

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

Appeal 1A/23
(Also referred as 1/23 and 6/22)

AND

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

Between

Mr A
CMEngNZ, CPEng

Appellant

And

Mr B
CMEngNZ, CPEng

Respondent

Decision of the Chartered Professional Engineers Council

20 December 2023

Introduction

1. Mr A appealed two separate decisions made by a Chair of Investigating Committees (CIC), appointed by the Registration Authority (RA) regarding:
 - (a) A complaint against Mr A by Mr B of Company C (Appeal 1A/23)
 - (b) A complaint against Mr B of Company C by Mr A (Appeal 1B/23).
2. Both appeals primarily relate to the seismic assessment work undertaken by both parties separately for Addresses D.
3. Mr A, a structural engineer, raised the appeals in his personal capacity. At the time the seismic assessment work was undertaken, he was a structural engineer and director of Company E.
4. Mr B is a structural engineer and director of Company C Limited.
5. The appeal panel (“The Panel”) of the Chartered Professional Engineers Council (“The Council”) has assessed and heard both appeals separately based on their individual merits.
6. The Panel has been provided with two paginated Bundles of Documents held by the RA in relation to each appeal. References to specific documents within these files are annotated as “[BOD1 *page numbers*]” and “[BOD2 *page numbers*]” relating to the appeals 1A/23 and 1B/23 respectively.
7. This decision of the Council relates to the Appeal 1A/23 i.e., Mr A’s appeal against the CIC decision to refer complaint about Mr A to an investigating committee.

The Legislation

8. Extracts from the relevant legislation considered by the Panel are presented in Schedule 1.
9. 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.
10. 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.
11. 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.
12. 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.

Background and Context

13. A timeline of key events is provided in Schedule 3.

Company C Engagement

14. Company C was engaged by Body Corporate F and Body Corporate G ("the Body Corporate") to carry out seismic assessment of existing buildings at Addresses D, Wellington and to develop a seismic strengthening scheme which achieves at least 67% NBS for all three buildings [BOD2 pg 39].

15. All three buildings Addresses D are unreinforced masonry (URM) buildings that are interconnected and share common walls. For simplicity, Company C analysed the joined buildings as separate structures [BOD2 pg 39].
16. In May 2019, Company C issued its report titled *“DSA and Seismic Strengthening Design of the Existing Buildings at Address D”* [BOD2 pg 37-237].
17. A *“Producer Statement – PS1 – Design”* was issued by Mr B, on behalf of Company C on 24 May 2019 [BOD2 pg 8-9].
18. City Council issued a building consent for strengthening works at Address D on 16 October 2019 [BOD2 pg 11-23].

Company E Engagement

19. On 7 May 2019, Company E was approached by members of the Body Corporate at Address D to consider an alternative approach, as apparently not all building owners were unanimously satisfied with the seismic strengthening scheme provided by Company C considering the total cost of strengthening exceeded the commercial value of building for some of the building owners [BOD1 pg 20 and 26].
20. Company E issued a letter report titled *“High Level Seismic Assessment on the building located at Address D”* on 14 June 2019 to Company H. [BOD1 pg 4-10].
21. As per their report, Company E were requested to *“... carry out a very high level assessment of the building to determine the level of confidence whether the “as-repaired” building can achieve a %NBS higher than 34%NBS before the client makes any further investment”* [BOD1 pg 4].
22. Company E based their High Level Assessment (HLA) on the assumption that the building at Address D experienced shaking from the Kaikoura earthquake of 14 November 2016. They obtained publicly available records from a nearby seismographic station (less than 500m away) with similar subsoil conditions [BOD1 pg 6].

23. Mr A visited the site on 24 May 2019 and was escorted to certain public areas around the building to confirm the geometry of building compared to the property file and to consider obvious visual damage and the quality of masonry block etc. In their report, Company E stated *“It is our understanding and engineering judgement that no significant damage was sustained by the building during the Kaikoura event”* [BOD1 pg 8].
24. Based on their experience of similar projects, Company E’s interpretation from the seismograph data was that the *“building was potentially subjected to shaking in the order of 25% NBS to 33%NBS earthquake intensities”* [BOD1 pg 8] and concluded *“... In the absence of any significant earthquake damage to the building in the recent Kaikoura earthquake, it is our conclusion that the existing building has a demonstrated seismic capacity which at this stage can be estimated at greater the 33% NBS. This is an outcome that Company E Engineers need to verify during the next phase of their involvement with the project with the completion of their advanced structural engineering model to enable a more accurate seismic rating on the building”* [BOD1 pg 8-9].
25. For their next stages of assessment, Company E stated in their report *“our use of the latest sophisticated and State-of-the-Art non-linear analysis technology, on full-scale 3D software models of buildings, has allowed us to carry out more accurate and less conservative assessments on URM structures throughout New Zealand, resulting in higher %NBS ratings achieved”* [BOD1 pg 9].
26. Company E provided seven examples of previous applications where they had used the same methodology, including the buildings located at Address J and Address I in Wellington.
27. In the concluding sentence of their report, Company E encouraged the Body Corporate *“... to proceed with the next stages of our assessment as presented within our proposal dated 31st of May 2019”* [BOD1 pg 10].

