

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

**Appeal 6/23**

**AND**

**In the matter of an appeal to the  
Chartered Professional Engineers Council  
pursuant to Section 35 and application for  
stay pursuant to Section 36**

**Between**

Mr A

**Appellant**

**And**

The Registration Authority under the  
Chartered Professional Engineers of  
New Zealand Act 2002

**Respondent**

Decision of the Chartered Professional Engineers Council on Urgent Application for Stay  
of Decision

1 December 2023

1. Mr A has appealed a decision of the Competency Assessment Board (“CAB”) to decline Mr A’s application for re-registration.
2. Mr A has applied to the Council for an order staying the decision of the CAB (“the Application”).
3. The Council convened this Panel to consider the Application.
4. We (meaning this Panel) prepared a paginated bundle from the documents provided for the Application. References to specific documents within this paginated bundle are annotated simply by page number, e.g. [000001] is page 1 of the paginated bundle.

### **The Legislation relevant to the Application**

5. The right of appeal is contained in s35 of the Chartered Professional Engineers 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.
6. Section 36 of the Act is at the heart of the Application and says in full:

Subject to the order of the Council or District Court (as the case may be), every decision of the decision authority against which an appeal is lodged continues in effect according to its terms until the determination of the appeal.
7. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules") and were enacted pursuant to s40 of the Act.
8. 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.
9. 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.

## **Correspondence and submissions**

9. Key correspondence, communications and submissions relating to this appeal are listed Schedule 1, which also provides an index to the paginated bundle.

## **Issues**

10. This Application raises two issues:
  - (a) Does the Council have the power to order a stay of the CAB's decision.
  - (b) If so, should a stay of the CAB's decision be ordered for this Application.

## **Grounds of appeal and outcome sought**

11. The grounds for appeal as cited by Mr A in his notice of appeal dated 9 November 2023 are set out at page 5 of the Notice of Appeal **[000026]**. The grounds for appeal are not set out in this decision but we have considered the grounds for appeal in deciding the Application.

## **Decision being appealed, this Application and evidence considered**

12. The decision under appeal is the decision of the CAB to decline Mr A's application for re-registration **[000004] to [000021]**.
13. The evidence and submissions we considered in deciding this Application includes all the documents listed in Schedule 1. We note specifically we considered Mr A's affidavit, its annexures and the peer reviews annexed to his affidavit and subsequently submitted by Mr A's counsel.<sup>1</sup>

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<sup>1</sup> We do not provide references to each of the documents.

## Hearing

14. An online hearing was conducted via “Zoom” on Friday 24 November 2023. Mr A was represented by counsel, as was the Registration Authority.
15. We undertook to provide our decision by Tuesday 28 November 2023 with reasons for the decision to follow on Friday 1 December 2023. The decision was issued on Tuesday 28 November 2023 and the reasons for the decision are set out below.

## Discussion and Findings

16. The issues identified in paragraph 10 are addressed in turn.
17. We note some matters were traversed in oral submission which are not specifically addressed or addressed in detail in this decision<sup>2</sup>, however we have considered these matters. This decision is brief considering the time urgency associated with the Application.

### Issue 1 - Does the Council have the power to order a stay of the CAB’s decision?

18. For the reasons that follow, we decided the Council has the power to order a stay of the CAB’s decision. We first summarise the parties’ positions and then our discussion.

#### Mr A’s position

19. Mr A’s position is set out at paragraph 22 **[100100]** to paragraph 28 **[000102]** of his Submission. The central plank of Mr A’s submission is the words at the start of section 36 of the Act “are not meaningless”, and the section is reproduced below with the referred words in bold.

**Subject to the order of the Council or District Court (as the case may be),** every decision of the decision authority against which an appeal is lodged continues in effect according to its terms until the determination of the appeal.

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<sup>2</sup> For example, there was lengthy exchanges of submission on the role of the integrity of the Register of Chartered Professional Engineers.

20. The submission compares section 106(3) of the Land Transport Act 1998<sup>3</sup> which is similar in wording but lacks the words in bold, or similar. The submission says section 106(3) creates an “inflexible rule”. In comparison, because the decision of the CAB continues in effect subject to an order of the Council, the submission is “parliament has deliberately built flexibility into section 36 of the Act”.

