In the Matter of the Chartered Professional Engineers of New Zealand Act 2002

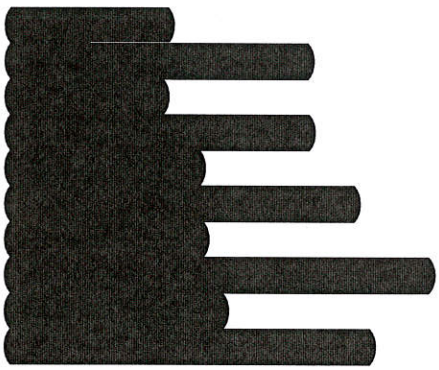
And In the Matters of Appeals Against Decisions of the Registration Authority pursuant to section 35

Graeme Robinson
(Mr Morrison as Counsel)
Appellant

And

IPENZ as the Registration Authority
(Mr Wilson as Counsel)
Respondent

And



Complainants

Decision of the Chartered Professional Engineers Council

CPEC Chartered Professional Engineers Council

Te Kāhui Hangahanga Ngaio Whaimana

Appeals filed

1. This decision concerns 10 appeals by Mr Graeme Robinson, CPEng, against decisions of the Registration Authority by way of its Disciplinary Committee. There are also 2 cross appeals, one by [redacted] and one by [redacted]

Procedural Background

2. The Chartered Professional Engineers of New Zealand Act 2002 ("the Act") governs the registration and disciplining of Chartered Professional Engineers ("CPEng"). All CPEngs are subject to the Act.

3. Discipline is covered by Section 21 of the Act. This briefly provides that a CPEng should not undertake engineering services in a negligent or incompetent manner and should not breach the Code of Ethical Conduct. Detailed provisions that are relevant are set out later in this decision.

4. The facts that give rise to the appeals and cross appeals derive from work undertaken by Mr Robinson in the aftermath of the Christchurch earthquakes.

5. Mr Robinson was the subject of 10 decisions by a disciplinary committee ("DC") of the Registration Authority ("RA"). These decisions variously found Mr Robinson to have been responsible for performing engineering services in a negligent or incompetent manner and to have breached the Code of Ethical Conduct.

6. All matters were originally handled by a Complaints Research Officer ("CRO") at the RA and passed on for further investigation. Initially an investigation was undertaken by a Chair of an Investigating Committee acting as an Adjudicator, who concluded that the number and nature of the complaints justified them being dealt with together. The complaints were then considered by a full Investigating Committee (IC) who reported on matters for the DC to consider at the hearings.

7. Mr Robinson appeals all 10 decisions of the DC.

8. In addition, two of the complainants, [redacted] and [redacted] lodged cross appeals.

Procedure on Appeals

9. On 13 January 2015 the Council wrote and emailed all parties individually notifying them of the Appeal Panel formed, where communications could be sent to the Appeal Panel, advising that the RA had engaged Counsel, and advising that the Council would issue some draft directions in the future. The letter annexed a copy of the Council's Appeal Practice Note and advised that the appeals would be conducted by way of rehearing. That last matter is in accordance with Section 37 of the Act which requires that every appeal must be conducted as a rehearing. Section 37(3) prescribes that:

> *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.*

10. Thereafter the Council issued a total of 6 minutes dealing with procedural matters leading up to the hearing of the appeals. Notable matters include:

(a) Complainants were provided with an opportunity to file cross appeals. Two such appeals were filed;

(b) The RA was directed to provide a copy of the evidence presented in reaching each of the decisions appealed against, and did provide that material;

(c) The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 ("the Appeal Regulations") require that appeals be held in private;

(d) That the hearings would be consolidated, in that each would be heard consecutively;

(e) Providing a timetable for interlocutory matters.

(f) In accordance with Rule 6(1)(b) of the Appeal Regulations the RA was requested to provide an additional written report on a number of matters that related to the appeals. This was provided and dated 6 March 2015.

(g) Setting clear directions for any party to file submissions that they wished to speak to at the hearing of these matters.

11. Counsel for the RA confirmed by email on 28 January 2015 that he had authority to represent all complainants in addition to the RA. We are grateful to the RA and to the complainants for agreeing to this and it undoubtedly made the whole appeal process more manageable for everyone.

12. Mr Robinson made an application to introduce further evidence, consisting of a witness statement by him addressing discreet issues raised by these appeals. We record that we allowed this application. During the hearing Mr Wilson indicated that he did not object to the evidence being admitted and confirmed that he did not wish to cross examine Mr Robinson in relation to it.

13. In our minute of 16 April 2015 we listed all the additional material that had been filed with us in accordance with our directions, and in addition to the files that we had been provided with by the RA.

14. On 17 April 2015 a letter from EQC dated 9 December 2014 came to the attention of the Chair of the Appeal Panel. EQC had been represented at the original hearings by Counsel and had called evidence. Unfortunately this letter did not come to the attention of the Appeal Panel earlier, we suspect because it was addressed to a former Chairman of the Council. EQC had not followed up on this original submission. The Appeal Panel considered that the submission should be admitted, being from a party who was represented at the original decisions, and a copy of the letter was immediately made available to all parties.

15. The RA made provision for a video link to be available to complainants in Christchurch, so that if they wished, they could address us directly on the appeals. A number of parties took this opportunity.

16. The hearing took place on 22, 23 and 24 April 2014 in Wellington. We are confident that all parties were made fairly aware of their ability to be heard at the hearing, whether in writing by way of submission only or in combination with an appearance in person or by video link. In addition the RA had indicated that it would effectively take the position of supporting the position of the complainants throughout the hearing so that even if a complainant chose not to appear, his or her position would still be advanced by the RA.

Approach to this Appeal

17. We are mindful of our obligations on appeal. We did not understand Counsel to disagree with the proposition that we should follow the principles of ***Austin, Nichols & Co Inc v Stichting Lodestar***[1] which were conveniently summarised in ***Tang Ming Hardware Co Ltd v Yu***[2] where Ellis J stated:

> *[8] It is accepted by both parties that the approach to a general appeal by way of rehearing under ss 75 and 76 of the District Courts Act 1947 is governed by the principles outlined by the Supreme Court in Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103; [2008] 2 NZLR 141. Essentially those principles are that:*
>
> > *a) It is a general appeal which requires this Court to come to its own view on the merits.*
> >
> > *b) The weight this Court gives to the judgment under appeal is a matter of judgment. If the High Court is of a different view from the District Court, it must act on its view.*
> >
> > *c) The appeal is conducted on the basis of the record of the District Court, and a de novo hearing of the evidence is not envisaged.*
> >
> > *d) The appellant bears the onus of satisfying the High Court that it should differ from the decision under appeal.*

[1] [2007] NZSC 103; [2008] 2 NZLR 141.
[2] (2010) 19 PRNZ 683

e) It is only if the High Court considers the District Court is wrong that it is justified in interfering with it.

f) The High Court may or may not find the reasoning of the District Court persuasive in its own terms.

g) The District Court may have had a particular advantage, such as the opportunity to assess the credibility of witnesses, where such assessment is important, in which case the High Court may rightly hesitate to conclude that findings of fact or fact and degree are wrong and it may take the view that it has no basis for rejecting the reasoning of the District Court and its decision should stand.

h) The extent of the considerations the High Court gives to the decision of the District Court is a matter for judgment. The High Court makes no error in approach simply because it pays little explicit attention to the reasons of the District Court because the High Court has the responsibility of arriving at its own assessment of the merits of the case.

[9] Although, as Austin, Nichols makes clear, credibility remains an area where an appellate Court may properly think twice before substituting its own view, that is not to say that credibility findings are immune on appeal. I accept, for example, that where the judge at first instance has assessed credibility solely by reference to witness demeanour and other such subjective criteria, close appellate scrutiny may well be justified. And even where the credibility assessment has been made objectively, by reference to matters such as the internal consistency and plausibility of the evidence given, it seems that the position is that

> *... the appellate court must undertake a "real review", weighing conflicting evidence and drawing their own inferences and conclusions.*[1]

[1] *The Rt Hon Sian Elias GNZM: "A painful and uncongenial obligation"? Appellate correction of error of fact in the electronic age, 26 January 2010, citing Fox v Percy (2003) 214 CLR 118 at 126 per Gleeson CJ, Gummow and Kirby JJ.*

18. We add an acknowledgement that the DC is a specialist body, in this case made up of lay people and members of the profession. However, we note that this Council is also similarly made up and is of course the statutorily mandated appeal body.

19. Lastly, we observe that in its report to the Council dated 6 March 2015 the DC advised that it had not taken any legal advice at any stage of these matters and it did not have any legally qualified panel members.

Breaches found by the DC

20. The DC found across the 10 decisions that it made that there had been a number of breaches of Section 21 of the Chartered Professional Engineers Act. The relevant parts of s21 are:

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) ...

(b) has breached the code of ethics contained in the rules; or

(c) has performed engineering services in a negligent or incompetent manner; ...

21. This requires an examination of the code of ethics which is contained in the Chartered Professional Engineers Rules (No.2). The Rules which the DC found breached were under the heading "General Obligations to Society":

43 Take reasonable steps to safeguard health and safety

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

45 Act with honesty, objectivity, and integrity

A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.

22. And under the heading "General Professional Obligations":

46 Not misrepresent competence

A chartered professional engineer must—

(a) not misrepresent his or her competence; and

(b) undertake engineering activities only within his or her competence; ...

23. An assessment of whether there has been a breach of the code of ethics requires us to consider the words of the Rules themselves and against the facts in issue. The Rules present a bar. We must assess whether, on the facts, the engineer complained about has fulfilled his ethical obligations or not.

24. Similarly whether there has been a breach of s21(c) also requires us to make an inquiry as to the standard to which an engineer has performed engineering services and depending upon the outcome of that inquiry whether that engineer has been negligent or incompetent.

25. As regards a breach of the Code of Ethics we have to consider the standard by which to assess whether a breach has occurred.

26. In previous decisions of this Council we have derived assistance from *v W*[3]. In that case a lawyer appealed disciplinary findings made against him which alleged he had been negligent so as to tend to bring the legal profession into disrepute. In that case a full bench of the High Court stated:

> *[82] ... We do think it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable.*
>
> *[91] In our view it was negligence of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.*

27. In Appeal No.2 of 2010 we stated:

28. *So here, we consider that we have to assess whether the Disciplinary Committee was correct in making a finding that the appellant's conduct was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Put slightly differently, would the acts complained of if acceptable tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?*

29. In all decisions appealed against the DC referred to the decision of *Re Nuttall*[4] and in particular to the following passage:

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[3] [2009] 1 NZLR 514

[4] A decision of the NZ Health Practitioner Disciplinary Tribunal -

"whether or not, in the Tribunal's judgment, the practitioner's acts or omissions fall below the standards reasonably expected of a practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measure against the standards of a responsible body of the practitioner's peers.

30. Mr Morrison considered that reference to *Re Nuttall* was inappropriate being distinguishable on the facts being as it was a decision of the NZ Health Practitioner Disciplinary Tribunal concerning a Doctor having a sexual relationship with a patient - something that has been recognised as professionally inappropriate for many years.

31. We were also referred by Mr Wilson and Mr Morrison to various other decisions that have discussed the standards to which various professionals have been held. Of some assistance is *Beattie v Far North District Council* [5]. Here His Honour Judge McElrea was considering an appeal from the Licenced Building Practitioners Tribunal and in particular as to what was meant by the term:

has carried out or supervised building work... in a negligent or incompetent manner[6].

32. His Honour commented at paragraph 43 onwards as follows:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous. The phrase appears to have been taken from s 21 of the Chartered Professional Engineers of New Zealand Act 2002, where it has not been the subject of any reported legal analysis of its meaning. The difference between "negligent" and "incompetent" is difficult to state. Because words take their meaning from their context, both terms - "negligent" and "incompetent" - have to be considered in the context of that whole phrase - one in which the adjective describes a manner of carrying out work, as distinct from the skills of the worker. Thus while in ordinary speech "incompetent" generally refers to someone lacking in the basic skills required for the job, an incompetent manner of working would be one that suggested or exhibited incompetence.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficit in the required skills) judged by the four areas of design competence in Schedule 1 of the Licensed Building Practitioner Rules 2007.

...

[5] District Court CIV-2011-088-313, Judge McElrea, Unreported 14 November 2012.
[6] Paragraph 40

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[47] I have also suggested that incompetence should be judged against the areas of competence measured under the relevant Rules.

33. Like His Honour, in previous decisions the Council has taken cognisance of the standard to be achieved for registration which is to be found in Rule 6 of the Rules. The entirety of Rule 6 reads as follows:

(1) To meet the minimum standard for registration, a person must demonstrate that he or she is able to practise competently in his or her practice area to the standard of a reasonable professional engineer.

(2) The extent to which the person is able to do each of the following things in his or her practice area must be taken into account in assessing whether or not he or she meets the overall standard in subclause (1):

(a) comprehend, and apply his or her knowledge of, accepted principles underpinning—

(i) widely applied good practice for professional engineering; and

(ii) good practice for professional engineering that is specific to New Zealand; and

(b) define, investigate, and analyse complex engineering problems in accordance with good practice for professional engineering; and

(c) design or develop solutions to complex engineering problems in accordance with good practice for professional engineering; and

(d) exercise sound professional engineering judgement; and

(e) be responsible for making decisions on part or all of 1 or more complex engineering activities; and

(f) manage part or all of 1 or more complex engineering activities in accordance with good engineering management practice; and

(g) identify, assess, and manage engineering risk; and

(h) conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct; and

(i) *recognise the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally; and*

(j) *communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities; and*

(k) *maintain the currency of his or her professional engineering knowledge and skills.*

34. The *Beattie* decision was also helpful for highlighting that the common law test of negligence, that is one involving damage, is not applicable and that not all misconduct amounts to negligence. His Honour in referring to *Collie v Nursing Council of New Zealand*[7], a case to which Counsel in this appeal also referred, stated as follows:

[41] There are no previous cases relating to s 317 of the Act but in a case cited by Mr McKay decided under a similar provision of the Heath Practitioners Competence Assurance act 2003, 32 it was held that the common law concept of negligence is not applicable:

> *It is highly unlikely the drafters of s100(1)(a) HPCA Act envisaged those prosecuting health practitioners would need to prove all criteria required by the common law to establish negligence on the part of a health practitioner. In the Tribunal's view, the term "negligence" as used in s100(1)(a) of the HPCA Act ['amounts to malpractice or negligence"] focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes negligence in s100(1)(a) of the HPCA Act requires, as a first step in the analysis, a determination of whether or not, in the Tribunal's judgment, the practitioner's acts or omissions fall below the standards reasonably expected of a health practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against the standards of a responsible body of the practitioner's peers.*

[42] That is a most helpful way of putting the test, and I was told by counsel that this approach has been consistently followed and upheld in cases under the Heath Practitioners Competence Assurance act 2003. However, in a case brought to my attention by Mr Corkill, Gendall J stressed that not all negligence or malpractice amounts to professional misconduct but only "behaviour that falls seriously short of what is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness". While the legislation I am considering does not require a finding of "professional misconduct", this is a timely reminder that disciplinary sanctions should not be applied unless there is a serious issue being addressed. (The fact that no loss or damage has occurred can be very relevant in that context but is not determinative of the matter.)

35. We had some discussion with Counsel during the course of the hearing concerning whether the test for negligence should be that which we

[7] [2000] NZAR 74

formulated in our earlier decision or whether it should involve a test measured against the standards reasonably expected by the respondent's peers or other such practitioners.

36. We have come to the conclusion that it is in reality the same test. On closer examination the test in *Complaints Committee of the Canterbury District Law Society* involves two lines of inquiry. The first is whether the conduct falls below that expected of the profession in question, if it were to be accepted as such by responsible members of the profession. This must involve some consideration of what responsible members of the profession would consider appropriate. The second is whether that would lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public.