Concerns Raised

28. Mr B of Company C initially raised concerns regarding contents of the Company E's HLA report to Engineering New Zealand (ENZ) on 21 July 2019 and stated, *"In this first instance we are not making a formal complaint"*. Their key concerns included:
- (a) The claim that *"because the building in question survived the Kaikoura Earthquake without significant damage it probably has greater than 34%NBS is somewhat irresponsible.."*, whereas *"... we have indicated this building has less than 34%NBS through a DSA"* [BOD1 pg 2].
 - (b) *"Some claims in their letter are false"* with respect to Company E's assessment of Address J and Address I [BOD1 pg 2].
 - (c) *"Non-linear analysis for URM buildings is not permitted under the MBIE Technical Guidelines"*, *"... this would make such an assessment method an alternate solution ..."* and that *"their analysis should be peer reviewed by an engineer who has the appropriate skill and knowledge"* [BOD1 pg 2-3].
29. On 17 September 2020, ENZ forwarded the concerns raised by Mr B to Mr A [BOD1 pg 11-13].
30. Mr A provided a response to the concerns raised in a letter dated 1 October 2020 with both an unredacted and a redacted version, along with supporting attachments, with a request to only provide the redacted copy to Mr B. Within his response, Mr A raised concerns on the methodology adopted by Company C in their DSA, that is subject of a separate appeal [BOD1 pg 20-40].
31. In response, Mr B re-emphasised his earlier concerns in his letter to ENZ dated 4 December 2020 [BOD1 pg 45-48].

Adjudicator appointment and decision

32. ENZ appointed a Chairman of Investigating Committees (CIC) as adjudicator on 29 October 2021. [BOD1 pg 41].
33. In his decision of 19 December 2022, the CIC decided to refer the matter to an investigating committee noting that *“none of the grounds of dismissal of the complaint apply as set out in rule 57 of the Chartered Professional Engineers of the Rules and clause 8(a) of the Engineering New Zealand Disciplinary Regulations”* [BOD1 pg 49-59].
34. Mr A lodged an appeal against the CIC decision on 24 February 2023, with a detailed description of the grounds of appeal [BOD1 pg 60-64].

Grounds of Appeal

35. **Ground 1:** *“The Adjudicator determined that the complaint against Mr A should be referred to an Investigating Committee as none of the grounds for dismissing the complaint, as set out in rule 57 of the Rules or clause 8 of the Disciplinary Regulations, apply”.*
36. **Ground 2:** *“The Adjudicator takes insufficient notice of, or fails to take into account, information relevant to the complaint including:*
 - (1) *The staged approach to Company E’s engagement relating to 20 Egmont St which involved:*
 - (a) *Stage 1: High Level Assessment (HLA) based on a desk top study and the collection of information with respect to the building.*
 - (b) *Stage 2: Feasibility Study providing more accuracy (based on comprehensive modelling of the building and high level calculations) on what rating the building might attain if a full Detailed Seismic Assessment (DSA) report were to be carried out.*
 - (c) *Stage 3: Full DSA Report along with a comprehensive peer review and signed PS2 from a qualified peer reviewer.*
 - (d) *Stage 4: Seismic Strengthening if desired by the client. This would involve design detail of a seismic strengthening scheme to improve the seismic rating of the as-repaired building to a pre-agreed %NBS.*

- (2) *The complainant, Mr B, appears to compare the HLA prepared by Company E Consulting dated 14 June 2019) to a full DSA (including the full DSA prepared by Company C) when any such comparison is entirely inappropriate.*
 - (3) *The complaint relates only to the HLA, taking this out of context in the staged approach described above. The HLA was a preliminary assessment to provide the client guidance as to whether it should make any further investment in the building. The engagement continued through Stages 2 and 3 of the process and a full DSA prepared (dated 17 November 2020) and peer reviewed.*
 - (4) *The reference to the impact of the 2016 Kaikoura event in the HLA was an observation based on data collected from the nearest seismographic station used to understand the earthquake intensities the building experienced during that earthquake.*
 - (5) *It was expressly stated in the HLA that the preliminary assessment must be verified during the next stage of the engagement, including the use of advanced structural engineering models to enable a more accurate seismic rating on the building.*
 - (6) *The HLA would not (and could not) have been used as the basis to determine the NBS% rating of this building, or any other, in Wellington.*
 - (7) *Company E Consulting met with City Council to discuss and seek City Council's agreement and acceptance to the modelling approach and NLTHA methodology it intended adopting. On 17 January 2020 City Council confirmed the methodology and competency of Mr A and the proposed peer review engineer, Mr K, as well as the scope of the DSA and peer review. A copy of this letter and covering email do not appear to be amongst the material before the Adjudicator.*
 - (8) *The full DSA was completed by Company E on 17 November 2020. This was peer reviewed by Company K who confirmed the conclusions reached by Mr A and Company E".*
37. **Ground 3:** *"It is unclear whether the Adjudicator was provided with an unredacted copy of Mr A's response to the complaint (dated 1 October 2020) as the document which appears in the Bundle of Documents provided to the Adjudicator appears to include redactions".*