### **The Registration Authority’s position**

21. The Registration Authority’s position is set out at paragraph 4.4 [100113] to paragraph 4.10 [000114] of its Submission. Its essential point is had parliament intended the Council to have a power of stay, parliament would have expressly stated such.
22. The Registration Authority says any ambiguity in section 36 of the Act “should be interpreted according to its surrounds”. This is developed to submit that the words “subject to the order of the Council or District” refer to only to the power to determine an appeal not any other power to order a stay pending an appeal.

### **Discussion**

23. The words at the start of section 36 must have some effect. While not referred to in submission, it is clear from High Court authority that section 106(3) of the Land Transport Act acts as a statutory bar to the District Court granting a stay on an appeal where it would otherwise have a power to do so<sup>4</sup>. In contrast, section 36 has the qualifying words “Subject to the order of the Council or District Court (as the case may be)”.
24. Our decision is section 36 affords the Council and the District Court the power to order a stay pending the outcome of an appeal. The Council can order a stay of decisions appealed to the Council and the District Court can order a stay of decisions appealed to the District Court from the Council, hence the use of the words “as the case may be”.

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<sup>3</sup> The submission refers to the Land Transport Act 2007, but we assume it refers to the Land Transport Act 1998.

<sup>4</sup> See *Longville v New Zealand Transport Agency* [2019] NZHC 1445 [24 June 2019].

## Issue 2 - should a stay of the CAB's decision be ordered for this Application.

25. For the reasons that follow, we have decided not to order a stay of the CAB's decision. We first summarise the framework for the decision and then briefly discuss each party's submission on the elements of the framework.

### Criteria for decision on the Application

26. For us to decide the Application, the parties agree "a balancing exercise is required, taking into account the consequences for all parties to the appeal"<sup>5</sup>. The parties also agree on the factors/criteria to be considered, which are:

- (a) whether the appeal will be rendered nugatory if a stay is not granted;
- (b) the bona fides of the applicant in the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) any effect on third parties;
- (e) the novelty and importance of the questions involved in the appeal;
- (f) the public interest in the proceeding;
- (g) the apparent strength of the appeal; and
- (h) the overall balance of convenience.

27. For the factors/criteria to be considered, Mr A relies on *Yan v Mainzeal*<sup>6</sup> and the Registration Authority relies on *Subramani*<sup>7</sup>. The latter authority confirms the former authority and both authorities are Court of Appeal, so both authorities are equally applicable. There is marginally more assistance for us in the Court of Appeal's analysis

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<sup>5</sup> *Bharath Raja Subramani v A Professional Conduct Committee Of The Dental Council* [2023] NZCA 375 [18 August 2023] at [20]. See Mr A's submission at [30] [000102] and the Registration Authority's submission at [4.12] [000115].

<sup>6</sup> *Yan v Mainzeal Property And Construction Ltd (In Rec And In Liq)* CA105/2014 [2014] NZCA 86 [21 March 2014] at [25].

<sup>7</sup> *Subramani* at [20].

in *Subramani* as it pertains to a body disciplining a professional whereas *Yan v Mainzearl* pertained to a stay of a liquidation order.

28. During the hearing we asked counsel for both parties if they agreed with the observation of Davidson J in *Talleys v Worksafe*<sup>8</sup> that “the party seeking a stay pending appeal carries a persuasive burden of showing that if not granted, any appeal will be rendered nugatory (in other words useless, futile, or worthless)”<sup>9</sup>. At the hearing, counsel agreed with Davidson J’s observation on an applicant carrying a persuasive burden.
29. Subsequently, in an email on 27 November 2023, counsel for Mr A submitted the panel should not consider *Talleys* as an authority and set out their reasons. As counsel are not agreed on the applicability of *Talleys*, we have not considered it in making its decision.
30. Having said this, considering *Subramani*, *Yan v Mainzearl* and the wording of section 36 of the Act, we consider that a stay is not to be ordered as a matter of course.
31. We now address the agreed factors/criteria in turn.

#### **Whether the appeal will be rendered nugatory if a stay is not granted**

32. Much of Mr A’s affidavit and submission focussed on this factor/criterion. We do not doubt the bone fides of Mr A’s concerns over reputational damage [000037] at [20] to [24]. However, our opinion is it is speculative to conclude what customers will think about his removal from the Register, and speculative for us to conclude from the evidence that Company B<sup>10</sup> will lose custom because of Mr A’s removal from the register.
33. Mr A says a lot of Company B’s work does not require “an engineer with CPENG accreditation” [000037] at 20. He does not say what proportion of Company B’s work

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<sup>8</sup> *Talley's Group Limited v Work.Safe New Zealand* [2017] NZDC 19107 [24 August 2017].

