

**BEFORE THE CHARTERED PROFESSIONAL
ENGINEERS COUNCIL**

Appeal 01/24

Under The Chartered Professional Engineers
Act 2002

In the matter of an appeal to the Chartered
Professional Engineers Council

Between Mr A

Appellant

And The Institution of Professional
Engineers of New Zealand t/a
Engineering New Zealand in its
capacity as the Registration Authority
under the Chartered Professional
Engineers of New Zealand Act 2002

Respondent

Decision of a panel of the Chartered Professional Engineers Council on the appellant's
application under s 36 of the Chartered Professional Engineers Act 2002

Dated 30 April 2024

Introduction

1. Mr A is a self-employed engineer and sole director of an engineering company. He has worked as a sole practitioner since 2006, when he was first registered as a chartered professional engineer (**CPEng**).
2. Mr A has appealed a decision of the Competence Assessment Board of Engineering New Zealand (the **Registration Authority**) which declined his application for continued registration as a CPEng under the Chartered Professional Engineers of New Zealand Act 2002 (the **Act**).
3. In addition to appealing the decision to the Chartered Professional Engineers Council (the **Council**) under s 35 of the Act (the **Appeal**), Mr A has sought an order from the Council under s 36 that the decision under appeal be 'stayed' so that his registration as a CPEng will be maintained pending the Appeal's determination (the **Application**).
4. Mr A has sought a stay on the basis that, to further allay any safety concerns, it could include a condition limiting his practice area description to "*design and construction monitoring of tenancy fitouts*".
5. The Council convened a panel to hear the Application (the **Panel**). The Panel determined that the Application could be heard urgently and set a timetable for written submissions and evidence from the parties, a hearing via videoconference, and the release of decision.
6. As part of setting a timetable, the Panel directed that a written application for a stay (separate to the notice of appeal), with the grounds on which a stay was sought, be filed with submissions and evidence.
7. In making this application, counsel for Mr A also sought an 'interim stay' until the stay application could be determined. The Registration Authority opposed an 'interim stay' on the basis that the Council did not have jurisdiction under s 36 to grant one. The Panel determined that there was not sufficient basis to depart from the timetable and decision-making procedure it had already set, particularly as it would result in very little additional time before a decision on the 'substantive' stay application would be made. For this reason, the Panel has not had to reach a conclusion as to whether it has jurisdiction to order an interim stay and does not address this point further.
8. An online, video-conference hearing was held on 16 April 2024 at which Mr A, his counsel, and counsel for the Registration Authority appeared and made submissions.
9. Following the hearing, at the Panel's request, supplementary submissions were provided by the parties on the ability of the Panel to make an order under section 36 that contains conditions.

10. Per the timetable set by the Panel, the Panel undertook to issue its decision by 30 April 2024.
11. This is the decision of the Panel on Mr A's application for a stay pending determination of his Appeal. As it has been made under urgency, the Panel's reasoning in this decision has been kept brief.

Legislation relevant to the Application

12. The Act requires CPEngS to meet the minimum standard for continued registration¹, and be assessed against this at least every six years.²
13. The decision-making power on applications for continued registration is delegated by the Registration Authority to the Competence Assessment Board (**CAB**).³ A decision by the CAB that a CPEng fails to meet these standards results in the removal or suspension of that individual's registration.⁴
14. Applications for continued registration are initially evaluated by an assessment panel which then makes a recommendation to the CAB on whether or not the applicant has demonstrated that they meet the minimum standard for continued registration.⁵
15. The minimum standard for continued registration is set out in rule 20 of the Chartered Professional Engineers Rules 2002 (the **Rules**).⁶

20 Minimum standard for continued registration as chartered professional engineer

To meet the minimum standard for continued registration, a person must demonstrate that—

- (a) he or she—
 - (i) is still able to practise competently in his or her current practice area to the standard of a reasonable professional engineer; or
 - (ii) if the person's practice area has changed materially since the last assessment, meets the minimum standard for registration within his or her current practice area; and
- (b) he or she has taken reasonable steps to maintain the currency of his or her professional engineering knowledge and skills within his or her current practice area since the last assessment.

¹ Section 11, Chartered Professional Engineers Act 2002. The minimum standard for continued registration is described in rule 20 of the Chartered Professional Engineers Rules 2002

² Rule 21, Chartered Professional Engineers Rules 2002

³ Rule 77, Chartered Professional Engineers Rules 2002

⁴ Section 11, Chartered Professional Engineers Act 2002

⁵ Rules 24 and 25, Chartered Professional Engineers Rules 2002

⁶ For further description regarding the rules, statutory framework and other matters relevant to assessment on continued registration, refer *Institution of Professional Engineers New Zealand Incorporated t/a Engineering New Zealand v Nowak* [2021] NZDC 11697

16. If the CAB proposes to decline an application, it must notify the applicant and allow them an opportunity to make written submissions on that proposal before making a final decision.⁷
17. Applicants for continued registration can appeal the decision of the CAB (as a decision of the Registration Authority) under s 35 of the Act. Section 37 of the Act sets out how the hearing of that appeal is to be conducted, including the scope of determinations that the Council is entitled to make.
18. Under s 36 of the Act, the appealed decision continues in effect until the determination of the appeal, unless the Council (or District Court) orders otherwise. The Application is made under this section. That section's complete wording is:

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.