37. *Nuttall* is not directly relevant on the facts. However, we do think it is relevant that the test formulated within it takes account of *standards reasonably expected of a practitioner in the circumstances of the person appearing before the Tribunal.*

38. *Beattie* formulated more relevant tests. It confirms that a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficit in the required skills) judged by the areas of competence which in this case are encapsulated in Rule 6. Our view is that incompetence is a more serious charge than negligence, and we did not understand Counsel to disagree with us on this.

39. *Beattie* also confirms to us that it is not all negligence or malpractice that amounts to misconduct but should be behaviour that falls seriously short of acceptable conduct.

40. Drawing all these threads together we conclude:

    (a) The circumstances of the person appearing before the Council need to be taken into account. That involves a proper

consideration of the factual background and context of each complaint.

(b) Whether engineering services have been performed in a negligent manner is a question of whether there has been a serious lack of care judged by the standards reasonably expected of a Chartered Professional Engineer. That standard may be informed by whether reasonable members of the public would consider such act or omission, if acceptable to the profession, were to lower the standards of that profession in the eyes of the public.

(c) Whether engineering services have been performed in an incompetent manner is a question of whether there has been a serious lack of competence (or deficit in the required skills) judged by the areas of competence which in this case are encapsulated in Rule 6.

(d) Rule 6 in turn references the need to comply with the Code of Ethics which includes Rules 43, 45 and 46. While these rules do not reference negligence or incompetence, there must still be a standard against which to measure the performance of a Chartered Professional Engineer and we conclude that it is no different to the test enunciated under subparagraph (b) above.

(e) Disciplinary action should follow for behaviour that falls seriously short of acceptable conduct, but not all allegations of breach of s21 or the Rules will fall into this category. We note in this regard that the Rules do build in a "filter" in the form of Rule 57 which entitles the RA to decline to investigate a complaint at its early stages for any of the reasons stated therein. We note that in two of the appeals, [redacted] there were dismissals of the complaints by the DC because the actions were insufficiently grave to warrant further action.

41. Having set out the matters of procedure and law, we turn to the general factual background and the specific factual background of each complaint.

General Factual Background

42. Mr Robinson is regarded by EQC as an expert in the assessment of earthquake damaged properties. In his statements on each of the matters under appeal, he has referred to his extensive experience in the assessment of earthquake damaged buildings since 1981. None of this evidence was challenged during the DC process. The DC made specific findings in 8 of its 10 decisions that competency was not an issue[8].

43. The Earthquake Commission ("EQC") is constituted under the Earthquake Commission Act 1993 and it is a Crown Entity. As part of its statutory obligation EQC administers the Natural Disaster Fund which is the source of funding used to meet the first $100,000 of domestic insurance claims for residential buildings caused by natural disaster.

44. As a "first layer" insurer EQC has a statutory role. This is described in the papers by [redacted] who was employed by EQC as the General Manager of the Canterbury Home Repair Scheme[9]. [redacted] evidence was that[10]:

> *4. EQC is a statutory insurer. As an insurer its role is limited to:*
>
> *4.1 identifying natural disaster (in this case earthquake) damage covered by the EQC Act;*
>
> *4.2 Determining an appropriate repair strategy to repair the earthquake damage covered by EQC to the standard required by the EQC Act;*
>
> *4.3 Costing that repair strategy;*
>
> *4.4 deciding to cash settle the claim by:*

[8] [redacted] paragraph 6.2, [redacted] paragraph 6.4, [redacted] paragraph 6.5, [redacted] paragraph 6.7, [redacted] paragraph 6.7, [redacted] paragraph 6.8, [redacted] paragraph 6.5, [redacted] paragraph 6.11.
[9] Transcript p690/730
[10] Statement p496/730

(a) *Cash payment; and/or*

(b) *repairs through the Canterbury Home Repair Programme (CHRP) managed by Fletcher EQR on EQC's behalf; and*

(c) *where EQC elects to repair, effecting that repair through CHRP.*

45. It was apparent from the evidence that Mr Robinson had been engaged by EQC for a considerable number of years on a consultancy basis[11]. His appointment appears to have been very informal[12] and is in the nature of a general appointment.

46. Following the Darfield earthquake on 4 September 2010 and as a consequence of the series of earthquakes that followed Mr Robinson received particular instructions from EQC to undertake inspections of damaged residential properties. These instructions often lacked detail and were either conveyed orally or by email[13]. In addition some instructions were provided on little or no notice and apparently with little background information being made available in advance to Mr Robinson.[14]

47. The purpose of Mr Robinson's inspections fulfilled, according to Mr [redacted] evidence, paragraph 4.1 and 4.2 of the role required of EQC. In terms of his oral evidence to the DC, [redacted] put it thus[15]:

Yeah in terms of what I I'm asking Graeme to do I'm not seeking a report from Graeme as if we were dealing with a landslip where there was significant damage. What I'm asking Graeme to provide is a succinct report identifying the earthquake damage or natural disaster damage and where appropriate, or where required, an appropriate repair methodology. Now that's my expectation of Graeme in the circumstances under which we work in Christchurch. I think one of our struggles has been the lack of available engineering resource. I can't, or the Earthquake Commission, can't afford to have Graeme produce a report as he might out of his

[11] Mr Robinson's evidence was that he had been providing inspections for clients of earthquake damaged properties, including EQC since 1981 (see for example p192/223 of evidence in 241: [redacted] vs Robinson).

[12] [redacted] produced correspondence from the EQC dated 30 April 1991 (when it was the Earthquake and War Damage Commission) being a letter of appointment to Mr Robinson as an 'approved' engineer for the purpose of investigative reporting for the Commission. This letter and a subsequent follow up dated 23 February 1994 contain little in the way of formality that one might normally associate with a professional services contract.

[13] Specific details of each instruction are addressed under the summary of each complaint.

[14] For example in the [redacted] appeal Mr Robinson's evidence (p173/197) was that he did not have his measuring equipment with him for that inspection because the inspection had not been scheduled for that day.

[15] P699/730

office in Napier for a client, we don't have the luxury of that time. We are trying to settle people's claims as quickly as possible and in Christchurch we've got people who are coming up four years waiting for their settlement or their home to be repaired. I'm not sure that that's acceptable for a lot of people. In fact I know it's not so I'm asking Graeme to work in a process that produces the best service we can possibly produce bearing in mind that we have hundreds of thousands of customers over the last four years who have been waiting for us to provide them with a service for which they pay and have an expectation that they will receive.

48. The documentation that Mr Robinson produced was short and to the point. We refer in these decisions to "memorandum" because that is what the documents are headed, but they have been described to us and referred to in the documentation as a report. Labelling the documents thus is irrelevant to the overall context. What is relevant is that the documentation was tailored specifically for EQC's needs. It allowed EQC, based on the extent of damage and repair strategy advanced by Mr Robinson, where appropriate, to quantify EQC's exposure in order that it could progress its claims negotiation. The documentation was not, and was never intended to be a comprehensive and thorough evaluation of all engineering matters affecting a particular site or property. We also note that EQC specifically engaged separate engineers to evaluate geotechnical matters.

49. It is quite apparent from the face of the memoranda produced by Mr Robinson that all he was producing in terms of a repair strategy was a brief overview, which, if appropriate, would be subject to detailed design by others that would then ensure compliance with the building code.

50. Also at this point we make mention of Mr Robinson's diary notes. Generally Mr Robinson wrote a diary note after he had undertaken an inspection. The diary notes can be useful to corroborate what was discussed. These diary notes are brief, and often contain personal statements that some have taken offence at. However, we consider that these diary notes were used by Mr Robinson as an aide memoir when writing up his memoranda, of which there were many, some days or weeks after the inspection. In no case have any of the personal notes that we have seen been transposed directly into the memoranda

for EQC. Mr Robinson's memoranda have remained factual and do not reference the comments that he made as an aide for his own recollections. The diary notes are relevant evidence, but need to be viewed in this context.

51. [redacted] evidence set out above touches upon the scale of Christchurch earthquakes and what it meant for EQC. His earlier evidence to the DC had been[16]:

> *Well I think that there's some context that I would like to provide to the Committee in terms of the Canterbury Earthquake's sequence. This is the largest disaster in New Zealand's history. It's the fourth largest natural disaster in world history. EQC has received over 469,000 individual claims. In total, we have received over three quarters of a million exposures. So each of our claims will cover land, contents and dwelling. That makes this a larger disaster than Hurricane Katrina. No insurer at Hurricane Katrina dealt with as many individual claims as what EQC has been dealing with in Christchurch over the last 4 years.*

52. The extent of the inspections undertaken by EQC staff and the traumatic situation of those inspections was underscored by another witness at the DC hearing, [redacted] who was an estimator for EQC and stated[17] in response to a question as follows:

> *...So how many occasions would have you been with Mr Robinson on a site visit in a circumstance similar to what we've heard over the last two days where he has been dealing directly with your clients homeowners?*
>
> *I'd have to answer that case, the question sorry and say many occasions. I would be unable to give you a definitive number. However if I refer back to my statement before immediately after 22 February, I was effectively nominated as, for lack of better words, an estimate support, or estimator support, for EQC's engineer. Within the 5 to 6 week period, and I can refer to the first page of my witness statement, we would have assessed over 390 properties in that period. We started work at 6.30 in the morning. We were generally on site well before 7 o'clock, obviously with approval from the customers. And we would not finish some nights till 9.30 in the evening. And during those site assessments on most occasions our customers were present. They were extremely stressed. They were extremely confused but they were very welcoming of the assistance and advice that Mr Graeme Robinson provided. We did have some confrontations with some customers but through good negotiation and sound decision-making, we were able to work through those issues. The benefit I guess we had straight after 22 February is we were very quick to respond. As time passes and more discussion happens amongst neighbours or friends or colleagues, the confusion can grow. And perhaps that might be explanatory of what we have seen over the last 2 days.*

[16] P690/730
[17] P664/730

But to go back to your question. Most occasions that we dealt with they were very highly stressed people. Some angry, some tearful and some plainly confused. Not at all dissimilar from what I have seen over the last 2 days.

53. We are aware from the evidence of [redacted] that Mr Robinson had undertaken over 2,000 assessments in Christchurch[18]. He was also candid enough to admit on more than one occasion that that fault of providing an appropriate service to its insured customers lay with EQC, not Mr Robinson. He stated:

I think it is regrettable that Graeme has been put into a situation where customers have not always had what they would term to be a good experience but that's my failing. That's EQC's failing[19].

54. And:

I accept that we have failed Mr Robinson at times by putting him under a huge workload without the support that we would normally provide to him on a day-to-day basis. He's completed over 2,000 assessments for us in Christchurch[20].

55. [redacted] written evidence provided a summary of 6 themes that he considered were recurring through each of the complaints[21]:

1. *A misunderstanding of EQC's role;*
2. *A misunderstanding of Mr Robinson's role;*
3. *Misplaced expectations;*
4. *A failure to agree can be a source of complaint; and*
5. *Mr Robinson's approach to inspections.*
6. *Mr Robinson becoming the personification of complainants' frustration at EQC, insurers and their wider post-earthquake situation.*

56. We note that annexed to its letter to the Council of 9 December 2014 is a document entitled *"How the EQC assessment process works"*. EQC states that it intends to send its customers a copy of this document outlining the role of the engineering advice in its processes. We make no comment on the content of this document, which is a matter for

[18] p694/730.
[19] P691/730
[20] P694/730
[21] Para 25 500/730

EQC, other than to observe if this type of communication had been promoted by EQC at the time of Mr Robinson's respective engagements we suspect that there would have been fewer complaints.

57. It is also relevant in the context of these appeals that Mr Robinson stated to the DC in each of the hearings that:

I provide reports to the parties who have instructed me, but I understand that my reports are available to the Customers as a matter of course, through my Client, the Earthquake Commission.

58. From the evidence it is clear that:

(a) The scale of damage caused the Christchurch earthquakes was unprecedented in New Zealand, if not worldwide. This was a difficult and frightening situation for EQC's clients including all the complainants. It was a difficult and challenging situation for EQC's professional staff, including staff it contracted, which would include Mr Robinson.

(b) Mr Robinson was viewed by EQC as, and he is, an expert in the assessment of earthquake damage;

(c) Mr Robinson was instructed on an ad hoc basis:

(i) to produce a succinct memorandum on a property as to whether damage was earthquake damage or caused by some other event or was a longer term maintenance issue; and if necessary;

(ii) to provide a repair strategy or methodology for the earthquake damage suffered by a property that he identified.

(d) This work was undertaken in a situation where home owners were stressed by events and where the assessors, including Mr Robinson, were dealing with a unique and challenging

environment. It was often a situation where homeowners had not accepted assessments made previously by other EQC staff[22].

(e) EQC's communication procedures to both Mr Robinson, and to its clients in these appeals were poor.

(f) Mr Robinson was aware that his memoranda for EQC could be made available to EQC's clients, being the owners of the properties that he was inspecting.

(g) EQC is satisfied with Mr Robinson's services and makes no complaint itself in this regard.

59. It is against this general factual background, which applies to each of these appeals that we now turn to consider the specific complaints and the appeals against the decisions of the DC.

Specific Factual Background of Each Complaint

[redacted] (complaint #243)

60. Mr Robinson visited [redacted] property at [redacted] on 24 January 2012 accompanied by EQC Estimator [redacted] Mr Robinson's brief was to reassess damage to the house and to assist in identifying a repair strategy. As a result, Mr Robinson issued a one page memorandum dated 2 February, addressed to [redacted] In it he referred to a new Scope of Works prepared by [redacted] on 26 January which included provision for all the additional remedial work that was discussed (and he believed resolved) with [redacted] Subsequently, [redacted] complained to the RA in a letter dated 7 December 2012. The essence of her complaint was that Mr Robinson's report was inadequate and incorrect. The DC's decision sets out the further background and evidence in its decision at paragraphs 5 through to 5.33. We note that [redacted] did attend the heating of this appeal, and took the opportunity to make a further verbal submission to this Panel (see paragraph 84 below)

[22] [redacted] 134,135/173

61. There is no cross appeal in this matter, so we have no jurisdiction to consider matters other than those raised in the appeal by Mr Robinson who seeks the reversal of the decision of the DC.

62. The critical findings of the DC were that Mr Robinson had "performed engineering services in a negligent manner" and had breached Rule 45. We address each of these findings in turn.

63. **Was Mr Robinson's conduct negligent? (paragraph 6.19)**

64. The findings that Mr Robinson was negligent are based on the findings in paragraphs 6.18 which found:

> *6.18 Mr Robinson failed to deliver engineering services to a professional standard of care reasonably expected of a chartered professional engineer in that his assessment and report on [redacted] property did not record the instructions of his client EQC, did not explain the purpose and basis of the inspection, and did not refer to any other reports on the property that he had taken into account when he made his assessment.*

65. Mr Robinson's memorandum to his client, EQC, is at page 249/443. The memorandum is dated 2 February 2012 and follows an inspection that took place on 24 January 2012.

66. As the DC set out it does not record the instructions of EQC, or explain the purpose and basis of the inspection or reference any other reports.

67. The Council disagrees with the findings of the DC on the issue of negligence. We acknowledge that Mr Robinson was aware that his memoranda could be made available to the home owner, in this case [redacted]

68. However, there was no evidence before the DC as to specific practice (such as in the form of a practice note, or accepted practice which has developed through time) which would indicate that recording a client's instructions, explaining the purpose of a report to the client who has commissioned it (or to a third party who might read it), and referencing other reports or information is a standard to be achieved by a Chartered Professional Engineer.