38. **Ground 4:** *“The Adjudicator’s recommendations as to issues for the Investigating Committee to consider:*
- (1) *Are not sufficient to investigate further as there is no applicable ground of discipline under s57(a) of the Rules based on the grounds of appeal set out above.*
 - (2) *Include as the third item an issue which is not relevant to the complaint against Mr A, but instead appears to arise from his complaint against Mr B which is properly dealt with in that context, if at all. That is particularly so when in the complaint against Mr B, the Adjudicator found that Company E’s concerns were genuine and made in good faith. It is therefore unclear what aspect of the Code of Ethical Conduct should be considered when that is not otherwise referred to in the decision”.*
39. **Ground 5:** *“The outcome of the complaint against Mr A is entirely inconsistent with the related complaint by Mr A against Mr B concerning the same property where the Adjudicator held that that complaint should be dismissed”.*

Outcome Sought

40. The outcome sought by Mr A is *“to reverse the Adjudicator’s decision and for CPEC to dismiss the complaint under r 57(a) of the CPEng Rules and clause 28.1 of the Disciplinary Regulations, on the ground that no applicable ground of discipline applies”.*

Evidence Considered

41. Under s15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
42. The evidence considered by the Panel includes:
- a) The Bundles of Documents, [BOD1 pg 1-64] and BOD2 [pg 1-251]
 - b) Submission received on behalf of Mr A on 28 Apr 2023
 - c) Email received from Mr B on 16 May 2023 stating, *“I have nothing further I wish to submit”.*
 - d) Submission received from the Registration Authority on 19 May 2023
 - e) Submission received on behalf of Mr A on 16 Jun 2023, in response to the RA submission.

The Hearing

43. An “in-person” hearing was arranged at Wellington on 12 September 2023, following consideration of the evidence by the Panel.
44. The hearing was attended by Mr A, Ms L (Mr A’s counsel), the RA and the Panel.
45. Mr B advised the Panel Principal, that he did not intend to attend the hearing on the complaint against Mr A, by email on 3 July 2023.

Discussion and Findings

46. The Panel has addressed the grounds of appeal in the following order:
 - (a) Grounds 1 and 4(1) are procedural and have been grouped together.
 - (b) Ground 2 addresses the main issues that were the subject of the complaint.
 - (c) Ground 3 addresses the information that was available to the Adjudicator/CIC.
 - (d) Grounds 4(2) and 5 address issues which may not have direct bearing on the decision for this appeal.

Grounds 1 and 4(1):

Ground 1: *“The Adjudicator determined that the complaint against Mr A should be referred to an Investigating Committee as none of the grounds for dismissing the complaint, as set out in rule 57 of the Rules or clause 8 of the Disciplinary Regulations, apply”.*

Ground 4(1): *“The Adjudicator’s recommendations as to issues for the Investigating Committee to consider are not sufficient to investigate further as there is no applicable ground of discipline under s57(a) of the Rules based on the grounds of appeal set out above.*

47. The Council has no jurisdiction to consider the matter with respect to the ENZ’s Disciplinary Regulations. The Panel’s focus is therefore on:
 - (a) whether as decided by the CIC, Mr A actions require further investigation and they are referred to an Investigating Committee or
 - (b) whether as submitted by Mr A his actions are dismissed on a ground in rule 57 of the Chartered Professional Engineers of New Zealand Rules.

48. Rule 57 (see attached Schedule 1), is summarised as below:
- (a) there is no applicable ground of discipline under section 21(1) 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.
49. Rule 57(a) refers to Section s21 of the Act, as included in the attached Schedule 1 of this decision. The facts and evidence clearly demonstrate that the criteria established under sections 21(1)(a) and (d) of the Act do not apply in this case.
50. The Panel is therefore tasked with considering whether there is a prima facie case that Mr A:
- has breached an aspect of the Code of Ethical Conduct¹ (s21(1)(b) of the Act), and/or
 - has performed engineering services in a negligent or incompetent manner (s21(1)(c) of the Act).
51. The Panel has considered all relevant issues raised in the complaint and under the grounds of appeal, against the criteria set out for rule 57 outlined in paras 48 and 49 above, as follows:

¹ Code of Ethical Conduct as outlined in the Rules 42E and 42F.