<sup>9</sup> *Talleys* at [17].

<sup>10</sup> Company B Limited is the Mr A’s firm [000034] at [7].

does require an engineer with CPEng accreditation, but we conclude from the content of the affidavit, peer reviews and CAB Decision that it is minor compared to work which does not require an engineer with CPEng accreditation. Therefore, we conclude that while Mr A has genuine concerns for his reputation, his removal from the Register has no effect on his status as a Heavy Vehicle Certifier which is Company B's main business.

34. As to the issue of branding and marketing [000035] to [000036] at [9] to [19], this is a matter for Company B to address. The title of chartered professional engineer is personal to Mr A<sup>11</sup>. Where Company B chooses to market itself "chartered engineering consultants"<sup>12</sup> it carries a risk that its engineers maintain the currency of any chartership on which the marketing relies, whether a chartered professional engineer or otherwise. We accept the Registration Authority's submission that any re-branding by Company B will be an inconvenience and does not meet the threshold to render the right of appeal nugatory [000116] at [4.16].
35. As to the issue of peer reviews not being available to Company B [000038] at [25] to [26], we see this point as speculative on Mr A's part and we do not consider it a strong point in favour of a stay.
36. We have considered Mr A's peer reviews which illustrate his standing as a Heavy Vehicle Certifier. It is difficult to reconcile his position that custom as a Heavy Vehicle Certifier will suffer from his removal from the Register when he held in such regard by contemporaries in Heavy Vehicle Certification.
37. We conclude Mr A's reputational concerns are genuine, but we do not consider the threshold has been met on this factor/criterion for it to count in favour of a stay.

#### **The bona fides of the applicant in the prosecution of the appeal**

38. We do not doubt the bona fides of Mr A's appeal. This counts towards granting a stay.

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<sup>11</sup> Section 6 of the Act.

<sup>12</sup> See for example [000048].

**Whether the successful party will be injuriously affected by the stay**

39. We agree with Mr A that there is no “successful party” in the original decision in this Application. We consider this factor/criterion to not be relevant in this Application.
40. However, we consider the Registration Authority’s submission on this factor/criterion is relevant to the next factor/criterion, Any effect on third parties.

**Any effect on third parties**

41. We note this factor/criterion is “Any effect on third parties” not that “third parties will be injuriously affected” as Mr A’s submission ends [000105] at [47].
42. Mr A’s submission focuses on whether his continued practice would create a public risk. The Registration Authority’s submission focused on the purpose integrity and accuracy of the Register. This factor/criterion was discussed at length and subject to further questions from us. We understood Mr A’s position to be that the integrity of the Register is not relevant but if it is, the integrity of the Register is not endangered where the grounds for removal are not the result of disciplinary proceedings. Counsel for Mr A drew a detailed and careful distinction between the facts of the Application and the facts in *Subramani*, in which it objectively appeared Dr Subramani was a danger to the public.
43. We disagree with Mr A’s submission. This factor/criterion is broader than, but does include, public safety, and considers third parties more widely. In *Subramani*, the loss of a dentist in an area underserved by dentists was also considered a relevant consideration<sup>13</sup>. Here, we cannot overlook the purposes of the Act, which include creating a register of persons who “must meet minimum standards to be, and continue to be, registered”<sup>14</sup>.

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<sup>13</sup> Subramani at [52].

<sup>14</sup> Section 3 of the Act.

44. Mr A has been assessed as not meeting the minimum standards for continued registration. Mr A being on the Register would be contrary to the purpose of the Register. There would be an affect on third parties in that persons who search the Register would find the name of a person who does not meet the minimum standards for continued registration.
45. We conclude this factor/criterion counts against a stay.

**The novelty and importance of the questions involved in the appeal**

46. We agree with Mr A's submission that this factor/criterion is neutral or not relevant. For completeness we address the Registration Authority's submission, which is this Application involves determining an important question. However, it is the novelty and importance of the questions involved in the which are relevant to this factor/criterion, not questions at issue in the Application.

**The public interest in the proceeding**

47. The parties submissions from earlier factors/criteria are reported again in relation to this factor/criterion.
48. For the reasons we addressed in the **Any effect on third parties** factor/criterion we conclude this factor/criterion counts against a stay.

**The apparent strength of the appeal**

49. Mr A's appeal appears to have little prospect of success. In summary the CAB decided:
- (a) Mr A has not demonstrated the work he is undertaking is complex. This goes to the minimum standard for registration as chartered professional engineer.<sup>15</sup>

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<sup>15</sup> Under Rule 6 of the Rules are four elements pertaining to complex engineering problems and complex engineering activities.