69. If a Chartered Professional Engineer was required to take into account every person who might read a report or memorandum produced, even though that might be highly likely, it would create a standard that would simply be so burdensome on the profession so as to be unworkable.

70. EQC subsequently provided the memorandum to [redacted]. If an obligation existed to properly inform [redacted] of the limitation of any reports or memoranda then that fell on to EQC - not Mr Robinson who had by this time completed the task he was requested to undertake by his client, to its satisfaction.

71. Mr Robinson may have excused himself by including on all his memoranda a standard disclaimer to third parties who might seek to rely on them in some way. However, the lack of such an exclusion cannot be seen as being negligence.

72. We therefore determine that Mr Robinson was not negligent in terms of the content of the memorandum that he produced for EQC on the [redacted] property.

73. **Was there a breach of Rule 45? (paragraph 6.29).**

74. The finding that there had been a breach of Rule 45 is based on the findings in paragraphs 6.27 to 6.29:

> 6.27 *The DC considered whether Mr Robinson had acted honestly and with objectivity and integrity in respect to [redacted] complaint. Of particular note is the allegation that Mr Robinson bargained items for repair with [redacted] Although there was conflicting evidence on what was discussed at the site visit, the DC is satisfied that there was sufficient evidence in the conversation that took place at the site visit to suggest to [redacted] that Mr Robinson played some role in deciding the items that EQC would cover for repair.*
>
> 6.28 *The evidence from Mr Robinson and [redacted] of EQC was that Mr Robinson had no role to play in making decisions on non-structural issues. His participation was limited to inspecting and assessing structural damage to the property.*
>
> 6.29 *DC found that Mr Robinson's discussions with [redacted] about what items might be covered, and what items she might accept as being part of the scope of works, showed*

a lack of objectivity in what is expected of an engineer whose role it was to inspect and assess damage for the purposes of reporting back to his client, EQC.

75. It is apparent from the transcript of the evidence that [redacted] was dissatisfied with outcomes of previous assessments made by EQC. [redacted] had 3 previous "scopes" of her property by EQC and was told that she could have an engineer (Mr Robinson) look at her house[23].

76. [redacted] provided evidence of what she termed "bargaining". It is found in the transcript[24]:

He did not believe the cook top had earthquake damage. He said if I forgot about it he would allow for the carpet in the lounge to be lifted and the floor checked for creaks. He was bargaining one thing against the other. I showed him cuts on half of the white kitchen cupboards which he acknowledged were damaged by glasses and things hitting them. I was concerned that if half the cupboards were replaced the new white melamine colour would be different to the old white colour and said to him they needed to replace all the cupboards he said no, but bargained that if I got half done I could use my own joiner.

77. This accords with some of the comments that [redacted] made in her written statement to the DC[25].

78. The conflicting evidence that the DC refers to is from Mr Robinson and [redacted] Mr Robinson states:[26]:

?? *One more question, yes. Could you tell us a little bit about how you, what you heard today from [redacted] in terms of alleged bargaining and how you react to that, Mr Robinson?*

GR *I think those are probably matters best addressed by [redacted] the estimator who was there at the inspection and it is not unusual for there to be some combination of points made between me, the estimator, or assessor whose with me and me. But I think that [redacted] is probably in a better position to respond clearly on who makes decisions on non-structural issues and whether they are, or are not included within the EQC scope of works. That's out of my field. I don't get involved with making determinations on the non-structural issues in the main.*

?? *Is [redacted] here, will we hear from him? Thank you.*

PM *Just further to that Mr Robinson, in terms of your involvement in the discussions with [redacted] and [redacted] about, it has been referred to as bargaining or some*

[23] Transcript 638/730
[24] Transcript 639/730
[25] Page 393/443
[26] Transcript 651/730

negotiation discussion, what was your involvement in regards to that? And I guess I should preface that by saying first, is it your role to participate in negotiating agreed settlements on EQC claims?

GR *With regard to structural issues - I deal with those. There are times when a person may ask me for my opinion or views on an aspect of the claim; a very minor issue that comes up into this category on this job and if I can find my report I can mention it and refer to it. But as I recall, one of the things that we had looked at on the site was a tie between the stairs and the foundation wall. And I noticed that* [redacted] *had left that out of his scope of works and suggested that it needed to be, you know, that it should be included. And I think, there we go, that's at the bottom of my memorandum of 2 February 2012 under the proposed remedial works. So there are times when perhaps I do jog the memory of the person, like happened in this case on something that he had mentioned during the inspection but it had been overlooked in the scope of works.*

PM *Okay, so come back to my question about is it your role to participate in negotiation discussions around the claims as a negotiator? I'm trying to understanding*

GR *No, did I bargain? No. Do I do the bargaining, no.*

PM *And that is what I am trying to understand. And you have referred us to perhaps, discuss that with, ask* [redacted] *about that. So what's your role? At that part of the meetings that you have, where you, there may be discussions around a proposed amount for settlement, or how the claim could be settled with the homeowner? What's your role in that part of a conversation?*

GR *I'm usually, at that stage, assisting with trying to get things sorted. And I think if we go back to the earlier matter of the* [redacted] *where as a way of just resolving issues, a solution that seemed to me to be reasonable, was to allow for the refilling of the joins. I don't recall specifically how I contributed here in detail but certainly I was part of a four-way conversation in the kitchen.*

PM *So do I understand correctly that you would make suggestions for solutions on occasions?*

GR *Sometimes yes, but not making the decisions on those in the same way as anything else I do a report or recommendation on, it's for the estimators to make the decision on the non-structural issues. I might point things out sometimes that appear to have been overlooked for example. So I am part of a team I guess that's working at finding and identifying recent earthquake damage and properly scoping that.*

PM *Thank you.*

79. [redacted] also gave evidence:

?? [redacted] *yeah potentially you could, you could confirm or otherwise Mr Robinson's role in the bargaining and negotiating of a settlement with* [redacted]

[redacted] *There was no bargaining as such. There was a discussion over the glass hob, which is a cooking hob and that had previously been declined by the three of us a couple of days earlier and it remained declined. There was no impact damage to that thing, there might have been a little bit of scraping which is general with those of types of elements where you'd drag a pot on and off the glass top. There was no evidence of that. There was also other issues that had been declined which, like a chip in the bath which [redacted] had stated was in the first claim and in the first assessment. And at the time of all three of us being there that could not be relocated by herself.*

[redacted] *[whispering] No, that's not true.*

?? *So those were the only elements that were being negotiated, or by negotiated upon?*

[redacted] *As I say there wasn't really a negotiation. It was either in or it was out.*

?? *Thank you.*

80. And later:

PM *I don't think there was any allegation of conflict in the discussion but there has been an allegation that there was some, that Mr Robinson was involved in some bargaining and some trade-offs so that was why I was wondering if you remembered.*

[redacted] *Sorry, yeah, I thought I had answered that. No, I would categorically deny that I noticed any form of bargaining going on.*

81. From these exchanges it is clear to us that there was a general discussion which took place at [redacted] property regarding the damage and the claim. That is to be expected. Mr Robinson was accompanied by [redacted] the EQC estimator.

82. These discussions in themselves do not in any way disclose a lack of objectivity by Mr Robinson, particularly as he had no decision making powers on settlement. Further, we note that his memorandum to EQC is factual and it does not appear on the evidence as though anything that has been written down has actually been called into question.

83. We therefore find that there has been no breach of Rule 45.

84. Finally on this matter we record that the DC found that there had been no breach of Rules 43 or 46. [redacted] did address us on the safety issue at the appeal hearing. We advised her on that occasion that absent a cross appeal we were unable to revisit that as an issue. We

note in any event that [redacted] own comprehensive report dated September 2012[27] does not raise safety as an issue.

[redacted] (Complaint #235)

85. The DC's decision sets out the background and evidence in its decision at paragraphs 5 through to 5.19.

86. The critical findings of the DC were that Mr Robinson had *"performed engineering services in a negligent manner"* (paragraph 6.18) had breached Rule 43 (paragraph 6.24) had breached Rule 45 (paragraph 6.27) and had breached Rule 46 (paragraph 6.29). Before addressing each of these matters we set out our understanding of the facts in this appeal.

87. [redacted] house is a single level dwelling, dating back to around 1885. Prior to the September 2010 earthquake, [redacted] and their family had been living in the house, and at the same time rebuilding and refurbishing it progressively.

88. Following that initial earthquake, Mr Robinson was requested to visit the house by the EQC, and did so on 3 November 2010. There is nothing in either the IC or DC reports, or indeed the evidence that was provided to either investigation by Mr Robinson, that sets out the instructions that were given to Mr Robinson by the EQC. Mr Robinson made the following statement to this Council in a Supplemental Brief of Evidence[28]:

> *'On Tuesday 2 November 2010, the day before my first inspection of the [redacted] house, I visited the [redacted] Council offices in [redacted] with [redacted] an experienced EQC Contracted Loss Adjuster, where we met [redacted] the Council's Building Manager.*
>
> *[redacted] raised with us his concerns about the [redacted] house at [redacted] He aired his concerns about the general condition of the house, the building work that had been done without there being any record of a building consent, and the question of whether the condition of the house was due to the recent Darfield earthquake, or whether it was due to its pre-existing condition.*

[27] Page 352/443
[28] para's 10- 12, page 2

'While the focus of my subsequent inspection and report to EQC was to identify the extent of any earthquake damage, and the appropriate response to that[29], the meeting with [redacted] and concern about the condition of the house are referred to in the annexed email stream dated 4 November 2010 ("GWR-1"). I draw particular attention to:

> *his comment in brackets "(It maybe [a 'right ' off], but not entirely as a result of the earthquake)"*
>
> *my response including "...there are issues with the building work that still need to be addressed..."*

89. Mr Robinson provided a memorandum to the EQC dated 1 December 2010. He commented that he had spent almost three hours with [redacted] during his visit on 3 November. He further commented had spent a good part of that time pointing out to them the details of the house construction that had led him to the very clear and definite opinion that the house had suffered very little (in fact any) recent earthquake damage.

90. Mr Robinson's memorandum included the following statements (our ordering):

'My general first impression, which was reinforced significantly on closer inspection, was that this house is in very poor condition, but not (except for a couple of minor possible exceptions) due to the recent earthquake'.

'I have definitely not found any evidence of earthquake-related foundation settlement'.

'On 4 November 2010 I spoke with [redacted] Building Manager at [redacted] Council about this house. I suggested to [redacted] that, based on my inspection and observation, I do not see any need for the Yellow Notice that is on the front window, which was put up in a window in the house on 1 November 2010..... I consider that the [redacted] House is in as sound and habitable condition as it was prior to the earthquake on 4 September2010.

This is notwithstanding the fact that there are many instances of defective and non-complying building work evident that I saw, but these do not mean that the status of the house was changed on 4 September 2010. I have suggested to [redacted] that the house can have a Green Notice in place of the existing Yellow one. However there are issues of building work that still need to be addressed in due course'.

91. In the course of this memorandum to the EQC, Mr Robinson identified some possible recent minor damage to the building that might be attributed to the earthquake.

[29] (our underlining)

92. In a submission provided to the IC[30], Mr Robinson stated that on 4 November 2010 (i.e. after inspecting the house the previous day, but prior to finalising his memorandum to the EQC), he had emailed a brief summary of his inspection to the [redacted] Council's Building Manager and to the EQC person who had instructed him. Both this submission, and a copy of the actual email provided as further evidence to this Council[31] confirm that an email was indeed sent. Its content repeats the recollections of Mr Robinson set out above.

93. Despite the recommendation from Mr Robinson to the [redacted] Council, the Yellow Placard—'No Entry Except on Essential Business' (issued under the Civil Defence Emergency Management Act 2002), was not withdrawn. In a subsequent letter to the [redacted] dated 28 January 2013 the council advised that it still considered that the building needed remedial work before it could safely be permanently re-occupied. The building is understood currently to remain unoccupied. There is no indication from either the IC or DC reports, nor the transcript of the DC hearing, that any evidence was sought from, or questions asked of, [redacted] or anyone else at the [redacted] Council relating to why the Council had not varied its opinion.

94. A second assessment of earthquake damage to the house was undertaken on 8 December 2010 by [redacted] of [redacted] Consulting Engineers. The report is addressed to a [redacted] There is no indication in the evidence as to [redacted] status or role. The IC report (page 80/242) suggests that [redacted] was recommended to the [redacted] by their local MP.

95. [redacted] report for [redacted] completed on the same day as his inspection, states that *"earthquake damage has been identified"* and lists seven areas of concern, along with proposed remedies to each. Neither [redacted] nor [redacted] appear to have been sought by any party to give evidence or questioned by the IC about this report.

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[30] (183, 184/242)
[31] Mr Robinson's Supplemental Brief of Evidence, Attachment "GWR-1"

96. Following the second earthquake, in February 2011, Mr Robinson was asked by EQC to visit the [redacted] house once more. He did so on 18 May 2011 and his memorandum to EQC is dated 21 May 2011. In the memorandum, Mr Robinson states that this inspection relates to a new EQC claim from the [redacted] to damage that might have occurred in the 90 days prior to the date of the lodgement of this latter claim. Mr Robinson notes that in the intervening period since his previous inspection, some further remedial and refurbishment work had been carried out in the house, but states that there is no evidence of any new or fresh damage to any of the house interior or exterior, the front/ south verandah posts, the subfloor framing, brick 'piles' or blocks resting on the ground surface, or to the brick sub-floor foundation walls. He reiterated again in this memorandum that the house was as safe at that point in time for occupation as a residential building as it was before the recent earthquake (which is this context was the earthquake of 22 February 2011). He also repeated that his earlier assessment of possible earthquake damage was reasonable.

97. [redacted] raised a number of concerns about this second visit, in a meeting with the IC, as reported on page 14 of the IC's report (pages 43-44/242 of the bundle), and referred to during the DC Hearing in relation to Mr Robinson's demeanour and attitude towards [redacted]

98. [redacted] provided a second report dated 7 July 2011, this time for [redacted] following a second visit to the property on 4 July. He stated that this inspection had revealed that there had been no significant additional damage to the superstructure of the house over and above what was observed on 8 December 2010. However because some floor boards had been removed in most rooms, he was able to observe a fresh crack in the west perimeter foundation from a hole in the middle bedroom floor on the west side of the house.

99. A third earthquake damage assessment of the house was undertaken for [redacted] on 28 March 2012, by [redacted] Consulting (structural and civil engineers). This report states[32]:

"Upon examination of the building we are satisfied that there has been earthquake damage, but that the building would have been considered a dangerous building pre-earthquake. The major issue that we noted is that the brick mortar is extremely soft and can easily be raked out".

[redacted] also added in the conclusion to their report that:

"there is no real structural mechanism holding the building together".

100. Having set out the factual matters we turn to the various findings by the DC.

101. First, we dismiss any notion that there was a breach of Rule 46. The issue identified by the DC in paragraph 6.12 of its decision was that:

Mr Robinson's repeated omissions in the course of his two visits to the site and his resulting reports together with the repeated assertions that the house was safe to occupy amount to demonstrable incompetence.

102. The DC found in paragraph 6.29 that this was a breach of Rule 46. However, that Rule requires a CPEng to not misrepresent their competence. We have already set out in the background to this matter that Mr Robinson is regarded by EQC as an expert in his field and is competent to advise on issues associated with earthquake damage. He has not, at any stage, misrepresented his field of competence.

103. The real issue is more properly addressed under section 21(1)(c) whether Mr Robinson had performed engineering services in a negligent or incompetent manner.

104. We also observe that there is an overlap in this matter between the breaches found by the DC of Rule 43 (health and safety) and Rule 45 (to act honestly with objectivity and integrity). We therefore address these 3 matters together.