19. In terms of procedure, s 25 of the Act provides high level procedural requirements for decisions made under Part 2 of the Act (where ss 35 and 36 are located)⁸ and s 26 otherwise provides that the Council can regulate its own procedure for making those decisions.
20. The other enactment relevant to the Council's role and the underlying Appeal is the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (the **Regulations**), which sets out rules for the conduct of appeals to the Council.

Evidence and submissions

21. The Panel has considered the written submissions and evidence filed in relation to the Application, along with the original notice of appeal and affidavit of Mr A.

The CAB's decision

22. Mr A has been registered continuously as a CPEng since 2006 and, on each occasion of application for continued registration, for the maximum period of six years, a total of 18 years. His latest application for continued registration was made in either August or October 2022 ahead of his registration being due for renewal on 31 December 2022.⁹

⁷ Rules 26 and 27, Chartered Professional Engineers Rules 2002

⁸ The requirements relevant to the Council being: to give written notice of, and reasons for, its decision; observe the rules of natural justice; and comply with any regulations made under s 65 i.e. the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002.

⁹ Per affidavit of Mr A, at [8] application was August 2022, per submissions for Registration Authority at [3.2] application was made in October 2022.

23. The assessment of Mr A's application by the assessment panel appointed by the Registration Authority took place across the course of the following year, during which time he remained registered as a CPEng.
24. On 29 September 2023 the CAB notified Mr A of its intention to decline his application for continued registration as a CPEng.
25. On 27 October 2023 Mr A submitted a response on that proposal to the CAB. At the hearing, Mr A noted he felt he had 'wasted' his opportunity for reconsideration by trying to address the concerns of the original assessment panel in that submission.
26. The CAB referred Mr A's response back to the assessment panel, which confirmed its original recommendation to the CAB to decline Mr A's application.
27. On 23 February 2024 the CAB's final decision to decline Mr A's application for continued registration was communicated to Mr A by letter from the Registration Authority. The following was stated as the CAB's reasons for declining the application:
 - Insufficient evidence to demonstrate competency in Engineering Knowledge as required under the Chartered Professional Engineers Rule 6(2)(a)(i)
 - 6(2)(a)(i): Failed to demonstrate knowledge of accepted principles underpinning widely applied good practice for professional engineering
 - Insufficient evidence to demonstrate competency in Developing Technical Solutions as required under the Chartered Professional Engineers Rule 6(2)(c)
 - 6(2)(c): Failed to demonstrate they design or develop solutions to complex engineering problems in accordance with good practice for professional engineering
 - Insufficient evidence to demonstrate capability to define, investigate and analyse complex engineering problems or to design or develop solutions to complex engineering problems in accordance with good practice for professional engineering as required under the Chartered Professional Engineers Rule 7.
28. Mr A appealed the decision to the Council on 21 March 2024.

Grounds of appeal and outcome sought

29. Mr A's application of 5 April 2024 states the following grounds in support of a stay:
 - 2.1 The appellant seeks a stay of his removal from the CPEng register on the condition of a limited practice area description (**PAD**), in respect of a practice area (retail/tenancy fit-outs) with which the Registration Authority did not take issue in the Decision.
 - 2.2 As such, there is no risk to the public in reinstating the appellant's CPEng registration on that limited basis and pending determination of the substantive stay application or the appeal.

- 2.3. Declining the stay would cause immediate and significant hardship to the appellant because:
 - (a) He would be unable to complete current projects and/or would have to engage another CPEng to review and sign-off his work;
 - (b) He would lose income and/or suffer losses in not being able to complete the current projects, having to engage another engineer to review/sign off, and not being able to take on new work.
 - (c) He would suffer reputational damage from having his registration removed on the public register, especially known as a CPEng and has been continually registered as such for 18 years.
- 2.4. The appeal is brought by the appellant in good faith and has merit.
- 2.5. Granting a stay will have no injurious effect on the Registration Authority nor on any third parties.
- 2.6. Declining a stay will have a negative impact on third parties, being the appellant's current and prospective clients.
- 2.7. The overall balance of convenience favours granting the stay (including the interim stay).

Issues

30. This Application raises the following issues:
 - a. Should the Council make an order under s 36 to stay the Registration Authority's decision until determination of the appeal?
 - b. If the Council does not consider that staying the entirety of the Registration Authority's decision is warranted, does it have jurisdiction to order a stay with conditions?
 - c. If it has that jurisdiction, should it exercise it in this case?

Approach to consideration of stay

31. Due to the urgency associated with the Application and decision, this decision does not address all of the matters traversed in written and oral submission before the Panel, but these were duly considered in reaching this decision.
32. The starting point, as codified in s 36, is that a decision continues in effect unless an order is made.

33. The parties put forward different authorities, however, these authorities agreed on the same exercise and factors to be considered on the application for a stay.¹⁰
34. The decision on whether to grant a stay of a decision is a ‘balancing exercise’, taking into account the consequences for all parties to the appeal.¹¹ The following criteria are to be applied:¹²
- 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.
35. In *Subramani*, the Court of Appeal approved the application of these factors in the consideration of whether to grant a stay of a dentist’s removal from the profession’s register following a disciplinary decision of the Health Practitioner’s Disciplinary Tribunal. Comment is made in that case of the conceptual awkwardness of some of the criteria in this setting, stating:

The criteria in *Yan* are not to be interpreted as rigid, hard-edged rules.^{43*} They are designed to inform the various considerations which may be relevant to whether a stay in a particular case should be granted. Some may apply. Others may not. They are self-evidently of general application and their utility will necessarily depend on the nature of the case involved.