Ground 2: *“The Adjudicator takes insufficient notice of, or fails to take into account, information relevant to the complaint...”* included under items (1)-(8) in para 36.

52. Key issues identified under Ground 2, items (1) to (8) are grouped as follows:
- (a) Comparison of the preliminary HLA undertaken by Company E as part of their 4-stage process, with the full DSA prepared by Company C for the seismic assessment of Address D (as outlined under items 1, 2, 3, 5 and 6 under Ground 2).
 - (b) Reference to the impact of the 2016 Kaikoura earthquake in Company E’s HLA report (item 4 under Ground 2)
 - (c) Company E’s use of the NLTHA methodology and modelling approach outlined for subsequent stages of their assessment following the HLA (items 7 and 8 under Ground 2)
 - (d) Reference to the buildings Address I and Address J in Company E’s HLA, as examples of previous assessments undertaken by them

Comparison of the preliminary HLA with the full DSA

53. Mr A submitted² that Company E had proposed a 4-stage assessment, with the Stage 1 being *“High Level Qualitative Assessment based on a desk top study and the collection of information with respect to the building with no computational models or calculations”*.
54. Mr A submits³ that:
- (a) Insufficient notice was taken of the staged approach to Company E’s engagement,
 - (b) The nature of Company E’s HLA, that was never intended to be a DSA, and that comparison with the Company C’s DSA is entirely inappropriate,
 - (c) The complaint, that related to the HLA was taken out of context in the staged approach,
 - (d) The HLA was a preliminary assessment to provide the client guidance as to whether it should make any further investment in the building,

² Submission on behalf of Mr A, dated 28 April 2023 (page 2)

³ Submission on behalf of Mr A, dated 28 April 2023 (pg 10-11)

- (e) The high-level assessment would not (and could not) have been used as the basis to determine the NBS% rating of this building, or any other, in Wellington,
 - (f) It was expressly stated in the high-level assessment that the preliminary assessment must be verified during the next stage of the engagement,
 - (g) The engagement continued through Stages 2 and 3 of the process and a full DSA prepared (dated 17 November 2020) and peer reviewed.
55. The RA have provided a detailed assessment of all sub-grounds under Ground 2, in their submission with a general theme that *“the Adjudicator did not state he considered the HLA was a DSA in his decision⁴.”*
56. The Panel notes, as stated earlier in para 28(a), the original complaint initiated by Company C stated, that Company E’s claim *“because the building in question survived the Kaikoura Earthquake without significant damage it probably has greater than 34%NBS is somewhat irresponsible”*, whereas *“we have indicated this building has less than 34%NBS through a DSA”* [BOD1 pg 2].
57. The Panel notes the original concern of 21 July 2019, focussed solely on the content of Company E’s HLA report, which included a proposed staged approach.
58. The original concern raised by Mr B, was then forwarded by ENZ to Mr A after over a year on 17 September 2020. Based on the content of Mr A’s response to the concerns raised on 1 October 2020, it is clear, by then Company E had carried out further works on the project, they had completed stages 2 and 3 of their engagement, had liaised with City Council and were waiting for the completion of the peer review of their DSA Report [BOD1 pg 22].
59. Mr A stated in his submission⁵ that the peer reviewed DSA report was issued on 17 November 2020, and provided a copy of the DSA report in their submission. It appears, a copy of Company E’s DSA was neither requested by any party nor provided by Mr A until his submission to the Panel on 28 April 2023.

⁴ Registration Authority submission dated 19 May 2023 (pg 17)

⁵ Submission on behalf of Mr A, dated 28 April 2023 (pg 11)

60. Considering, Mr A had qualified their high-level assessment with a number of caveats and recommended next steps of analysis, the Panel considers the alleged misconduct is insufficiently grave to warrant further investigation.

Reference to the Kaikoura Earthquake

61. Company E referenced records from the Kaikoura earthquake in their initial HLA, as they believed this event had caused shaking at Address D. By using seismographic station records at Te Papa Museum, believing it to be in an area with similar soil conditions, Company E estimated the building potentially experienced 25%NBS to 33%NBS earthquake intensity. Based on a limited site inspection, they believed the damage to the building was negligible [BOD1 pg 27].
62. The initial concern raised by Mr B on 21 July 2019 stated. *“We believe the science/engineering behind their claim that because the building in question survived the Kaikoura earthquake without significant damage it probably has greater than 34% NBS is somewhat irresponsible”.*
63. In their response letter of 1 October 2020, Company E responded, *“we clearly stated within our letter that “this is an outcome that Company E Engineers need to verify during the next phase of their involvement with the project with the completion of their advanced structural engineering model to enable a more accurate seismic rating on the building”. We also stated that “any outcomes of the high-level assessment would be subject to the “as repaired” structure as we didn’t undertake a comprehensive site visit to determine with high accuracy the “as-built” information on the building and any construction defects or damage from previous earthquakes” [BOD1 pg 27].*
64. The submission⁶ on behalf of Mr A clarifies that *“The reference to the impact of the 2016 Kaikoura event in the high-level assessment was nothing more than an observation based on data collected from the nearest seismographic station used to consider the earthquake intensities the building experienced during that earthquake.”*