[32] 4, or 134/242

105. In our view there are two different areas to which we have to give consideration in deciding this matter. First, was the building structurally safe and second was there general building work that had or which was being undertaken on the property which made it unsafe. In relation to both of these issues what were the obligations of Mr Robinson?

106. A review of the timeline is instructive:

(a) The Darfield earthquake occurred on 10 September 2010;

(b) The house was yellow stickered by [redacted] Council on 1 November 2010.

(c) On 2 November 2010 Mr Robinson visited the Council and became aware of their concerns about the building work at the property.

(d) Mr Robinson's first inspection was on 3 November 2010. He spent 3 hours with the [redacted]

(e) Mr Robinson emailed and spoke to the Council on 4 November 2010 raising his concerns about the building work, but also stating that the yellow notice could be rescinded in favour of a green notice. Mr Robinson's diary note indicates that:

Bldg consent required for existing/new work - provisions of Bldg Act spelled out to [redacted] really got the message.

(f) Mr Robinson's memorandum to EQC was dated 1 December 2010.

(g) [redacted] inspected on 8 December 2010 and reported the same day. He advised [redacted] (whoever he was) that if the property had some propping and shoring a wall between the chimney and the East side of the House and another area between the dining room and the northwest bedroom then it was safe to re-occupy.

(h) 20 December 2010 MBIE issue *'Guidance on House Repairs and Reconstruction Following the Canterbury Earthquake'*. Section 5.35 refers to unreinforced masonry.

(i) The Christchurch Earthquake occurred on 22 February 2011.

(j) Mr Robinson re-inspected the property on 18 May 2011. He produced a further memorandum on 27 May 2011. It is clear from this further memorandum that the propping and shoring had occurred - we conclude following the earlier recommendation of [redacted] and confirmed in [redacted] second report of 7 July 2011.

(k) Mr Robinson's second memorandum said that there was no evidence of any recent or new earthquake damage and that the property was "as safe for occupation as a residential building as it was before the recent earthquake" (ie the event of 22 February 2011).

(l) On 4 July 2011 [redacted] looks at the building again. He reports on 7 July 2011, he notes that the earlier work he recommended had been done, he comments that:

There had been no significant additional damage to the super structure of the house over and above what was observed on 8 December 2010.

(m) Despite this, he also notes, for the first time, that:

There is obvious structural damage to most brick walls and to effect any repair a building consent would be required from the local authority. This would then require that repairs were effected to the requirements of the building code and for an 1885 construction in dubious condition and of poor original construction it would be a nightmare to achieve compliance.

(n) We note that [redacted] gives no reason for the "obvious structural damage" - ie whether this was due to earthquake or some other reason such as the age of the dwelling. We also note that [redacted] was not interviewed by the IC and did not give evidence to the DC.

(o) Lastly in this report [redacted] adds, again for the first time, that:

I would not advise them to sleep in the bedrooms because of unstable brick internal walls.

(p) In November 2011 MBIE releases a revised document *'Guidance on House Repairs and Reconstruction Following the Canterbury Earthquake'*. Section 7.6 provides significantly more detail on issues with unreinforced masonry walls.

(q) In April 2012 [redacted] of [redacted] wrote his report for [redacted] The main finding of that report is:

Upon examination of the building we are satisfied that there has been earthquake damage but that the building would have been considered a dangerous building pre-earthquake. The major issue we noted is that the brick mortar is extremely soft and can easily be raked out. The soft mortar is throughout the building both in the exterior and interior walls.

We suspect that the soft mortar is a reflection of the age of the building rather than the seismic activity.

107. We also need to consider the transcript[33] of evidence in this matter. There was some lengthy questioning of Mr Robinson and the following extracts are relevant:

GR The issue that I need to stress is that I was looking at work and damage under the Earthquake Commission Act, for the Earthquake Commission, my client. The question of whether this was a dangerous building is a separate section in the Building Act and a dangerous building is something that has to be determined by the Territorial Authority. I raised my concerns with the Council because I believed that it had been incorrectly identified by Civil Defence as a yellow sticker building, under the Civil Defence Act, that it was already a dangerous building, prior to the earthquake both due to its original condition and more particularly to some of the alterations that were carried out.

GR The concerns that I raised were, that I believe that the yellow sticker had been incorrectly appended to the building, under the Civil Defence Act, because it was relatively minor recent earthquake damage to the building. However the building was unsafe and was dangerous and a further endorsement or confirmation of that is in the [redacted] consulting report which has already been mentioned the [redacted] report to [redacted] which you will find at pages 15 through to 25.

[33] Transcript 532/730

GR In particular - I've just got to find the reference it's at the bottom of page 18, where [redacted] *states: "upon examination of the building where it is satisfied that there has been earthquake damage but that the building would have been considered a dangerous building, pre-earthquake." That is why I brought it up with, raised this issue with the Manager of the Building Consent section at the* [redacted] *Council, the Territorial Authority, because I was so concerned that there was serious issues with this building that pre-dated the earthquake, and that is why I spoke to the Building Manager and raised my concerns with him.*

GR Dangerous buildings are a separate issue, this was before they came in. There are provisions in the CERA order that changed that but at that time dangerous buildings were an issue, under the Building Act, not under the Earthquake Commission Act. That is why I raised them with the Council.

GR Just to, perhaps, reinforce some of my real concerns if I can only find my bundle of photographs that I took and they were extensive during my inspection and perhaps I can particularly refer you to some elements of the building as I saw them as being dangerous at 3 November 2010. Go to pages 74 through 99 there are two bundles there, from my two inspections. The first bundle of 61 photographs, 74 to 89 was from my first inspection, 3 November 2011. And the second bundle, on pages 90 through 99, 37 photographs that I took on the 18th of May, on my second inspection.

GR At the time of my first inspection, I have to say one of my real concerns is shown in photograph 14, at the bottom of page 74. A hot water cylinder standing on three 4x2s in a rather rudimentary platform with electrical wiring coming down and hanging down through a hole in the ceiling.

GR If you look at photograph 12 and 3 they are similar and they both show electrical wiring exposed in the walls. It is obvious building work was going underway and one of my first questions that I had asked at the Council was, "was there a building consent for the building work that was going on?"

GR Photo 15, similarly shows the cylinder and the general condition of the building. Specifically, there was relatively minor recent earthquake damage, but in the big picture we have the condition of this dwelling; it was its overall condition and certain aspects of building work that were underway, that gave me cause for concern that it was a dangerous building under, as I say, a separate provision from the Earthquake Prone Building provisions in the Act. It certainly hadn't been made any more dangerous as a result of relatively minor earthquake damage that I identified and reported on, in my report of December 2010.

108. And at page[34]

NB And may I ask you what level of consideration in terms of safety of the house as far as accommodation goes, did you give to the, the fact that there were ongoing aftershocks?

[34] Transcript 533/730

GR Well I did carefully compare the photographs that I took on my two visits. On the second visit I was able to see more information in the subfloor area because [redacted] had opened up a more extensive area that I could look at. He has raised the question of [redacted] contacting me; it was to actually ask if I had better photographs than he had taken of some specific details of movement and damage, and I think that is a proper thing for engineers to do, is to, you know discuss issues when they are relevant to the investigations. I had identified a couple of bricks that had moved at two of the corners of the house near the top of the walls that [redacted] had not seen and I was also able to provide him with my earlier photographs that showed brick walls that had been covered up by some of the dunnage and plywood sheets. I did carefully compare them. [John, I just need advice on whether I can read this statement out or not?]

GR It's a court minute I received on the matter in the High Court between [redacted] The Earthquake Commission is first defendant, [redacted] second defendant. And the minute of Justice Kós, records that the house was damaged only in the September 2010 earthquake. I do pretty much concur with that. I could not find any new damage on my second inspection compared with photos of stuff I had been able to see and photograph on my first inspection.

NB Thank you. I guess what I was getting to, Mr Robinson, is you made a statement along the lines that you determined that the house was at that stage of your inspections, as safe as it had been prior to the earthquakes? In making that statement, what level of consideration did you give to future ongoing aftershocks?

GR Well I guess the same consideration that [redacted] had given, in that he saw some works that were needed to make it safe to reoccupy. Those works had been carried out and I have no reason to question [redacted] work, which I have found is pretty good.

NB Thank you.

109. And at page[35]

PM Okay, sorry. So for clarity so where you say that in your note that "remove the yellow notice for green notice, building consent required for existing/new work in provision of Building Act spelled out to [redacted] really got the message." So can you just explain a bit about how that discussion went and what the situation was like when you were talking to [redacted] about explaining to them, I assume, the requirements that they would need to do for the Building Act requirements.

GR Specifically, I was concerned about the dangerous elements which were the you know the free-standing, literally free standing hot water cylinder, and that was one of the greatest concerns; the exposed electrical wiring when there was a young child in the family. I think one of my photographs shows what I presume to be an older member of the family but there were a range of young people there. I thought that she had understood, my real concerns about the safety of the building as it stood.

[35] Transcript534/730

PM Okay, so tell us a bit about your demeanour and how that conversation went because that seems to be part of what some of these complaints are about. So from, this is an opportunity for you to tell the Committee about how you think your interaction with the homeowners was.

GR My recollection was that, as it is, that I will explain things that I see from an engineering point of view. I am rather direct and I guess that sometimes, and people are sometimes not hearing what they want to hear. That is one of the realities and I'm talking in general terms now rather than about the specific, perhaps. Sometimes, the information and evidence that I am getting perhaps isn't in line with expectations, and I have to address that. Sometimes, the information, the message, is not nice.

PM So, talking specifically about your conversation with [redacted] *relating to this, perhaps this diary note as an example, did you get the impression that they may have been offended by some of the things that you have said?*

GR I certainly wasn't aware of it. I thought I'd explained things in a clear and reasonably pragmatic manner which I'm afraid I am a pragmatist. That I had pointed out things that were of real concern to me. I raised issues about you know some of the nature of some of the building work that had gone on and how I saw that as you know going to be having issues if, and when, building consent was required. As far as the message I thought the message she got was that the building had some dangerous features.

PM Thank you, Mr Robinson.

[ ] My first question relates to your initial report on pages 7 and 8, were you?

Okay, my first question is on page 8 of your initial report where you state that at the outset that you consider the house is as safe now for occupation as it was before the recent earthquake and you go on to say that you recommended to the Council Building Manager that the yellow notice might reasonably be replaced by a green notice. And then in your comments just now you seem to mostly focus on the hot water cylinder and wiring issues and things like that. Can you tell me what view you took at that time of the structure of the building, and did that influence your decision to suggest that the yellow notice be changed?

GR The building construction is what it is, a mixture of materials of historic nature with extensions and alterations over the years past, and then more recent work carrying on now with removal of panels of wall and the like. Overall, the building structure hadn't really changed and the stability, in my opinion, hadn't significantly, if anything, changed as a result of the recent earthquake on the Darfield earthquake on 4 September 2010. I saw no new damage or significant new damage when I went back for my second inspection after that 22 February 2011 quake.

[ ] We agree that we are talking about building of a construction type that is, shall we say earthquake prone, the old soft mortar, brick construction. Did you not have some concerns in the light of the ongoing aftershock that the building could be vulnerable to further aftershock?

GR In the general context, yes, I do have regard for what is going to happen in this specific case. I do look at the likelihood of further damage but in this case I saw very little recent earthquake damage to the building as I recorded in my report. Having come through that event which was significantly in excess of 100% new building standard, I was reasonably satisfied that it was reasonably capable of continuing to stand as a building. I do have a little bit of experience, well quite a lot of experience with historic places trust buildings, so I am aware of materials and historic building construction and techniques.

[ ] You didn't think it necessary to recommend some additional bracing or support as [redacted] did?

GR I didn't see any need for it - no! But I did raise concerns about the bigger picture which was that the question of the dangerous building in total and that does include the structure, the building materials, the removal of walls which, while brick, do still have some in plain shear strength that contributes to buildings and some of those had been removed as part of the building work going on. I was dealing with earthquake damage and repairs to earthquake damage. I didn't see it as being a building that was earthquake prone but rather dangerous.

[ ] And yet you still appear to have advised people that it was safe to reuse, even though your terms were as safe as it was before; but that still implies that you thought it was safe. Well that's my question.

GR I thought it was a statement, sorry.

[ ] No. You used the words "as safe to". I'll restate the question, you used the words "that it was as safe as it was before" and that you were going to advise the Council, the local Council, to change it to a green sticker, which means that you seemed to think that it was safe for [redacted] to reoccupy and that was your suggestion. Was it really safe for [redacted] to reoccupy.

GR In my view it was, as I have stated, no less safe than it was before the earthquakes but for a combination of reasons. As far as safety to occupy, that had not changed as a result of the earthquakes.

110. And at page[36]

PMcC Yes, Mr Robinson, I think Mr Wilson has raised the matters concerning me that I would like to just have a brief review of you with. I see some tension, perhaps that has been highlighted in the dialogue you have had just now between your view that the house had dangers. You mentioned the hot water cylinder, you mentioned exposed wiring and the like, and your actions in seeking to have the yellow sticker removed and the words you chose of saying "it's as safe as it was before", which implies to me, and I wish to ask you whether that is what you intended. It implies that you are making an observation from the point of view of your appointed task for CERA which, and I'll use the word again; it had some tension against the concerns you had about the condition of the house itself. You have drawn our attention to

[36] Transcript 536/730

the one hand, the Building Act, and the other hand, the effects of the earthquakes. Did you see that tension yourself?

GR *First thing, my client is Earthquake Commission, not CERA.*

PMcC *Alright.*

GR *There are tensions between the provisions that I'm dealing with under the Earthquake Commission Act, which are dealing with repairs to buildings, and the provisions under the Building Act.*

PMcC *Yes.*

GR *The issue of the yellow sticker, which I tried to explain before, were that it had been posted under the Civil Defence Act. In my view, this building has and I agree with the* [redacted] *Report, had prior to the earthquake sequence, problems that meant that it was a dangerous building.*

PM *Right.*

GR *Now, I can't make the call on whether it's a dangerous building or not. That is why I went to the Council because that is for the Council to call. I don't normally, you know chase those issues unless I see real concerns. I have certainly done it on a number of buildings including multi-storey buildings with you know apartment buildings, where I've called in CERA and met with their engineers and raised concerns about dangerous buildings*

PMcC *Yes.*

GR *that need to be dealt with. This building had features that pre-existed.*

PMcC *Yes.*

GR *And I believe that by referring those issues to the Council officer who was relevant, who was responsible for posting the sticker and for building consent issues, I believed I had discharged my responsibility in that way outside of my work for the Earthquake Commission, which was looking at some relatively minor cracks and bit of brick damage,*

PMcC *Yes.*

GR *as recorded in my report.*

PMcC *Well, I think that is a useful discussion we are having and what draws to my attention is the professional responsibilities you have as a professional engineer, and how you address those, and the manner in which you went about doing it with* [redacted] *and, what is your view of that?*

GR *I raised concerns about the safety of the building.*

PMcC *With?*

GR With [redacted] I raised my concerns about some of the building work that was contributing to its dangerous state.

PMcC It just seems to me to be something of a puzzle here of a measure. Actions on your part, which seek to remove the sticker on the building, that is there for all to see, and your professional judgements about the general safety of the house. I accept it is not an easy matter to deal with and I am just interested in the manner in which you approached it.

GR The sticker was put in place by the Council officer.

PMcC I understand that.

GR I referred the issue directly to the Council officer and suggested that there was a better process for dealing with that house.

111. **Was there a breach of s21(1)(c), Rules 43, 45 or 46?**

112. When viewed in this context the following is apparent:

113. Mr Robinson knew that the Council was aware that there were unconsented building works being undertaken at the property. He spent 3 hours at the property and discussed the works in detail with [redacted] The transcript records that he advised [redacted] that the house was not safe.