(*Footnote 43, *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 86, (2014) 22 PRNZ 296)

¹⁰ Mr A’s counsel relied on *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZCA 377 and *Keung v GBR Investments Ltd* [2010] NZCA 396 whereas the Registration Authority pointed to *Subramani v Professional Conduct Committee of the Dental Council* [2023] NZCA 375

¹¹ *Subramani v Professional Conduct Committee of the Dental Council* [2023] NZCA 375 at [20]

¹² *Ibid*, and almost identical to *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZCA 377 at [10].

Consideration of factors

The consideration of public health and safety

36. The parties both acknowledged the importance of the consideration of risk of harm to the public in the Panel's determination of the Application. These impacts were a strong focus of written and oral submissions and evidence, being identified by counsel and Mr A himself as being front of mind in this exercise.
37. While not a criteria in the list quoted above in [34], the risk of harm to the public is a factor that has been acknowledged as being a key concern in the authorities from the professional regulatory context such as *Subramani* and *Edwards v A Professional Conduct Committee* [2022] NZHC 971 (cited in *Subramani*) and *Hart v Auckland Standards Committee 1* [2012] NZAR 1085.
38. The Court of Appeal in *Subramani* noted protection of the public from harm caused by an incompetent practitioner can be considered under several headings, including injurious effects on the successful party, public interest, or as part of the overall assessment of where the balance of convenience lies.¹³
39. In *Hart*, the Court took the approach that its power to grant a stay must be exercised having regard to the purposes of the Lawyers and Conveyancer Act 2006 which include maintaining public confidence in the provision of legal services and to protect consumers of legal services. It considered that, "*It follows that the Court will exercise the power to grant interim relief from suspension sparingly, and only in circumstances where it can be confident that any order it might make will not place members of the public at risk.*"
40. It is acknowledged that these authorities arise in different statutory contexts and involve appeals of disciplinary decisions. However, there are strong parallels between professional regulatory contexts. It is useful to set out the features of the CPEng regime that the Panel considers introduces the element of public health and safety to its consideration.
41. The term 'engineer' is used across many contexts and, due to that variety, is not a cohesive 'profession'. However, it is typically an individual with the training and title of 'engineer' that will be called on to design and/or review propositions for a built environment. Ideas or propositions for infrastructure or processes of a complex and risky nature are 'engineered' to provide a solution to a problem which must consider and reasonably minimise the risk to people.

¹³ Ibid at [42]

42. Unlike the Health Practitioners Competence Assurance Act 2003 and the Lawyers and Conveyancers Act 2006, the Act's purpose is not framed around protection of the public.¹⁴ Rather, the Act's purpose is stated as follows:

3 Purpose of Act

The purpose of this Act is to reform the law relating to the registration of engineers and to establish the title of chartered professional engineer as a mark of quality; and, to those ends, this Act—

- (a) establishes a registration system for chartered professional engineers, under which persons who wish to be chartered professional engineers must meet minimum standards to be, and continue to be, registered:
 - (b) requires a code of ethics and a complaints and disciplinary process to apply to chartered professional engineers:
 - (c) requires a professional body to carry out the functions relating to the registration system, the code of ethics, and the complaints and disciplinary process, and establishes a statutory body to oversee aspects of those functions:
 - (d) repeals the Engineers Registration Act 1924.
43. The title of 'CPEng' is a protected status¹⁵ which can only be achieved through initial and ongoing assessment of meeting certain minimum standards for conduct and competence. That title is underpinned by periodic assessment of meeting those standards, accountability to those standards through the required adherence to a code of ethics, and existence of a complaints and disciplinary regime.
44. As the Registration Authority submits, the Act itself does not confer a right on a CPEng to engage in a particular, restricted activity. Nor does the Act determine a 'scope of practice' or speciality within which a CPEng must practice. The concept of a 'practice area' is created in the Rules, but not for the purposes of limiting a CPEng's practice. It only appears in reference to the minimum standard for registration and continued registration and requires at least one assessor on the registration assessment panel to have the knowledge and experience relevant to the practice area being assessed.¹⁶
45. Engineers who are registered as CPEng have an ethical obligation to, "only undertake engineering activities within the engineer's competence"¹⁷, however, their practice area description is not determinative of what activities are within their competence. The

¹⁴ See section 3, Health Practitioners Competence Assurance Act 2003 and section 3, Lawyers and Conveyancers Act 2006

¹⁵ Section 7, Chartered Professional Engineers Act 2002

¹⁶ Rules 6, 20, and 75, Chartered Professional Engineers Rules 2002

¹⁷ Rule 42E, code of ethical conduct, Chartered Professional Engineers Rules 2002

consequence of a breach of ethical conduct is a disciplinary process under the Act if complained of or otherwise brought to the attention of the Registration Authority.