(b) Mr A's work samples had errors [000018] and [000019] and calculations that were not complex.

50. Mr A's affidavit does not address the CAB's decision in detail except to say it is "incorrect" [000039] at [27], the rest of which says in full:

My work is primarily in the field of heavy vehicle certification. As stated earlier, I am registered with the New Zealand Transport Agency as Heavy Vehicle Specialist Certifier. The Rules state that to meet the minimum standard for registration, a person must demonstrate that they are able to practise [sic] completely in their practice area. I am confident that I provided information to show this.

51. This statement illustrates the crux of the issue. The CAB does not believe the Heavy Vehicle Certifier appointment process is the equivalent of CPEng assessment and Mr A does believe this to be the case [000009]. The CAB decided:

The Panel does not believe that there is equivalence between the two processes noting that each is governed by separate Acts, Rules and Regulations.

52. The Application has six supporting peer reviews. Only one of which, that from Person C [000061] addresses any of the issues raised by the CAB in its decision<sup>16</sup>. The rest of the supporting peer reviews address Mr A's work as a Heavy Vehicle Certifier and Company B's systems. In our opinion, they do not create evidential grounds illustrating the appeal has any prospect of success.

53. In the appeal, the Council will re-hear the matter and can make a range of decisions. In this Application, we must consider the likely outcome of that appeal with the submitted information. On detailed reading, the CAB decision shows an engaging and iterative process with Mr A.

54. We disagree with the submissions, among others, the CAB is "at odds" with Mr A's endorsements [000099] at [13] and the CAB is "out of touch" [000107] at [58]. The

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<sup>16</sup> This peer review addresses the complexity of the work undertaken by Mr Al-Afaghani.

information supplied for the Application does not show Mr A's work is complex. As such he cannot meet the minimum requirements and his appeal has almost no prospect of success.

55. Our decision is that this factor/criterion counts against ordering a stay.

**The overall balance of convenience.**

56. As an introduction to this factor/criterion, we address a point advanced by counsel for Mr A in oral submission. We understood the point to be, as the Appeal has not been heard, in effect the assessment process for continued registration is not concluded. We do not accept this proposition for two reasons. First, section 36 of the Act is clear that decisions have effect until the determination of the appeal (subject to the order of the Council). Second, the Council 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)).
57. Also in introduction, we also address a point raised in written submission by the Registration Authority, being Mr A's previous declination of continued registration and appeal of that decision [000110] at [3.2] to [3.3]. this was not relevant to this Application or the appeal. We have not considered it in our decision making.
58. The overall balance of convenience does not favour Mr A. We cannot overlook that the appeal has little prospect of success. We also consider the purpose of Act and by extension the Register go against ordering a stay.
59. We also consider the weight of regard for Mr A in the peer reviews strongly suggest his business as a Heavy Vehicle Certifier will not suffer from not being on the Register.

**Outcome of Application**


60. We reviewed the Application and have decided not to order the stay of the CAB's decision.

**Dated 1 December 2023**

Signed by the Appeal Panel



Mark Holland (Principal)



Simonne Eldridge (Member)



Alan Winwood (Member)

## Schedule 1

### Key correspondence, submissions and communications in this Appeal

#### The Council has compiled and paginated the documents as follows:

- (a) The Competency Assessment Board Decision **[000001]**

#### Mr A filed a

- (b) Notice of Appeal **[000022]**
- (c) An application for a stay of Decision **[000029]**.

#### Mr A provided an affidavit in support of the Application with the following Annexures:

- (d) Affidavit **[000033]**
- (e) Annexure A: Mr A's CV **[000041]**
- (f) Annexure B: Copy of Company B's logo **[000047]**
- (g) Annexure C: Company B Brochure **[000049]**
- (h) Annexure D: Company B business cards **[000051]**
- (i) Annexure E: Company B letterhead **[000053]**
- (j) Annexure F: Company B letterhead **[000055]**
- (k) Annexure G: **[000058]**
  - (1) Company D **[000059]**.
  - (2) SMT Verification **[000061]**.
  - (3) Functional Unit **[000062]**.

Mr A provided additional peer reviews:

- (l) Peer review by Company E **[000088]**.
- (m) Peer review by Company F **[000089]**.
- (n) Peer review by Company G Limited **[000091]**.

Submissions on behalf of Mr A **[000096]**

Submissions on behalf of the Registration Authority **[000108]**