114. The next day Mr Robinson advised the Council by email and by telephone that the house had suffered little earthquake damage, that there was no need for the "yellow sticker" and that a "green sticker" could be provided and that there were many instances of non-complying building work.

115. In our opinion, Mr Robinson fulfilled his obligations as a Chartered Professional Engineer in informing the Council, almost immediately, that he had concerns about the unconsented building work that had taken place. Having done this, it was incumbent on the territorial authority to fulfil its statutory role and it is difficult to see what further action Mr Robinson could have taken. As Mr Robinson pointed out in his evidence he had no statutory authority to declare the building unsafe because of deficient building work.

116. Therefore Mr Robinson discharged any obligation that he had to advise [redacted] and the territorial authority of the unconsented building work which was posing a danger. There was no breach of Rules 43, 45, 46 or section 21(1)(c) as a consequence of this.

117. **Was there a breach of s21(1)(c) or Rules 43, 45 or 46 for any other reason?**

118. The next issue is more difficult, and the decision of the DC does not fully turn its attention to this. That question is whether or not the building was structurally safe to occupy as at the dates of Mr Robinson's two inspections, being 3 November 2010 and 18 May 2011. Should Mr Robinson have advised on those occasions that the building was not structurally sound such that it should not be occupied?

119. Mr Robinson found that there was little earthquake damage on his inspection on 3 November 2010. That does not mean that it was structurally sound. Mr Robinson's oral evidence was that he did not see the building as being earthquake prone but rather one that was dangerous (in terms of the Building Act). It is perhaps unfortunate that Mr Robinson was not more careful in his choice of words rather than saying, as he did in his report that:

The building is as safe for occupation as a residential building as it was before the recent earthquake.

120. The only other evidence that we have which is contemporary with Mr Robinson's first memorandum is from [redacted] report of 8 December 2010. That report notes that some limited propping and shoring should be undertaken to two walls before re-occupation.

121. Mr Robinson expressly commented on this in his evidence and stated that he saw no need for propping. We have no evidence from [redacted] who was not interviewed by the IC. [redacted] mentions the same damage in his report as Mr Robinson does, it is just that Mr Robinson notes that damage to brickwork is due to settlement whereas [redacted] attributes this to earthquake.

122. In the circumstances we do not consider that there is sufficient evidence to find that Mr Robinson breached s21(1)(c) or Rules 43, 45 or 46 in the way he reported on the structural issues following his first inspection. Mr Robinson provided evidence on why he considered the issues in the way that he did.

123. Mr Robinson's second inspection occurred on 18 May 2011. This was *after* the Christchurch Earthquake and the temporary shoring recommended by [redacted] had been installed.

124. There is no further evidence that the building was any more structurally unsound than when Mr Robinson undertook his first inspection. His memorandum does not note any significant earthquake damage. He reiterates that the same statement that the building was:

"as safe now for occupation as a residential building as it was before the recent earthquake".

125. The report of [redacted] of 7 July 2011 confirms that there was no further damage to the superstructure of the house. This confirms Mr Robinson's memorandum. What changes is [redacted] conclusion which is that the bedrooms should not be occupied because of unstable brick internal walls. This was not mentioned in [redacted] first report and should not retrospectively be used to criticise Mr Robinson, particularly when neither the IC nor the DC heard from [redacted]

126. Lastly there is the report of [redacted] Their inspection was undertaken on 28 March 2012 and reported on 4 April 2012, 11 months after the second Robinson inspection and 18 months after the first. Critically it was also undertaken after the revised MBIE guideline was published containing significantly more detail on issues of unreinforced masonry. The significance of this was not put to Mr Robinson, nor to the authors of the reports, but seems to us to be significant. We note that report from [redacted] specifically reference the later MBIE guideline at section 7.6.

127. For this reason, and aside from the fact that no one from [redacted] was interviewed by the IC or called to give evidence to the DC, we have doubts that the [redacted] report can be given much weight in consideration

of whether Mr Robinson fulfilled his obligations at the dates he undertook his inspections.

128. It is also relevant, and was put to both Counsel at the hearing of this matter, that there is no general rule under any legislation that simply because a building is of unreinforced masonry that it is unsafe to occupy. Neither Counsel disagreed with this proposition.

129. In the circumstances we find that at the date of the second inspection by Mr Robinson there was even less reason to consider that the property was structurally unsound for occupation due to the shoring and propping work that had by then been undertaken.

130. In the circumstances we do not consider that Mr Robinson could be in breach of s21 or Rules 43, 45 or 46.

[redacted] (Complaint # 225)

131. Mr Robinson visited the property at [redacted] on 28 June 2012. He issued a single page memorandum addressed to [redacted] on 13 July 2012. Mr Robinson's brief was to look at the damage to the cladding system.

132. Prior to Mr Robinson visiting site EQC had proposed a variety of remediation solutions. These had not been accepted by [redacted]. Mr Robinson concluded that the majority of the damage to the external cladding was pre-existing. He recommended a repair strategy similar to that evidenced from previous repairs to the cladding. Mr Robinson also noted that the proposed repair strategy would comply with section 112 of the Building Act and would comply with the Building Code to at least the same extent as before previous alterations to the property.

133. [redacted] made a complaint to the Earthquake Commission on 17 July 2012. Their complaint included a number of issues relating to how their claim had been managed by EQC. With relation to Mr Robinson, they complained about his arriving at site with inadequate briefing and of unprofessional conduct. They claimed that Mr Robinson threatened

them by saying if they didn't accept his proposal he would advise EQC that all the damage was pre-existing.

134. [redacted] complained to the RA on 18 October 2012. Their complaint covered:

(a) Mr Robinson's behaviour whilst on site;

(b) Mr Robinson's incorrect interpretation of the Building Act;

(c) Mr Robinson's competence to make assessments of cladding systems;

(d) The implication by Mr Robinson that he had the authority to negotiate the value of insurance claims;

(e) The allegation of threatening behaviour.

135. The DC found Mr Robinson breached Rule 45[37] by:

"Having been brought to site to undertake an inspection and make an assessment then having failed to make appropriate allowances in his conduct and in the commentary he made during the visit for his not having been fully and appropriately briefed and informed as to the background involved and the matters being considered.

In his making comments during the course of his visit able to be interpreted as conveying a threat.

And having "flared up" and lost his demeanour when challenged.

The DC finds these matters together demonstrate and unacceptable lack of objectivity and integrity in Mr Robinson's actions and conduct."

136. We note that neither the content nor conclusions drawn from Mr Robinson's memorandum are addressed in the DC's findings. We note that in the [redacted] written complaint dated 18 October[38] and in their evidence to the DC [39] they referred to Mr Robinson's incorrect interpretation of the Building Act and EQC Act.

[37] Item 7.3, 7.4 15/425
[38] item 3 214/425
[39] Transcript 600/730

137. The issue of interpretation of the Building Act has been the subject of MBIE Determination [redacted]. The Determination concludes:

"that the proposed scope of work to repair the cladding to the house will comply with the relevant clauses of the Building Code"

The Determination includes consideration of the repair strategy at a far greater level of detail than contained in Mr Robinson's memorandum which only stated:

"The repair strategy would therefore be to fill the cracks with a suitable RTV sealant in much the same manner as previous repairs have been made to the external sheet panel system."

138. We do not consider Mr Robinson's interpretation of the Building Act to be relevant. It is possible for any engineer to misinterpret legislation, if that is what occurred. However, the remedy is to proceed, as the [redacted] did to obtain a determination from MBIE. As the issue is not noted in the DC's findings, and there is no cross appeal on the subject we do not address it any further in this Appeal.

139. **Was there a breach of Rule 45?**

140. On the first point of the DC's findings in 7.3.1, the nature of Mr Robinson's engagement was that he was often not briefed prior to making an inspection. This in an issue between Mr Robinson and his client the EQC.

141. In this instance, we do not consider that the lack of briefing impacted on the observations that Mr Robinson made or on his interaction with [redacted]

142. The evidence in this particular case shows that where Mr Robinson required additional clarification on any concern raised during his inspection, his practice was to follow this up with the appropriate EQC staff member after his inspection and prior to writing his memorandum. His email to [redacted] (in this case a legal adviser) of the EQC dated 6 July 2012[40] is an example of this.

[40] 354/425

143. We find no breach of Rule 45 in the actions of Mr Robinson with respect being briefed adequately.

144. **Was there a breach of Rule 45?**

145. **On the second and third points of the DC's findings in 7.3.2 and 7.3.3, the** DC's findings relate to the conversations between Mr Robinson and [redacted] from EQC was present for most of the conversation and provided evidence to the DC. [redacted] from [redacted] was also present on site but provided no evidence to the DC.

146. Drawing from the transcript, [redacted] stated[41]:

> *"Much of the meeting was discussing Mr Robinson's understanding of the regulatory environment in which he operated and what was required in his view to repair the cladding and at that point it was just usual sort of professional robust discussion.* [redacted] *being an engineer, myself being a lawyer, and so it wasn't an uncomfortable point of view it was just a forthright exchange of ideas and viewpoints. It was at the point when Mr Robinson continued to hold that his interpretation of the relevant Acts was correct and that therefore he could provide a RTV repair solution. It's at that point when we said well we didn't believe that was correct and he couldn't do so and it came as a shock for him then to respond well if that was the position we were taking, he proposed to advise EQC that the damage was pre-existing. And I would say at that time I became upset and distressed, I was shocked by that statement. As a lawyer working in disputes I deal with robust discussion,* [redacted] *as an engineer, a consulting engineer, deals with robust discussion and that felt firmly outside of what I would see for the usual range of appropriate responses for a professional."*

147. And [redacted][42]:

> *"As* [redacted] *said, inside the house we were, there was a robust discussion going on around applicable legislation and interpretation of the same. Outside the house we were down the back of the house, there was the statements that were made, except my view, [re pre-existing] and I believe it was me at that point that said to Mr Robinson, look I don't believe there is any way you can take that but a threat and the comment he made that he took umbrage to that and then stormed off down the side of the house. And those are my words of course. My view, when my wife's distressed, I am there, what can you do? So the approach that we took was, he's there, he's going to do what he's going to do and we are going to have to deal with it afterwards."*

> *"Ok in the original complaint there's three phases to the meeting. There's the interior to the house. There's the exterior investigation and then there's a period at the end when we went*

[41] Transcript 609/730
[42] Transcript 610 and 611/730

back inside where I think the original complaint says there was an attempt to agree a resolution at the end of that meeting."

"Mr Robinson came inside again with [redacted] *at the end after* [redacted] *had left site and then there was a discussion at the end there, in the original complaint."*

"It wasn't a discussion about solution, it was about trying to unravel the events of the day, was what the discussion was at the end."

"The agreed process, it was a process agreement really, that he would go away from site, write his report and that would come back".

148. [redacted] confirmed the nature of the conversations[43]:

"In the initial stages where we met in the living room the conversation was around the qualifications that Mr Robinson had to be doing an assessment or giving us advice as EQC and in particular on the damage to the exterior. At the time it was very friendly and I think even the customers, the homeowners, also explained their credentials and what they were doing as far as careers were. Mr Robinson said that he would be talking out aloud as we went around the exterior and which he did and he was able to explain the cracking in the exterior and how he believed that cracking had come to be. I can remember vividly that he used his experience of boatbuilding where he'd seen the same type of resin and the same type of resin failure in boatbuilding and used that as an example as well. I wasn't there for all of the conversation. I was called away as the [redacted] *representative who was there as well had to leave the site early but I was probably able to hear 70-80% of the conversation that took place. It did become quite vigorous as the homeowners realised that Mr Robinson had an opinion that didn't agree with their opinion on the origin of the damage to the exterior. Heated perhaps, but I don't think either side lost it. Certainly both sides were in disagreement with the origin of the cracking on the exterior."*

149. [redacted] states he was not aware of a threat being made but acknowledges[44]:

"If there was a threat made then I didn't hear it. There could well have been a threat made but it could well have been while I was away at the front gate."

150. Mr Robinson[45]:

"With [redacted] *my recollection is that we walked around, anti-clockwise around the outside of the house with the customers, and with* [redacted] *from* [redacted] *By the time we got two thirds to three quarters of the way around the house that was when* [redacted] *had to leave.* [redacted] *left us for possibly a couple of minutes for an hour and a quarter inspection or thereabouts. When* [redacted] *came back, we went into the house and had a sit down discussion. I had raised early on in the walk around my observation that I wasn't seeing any*

[43] Transcript 622/730
[44] Transcript 617/730
[45] Transcript 622/730

evidence of fresh damage that was clearly attributable to earthquakes. With regard to the inference of threats, I think [redacted] may well have answered that, but I would confirm that I made no threats, I did make it clear that my opinion, I was not seeing significant, if any, and I didn't believe there was any fresh recent earthquake damage to the external fibre cement sheets and textured sprayed surface that was reasonably attributable to earthquakes."

151. The descriptions of the meeting are very similar in content. The difference is in the interpretation of the discussion by the various parties.

152. We agree with the DC that with respect to the statement made by Mr Robinson that he would inform EQC that *"all damage seen was pre-existing"* could be interpreted as a threat, and we decline to disturb their finding that this comment was made.

153. We agree with the DC that Mr Robinson's comments and his reported change in demeanour when challenged were un-professional. However, this is not where the matter was left.

154. Neither the DC nor the IC included in their findings reference to the "third phase" of the meeting where Mr Robinson returned to the inside of [redacted] house. We repeat again a segment from the transcript of [redacted] evidence[46]:

"Mr Robinson came inside again with [redacted] at the end after [redacted] had left site and then there was a discussion at the end there, in the original complaint."

"It wasn't a discussion about solution, it was about trying to unravel the events of the day, was what the discussion was at the end."

"The agreed process, it was a process agreement really, that he would go away from site, write his report and that would come back".

155. We consider that these actions are those of a reasonable professional engineer. Mr Robinson realised that there was a significant difference of opinion between him and [redacted] and discussed a process for the way forward. This was that he would write his report and [redacted] could take any issues they had with it to his client, the EQC. The words and conduct earlier used were evidently in the heat of the

[46] Transcript 610,611/730

moment and not followed through, either in action, or in any way in Mr Robinson's memorandum to EQC.

156. We accept [redacted] evidence regarding the comments having been made by Mr Robinson and that these were considered a threat. We consider that this action was unprofessional and should not have occurred. We also consider that his actions at the conclusion of the meeting go some way to mitigating his transgression.

157. We are also conscious that the factual situation, and general background, that we have set out was undoubtedly difficult for all parties.

158. On balance and based on the evidence presented, when the matter is viewed as a whole, we do not consider that Mr Robinson has behaved in a manner sufficiently grave to be considered a breach of Rule 45.

[redacted] (Complaint # 217)

159. Mr Robinson visited the property at [redacted] on 27 January 2012. He issued a single page memorandum addressed to [redacted] of [redacted] on 2 February 2012.

160. Mr Robinson notes:

"It was difficult to thoroughly inspect the interior of the house due to the amount of furniture and other contents of the rooms".

"I could not find any evidence of recent movement between the bottom plate of the wall and the framing".

"some of the pile foundations comprise concrete blocks laid on their side on top of the soil, with a variety of timber packers".

"there has not been any recent differential movement between the timber framed house and the concrete ring foundation".

"There is clear evidence of damage to the area around the internal fireplace"

161. The paragraph of most relevance to this complaint from Mr Robinson's memorandum states:

"Under the Earthquake Commission Act 1993 there are no grounds for lifting the house and replacing the piles and ring foundation. If it is established that there have been recent variations in floor levels due to the recent earthquakes (which will be difficult to determine until floor areas are more accessible for full inspection), then all that is required is to cut holes in the flooring and to re-pack or adjust the existing packing thickness on the tops of the existing piles."