46. With the exception of specific instances in legislation and procedures created by local and regional authorities, engineers in New Zealand are not generally prevented from carrying out safety-critical tasks. Engineers who are not CPEng are not prevented by legislation from undertaking work outside of their area of competence.
47. Instances in which the CPEng regime and title is used in legislation include under the Building Act 2004 and its associated orders:
 - a. A CPEng has automatic licensing for restricted building work in 'area of practise 3' for both design and site (i.e. licensed for design and site observation of category 1, 2, and 3 buildings).¹⁸
 - b. Some 'building work' under Part 3 of Schedule 1 does not require building consent where the design has been carried out or reviewed by a CPEng, and the building work has been carried out in accordance with that design.¹⁹
 - c. a 'recognised engineer' for the purposes of reviewing and classifying dams must be registered under the Act (i.e. a CPEng).²⁰
48. Building consent authorities rely on producer statements to confirm that someone with a recognised level of competence has reviewed the relevant calculations and drawings before granting building consent or issuing a code of compliance certificate under the Building Act 2004. To demonstrate that competence, those authorities often require that person to be a CPEng. Building consent authorities also often require a CPEng to be involved in construction monitoring.
49. In the Panel's view, this context, which includes a use and reliance on the CPEng title in legislation, demonstrates that, while the purpose of the Act is not explicit in providing for the protection of the public, the nature of engineering and the situations where reliance is placed on the title of 'CPEng' means that risk to the public is a live consideration which should not be taken lightly and informs discussion on the factors below.
50. The Panel heard argument between the parties as to what heading several considerations related to public health and safety should appropriately be placed under. While the criteria above in [34] are useful and have been adopted below as a framework for the Panel's discussion and findings, the Panel has not approached this as a numerical exercise counting the number of factors 'for' and 'against'. Therefore, in determining this

¹⁸ Building (Designation of Building Work Licensing Classes) Order 2010, also see Licensed Building Practitioner Rules 2007

¹⁹ Section 42A, Building Act 2004

²⁰ Section 149, Building Act 2004

matter the Panel has not 'double-counted' the consideration of public health and safety and will not otherwise engage in that aspect of the arguments below.

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

51. It is accepted by counsel for Mr A that the Appeal will not be rendered nugatory if a stay is not granted. Mr A will pursue the Appeal and seek to have the decision on his registration overturned and could, if successful, have his CPEng registration restored regardless of whether the stay is granted.
52. The parties differed on the weight this factor should be afforded. Counsel for the Registration Authority argued that the fact of a refusal of stay not rendering the Appeal nugatory, "weighs strongly in favour of the declining of the stay application." Counsel for Mr A argued that, rather than weighing against a stay, the neutrality of this factor means it becomes irrelevant and other factors are to be weighed instead.
53. In *Subramani*, the Court of Appeal noted the provision stating that an appeal does not operate as a stay of the proceedings "*reflects the general rule in litigation that a party is entitled to enjoy the benefits of judgment in their favour and that a party seeking a stay must persuade the court that, if a stay is not granted, the appeal right would be rendered nugatory.*" However, when undertaking the balancing exercise with respect to the criteria listed, it did not state what weight, if any, was attached to the fact that in that case, the refusal of a stay would not render the appeal nugatory.
54. The Panel agrees that a refusal to grant a stay would not render Mr A's Appeal nugatory and that therefore this factor does not weigh in favour of a stay. While the Panel does not consider its absence weighs strongly *against* a stay, it acknowledges that it is for the applicant to persuade the Panel that a stay should be granted in the circumstances and more reliance will be needed on other factors for that.
55. It is this heading under which the effects on the applicant of a refusal will typically also be considered. The loss of his CPEng registration would clearly be a source of shame and embarrassment for Mr A, who has been CPEng for a significant period of time and has built and advertised his practice on the basis of being a CPEng. He has deposed that the loss of CPEng registration will be reputationally damaging for him, having been a CPEng for so long, he is well known as one.
56. As the Registration Authority has emphasised, a CPEng registration is an additional level or certification of expertise in a particular area. The lack of a CPEng registration will only directly affect an engineer's ability to work where it is required for specific work (as discussed above), or a client or stakeholder has a preference for using an engineer with that additional recognition – in the way that a client wishing to engage a barrister may prefer to engage one with the rank of King's Counsel.

57. CPEng is a hard-earned distinction that engineers will naturally trade on and build their business around. While it does not prevent them from working as an engineer, it may be the case that their workstream is so tied to their status as CPEng that it will have the effect of eliminating their current work. Mr A has deposed that 'all of' his work requires CPEng status to prepare and sign producer statements. He currently has about 50 ongoing projects where he has been contracted to carry out structural design and sign relevant producer statements. He has also said that engagement with new clients will be difficult as without CPEng status he cannot now start the work.
58. There is unfortunately an inevitable level of harm or hardship that will follow a decision of the Registration Authority not to continue an individual's registration. As in *Hart*, that is something Parliament must have been cognisant of.²¹ The effect of a decision is likely to be greater where an engineer is practicing on their own, rather than in a firm in which work requiring CPEng can be redistributed on a temporary or permanent basis. However, the legislation is clear in its requirement and effect of a decision that an engineer has not met the minimum standard for continued registration.
59. Therefore, much of the hardship to an individual is a 'natural' consequence of such a decision, and the extent of the personal harm or prejudice arising from such a decision needs to be significant before it can be considered a strong factor in favour of a stay to overturn the standard position. While the Panel appreciated hearing from Mr A directly and takes his sworn evidence at face value, it would have been useful to have more and greater detailed information about the likely financial hardship posed by the loss of his CPEng registration.
60. On the face of the evidence provided, that hardship is not of a level that will render Mr A's Appeal nugatory. However, the Panel does take the effect on Mr A's ongoing ability to earn a living into account in the overall balance of convenience.