⁶ Submission on behalf of Mr A, dated 28 April 2023 (pg 11).

65. Although there could be differences in subjective engineering judgment on the use of the Kaikoura earthquake as key reference for the HLA report, the Panel considers Mr A did not perform in a negligent or incompetent manner and that the alleged misconduct is insufficiently grave to warrant further investigation.

Nonlinear Time History Analysis (NLTHA) Methodology

66. Company E proposed a non-linear analysis methodology in their HLA report stating “... *our use of the latest sophisticated and State-of-the-Art non-linear analysis technology, on full-scale 3D software models of buildings, has allowed us to carry out more accurate and less conservative assessments on URM structures throughout New Zealand, resulting in higher %NBS ratings achieved.*” [BOD1 pg 9].
67. Company C commented on the proposed non-linear analysis methodology by stating “*We understand that non-linear analysis for URM building is not permitted under the MBIE Technical Guidelines. This would make such an assessment method an alternative solution. It appears Company E are using this assessment method. If this is the case we consider that their analysis should be peer reviewed by an engineer who has the appropriate skill and knowledge*” [BOD1 pg 3].
68. Company E commented “*The client requested we first meet with the City Council to discuss our modelling approach and methodology (NLTHA) and seek their agreement and acceptance.*” Company E provided a copy of the letter that they received from City Council, to ENZ, accepting Company E’s methodology and endorsing Mr A’s competency for undertaking the analysis. Company E confirmed that at the time of writing the letter, they were working on the completion of Stage 3 including the Peer Review [BOD pg 20-21].
69. Company E had further stated that “*NZSEE guidelines endorse the use of time history analysis, appropriate for buildings which contain irregularities*”, and that “*... it can be used to analyse most URM buildings*”. The limitations of the methodology and the peer review requirements were highlighted [BOD pg 22].

70. The Panel notes that Mr A provided information on the methodology including pros, cons, limitations and peer review requirements; sought permission from City Council on the use of the NLTHA methodology, engaged and peer reviewed the DSA report.
71. The Panel considers Mr A performed his engineering services in a competent manner and that the alleged misconduct is insufficiently grave to warrant further investigation.

Ground 3: *“It is unclear whether the Adjudicator was provided with an unredacted copy of Mr A’s response to the complaint (dated 1 October 2020) as the document which appears in the Bundle of Documents provided to the Adjudicator appears to include redactions”.*

72. Mr A had provided a redacted and unredacted copy of the letter dated 1 October 2020 to ENZ. The details of the peer reviewer, and reference to City Council letter were redacted in the redacted version.
73. Mr A had requested to ENZ to only send the redacted copy of the letter to Company C and also requested not to send a copy of the City Council letter stating they had not obtained permission from City Council to release a copy of the letter at the time.
74. The Registration Authority confirmed⁷ the following information was not provided to the CIC and Mr B:
- (a) Mr A’s unredacted response (dated 1 October 2020),
 - (b) City Council’s letter setting out their view on Mr A’s modelling approach and NLTHA methodology, competency of Mr A and Mr K, and scope of the DSA and DSA peer review.

⁷ Registration Authority submission dated 19 May 2023 (pg 21)

97 The Terrace and 6 Edward Street

75. Company E, in their HLA report had included two example seismic assessment projects undertaken by Company E using the non-linear analysis for the buildings Address J and Address I, Wellington.
76. Mr B claimed Mr A had mis-stated the facts regarding the seismic assessment of both buildings and regarding the status of Address J on the earthquake register.
77. In relation to Address J, Mr B noted Mr A's 14 June 2019 letter could not be correct on the basis of Mr A earlier statements "*...Company E gave the building a seismic rating of 45% NBS at (sic) is and rating upgraded by council ... In his 1 October 2020 letter he indicates the DSA was not submitted to council*" [BOD1 pg 46].
78. In addition to providing evidence supporting that project's construction monitoring sheets and a PS2 from a recognised expert, Mr A, submits⁸ "*...even if it could be said the statement about Address J was misstated (which is denied), conveying something which was incorrect (although believed to be correct based on a client's instructions) does not constitute performing engineering services in a negligent or incompetent manner. It also was part of outdated Company E marketing material which Company E has updated*".
79. The Panel recommends Mr A check and update all marketing material, for currency and correctness, before releasing it.
80. In relation to Address I, Mr B claimed the DSA was not peer reviewed.
81. Mr A responded by noting that Company E had advised their client that their DSA must be peer reviewed and the client advised they would procure this review when the works were submitted to City Council.
82. The Panel considers Mr A's actions and response provided fall within the scope of what would be acceptable to engineering fraternity to Company C's concern and does not