162. [redacted] Consultants [redacted] prepared two reports on the property 7 December 2011 for [redacted] (i.e. prior to Mr Robinson's inspection) and 17 April 2013 for [redacted]

163. The 2011 [redacted] report notes:

"There is severe differences in the levels of the floor across the dwelling, approximately +/- 114mm".

"House appears to have shifted off the foundation wall"

164. It recommends:

"Subject to floor level data taken on site: Floor requires rebuilding to DBH tolerances".

165. The report does not note the type of foundations.

166. There are clearly some difference between the findings of the Robinson and 2011 [redacted] report. [redacted] were not interviewed during the investigation. They were not asked why their conclusions may have been different to those contained in Mr Robinson's memorandum.

167. On 20 March 2012, [redacted] and [redacted] from EQC, and [redacted] from [redacted] met with [redacted] The EQC personnel attending were unaware of Mr Robinson's memorandum. It had not been logged against the complainants file; they were provided a copy by [redacted] and [redacted] expressed their disappointment with both the contents of Mr Robinson's memorandum and his demeanour whilst on their property.

168. Following this meeting EQC were to review the entire file and assess EQC's position regarding the claim.

169. Mr Robinson met with the [redacted] loss adjuster on 31 May 2012. At this meeting the differences between his memorandum and the December 2011 [redacted] report were discussed. The outcomes of this meeting are contained in Mr Robinson's memorandum dated 7 June 2012. Mr Robinson notes that it was agreed with [redacted] that his memorandum dated 2 February 2012 could remain without alteration or amendment. This was Mr Robinson's last involvement with the property/claim.

170. We note that whilst the recommended outcomes of Mr Robinson's memorandum and the [redacted] report differ, they do not necessarily contradict each other. The [redacted] report is a more in depth and thorough investigation.

171. The comment and recommendations contained on page 5 of 7 of the 7 December 2011 [redacted] report[47] are based on Table 4.1 from Section 4.2 of the Department of Building and Housing document *"Guidance on House Repairs and Reconstruction Following the Canterbury Earthquake - 20 December 2010"*. [redacted] have assessed that the property falls into the category *"Foundations rebuild required"*.

172. The text associated with Table 4.1 states:

> *"The criteria in Table 4.1 are to provide guidance rather than representing absolute criteria, as suggested by the vertical dotted lines between the columns."*
>
> *"These criteria are intended for use by a range of industry personnel. Where questions relating to the applicability of the criteria to a particular situation are encountered, professional engineering input should be sought."*

173. The Department of Building and Housing issued a *"Revised Guidance on Repairing and Rebuilding Houses Affected by the Canterbury Earthquake Sequence"* in November 2011. This is prior to the date of the [redacted] report and Mr Robinson's memorandum. The revised document contains a table (Table 2.3) similar to Table 4.1 in the original document. The revised document notes:

[47] 121/185

"please note: these indicator criteria are less onerous than those contained in Table 4.1 of the Department 2010 guidance document"

174. It is also noted that the headings of the columns have been changed from *"Foundation rebuild required"* to *"Foundation rebuild indicated"*.

175. [redacted] commissioned [redacted] to undertake the April 2013 Report. As a result of this second report [redacted] issued a letter 26 April 2013 noting inconsistencies between the [redacted] reports and Mr Robinson's February 2012 memorandum. They stand by the [redacted] report that recommends foundation re-levelling.

176. [redacted] complained to the RA on 21 August 2012. Their complaint covered:

(a) Mr Robinson's behaviour on site; and

(b) Alleged a lack of thorough investigation; and

(c) Claimed there are inaccuracies in his memorandum.

177. The IC in its evidence to the Disciplinary Hearing state[48]:

"The report of, one of which, the main components was to report on flooring deformation and foundation issues relating to the earthquake, essentially defaults and makes some statements but then says "can't really go any further because there's not, there needs to be levels." No clear recommendation that get on and someone takes some levels. In fairness, I guess, that is up to EQC and here is one of these interface issues that we have identified in a number of these things."

178. They go on to state:

"...consequently, the Committee had the view that Mr Robinson did not conduct a thorough investigation and I think those really are the issues that we look for some consideration."

179. This follows through into the DC's findings that:

"Mr Robinson to have been negligent in failing to clearly state or recommend that floor levels were to be taken to verify that the floors were out of level by a value which falls within the acceptable limits stated by MBIE, and which would then have confirmed the suitability of his recommended remedy".

[48] Transcript 546/730

180. The DC found[49]:

(a) Mr Robinson to have been negligent in failing to clearly state or recommend that floor levels were to be taken to verify that the floors were out of level by a value which falls within the acceptable limits stated by MBIE, and which would then would have confirmed the suitability of his recommended remedy, and

(b) Mr Robinson professional conduct has demonstrated an unacceptable level of objectivity and integrity in breach of Rule 45 by acting in an "abusive, belittling and dismissive manner".

181. **Was there a breach of s21(1)(c)?**

182. We consider that Mr Robinson's inspection and memorandum cannot be compared on a like for like basis with the more detailed investigations and reports prepared by [redacted] The outline repair strategy proposed by Mr Robinson is in accordance with MBIE guidance documents. It is noted that the MBIE documents are for guidance only. It is also noted that in the updated guidance document (current at the time of Mr Robinson's inspection) the heading of each column has been amended from a *"required"* repair strategy to and *"indicated"* repair strategy.

183. Mr Robinson's memorandum states:

"..If it is established that there have been recent variations in floor levels due to the recent earthquakes (which will be difficult to determine until floor areas are more accessible for full inspection), then all that is required is to cut holes in the flooring and to re-pack or adjust the existing packing thickness on the tops of the existing piles."

184. Whilst this is not a clear instruction that a more detailed inspection of floor levels should be conducted, it clearly predicates the repair strategy to the taking of these levels.

185. We find that whilst Mr Robinson could have been clearer in the wording of his memorandum, this failing does not approach the threshold of negligence.

[49] Item 7.2 11/185

186. We find that there has been no breach of section 21(1)(c) of the Act.

187. **Was there a breach of Rule 45?**

188. [redacted] provided a statement, as recorded in the transcript of Mr Robinson's behaviour[50]. When questioned if there had been a "stand-off" outside the house, Mr Robinson stated[51]:

"I am denying it, categorically".

189. [redacted] provided a letter from [redacted] who was present on site during Mr Robinson's inspection. [redacted] was not called to give evidence. In his letter[52], [redacted] states that Mr Robinson was *"abrupt and judgmental"* and that he became *"agitated and aggressive in his manner while disputing what damage had been pre-existing and what was caused by the quakes"*.

190. We also note that the letter states that Mr Robinson "used this as a means of easing himself and [redacted] from [redacted] off the property before things became more heated", which to us is evidence that he was keen to defuse the situation, or at least recognised that it was not productive.

191. Given that [redacted] was not called to give evidence the letter concerned cannot really be given too much weight either way.

192. Given the factual background and the general context we have outlined, we consider that there is no evidence that Mr Robinson's behaviour was such as to be considered a breach of Rule 45.

[redacted] (complaint #241)

193. Mr Robinson visited [redacted] property at [redacted] on 8 August, 2012. His brief was to undertake a partial external inspection of a section of the ring foundation and veneer and assess a possible repair strategy. He subsequently issued a short memorandum

[50] Transcript 545/730
[51] Transcript 552/730
[52] 173/185

dated 17 August 2012, addressed to [redacted] in which he advised he considered the proposed repair strategy to be a reasonable one. [redacted] complained to the RA in a letter dated 17 December 2012, citing a breach of the Code of Ethics. The DC's decision sets out the further background and evidence in its decision at paragraphs 5 through to 5.24.

194. The DC found that Mr Robinson had *"performed engineering services in a negligent manner"* and had breached Rule 45. We address each of these findings in turn.

195. The Finding that Mr Robinson's conduct was negligent is in para 6.10

196. The reasoning that Mr Robinson was negligent is based on the findings in paragraphs 6.17 and 6.18 which found:

> 6.17 *In considering whether Mr Robinson's report met the standard of what could be reasonably expected from a professional engineer, the DC considered that he captured the necessary information in regard to the purpose and scope of the report. However, the DC found that the report fell short in that Mr Robinson failed to provide reasons to support the recommendations he made to EQC, and that he should have alerted EQC to the geotechnical issues that needing (sic) to be determined before deciding on the scope and detail of the foundation repairs.*
>
> 6.18 *Regardless of whether the client is satisfied with the quality of the report that Mr Robinson provided to it, as a chartered professional engineer Mr Robinson is expected to carry out his work with the appropriate level of diligence, skill and care. The DC considered that it was reasonable to expect that he would have clearly set out for his client the reasons for any recommendations made.*

197. **Was there a breach of s21(1)(c)?**

198. Mr Robinson's memorandum to his client, EQC, is dated 17 August 2012[53] and follows an inspection that took place on 8 August 2012.

199. The memorandum includes the instructions of EQC:

> *The specific purpose of our inspection as instructed by you ([redacted] EQC), was to assess the damage to the concrete ring foundation and to the Summerhill stone external wall cladding on the South east wall of the flat that comprises the north eastern part of the building.*

[53] page 153/233

200. Mr Robinson had been provided with a copy of a report to [redacted] prepared by [redacted] of [redacted] dated 8 June 2012.

201. The report prepared for [redacted][54] was in considerably more detail than Mr Robinson's and included the geology of the site, site investigation, extent of damage, levels and discussion on repair strategies.

202. The report stated that[55]:

> *..the DBH guide indicates a foundation re-level and partial foundation replacement are required as a minimum. The re-level strategy will need to be considered in conjunction with a site specific geotechnical assessment by a geotechnical engineer. As a minimum requirement (amongst other things):*
>
> - *replace 8m of foundation centred to the crack on the south side*

203. Mr Robinson agreed with the identified damage as set out in the report by [redacted] and both engineers concluded that partial foundation replacement of 8m on the south wall was a reasonable repair strategy.

204. Re-levelling was not discussed in Mr Robinson's memorandum, nor was he requested to do so.

205. Similarly Mr Robinson did not mention the TC3 soil zone. Mr Robinson gave evidence that not only was he not obligated to do so, but he would be stepping outside his expertise if he did. The DC accepted this, but decided he should have alerted the EQC.

206. The panel does not accept that Mr Robinson had a requirement to alert the EQC. The report prepared for [redacted] clearly identified the TC3 soil zone and had the EQC wanted this confirmed they would have requested another of their engineers to do so.

207. Mr Robinson made the decision on the repair strategy based on his own inspections and observations. He stated clearly what his brief was and fulfilled his brief to the satisfaction of the client. The DC accepted in para 6.16:

[54] page 154/223
[55] 157/223

that these wider issues were not the responsibility of Mr Robinson. [redacted] was in dispute with the EQC over his earthquake claim and the technical aspects to his claim are matters for him to address.

208. The Panel considers that there was considerable agreement between the two engineers over the 8 June report.

209. Further Mr Robinson reached his decision based on his own observations. The DC *considered it was reasonable to expect that he would have clearly set out for his client the reasons for any determination*. The client, EQC, has not expressed any dissatisfaction with the memorandum nor asked for his reasoning on other memoranda. Failure to do was not an act of negligence.

210. The later reports by [redacted] of 21 June 2012 and 2 August 2012 were not made available to Mr Robinson at 17 August (date of his memorandum) as it was clearly referenced in this memorandum that he had the 8 June 2012 memorandum from [redacted] only.

211. These reports cannot be considered as part of the complaint but the panel notes that both Mr Robinson[56] and [redacted][57] state the documents are essentially the same. Mr Robinson states that even with the additional reports his recommended repair strategy would not change[58].

212. The Panel finds there was no breach of section 21(1)(c) of the Act.

213. **Was there a breach of Rule 45 (paragraph 7.2.2)?**

214. The finding that there had been a breach of Rule 45 is based on the findings in paragraphs 7.3:

> *7.3 The DC considers Mr Robinson's conduct and behaviour at the site in this respect to have fallen short of what is expected of and not be acceptable from a professional engineer. This is considered to have been at the lower end of a scale of misconduct.*

[56] at page 218/223
[57] Transcript 636/670
[58] at 218/223

215. [redacted] was present when Mr Robinson and [redacted] carried out the inspection on 8 August 2012. The complaint 112/223 includes the following[59]:

....We jointly inspected the building, a process that took approximately 10 minutes...

I considered this cavalier attitude to display an alarming degree of arrogance especially when we were in the process of digesting the catastrophic failure of the engineering profession to protect the public emerging from investigations into the CTV building.

216. At the meeting on 18 March 2013 with the investigating committee [redacted] expressed the view[60]:

that Mr Robinson is biased because of his expertise and the reputation he has for identifying pre-existing damage. He felt that Mr Robinson's view from the outset was to seek to dismiss the claim and questioned what you could do as a member of the public when you are being bullied and the approach is not fair and reasonable

[redacted] considered that Mr Robinson was cold and pushed people to make them break.

217. The transcript has no reference to Mr Robinson's behaviour other than the following[61]:

Panel member *Could I ask a question of [redacted] please? [redacted] you told the Investigating Committee that, well you implied that you'd been bullied and the approach was not fair or reasonable. Can you tell us in what circumstances you felt that you were being bullied by Mr Robinson I presume?*

[redacted] *Um yeah. These things always have a fair degree of subjectivity to them and that I think is probably your dilemma. It was when we first met in the driveway and I said why are you here in that there has already been a detailed engineering memorandum and he simply walked straight past me and said I'm not taking any notice of that. I'll be doing my own memorandum thank you. And then I said well hang on a moment, that memorandum is based on the Department of Building and Housing Guidelines and he turned around and eyeballed me straight and said those sir are guidelines only, they're not the law and at that point I thought - well I can't say what I thought because it's not appropriate - but I didn't think much that we were going to get on that well. And I felt somewhat intimidated by him so in fact I gave as good as I got. I sit on the [redacted] Board, the equivalent of your CPEC, and so I'm aware of the requirements of professionals to work inside codes of ethics and standards of practice and so I said to him straight - if you drift too far away from [redacted] memorandum, I'll be lodging a*

[59] 112/223
[60] 77/223
[61] 635/730

complaint with your professional body. So I believe he perceived that as a threat. I think if you go through driving down the road and it says speed cameras in operation, you're sensible to take your foot off the gas. I think I gave him a fair warning that I would expect him to be writing a memorandum that is compliant with the Building Act and the recommendations of the Department of Building and Housing. But no we didn't get on. Not from the very outset.

Panel member *Thank you and you further said that you thought Mr Robinson was cold and pushed people to make them break. Can you give me any further examples of situations that might illustrate that point?*

[redacted] *Yes. When he and* [redacted] *were there, I was standing there and you know how he said he likes to address, I heard him in an earlier conversation saying how he likes to address his comments to the client right? He didn't. He addressed all his comments to* [redacted] *For instance he stood at the back of the house where the crack was and he said aw yeah, no this is pretty straightforward - we're just going to take out 8 metres of foundation here and here, take these bricks away and re-put them back up and then she's done. That was it. That was the whole repair for this TC3 strategy piece of land and I might as well have been a hedgehog on the grass alongside him. That's about how much interest he took. So it was dismissive and it was isolating but I mean you know I'm not the type to be bullied so I didn't feel overly bullied, I felt his characteristics were bullying if you know what I mean. There's bullies and there's people who stand up to bullies and there's people that fold under bullies.*

Panel member *Thank you and was there anyone else there from your side to witness these events or just* [redacted]

[redacted] *No there wasn't. He actually turned up at the time when I was actually in practice so I sort of shot out. My house is also where my* [redacted] *practice is so I sort of shot out in a break and went with him. We were only there I think 10 minutes, if that.*

218. [redacted] did not give evidence nor were there any further questions asked of [redacted]

219. The diary notes of Mr Robinson[62] show that he spent approximately an hour on site.

220. If the DC did deliberate on Mr Robinson's behaviour there is no record of the conclusions in the decision. In reaching their decision on the breach of rule 45 the focus appears to be on the way Mr Robinson strictly followed his brief from the EQC and did not cover other issues

[62] page 187/223

including the reasoning behind his recommendations and alerting EQC to the geotechnical requirements.