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

61. The Registration Authority acknowledged that there is no evidence to suggest that Mr A's Appeal is anything other than bona fide. There is no dispute between the parties on this ground.
62. The Panel accepts that Mr A's Appeal is bona fide and is bringing and pursuing the Appeal in good faith.

²¹ *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2012] NZHC 2496

Whether the successful party will be injuriously affected by the stay

63. As discussed above, the Panel acknowledges that there is a public interest in the integrity and maintenance of the CPEng registration regime, in particular the publicly available register of CPEng individuals that the Registration Authority keeps and maintains per the Act (the **Register**).²² Per *Subramani*, the statutory overlay can be recognised. However, in relation to this matter, the Panel considers it more appropriate that this is weighed as part of the public interest factor and discusses this below.
64. Therefore, the Panel does not consider that this factor relevant in this instance.

Effect on third parties

65. Mr A has said that the impacts of losing his CPEng on his business will flow through to his family, whom he supports as sole earner, and to his clients and stakeholders. The Panel was not provided specific details of the likely financial impact of a refusal to grant a stay.
66. With respect to the financial hardship on his family, the Panel considers that this factor provides some weight towards granting a stay.
67. The Panel understands that if a stay is refused, either Mr A's clients, or Mr A on their behalf, would need to engage another CPEng to review and complete producer statements, which will add cost, and possible additional time to the projects. However, there does not appear to be a lack of other CPEng who could take on the work or evidence of the current projects being so time critical in nature that this couldn't be achieved. It is not apparent that Mr A's clients are likely to go elsewhere if they can achieve CPEng through his company but with another CPEng, it is more a matter of cost to be borne either by the clients or Mr A (if he chooses to absorb the cost).
68. Therefore, the Panel does not find that additional cost or inconvenience for Mr A's clients and project stakeholders to be persuasive and does not add weight to this factor in favour of a stay.
69. With respect to 'the public' as a third party, having noted that the impact to particular third parties needs to be weighed against risks to the public (including those third parties for whom work is performed), the Panel considers this best discussed under the heading of 'public interest'.

²² Section 16, Chartered Professional Engineers Act 2002

The novelty and importance of the questions involved in the appeal

70. After clarifying that this factor is aimed at the Appeal, rather than this Application, parties were in agreement that the Appeal does not raise any novel issues.
71. The Panel views this factor as neutral.

Public interest in the proceeding

72. While per *Yan*, the criteria for consideration are not limited, the Panel considers that the risk of public health and safety sits most comfortably under this heading.
73. In summary, the Registration Authority's position with respect to the public (albeit in relation to various criteria), is that:
- a. The CAB's process found Mr A has not met the minimum standard for continued registration. The assessment identified he was conducting complex engineering work which he could not competently do. As a structural engineer, there is a significant risk to the health and safety of the public if Mr A does not conduct engineering activities in a competent manner.
 - b. Allowing Mr A to stay on the Register pending the substantive decision of the Appeal would communicate to the public that he has met the standards of a CPEng, when, in fact, he has not. This undermines the accuracy and integrity of the Register, which serves to protect the public.
 - c. In relation to Mr A offering to restrict his practice area, the Registration Authority argued that assessments for continued registration are 'holistic', and a lack of comment on one work sample does not mean that the applicant is competent – they have still failed to meet the minimum standard required to maintain their CPEng registration.
74. With respect to the accuracy and integrity of the register, in the CPEng context, the statutory overlay is a protected title conveying a level of competence in engineering. The intent of the Register is that it enables members of the public and local and regional authorities to, "*know who is a chartered professional engineer and what is the status and relevant history of the person's registration*".²³
75. That title of CPEng and the competence or 'quality' it evidences of the individuals on the Register is relied on by others in various contexts. The Panel accepts that the confidence of the public in the quality and integrity of the title of CPEng could be undermined if it cannot rely on that title conveying that the individual's competence has been assessed

²³ Section 16, Chartered Professional Engineers Act 2002

as meeting the minimum standard required. This carries through to the need for the Register to be accurate to an individual's status.