⁸ Submission on behalf of Mr A dated 28 April 2023 (pg 8)

consider Mr A has performed engineering services in an incompetent manner, such as that described under 42E(a)(iii) and that the alleged misconduct is insufficiently grave to warrant further investigation.

Ground 4(2): *“The Adjudicator’s recommendations as to issues for the Investigating Committee to consider include as the third item an issue which is not relevant to the complaint against Mr A, but instead appears to arise from his complaint against Mr B which is properly dealt with in that context, if at all. That is particularly so when in the complaint against Mr B, the Adjudicator found that Company E’s concerns were genuine and made in good faith. It is therefore unclear what aspect of the Code of Ethical Conduct should be considered when that is not otherwise referred to in the decision.*

83. The CIC decision, states *“Whether the Company E Report’s, and/or Mr A’s review of Company C’s assessment and strengthening work implied any breach of the Engineering New Zealand Code of Ethical Conduct”* [BOD1 pg 59]
84. The RA in its submission⁹ considers *“both parts of the issue relevant to the complaint because the complaint centres on Mr A’s conduct in relation to the Company E report, and Mr A reviewed Company C’s relevant work when he prepared the Company E report”*.
85. The Panel accepts that “third item” mentioned in para 83 above is not the subject of a separate complaint. Irrespective, the Panel also accepts this “third recommendation” has no reference to any aspect of ethical conduct for further consideration.

⁹ Registration Authority submission dated 19 May 2023 (pg 14)

Ground 5: *“The outcome of the complaint against Mr A is entirely inconsistent with the related complaint by Mr A against Mr B concerning the same property where the Adjudicator held that that complaint should be dismissed”.*

86. The Panel has treated and assessed both appeals independent of each other on their own merits, based on the relevant information provided for either appeal. Therefore, the issue raised under Ground 5 has no bearing on the Panel’s decision on this appeal, and no merit.

Outcome of Appeal

87. The Panel has considered grounds 2, 3 and 4(2) of Mr A’s appeal, as to whether the complaint should be referred for further investigation to an investigating committee; having accepted ground 5 has no merit, and grounds 1 and 4(1) form the basis of this approach.

88. The Panel has found that:

- Mr A has not performed engineering services in an incompetent manner, such as that described under 42E(a)(iii)
- there is no applicable ground of discipline under section 21(1) (a) to (d) of the Act (rule 57(a)); and
- the alleged misconduct is insufficiently grave to warrant further investigation (rule 57(ba)).

89. The Panel has, therefore, decided to dismiss Mr B’s complaint under rule 57, specifically rule 57(a) and r 57(ba), and uphold Mr A’s appeal.

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

Costs

92. The Panel rules that any costs incurred by the parties in relation to this appeal shall lie where they fall.

Dated 20 December 2023

Signed by the Appeal Panel

	
Manjit Devgun (Principal)	Alan Winwood (Member)
	
Mark Holland (Member)	Sandra Hardie (Member)

Schedule 1: Extracts from the relevant legislation

Chartered Professional Engineers of New Zealand Act 2002 (“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 or 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.
- (2) The Registration Authority may make the order whether or not the person is still a chartered professional engineer.
- (3) The Registration Authority must comply with the applicable procedures under [section 25](#) before making an order.

35 Right of appeal

- (1) The person to whom the decision relates or, if it is a disciplinary matter, the complainant may appeal to the Council against a decision of the Registration Authority under this Part.
- (2) The Registration Authority, the person to whom the decision relates, or, if it is a disciplinary matter, the complainant may appeal to the District Court against a decision of the Council under this Part.
- (3) The appeal of a decision must be made by written notice to the Council or District Court (as the case may be) within—
 - (a) 28 days after the person receives notice of the decision from the decision authority; or
 - (b) any further time that the Council or District Court (as the case may be) allows on application made to it before the expiry of the 28-day period.

Section 35(2): amended, on 1 March 2017, by [section 261](#) of the District Court Act 2016 (2016 No 49).

36 Decisions to have effect until appeal

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.