221. The memorandum issued on 17th August is objective. In the area that Mr Robinson specifically focussed on, there is general agreement between the two engineers and the panel does not see any lack of objectivity.

222. According we find that there was no breach of Rule 45.

[redacted] (complaint #224)

223. The DC's decision sets out the background and evidence in its decision at paragraphs 5 through to 5.10.

224. The DC found that Mr Robinson had "performed engineering services in a negligent manner" and had breached Rule 45. We address each of these findings in turn.

225. The determination that Mr Robinson's conduct was negligent is based on the findings in paragraphs 6.5 and 6.6 which found:

> 6.5 *the particular matters in which Mr Robinson's performance did not meet the standard of diligence and care reasonably expected of a chartered professional engineer are set out below.*
>
> *(a) Mr Robinson failed to observe and comment on damage as claimed by [redacted] and subsequently recorded in the engineering memorandum from [redacted]*
>
> *(b) Damage of the colorsteel roof and fixings was observed by [redacted] and repairs were recommended. Roof damage is not mentioned by Mr Robinson in the memorandum to EQC dated 11November 2011*
>
> *(c) Cracking of internal plastered walls and ceilings was observed and recorded by [redacted] and repairs recommended. This damage is not mentioned in the memorandum from Mr Robinson.*
>
> 6.6 *The DC considered it was reasonable to expect that a chartered professional engineer when requested by his client to review an independent engineering memorandum would address all substantial damage matters as raised in the [redacted] engineers memorandum. His memorandum to EQC dated 30 August 2013 (actually*

2012) does not address the roof damage or the damage to internal plastered walls and ceilings as noted above.

6.7 *In this regard the DC did not consider (Mr) Robinson to have been negligent in his recording of floor subsidence or in his opinions as to the probable cause as he agreed that some of this damage was probably due to the Christchurch earthquakes. Further, the DC did not consider (Mr) Robinson to have been negligent in his recording of cracking to external stucco walls. .*

226. **Was there a breach of s21(1)(c)?**

227. Mr Robinson provided two memoranda to his client, EQC. The first is dated 11th November 2011[63] and follows an inspection that took place on 1 November 2011.

228. The second memorandum is dated 30th August 2012[64] and is specifically focussed on the [redacted] memorandum.

229. The brief for the first memorandum was a paragraph in an e-mail from [redacted] to Mr Robinson dated 21 October 2011[65].

[redacted] *Road. Contractor is talking a major lift to enable work under it. Needs an Engineer design foundation remedy?*

230. Mr Robinson and [redacted] visited the site on 1 November 2011. [redacted] from [redacted] was present on site, undertaking a structural inspection on instructions from [redacted] [redacted] were also present.

231. [redacted] completed his report on the house inspection, floor levels and soils investigations and provided Mr Robinson a copy. Although this report is referenced in evidence it is not included in the papers.

232. Mr Robinson completed his memorandum on 11 November 2011 The memorandum notes:

There is some relatively minor damage to the house that might be attributed to recent earthquakes...

floor levels vary significantly throughout the house as recorded by Ashley...

[63] at page 117/205.
[64] at page 121/205
[65] page 159/205

There has not been significant recent foundation movement due to recent earthquake activity.

233. It concludes:

There is however clear evidence of long-term on-going foundation settlement that has been occurring since the house was relocated onto this site.....

234. [redacted] had commissioned [redacted] to identify any structural issues that may have occurred to the house as a result of the earthquakes on the 4th September 2010, 22nd February, 13th June and 23rd December 2011.

235. The [redacted] memorandum concluded [66] that in terms of earthquake damage:

Damage to the property is aesthetic in nature and although prevalent throughout has not affected the structural elements of the house. Effectively the house is not significantly different in terms of structural strength than before the earthquake.

Structural items that require immediate attention to prevent on-going damage to the house are/enable ongoing occupation of the house are

Sealing of the cracks in the exterior solid plaster cladding to ensure the weather tightness of the house is maintained. Sealing of the foundation cracks to ensure the stability is maintained.

The following specific items have been noted as requiring attention in the near future but are not considered to affect the short term structural integrity of the house

The house is out of level and although some of the settlement may be historic we believe some is earthquake induced and will require re-levelling of the floor and exterior walls. Movement between the colorsteel sheets on the roof was observed and we recommend re-fixing the roof sheeting and painting the roof area to ensure the durability and rigidity of the roof is maintained. Care and consideration for the re-fixing of the fastenings is to be undertaken due to the obvious movement which has occurred in the roof sheeting.

There was no obvious significant indications of ground movement, fissuring and /or liquefaction on the site.

236. There is considerable consistency between this memorandum and that of Mr Robinson dated 11 November even though Mr Robinson had not seen the [redacted] memorandum. Both memoranda referenced the house being out of level, both referred to aesthetic or minor

[66] page 122/205

damage and both referenced the cracks in the stucco exterior walls. Mr Robinson concluded that there had not been any significant recent foundation movement due to earthquake activity while the [redacted] memorandum stated that while *some was historic in their view some was earthquake induced.* It is not uncommon for two engineers to form different views and the appropriate response would be to attempt to reach agreement if possible by consideration of each other's assessment.

237. Mr Robinson did not mention the movement of the coloursteel roofing sheets nor the cracking in the internal walls.

238. Mr Robinson was given the [redacted] memorandum and requested to review the memorandum and provide comment. Mr Robinson did not revisit the site and provided a memorandum on 30th August 2012. The main point of difference between the two engineers was the cause of the foundation cracking and Mr Robinson while stating that it was reasonable to allow for some re-levelling the principal cause of the *settlement was that not all of the foundations are adequately founded onto good ground.*

239. It is the panel's view that by Mr Robinson focussing on this issue and omitting to mention the roof movement and the internal cracking does not mean he was negligent. Other house inspections were being done for EQR at the time by [redacted] EQC would have the information from the [redacted] memorandum and given Mr Robinson's role as outlined by [redacted] in his evidence, the focus was on identifying earthquake related damage and a repair strategy.

240. The panel finds there was no breach of section 21(1)(c) of the Act.

241. **Was there a breach of Rule 45?**

242. The finding that there had been a breach of Rule 45 is based on the findings in paragraphs 6.16 ad 6.17:

> *6.16*Mr Robinson supplied the IC with his diary notes. The DC considers these notes demonstrate a lack of objectivity.

She [redacted] was feisty from the very outset. Shoddy work in porch and kitchen. Very shoddy work.

*6.17*The IC's memorandum states in section 6.5.

If [redacted] account of Mr Robinson's alleged bullying attitude and her husband's "need to hit something" is true and on a prima facie basis the Investigating Committee is satisfied that it is, then we do not consider such alleged actions to be those of a reasonable professional engineer, particularly in the light of the Christchurch environment in which Mr Robinson was working.

243. [redacted] stated in her complaint that[67]:

During the assessment, we were treated by Mr Robinson, unprofessionally, rudely with the implication from him that we were attempting to defraud the NZ government with our claim. Mr Robinson made several comments that were derogatory and insulting not to mention unnecessary.

[67] page 113/205

244. [redacted] who is an experienced loss adjuster was also present on the day[68]. The DC had the opportunity to question [redacted] on his version of events of the day. While [redacted] was not always present in the discussions he did state that:

he had no recollection of innuendo about "fraud", or intentional rudeness, disrespect or derogatory remarks. He further stated page 568/730 that Mr Robinson by his own admission, has said he likes to give it direct. He's very articulate and enthusiastic attendee to his work. He tends to try and make is point somewhat generously to the point of explaining things in absolute "frank", I use that word again, in detail. And again that's his method and personal style of delivery. He's an enthusiastic operator.

245. We consider that the panel should have given due weight to [redacted] evidence. He would have been in this situation himself many times. Neither [redacted] provided evidence to the DC. Mr Robinson clearly disagreed with an earlier assessment of the house and this would be distressing to [redacted]. Even if words were used in the heat of the moment this in itself does not mean a breach of rule 45. In the end a memorandum was written that was objective and accepted by the EQC.

246. Mr Robinson had expressed his view of [redacted] in his diary notes. He made his diary notes freely available to the IC. A personal comment in a diary is not evidence of lack of objectivity, particularly as it did not demonstrably affect the content of Mr Robinson's memorandum to his client.

247. The panel finds that there was no breach of rule 45.

[redacted] (complaint #246)

248. The DC's decision sets out the background and evidence in its decision at paragraphs 5 through to 5.29.

249. The DC found in paragraphs 7.1 to 7.4 that Mr Robinson breached Rule 45 in that his conduct did not demonstrate expected levels of professional objectivity and integrity. Their reasoning is summarised in paragraphs 6.14 - 6.16:

[68] His evidence is on page 191/205 and the transcript is on page 566/730.

6.14 *The DC considers Mr Robinson to have fallen short of the expectations of Rule 45 as to maintaining a proper degree of professional objectivity and integrity by way of the inappropriate and over bearing manner in which he conducted himself during the inspection and in his dialogue with* [redacted] *and* [redacted]

6.15 *In this regard, the disciplinary committee considers such conduct during the course of his visit to the site and in his associated conversations with those around him amounts to Mr Robinson having not acted and behaved with the properly expected levels of professional objectivity and integrity.*

6.16 *As to the matter of the need for a geotechnical investigation, and while it would be preferred that Mr Robinson's reports were explicit in such regard, the DC accept Mr Robinson's explanation that his client EQC have standard procedures in place regarding geotechnical investigations that he was able to rely upon in this case.*

250. **Was there a breach of Rule 45?**

251. [redacted] stated in his complaint[69]:

that the conduct of Mr Robinson during this visit was inappropriate and could only be described as over bearing. He systematically spoke to everyone present ...in an attempt to influence the outcome of his assessment.

252. In the transcripts of evidence[70] in reply to a question from Mr Morrison, [redacted] states

We've never made any comment about his actual memorandum, we're talking about his conduct when he was on site.

253. The evidence of [redacted] and his brother [redacted] was that there was clearly robust debate on site on the extent and cause of the damage. It is apparent that this difference of views was seen by [redacted] as Mr Robinson having arrived at the site with a pre-decided outcome, unwilling to accept new evidence and not being independent. Further, in the view of [redacted] Mr Robinson was trying to influence the views of others to the point where he was not being objective.

254. The DC in paragraph 6.15 also formed the same view.

255. Mr Robinson had expressed his view of the action of [redacted] of [redacted] in his diary notes[71]:

[69] page 105/173
[70] Transcript 555/730

Discussed conduct of [redacted] with [redacted]. I am concerned that he is making excessive comments on what is covered which may be Ok for [redacted] but EQC is bound by the Act, not over -generous (?) insurance policy provisions. The way he conducts himself is very unhelpful where a claim is under the EQC caps.

256. Mr Robinson in his evidence stated that[72]:

There had been a number of instances brought to my attention by estimators, of concerns where [redacted] had been involved in costings for [redacted] and was going way beyond what was needed for earthquake damage repairs, which again is EQC's responsibility, rather than the general insurance policy and AMI, at that stage were still, well they did stay with ( ) was one of the particular things. ...So this had been my first chance to in some time to have a discussion with the [redacted] people and raise the concerns that had been brought to my attention by others. I saw it as my responsibility, or part of my responsibility to do that. If my diary entry and diary note have been misinterpreted that is again unfortunate but as I say they are for my use and reference and record.

257. It is the panel's view that this diary entry does not demonstrate a lack of objectivity. In the end a factual objective memorandum was issued to the satisfaction of the client with a recommended repair strategy.

258. The panel finds that there was no breach of rule 45.

[redacted] (Complaint # 237)

259. [redacted] had purchased their house at [redacted] in 1993. A pre-purchase report included in the evidence considered by the IC had portrayed the house in very poor condition, with a lot of repair work to be carried out. In the intervening period a considerable amount of improvement had been undertaken. Those works had included the construction of a patio/terrace. More improvements and repairs had been completed since the earthquakes in 2010/2011.

260. Mr Robinson visited the house on 6 September 2011. He was accompanied by [redacted] of the EQC. His task was to investigate whether there had indeed been, as claimed by the [redacted] in their claim to the EQC, a slump in the patio/terrace, caused by the earthquake(s), resulting in water falling back towards the house. There do not appear to be any written instructions from EQC relating to

[71] 131/173
[72] Transcript 558/730

this visit to the property. However, on 15 September 2011, [redacted] emailed Mr Robinson[73], asking him to:

'confirm his findings on the floor levels of the original section of the house'.

261. Mr Robinson then provided a written memorandum to the EQC dated 20 September 2011. This one page memorandum concluded that the terrace falls outside of the scope of the Earthquake Commission Act and therefore is not subject to a claim under the Act. In the memorandum Mr Robinson states that:

"there is no evidence of variations in levels as a result of recent earthquakes"

262. This comment is clearly referring to the levels of the surface of the terrace. Mr Robinson's diary note[74], made available to the IC, also notes that:

"it is a path, not building or structure & includes paving. So excluded by definition of 'Residential Building" & Second Schedule 10 & 16".

263. Mr Robinson made a second visit to the property on 22 November, again with [redacted]. The purpose of this second visit was to review the subfloor area beneath the west wing of the house. Mr Robinson's memorandum[75] notes that:

"there is clear evidence of liquefied silt and (interestingly) fine sand beneath the subfloor area..... I would confirm that it is necessary to remove remaining liquefied silt and fine sand in accordance with normal practice in such cases".

264. [redacted] then commissioned a 'second opinion' engineering report from [redacted][76]. The purpose of this report was to:

"give a full commentary on the recent EQ and Insurance memorandums offering further consideration with respect to the outside foundations and soils underlying the structure on this site".

265. This memorandum, provided by [redacted] on 28 November 2011, concluded that[77]:

[73] 157/197
[74] 155/197
[75] 160/197
[76] 108/197

"Upon visual inspection the property appeared to have sustained moderate to severe damage in the 22 February earthquake mainly due to damage to floors and brickwork with suspect underlying foundation to the whole of the house. This land is highly susceptible to liquefaction....."

266. On 27 November 2012, the RA received a complaint against Mr Robinson from [redacted]. The complaint relates to the manner of Mr Robinson's assessment of their property.

267. [redacted] summarises the complaint as being that Mr Robinson[78]

"was ill- prepared to carry out the assessment that he had been contracted to complete, was subjective rather than objective in his engineering assessment, sought to minimise or deny evidence of damage that I observed occurring as a result of the earthquakes, misreported information given to him and challenged my integrity. I was offended by his manner and arrogance. He appeared to me to behave as if his view was absolute and could not be questioned because he carried the designation of a professional engineer. His behaviour as an engineer risks bringing the entire profession of engineering into disrepute".

268. The DC had no concerns regarding Mr Robinson's competence in respect of this case, but found that there were shortcomings that occurred in Mr Robinson's conduct and behaviour during the course of the engineering services he provided to his client EQC, and the diligence and care that he provided to the property owners. As such, the DC found this behaviour was found to have fallen below that reasonably expected of a Chartered Professional Engineer. The DC found that Mr Robinson's behaviour in this respect was not negligent, but that he[79]:

'had breached the Rule 45 requirements of objectivity and integrity by way of the manner in which he conducted himself in his meeting and dialogue with [redacted] and in his remarks to the effect that he thought [redacted] was lying and trying to get something they were not entitled to out of the EQC'.