76. Counsel for Mr A argued that the integrity of the Register is 'just as compromised' by Mr A not being restored to the Register. The Panel does not accept this. The starting point here is that a legislated process has been undertaken and a decision made by the Registration Authority that Mr A does not meet the minimum standard for continued registration. The Registration Authority must give effect to that decision, including its reflection on the public register.²⁴ Per s 36, that decision takes effect regardless of its appeal. It is for the applicant to persuade the Council that an order should be granted which precludes the decision taking effect and the Council is not in a position to determine whether or not Mr A meets the standard for continued registration until the substantive Appeal.
77. With respect to the more direct risk to the public from Mr A continuing to undertake work that requires CPEng status, counsel for Mr A argued that the RA has conflated the concept of 'risk' with the stakes involved, i.e. focusing on the possible consequences without considering the likelihood of a poor outcome. He argues that the 'actual risk' (i.e. likelihood of harm) is practically nothing, given:
- a. Mr A's length of previous registration as a CPEng without issue (18 years);
 - b. Mr A is a senior engineer who has never previously been refused re-registration and has always been registered for the maximum period (six years);
 - c. The current situation is not the result of any 'actual' or 'genuine' harm, as this is not a disciplinary matter such as *Subramani*;
 - d. The work Mr A undertakes as a CPEng is inherently low risk – tenancy fit outs are typically 'minor' works, within an existing building, using lightweight materials, not subject to wind loading and the bracing component products are often standardised;
 - e. Mr A has successfully designed more than 500 commercial fitouts;
 - f. The assessment panel took no issue with and asked Mr A no questions about the work sample that was a commercial fit-out.
 - g. Construction of the fitouts designed by Mr A is carried out by experience contractors.
78. Mr A also addressed the Panel directly at the hearing and recognised that a risk to the public is front of mind – as it is for all engineers. For that reason he is happy to have measures in place such as supervision by a CPEng or 'whatever needs to be done' to satisfy the Panel that risk is addressed. When asked how 'supervision' by another CPEng

²⁴ Section 11(2), Chartered Professional Engineers Act 2002

would be different to having another CPEng undertake the review and sign off of CPEng elements to current projects until the Appeal is determined, Mr A stated he wasn't sure about any cost difference, it would be more about avoiding the loss of dignity for him associated with losing his CPEng registration.

79. While the purpose of the Act is to establish the protected title of CPEng as a 'mark of quality', the effect of this has been to create recognition and reliance on that title by the public, local and regional authorities, and in legislation. Requiring or engaging a CPEng is a step that is typically taken to mitigate the risk in an engineering activity to health and safety through the individual having demonstrated a level of competence. This is reflected in the fact that certain work can only be undertaken or certified by a CPEng.
80. In the Panel's view it is inescapable that in a situation such as this, where the decision under appeal is a finding of an engineer undertaking structural design certification as a CPEng who has been found not to meet the minimum standard for CPEng status, there is the potential for the following if a stay were to be granted:
 - a. the title of CPEng, and public trust and confidence in the CPEng registration regime and Register to be undermined; and
 - b. a direct risk to the public from an engineer undertaking work where that CPEng status is relied on, when they do not have the competence to do it.
81. It follows that there is necessarily a significant weighting of the public health and safety and interest in these circumstances. It does not follow that the level of risk or strength of this factor will be the same in every case, nor always outweigh other factors that support granting a stay. However, it may mean that applicants face a not insignificant hurdle to be granted a stay in such circumstances, but in the Panel's view and based on the authorities provided, this is not unwarranted.
82. With respect to the work that Mr A commonly undertakes, the Panel notes that the fitout of commercial premises is a type of work that necessarily carries with it a risk of harm to those who are accessing the premises. Poorly designed, such fitouts can have significant consequences. With respect to counsel for Mr A's argument that the risk is 'practically nothing', the Panel notes that where there is the possibility of significant consequences to public health and safety arising from an activity, the 'risk' involved cannot be so minimised.
83. However, Mr A's experience and tenure in this area does speak to a low likelihood of such consequences occurring and, as Mr A pointed out, no concerns were raised with the work sample of a fitout and it is this work which forms the majority of his practice currently. Mr A deposed that since 2019, he has "scaled down his work and focus to smaller domestic and commercial projects such as stairs, Portacom building and retail/tenancy fit-outs" and that this now comprises the entirety of his current work. In

other words, he no longer undertakes the type of work in the samples that the assessment panel raised concerns about.

84. As there remains a risk of harm to the public, both direct and indirect through undermining the CPEng title, this factor weighs against the granting of a stay. However, the level of risk involved in this matter (and therefore this factor's weighting) is somewhat moderated by the above considerations.

Apparent strength of the appeal

85. The Panel is not in a position to interrogate the CAB's decision – that is a matter for the substantive Appeal.
86. However, the authorities are clear that the 'apparent strength of appeal' is a factor. The Court of Appeal in *Subramani* suggested there may be cases "where the merits of the proposed appeal are so obvious and so favour the appellant that this factor operates in favour of a stay."²⁵ At the other end of the scale, it may be "an appeal stands no reasonable prospect of success".²⁶ An application for a stay of the latter type would rightly struggle to succeed.
87. An application for a stay will typically fall somewhere between the two extremes identified above. The Panel considers the mere fact an appeal has been made is not sufficient to count towards a stay under this factor.
88. In the Panel's view, the apparent strength of the Appeal was best addressed by Mr A at the hearing. Mr A explained the circumstances and situations during his assessment for reregistration of which he feels aggrieved. He also described what he saw as the procedural failings. In short, Mr A provided the Panel with his view of the facts that underpin his Appeal.
89. The Panel must acknowledge it only heard from Mr A about the conduct of his assessment for reregistration. In this decision, the Panel makes no further comments on the facts asserted by Mr A. Those will be explored during the Appeal.
90. It is sufficient for the Panel to say that in its view there is a prospect of success and that there are issues which, in the course of the Appeal, "will be open to argument".²⁷

²⁵ *Subramani* above n 10 at [57]

²⁶ *Brook Valley Community Group Inc* at [12].