37 Hearing and determination of appeal

- (1) Every appeal under [section 35](#) must be heard as soon as practicable after the appeal is lodged.
- (2) An appeal to the Council is a rehearing and must be conducted in accordance with any regulations made under [section 65](#).
- (3) Unless the Council otherwise directs, on the rehearing, the record of the evidence adduced at the hearing before the Registration Authority must be placed before the Council, and it is not permissible to recall witnesses who gave evidence before the Registration Authority or to call other witnesses.
- (4) An appeal to the District Court is a rehearing and must be conducted in accordance with the District Court Rules made under [section 228](#) of the District Court Act 2016.
- (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.
- (6) Nothing in this Part gives the Council or District Court the power to review any part of the decision other than the part to which the appeal relates.
- (7) In reconsidering a decision referred back to it with a direction under this section, the decision authority must take account of the reasons for the direction and give effect to the direction.

Section 37(4): replaced, on 1 March 2017, by [section 261](#) of the District Court Act 2016 (2016 No 49).

Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules")

Part 3 **Code of ethical conduct**

Part 3: replaced, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

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

engineering activities means activities for which a chartered professional engineer uses the engineer's engineering knowledge and skills

environment means—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural resources and physical (man-made) resources.

Rule 42A: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

Obligations in public interest

Heading: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42B Take reasonable steps to safeguard health and safety

A chartered professional engineer must, in the course of the engineer's engineering activities, take reasonable steps to safeguard the health and safety of people.

Rule 42B: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42C Have regard to effects on environment

- (1) A chartered professional engineer must, in the course of the engineer's engineering activities,—

- (a) have regard to reasonably foreseeable effects on the environment from those activities; and
- (b) have regard to the need for sustainable management of the environment.

- (2) In this rule, **sustainable management** means management that meets the needs of the present without compromising the ability of future generations (including at least the future generations within the anticipated lifetime of the end products and by-products of activities) to meet their own reasonably foreseeable needs.

Rule 42C: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42D Report adverse consequences

A chartered professional engineer who has reasonable grounds to believe that an engineering matter has, or could have, adverse consequences must bring the matter to the notice of the relevant regulatory body unless the engineer, having made inquiries, is satisfied on reasonable grounds that the matter is being dealt with through an appropriate process or in an appropriate manner.

Rule 42D: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

Obligations relating to personal conduct

Heading: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42E Act competently

A chartered professional engineer—

- (a) must—
 - (i) ensure that the engineer's relevant knowledge and skills are kept up to date; and
 - (ii) only undertake engineering activities that are within the engineer's competence; and
 - (iii) undertake engineering activities in a careful and competent manner; and
- (b) must not—
 - (i) misrepresent, or permit others to misrepresent, the engineer's competence; or
 - (ii) knowingly permit other engineers for whose engineering activities the engineer is responsible to breach paragraph (a)(ii) or (iii) or subparagraph (i).

Rule 42E: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer's engineering activities,—

- (a) must—
 - (i) act with honesty, objectivity, and integrity; and
 - (ii) treat people with respect and courtesy; and
 - (iii) disclose and appropriately manage conflicts of interest; and
- (b) must not—
 - (i) offer or promise to give to any person anything intended to improperly influence a decision relating to the engineer's engineering activities; or
 - (ii) accept from any person anything intended to improperly influence the engineer's engineering activities; or
 - (iii) otherwise engage in, or support, corrupt practices.

Rule 42F: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

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 42G: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

42H Maintain confidentiality

- (1) A chartered professional engineer who obtains confidential information from clients or employers in the course of the engineer's engineering activities—
 - (a) must not use the information for any purpose other than the purpose for which the information was obtained; and
 - (b) must not disclose the information unless the disclosure is permitted by this rule.
- (2) A chartered professional engineer may disclose confidential information if, and to the extent that,—
 - (a) the engineer is required to disclose the information in order to comply with rule 42D or 42I and the engineer has first raised the matter with the person to whom confidentiality is owed; or
 - (b) the engineer is otherwise required by law to disclose the information; or
 - (c) the information is publicly available; or
 - (d) the disclosure is authorised by the person to whom confidentiality is owed.
- (3) Information disclosed under subclause (2)(a) or (b) may only be disclosed to the person or organisation to whom or to which the engineer is required to disclose it.

Rule 42H: inserted, on 1 July 2016, by rule 4 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 Amendment Rules 2016 (LI 2016/121).

Initial investigation of complaint

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 56(a): amended, on 1 January 2012, by [rule 15](#) of the Chartered Professional Engineers of New Zealand Amendment Rules 2011 (SR 2011/408).

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 57(ba): inserted, on 1 January 2005, by [rule 13](#) of the Chartered Professional Engineers of New Zealand Amendment Rules 2004 (SR 2004/413).

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](#).

Rule 58(d): replaced, on 1 January 2012, by [rule 16](#) of the Chartered Professional Engineers of New Zealand Amendment Rules 2011 (SR 2011/408).

