or incompetent manner; or*
 - (d) *has, for 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.”*

Section 37(5) of the Act

“37 Hearing and determination of appeal

....

- (5) The Council or District Court, as the case may be, may—
- (a) *confirm, vary, or reverse the decision, or part of decision, to which the appeal relates:*
 - (b) *refer the matter back to the decision authority for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that the Council or District Court, as the case may be, thinks fit):*
 - (c) *make any decision that could have been made by the decision authority:*
 - (d) *make any order as to the payment of the costs of the appeal that it thinks fit.”*

Rule 42A of the Rules

“42A Interpretation

In this Part,—

adverse consequences means—

- (a) *significant harm, or an unacceptable likelihood of significant harm, to the health or safety of people; or*
- (b) *significant damage, or an unacceptable likelihood of significant damage, to the environment*

Rule 42G of the Rules

“42G Inform others of consequences of not following advice

A chartered professional engineer who becomes aware that the engineer’s professional advice may not be followed, and who considers that a failure to observe that advice may have adverse consequences, must inform the recipient of the advice of those adverse consequences.

Rule 56 of the Rules

“56 Registration Authority must refer complaint to investigating committee unless grounds for not doing so

The Registration Authority must, as soon as practicable after receiving a complaint, carry out an initial investigation of the complaint in accordance with rule 58 and—

- (a) *refer the complaint to an investigating committee in accordance with rule 59(b); or*
- (b) *dismiss the complaint on a ground in rule 57.”*

Rule 57 of the Rules

“57 Grounds for not referring complaint to investigating committee

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

- (a) *there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or*
- (b) *the subject matter of the complaint is trivial; or*
- (ba) *the alleged misconduct is insufficiently grave to warrant further investigation; or*
- (c) *the complaint is frivolous or vexatious or is not made in good faith; or*
- (d) *the person alleged to be aggrieved does not wish action to be taken or continued; or*
- (e) *the complainant does not have a sufficient personal interest in the subject matter of the complaint; or*
- (f) *an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*

Rule 58 of the Rules:

“58 Way in which decision on whether or not to refer complaint to investigating committee must be made

The Registration Authority must carry out an initial investigation of a complaint against the grounds in rule 57 in the following way:

- (a) the Registration Authority must notify the person complained about of the general nature of the complaint before commencing the investigation; and*
- (b) a complaints research officer must carry out the initial investigation of the complaint and recommend to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 57; and*
- (c) the complaints research officer, or chairperson of investigating committees, may seek to verify the information provided in the complaint by a statutory declaration from the complainant; and*
- (d) after considering the complaints research officer’s recommendation, the chairperson may explore (with the complainant and the person complained about) the possibility of the complaint being referred to conciliation, mediation, or another dispute resolution process for 60 days or any other time period that the chairperson thinks fit; and*
- (e) if alternative dispute resolution is not used or if it fails to resolve the dispute within the requisite time period, the chairperson must decide whether the complaint should be—*
 - (i) referred to an investigating committee in accordance with rule 59(b);*
or
 - (ii) dismissed on a ground in rule 57.”*

Schedule 2 - Key correspondence and submissions

- (a) Notice of Appeal by email (7 November 2022) and Adjudicator's decision dated 4 October 2022
- (b) Email from CPEC Chair to counsel for Mr A requesting copy of email / letter sent to Mr A with the Adjudicator's decision (7 November 2022)
- (c) In response to (b) above email from counsel for Mr A (8 November 2022) forwarding copy of letter from the RA to Mr A dated 11 October 2022
- (d) Email from CPEC Chair to the parties and RA acknowledging receipt of Notice of Appeal, requesting RA actions and addressing communications (9 November 2022)
- (e) Letter emailed from CPEC Chair to the parties and RA, naming the appeal panel, acknowledging that the Panel had granted permission for RA to make submissions, outlining the appeal process, indicating submission schedule and addressing hearing arrangements and communications (17 November 2022)
- (f) Email from RA to the parties and CPEC providing link to the bundle of documents (28 November 2022)
- (g) Email from Panel Principal to the parties and RA proposing submission due dates (29 November 2022)
- (h) Email from counsel for Mr A agreeing to submission schedule subject to receiving hard copy of Bundle of Documents by 6 December (30 November 2022)
- (i) Email from Ms C agreeing to the submission dates (30 November 2022)
- (j) Email from RA agreeing to the submission dates (1 December 2022)
- (k) Letter emailed from Panel Principal to the parties and RA confirming submissions schedule (2 December 2022)
- (l) Submission of counsel for Mr A (21 December 2022)
- (m) Submissions of Ms C (25 January 2023)
- (n) Submissions of the RA (27 January 2023)

- (o) Email from counsel for Mr A seeking one week extension of time to file submissions in reply (1 February 2023)
- (p) Email from Ms C to the parties and RA containing consent records and a link to related files (1 February 2023)
- (q) Email from Panel Principal confirming extension of time granted for filing of submissions in reply (2 February 2023)
- (r) Reply submissions of counsel for Mr A (10 February 2023)
- (s) Letter emailed from Panel Principal proposing that the appeal be heard on the papers (15 February 2023)
- (t) Email from Ms C confirming no objection to hearing being conducted on the papers (15 February 2023)
- (u) Email from RA confirming no objection to hearing being conducted on the papers (15 February 2023)
- (v) Email from counsel for Mr A confirming no objection to hearing being conducted on the papers (22 February 2023)
- (w) Email from Panel Principal, confirming hearing is proceeding on the papers (2 March 2023)