²⁷ *Brook Valley Community Group Inc* at [12].

Overall balance of convenience

91. The Panel found that this matter came down to three key factors in the balancing exercise: the public interest/risk to public safety; the personal hardship and ability of Mr A to make a living and support his family; and the strength of the Appeal.
92. At the heart of this balancing exercise is that a senior engineer, registered continuously for 18 years as a CPEng, has been declined continued registration as a CPEng because the CAB has determined he has not provided sufficient evidence that he meets the minimum standard of competence required.
93. The proposition of a stay in the circumstances before the Panel is that, despite a panel of experts having assessed an engineer as not meeting the standards for the CPEng status, that status should nevertheless be maintained and able to be relied on by the public and authorities for work that warrants engaging someone of that status while the registration decision is challenged.
94. The Panel faced considerable difficulty in weighing the opposing factors in the balance of this matter. It is inherently against the objects and intentions of the Act that an individual remains, to the public's view, a registered CPEng when they have been assessed as not meeting the required minimum standards. There is a particular concern in the public relying on the Register as proof of CPEng status with no awareness of Mr A's continued registration having been denied.
95. On the other hand, the Council's power under s 36 is available. If the CAB have erred in their decision regarding Mr A, the period of being without his CPEng registration would have caused him professional, reputational, and financial setbacks. In particular, his family will be without the sole earner and his ability to make a living is prejudiced.
96. In addition, the Panel was persuaded by Mr A's submissions to it at the hearing that there is enough on the face of his Appeal to warrant weighing the strength of the Appeal in favour of granting a stay.
97. This matter was finely balanced. The Panel finds that the overall balance of convenience favours ordering a stay of the Registration Authority's decision. By a fine margin, the Panel considers that the apparent loss of livelihood to Mr A outweighs the other considerations that favour against awarding a stay. In reaching its conclusion, the Panel is cognisant of Mr A having already limited the scope and type of work he undertakes and intention of ongoing self-regulation and access to support from another CPEng.

Stay with conditions

98. Mr A has volunteered to limit his practice area description by conditions on a stay and, at the hearing, also offered to be supervised by a CPEng, if that would alleviate the Panel's concerns sufficiently to allow him to maintain his CPEng registration.
99. The Panel acknowledges it would be comforted by the existence of conditions that limited Mr A's practice in the interim and/or provided a level of oversight. A stay that limited Mr A's area of work and provided a form of supervision would go a long way to alleviating the Panel's remaining concerns regarding risk to the public, particularly if such limitations could be communicated on the public register. Were a stay to be granted in circumstances that promoted awareness of the restrictions on Mr A's practice, the public and authorities might then assess for themselves the risks in engaging Mr A as a CPEng while his Appeal is heard and determined.
100. However, after hearing and considering submissions from the parties on whether the Council can order a stay with conditions under s 36, the Panel considers that in these circumstances it does not.
101. While in any case the Panel has determined that, by a very narrow margin, it will grant a stay of the decision without conditions, it sets out below the reasons as to why it considered it did not have jurisdiction to make an order with conditions in this instance.
102. To the Panel's knowledge, the Council has never previously made an order under s 36 of the Act that included conditions, although this was proposed by the Registration Authority in Appeal 03/22 (Appeal Ruling #75).
103. The wording of s 36 is:

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.

104. Mr A's counsel argued that the wording of s 36 is 'clear and unambiguous' in allowing a stay with conditions. As such, general words in a statute must be given a general interpretation and the lack of restriction or qualification to s 36 means Parliament intended to give the Council a broad power, only fettered by the rules of natural justice and the other ordinary judicial review grounds such as illegality, irrationality, and procedural impropriety. He noted that the Act gives the Council broad powers to perform its statutory functions as long as there are no specific provisions in the Act to the contrary. This is consistent with s 26 which provides that "*Except as otherwise provided in this Act, a decision authority may regulate its own procedure for making decisions under this Part*".

105. With respect to the Council's ability to order a stay, the Panel agrees. However, whether the wording in s 36 allows for a stay limited by conditions is less clear.

106. The Panel notes the following considerations of the wording in s 36:

a. The effect of the phrase "until the determination of the appeal" has two interpretations:

i. Every decision continues in effect *until the determination of the appeal*. Therefore, the 'order' that can be made under s 36 is only whether or not it continues until the determination of the appeal – i.e. it does, or it does not. Therefore, the phrase 'subject to the order' is limited to the determination of that 'yes or no' question and the Council is limited in ordering a stay for the duration of the appeal, or not.

OR

ii. The phrase 'until the determination of the appeal' is only intended to clarify the temporal limit on any order under s 36 – i.e. any order can be made that prevents the effect of the decision under appeal, only up until (at the most) the determination of the appeal. It also recognises that once the appeal is determined, the decision under appeal may fall away.

b. The phrase 'continues in effect according to its terms' is arguably only all or in part:

i. An order is permitted that prevents a decision 'continuing in effect according to its terms'. The decision is either given effect, or it is prevented from doing so by a stay.

OR

ii. That order can prevent some or all of the effects of that decision. For example, in a disciplinary matter, an order may be made that prevents a fine being payable until the determination of the appeal but does not stay removal from the register.