Rule 58(e): inserted, on 1 January 2012, by [rule 16](#) of the Chartered Professional Engineers of New Zealand Amendment Rules 2011 (SR 2011/408).

Schedule 2: Key correspondence, submissions and communications in this Appeal

1	Notice of Appeal received	24 Feb 2023
2	Email to the parties from CPEC Chair confirming Notice of Appeal	24 Feb 2023
3	Email to the parties from CPEC Chair confirming appointment of the Panel	13 Mar 2023
4	Email from the RA to the parties containing link to the paginated bundle of documents	28 Mar 2023
5	Letter from the panel principal to the parties confirming the panel members, outlining the appeal process, establishing the schedule for submissions and addressing communications	2 Apr 2023
6	Letter from the panel principal regarding appointment of additional panel member	27 Apr 2023
7	Submission received on behalf of Mr A	28 Apr 2023
8	Email from Mr B stating, <i>"I have nothing further I wish to submit"</i> .	16 May 2023
9	Submission received from the Registration Authority.	19 May 2023
10	Submission in response on behalf of Mr A	16 Jun 2023
11	Letter from panel principal acknowledging receipt of all submissions, proposing a hearing on the papers and checking if either party preferred a hearing in-person.	27 Jun 2023
12	Email received on behalf of Mr A stating, <i>"Mr A's preference is for the hearing to be in-person"</i>	30 Jun 2023
13	Email received from Mr B stating, <i>"I do not wish to attend the hearing against Mr A"</i> .	3 Jul 2023
14	Letter from the panel principal confirming the hearing date of 12 Sep 2023, hearing agenda, venue and relevant instructions (after exchanging various email messages to arrange a mutually suitable date for the hearing)	16 Aug 2023

Schedule 3: Timeline of Key Events

Note: BOD1 refers to Bundle of Documents for Mr B's complaint about Mr A, and BOD2 refers to Mr A's complaint about Mr B

Date	BOD Ref.	Item
Before May 2019	BOD2 [pg 39]	Body Corporate F and Body Corporate G engaged Company C (Mr B) to Assess Address D, Wellington and provide a seismic strengthening scheme.
7 May 2019	BOD1 [pg 20]	Company E approached by members of Body Corporate at Address D to provide an alternative approach.
May 2019	BOD2 [pg 37-237]	Company C produced DSA and Strengthening Design report for Address D.
24 May 2019	BOD2 [pg 8-9]	Mr B/Company C issued PS1 for the strengthening scheme for Address D
24 May 2019	BOD1 [pg 8]	Mr A visited the site on behalf of Company E Consulting and was escorted by Mr H to certain public areas around the existing building.
31 May 2019	BOD1 [pg 10]	Company E proposal to undertake a staged assessment to Address D St
14 Jun 2019	BOD1 [pg 4-10]	Company E's report issued to Company H titled " <i>High Level Seismic Assessment on the building located at Address D</i> "
21 Jul 2019	BOD1 [pg 2-3]	Email from Mr B to Mr M of ENZ raising concerns about content of letter dated 14 June 2019 from Company E to Company H, relating to Address D report.
17 Sep 2020	BOD1 [pg 11-13]	ENZ forwarded summary of concerns raised by Mr B, to Mr A with a statement "at this stage we have not formally classified it as a complaint"
2 Oct 2020	BOD1 [pg 20-40]	Mr A responded Mr B's concerns by sending a redacted and an unredacted letter dated 1 October 2020 to ENZ along with supporting documents.
8 Oct 2020	BOD1 [pg 14]	Mr A's email to ENZ stating " <i>I would like to exclude from documents the City Council letter as I haven't received approval from my client to share this in public</i> "
16 Oct 2019	BOD2 [pg 11-23]	City Council granted Building Consent for Address D.
4 Dec 2020	BOD1 [pg 45-48]	Mr B's letter to ENZ, in response to Mr A's letter dated 1 October 2020.
18 Feb 2021	BOD2 [pg 4-7]	Mr A raised concerns to ENZ regarding Company C's work on Address D buildings, with supporting documents.
27 May 2021	BOD2 [pg 2-3]	ENZ forwards summary of concerns raised by Mr A to Mr B
18 Jun 2021	BOD2 [pg 238]	Mr B responded to the RA summary of concerns from Mr A about himself/Company C.
19 Dec 2022	BOD2 [pg 239-247]	Adjudicator/CIC decision on Mr A's complaint against Mr B
19 Dec 2022	BOD1 [49-59]	Adjudicator/CIC decision on Mr B's complaint against Mr A.
24 Feb 2023	BOD1 [pg 60-64]	Adjudicator/CIC decision on Mr B's complaint about Mr A appealed by Mr A.
24 Feb 2023	BOD2 [pg 248-251]	Adjudicator/CIC decision on Mr A's complaint against Mr B appealed by Mr A.