107. Regardless of which of the interpretations above in paragraph 106.b.(i) or b.(ii) is preferred, the Panel's view is that s 36 only permits the *prevention of the effect* of a decision of the Registration Authority. It does not permit the introduction of *additional* terms or effects that were not in the original decision. This is supported by:

a. The principle that the Council only has the powers expressly provided to it by statute.

b. The Council does not have the discretion to provide 'any interim relief it sees fit' as exists in the rules for appeals through the courts on such matters.

c. The lack of supervisory role or structures to deal with a breach of conditions of a stay.

108. In relation to c. above, once a Council has made an order, there is no provision for ongoing supervision or consequence if an order is not complied with. If an order under s 36 is only able to *prevent* the effect of a decision (or part of it), this does not appear to be problematic. If, however, a stay is conditional, it must cease to have effect if those conditions are breached. Yet there is no apparent role for the Council or the Registration Authority in monitoring compliance. Without publication of such conditions, there is no public awareness that could also trigger notification of a breach. Creating a role for the Registration Authority in monitoring compliance would be to impose something which appears to be beyond the scope of the Act and Council's role.
109. The Panel does not consider that relying on the general application of the code of ethical conduct and a breach somehow being brought to the attention of the Registration Authority would be satisfactory for the enforcement of such conditions.

'Effect' of decisions on registration

110. A person is a chartered professional engineer if they are 'registered' and 'hold a current registration certificate'.²⁸ Under s 11(1) of the Act the Registration Authority must assess (at the frequency required by the rules or at any other time), whether or not a registered person meets the minimum standards for continued registration contained in the rules. Then, per s 11(2):
- (2) If the Registration Authority determines that the person does not meet those minimum standards, it must—
 - (a) remove the person's registration; or
 - (b) suspend the person's registration until the person satisfies the Authority that he or she meets those minimum standards and, if he or she does not do so within 12 months, remove his or her registration.
111. Therefore, the effect of the Registration Authority's decision in this case is that it must remove Mr A's registration.
112. The Act equates 'removal from register' with removing a person's registration.²⁹
113. The question becomes whether the Council can order a partial or limited removal of a CPEng registration, i.e. preventing part of the effect of the decision. Put another way, is it within the scope of s 36 for the Council to limit a CPEng's registration by reference to their practice area as argued by counsel for Mr A.
114. Counsel for Mr A argued that a conditional stay that limits an engineer's practice area is no different from any engineer being granted CPEng within their practice area. The

²⁸ Section 6, Chartered Professional Engineers Act 2002

²⁹ Section 12, Chartered Professional Engineers Act 2002

engineering profession is self-regulating, and CPEng engineers assume a responsibility under the code of ethical conduct to act competently within their area of competence. If they don't, they will be in breach of the Code and will be amenable to disciplinary action.

115. Counsel for Mr A further argued that any stay granted to Mr A would already effectively be on the condition of his practice area description, because that is the situation for CPEng registration (continued or otherwise) in every case. To provide CPEng-level services outside of an engineer's practice area would open them up to liability. The same considerations would apply if Mr A were granted a stay on a limited practice area description.
116. The Registration Authority argued that, in the context of a registration decision, someone is either a CPEng, or they are not, and the only formal legal implication of this is being able to call oneself a CPEng and be on the Register. A condition to remain on the Register, but not call yourself a CPEng, or vice versa, would serve no purpose.
117. In addition, limiting a 'practice area' would have no real effect. A practice area is not a 'scope of practice' that limits what work an engineer may perform as CPEng. It is a self-described area of practice that enables the Registration Authority to assign an appropriate assessment panel to evaluate the application – to meet the minimum standard a person must be competent in their practice area (per rule 6(1) of the Rules). The description is discussed and agreed between the applicant and the assessment panel, then acknowledged by the CAB. While undertaking engineering work outside of that practice area can be a factor in whether a CPEng has breached their obligations to act competently, it is not determinative.³⁰
118. Additionally, practice area descriptions are not published on the Register so the public at large will be unaware of a practice area description having been 'restricted', even if the publication of conditions were within the scope of s 36. While 'practice fields' are published on the Register, a 'practice field' relates to the broader field of engineering qualification. For example, Mr A's 'practice field' is 'structural'. Whereas his assessed 'practice area' is "Structural design of low rise commercial and residential buildings".
119. Because of the limited role of 'practice area descriptions under the Act, with publication of practice fields, not practice area acknowledged by the public register, the Panel does not consider that a restriction of a practice area is conceptually a prevention of part of the effect of removal from the Register and therefore not in the contemplation of s 36.
120. Therefore, the Panel considers:

³⁰ Supplementary Submissions for the Registration Authority, at [3.8]

- a. Section 36 does not give it the ability to make an order that goes beyond preventing all or part of the effect of a decision of the Registration Authority; and
- b. In circumstances of a registration decision, that 'effect' must be all or nothing, a stay which is conditional on a limited practice area is not available.

Conclusion

121. For the reasons set out above, the Panel makes an order under s 36 of the Act that the Registration Authority's decision to decline Mr A's application for continued registration is stayed until the determination of the Appeal.

Dated 30 April 2024

Signed by the Appeal Panel



Megan Neill (Principal)



Sandra Hardie (Member)



Mark Holland (Member)