269. The DC's finding in respect of Rule 45 also notes that Mr Robinson had said (in his personal diary note[80]) that:

"the house has been made good and generously too"

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[77] 111/197
[78] 106/197
[79] 10/197
[80] 10/197

270. The DC described both the above remarks to have been neither relevant nor pertinent to his task, and to have been disingenuous. Nevertheless the DC also then concluded that his demonstrated failings were at the lower end of the scale of misconduct and by themselves insufficiently grave for the matter to be taken further.

271. Mr Robinson's appeal is against the DC's finding of lack of professional objectivity and integrity. [redacted] have in turn filed a cross-appeal. They ask that the full complaint be upheld and that Mr Robinson be censured for his breach of Rule 45.

272. We deal first with Mr Robinson's appeal.

273. **Was there a breach of Rule 45?**

274. The DC finding that Mr Robinson had breached the Rule 45 requirements of objectivity and integrity is based on their view of the manner in which Mr Robinson is reported to have conducted himself in his meeting and dialogue with [redacted].

275. [redacted] acknowledges in his evidence:[81]

> *"...I argued the toss on every point. I wasn't prepared to give, was insisting that he look at what I provided as evidence of movement and the end of that one basically came down to one of us was lying."*

276. [redacted] engaged another engineer, [redacted] of [redacted] stated in his evidence[82]:

> *"We did employ another engineer afterwards who tried to phone Mr Robinson and had a very unpleasant phone call as he put it. Basically being accused of, well the direct quote is "I suffered the most verbal abuse over the phone by Graeme Robinson calling me unprofessional and typically not knowing the facts of the situation to comment on."*

277. On reviewing [redacted] email to [redacted] on the subject[83] it is apparent that this quote refers to a conversation that [redacted] had

[81] Transcript 573/730
[82] Transcript 574/730
[83] 167/197

with another client who had dealt with Mr Robinson. He did note that Mr Robinson was :

"...savage in his remarks about your husband's personal work..."

278. [redacted] of the EQC, who accompanied Mr Robinson on each visit to the [redacted] property, and who was also cross-examined at the hearing noted[84]:

"When Graeme carried out his inspection he mentioned the general construction techniques of the dwelling as an explanation around his observations/findings and not a criticism. He certainly did not suggest [redacted] was lying.

Although during these types of inspections where the customer believes their home has moved more that what is assessed the discussions can become quite heated, I believe Graeme while being assertive, was professional and courteous in his delivery of his findings."

279. From reviewing the evidence presented we take a different view from the DC and do not consider that Mr Robinson breached Rule 45.

280. In respect of the diary note we consider it to be a personal diary note provided to the IC by Mr Robinson at their suggestion, to enable the IC to have such information as was relevant to the complaints and related matters such as the scope of his contracts and briefs. The wording cited did not form part of any of Mr Robinson's two memoranda to his client, the EQC.

281. While therefore, Mr Robinson's manner might have been abrupt and judgmental, there is no evidence that his behaviour was such as to be considered a breach of Rule 45.

282. **Cross Appeal**

283. The cross appeal by [redacted] also asks us to reconsider the DC finding that there were no concerns regarding Mr Robinson's competence. In their appeal, [redacted] reiterate their concern that:

[84] 185/197

(a) Mr Robinson did not arrive at their property equipped to make an assessment;

(b) Mr Robinson based his decision that the slumping of their patio (terrace) was not caused by earthquake damage on limited factors and disregarded evidence of adjacent ground disturbance etc. These elements were contradicted by [redacted] report.

284. Mr Robinson had replied to these concerns in his written evidence[85]; viz

285. His first visit to the property on 6 September 2011, had not been scheduled that day (i.e. was therefore arranged at short notice) thus explaining his lack of preparedness.

286. He comments on [redacted] report, and acknowledges agreement with some of [redacted] assessments. However he also repeats that any earthquake-related damage to the terrace would in his view fall outside the scope of the Earthquake Commission Act and therefore is not subject to a claim under the Act. We note that [redacted] based on his report, would likely dispute that point. However, that is a matter for the Earthquake Commission and their legal staff to rule on: it is not relevant to this appeal.

287. We therefore find that in the matter of competence, there is no basis for any concern. Mr Robinson is qualified to undertake such assessments: his opinions may differ from those of another engineer in particular situations, but that does not mean that every time two engineers have a difference of opinion one of them is "right" and the other is "incompetent" or "negligent".

288. We dismiss the cross appeal.

[redacted] (Complaint # 239)

289. On 24 May 2011, Mr Robinson visited the [redacted] property at [redacted] He was accompanied by EQC Estimator, [redacted] Mr Robinson advised he had come to inspect the garage

[85] 196/197

and following an assessment, developed a memorandum outlining a repair strategy for costing purposes. The repair strategy included partial removal and replacement of some portions of the concrete blockwork walls and floor slab as shown in a sketch drawing. He also recommended scraping asphalt away from the southern end of the garage door opening to provide opening clearance.

290. Mr Robinson's hand-written memorandum of 24 May 2011 outlined a repair strategy which incorporated a sketch of a possible cross-section detail indicating the extent of the proposed remedial works on the garage.

291. On 10 December 2012, [redacted] complained to the RA about Mr Robinson, citing unprofessional conduct and breach of the Code of Ethics, in particular regarding: protection of life and safeguarding people (including the [redacted] family, Mr Robinson himself, and other EQC personnel); and Mr Robinson's manner.

292. The DC's decision sets out the background and evidence in its decision at paragraphs 5.1 through to 5.20.

293. With regard to Section 21(1)(c) of the CPEng Act, the DC considered that Mr Robinson clearly understood the issues associated with the engineering activities undertaken and they had no concerns regarding Mr Robinson's competency. The DC considered that Mr Robinson's diligence and care when giving advice about whether a building consent was required, did not fall below that reasonably expected of a chartered professional engineer when performing the engineering services he provided to [redacted]

294. The DC also found that Mr Robinson had not breached Rule 46 regarding competency, since while they considered his conduct fell short of the standards expected of a professional engineer, he did not exceed his competence when making assessment of options available for repair.

295. However, the DC found that Mr Robinson had contravened Rule 43 to safeguard health and safety, as noted in its findings in 6.10.

"6.10 The DC considered that Mr Robinson had contravened Rule 43. While he warned [redacted] of the risks associated with the damaged garage in response to her queries, he did not take reasonable steps to formally document and communicate the risks associated with the [redacted] property in his memorandum to EQC. This was a safety issue with the potential to harm people."

296. In evidence, it noted[86]:

" 5.4 Mr Robinson inspected the garage and in [redacted] words "...put himself at risk by pushing on the garage wall to see if it would fail ...",

297. and:

"5.5 Mr Robinson makes no comment on the safety of the garage or the risk to others in his memorandum of 24 May 2011."

298. Evidence was given that [redacted] was aware of the safety issues with the garage, and that she had raised the matter with Mr Robinson who as noted by the DC, warned [redacted] of the risks associated with the damaged garage in response to her queries. In testimony, Mr Robinson noted[87]:

"GR Yes, she raised her concerns about it. I made it clear that it was not safe to go in the area for children and definitely it was best to keep them right away and right and proper to keep them away from the area. But that hadn't changed as a result of my inspection. That's - it was obvious just to look at it. I would also comment further that I think [redacted] said it's still there."

299. The DC found Mr Robinson had breached Rule 43 because he did not take reasonable steps to formally document and communicate the risks associated with the [redacted] property in his memorandum to EQC.

300. The DC also found that Mr Robinson had breached Rule 45 to act with honesty, objectivity and integrity, as noted in its findings in 6.12 -6.19:

"6.12 In considering the matter of honesty, the DC notes Mr Robinson's denial of involvement with the demolition order contrasts with the portion of an EQC document [redacted] had obtained with the entry reading "EW repairs denied by G Robinson EQC July 2011. Garage needs to be knocked down."

"6.13 There is also the matter of Mr Robinson's diary note made on the day of his visit to the property on 24 May 2011 stating: "Minor Horizontal crack to one joint in house veneer.

[86] 5/237 and in complaint 144/237
[87] Transcript 680/730

Very minor internal damage". [redacted] is adamant that Mr Robinson did not enter the house sufficiently for him to make such a judgement on the house interior. [redacted] advised the DC that considerable repairs to the damaged interior of the house had been done as part of their overall claim."

"6.14 In responding to questions from the DC, Mr Robinson admitted that the "Very minor internal damage." was not his observation. Instead, it was an observation of [redacted] who [redacted] in response said had also not entered the house. Mr Robinson said that personally, he had at most stepped over the threshold of the house."

"6.15 The DC considers Mr Robinson has not acted honestly in respect of these aspects of the matter."

"6.16 On the matter of objectivity, Mr Robinson's diary note states: "Woman trains dogs. She gave us a very challenging time. Turned on tears, children etc. Minor horizontal crack to one joint in house veneer. Very minor internal damage. Nasty one."

"6.17 The DC considers this diary entry shows a lack of objectivity in Mr Robinson's handling of this matter for EQC."

"6.18 It is clear to the DC that Mr Robinson conveyed to [redacted] that the [redacted] would no longer be getting a new garage and that it would be repaired. In this, and as confirmed by [redacted] appearing for EQC, Mr Robinson was going beyond the brief of his engagement to EQC which demonstrates a lack of integrity."

"6.19 In considering the matters of honesty, objectivity and integrity, the DC finds that in the manner in which he handled his discussions with [redacted] and his investigations for EQC, Mr Robinson has breached Rule 45."

301. **Was there a breach of Rule 43?**

302. We do not accept that Mr Robinson needed to formally document the health and safety risk in his memorandum, the purpose of which was to provide a possible repair strategy for the garage. As noted in the letter from EQC of 9 December 2014 to the Chairman of CPEC:

"There are far reaching implications for all engineers if they must document and give formal written notice for every risk they might be expected to identify regardless of whether the risk was self-evident or within their brief or the capacity in which they were acting."

303. It is the panel's view that Mr Robinson took reasonable steps to safeguard health and safety by verbally addressing the safety risk and that this was sufficient in this instance. The risk was apparently well understood by those living in the property.

304. The panel finds that there was no breach of Rule 43.

305. **Was there a breach of Rule 45?**

306. We accept the evidence from EQC regarding the scope of Mr Robinson's brief to EQC. As noted by Mr Hamish Foote, Counsel from Chapman Tripp for EQC[88]:

> *"Graeme's role or EQC's role- the processes all begin with identifying the natural disaster damage, the earthquake damage. And from there Graeme's role is to recommend an appropriate repair strategy for that damage and as he said before in this case the sketch was their part of the strategy to enable* [redacted] *to cost it. That is Graeme's role as we've heard throughout the last two days. EQC then decides or forms its view as to what the damage is and what the appropriate repair strategy is. And we've heard over the last two days that sometimes, often, they take Graeme's recommended approach. But we've also heard in the last two days how sometimes they reach a different decision. They then decide what the cost of that approach is and once they've determined that they determine how to settle it."*

307. As [redacted] noted in his evidence[89]:

> *"Am I allowed to add anything to this conversation? During the - and its spelt out in the memorandum - during the assessment the urgent demolition order was discussed with Mr Robinson. Mr Robinson said that he could only supply a repair strategy. My wife asked will this meet the Building Code? Mr Robinson said "I can only do what I'm allowed to under the EQC Act" and then I believe things started to get a wee bit heated around that area."*

308. The DC gave weight to several documents which had been obtained via an Official Information Act request. One, referred to as a *"demolition order"* by [redacted] is in fact an EQC Emergency Work Site report[90] which noted *"Garage safety risk need to be pulled down"*. This document was dated May 2011, and we note that this same memorandum states: *"On hold 26/5/2011"* and *"Dispute with Owner"*. We note that Mr Robinson was unaware of this document until it was provided by [redacted] in the bundle of documents provided for the DC hearing as he stated in evidence[91]. Given this, we accept the appellant's submission that he could not countermand a document he had not seen.

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[88] Transcript 673/730
[89] Transcript 675/730
[90] 176/237
[91] page 678/730

309. The second document given weight by the DC[92], apparently a portion of an EQC "file note" provided by [redacted] as evidence, and undated, states:

"EW repairs denied by G Robinson EQC July 2011. Garage needs to be knocked down. EQC?"

310. Given that this is an unsigned, undated excerpt from another document, we are not persuaded that this is strong evidence that Mr Robinson made a decision not to demolish the garage.

311. We note that Mr Robinson's visit and memorandum date from 24 May 2011. In evidence we heard that Mr Robinson's job was to develop a repair strategy to enable EQC to compare the costs of replacement or repair of the garage. This accords with the content of his memorandum to EQC. The above referenced "file note"[93] may be what someone at EQC took from Robinson' memorandum - we do not know. We do not accept it is evidence of dishonesty by Mr Robinson. We would require far more probative evidence than this to make such a finding.

312. The further evidence of dishonesty cited by the DC relates to Mr Robinson's diary note. There is no dispute that Mr Robinson did not enter the house. The fact that Mr Robinson's diary note records "*Very minor internal damage*" is not evidence that Mr Robinson is dishonest. Mr Robinson states in evidence:[94]

"PMcC

In any event Mr Robinson you say that entry in your diary note is information you were given by somebody else rather than your own observation."

"GR

I can't enlighten further. I do confirm that I literally - if I stepped over the front door's threshold that was as far as I went into the house. So I obviously wasn't in a position to of assessed the interior."(sic)

313. Further, it is the panel's view that the personal diary entry in its entirety does not demonstrate a lack of objectivity or integrity. Mr

[92] 209/237
[93] 209/237
[94] Transcript 677-678/730

Robinson had made comments in his diary notes for his personal use, reference and record. He made his diary notes freely available to the IC at their suggestion, to enable that Committee to have such information as was relevant to the complaints and related matters such as the scope of his contracts and briefs. The wording cited did not form part of Mr Robinson memorandum to his client, the EQC.

314. While Mr Robinson's manner might have upset [redacted] we find there is insufficient evidence to support the findings of lack of objectivity and/or lack of integrity and/or lack of honesty in the course of his engineering activities in this instance.

315. The panel finds that there was no breach of Rule 45.

316. **Cross Appeal**

317. On February 2015, [redacted] lodged a cross-appeal regarding the decision of the DC that Mr Robinson had been found competent in relation to their complaint. Grounds cited included that evidence regarding building consent had not been addressed appropriately, that Mr Robinson's design memorandum showed incompetence in recommending asphalt removal as a repair strategy, and that Mr Robinson's repair sketch plan lacked measurements which would enable costing. They also considered that in failing to meet the requirements of the Health and Safety Act 1992, Mr Robinson has shown incompetence as he has not met legal requirements for undertaking business in New Zealand.

318. As to the allegation that Mr Robinson's sketch plan lacked measurements which would enable costing, we accept the evidence given that the sketch and memorandum was sufficient for EQC to scope and cost the garage repair option.[95] It was a sketch plan, not a detailed design for building consent.

[95] 178/237 and 186/237

319. Further, it is accepted that Mr Robinson is regarded as an expert in his engineering field. We have no reasons to disagree with the DC's finding that[96]:

"Mr Robinson clearly understood the issues associated with the engineering activities undertaken and they had no concerns regarding Mr Robinson's competency."

320. [redacted] also considered that in failing to meet the requirements of the Health and Safety Act 1992, Mr Robinson has shown incompetence as he has not met legal requirements for undertaking business in New Zealand. We have found that there was no breach of Rule 43. That being the case, we would also be satisfied that there was no breach of the Health and Safety Act 1992, though we record that there was no legal submission indicating how it had been breached.

321. We dismiss the cross appeal.

[redacted] (Complaint # 222)

322. On 8th May 2012, Mr Robinson visited the property of [redacted] where he inspected the solid timber Fraemohs pole house accompanied by [redacted] and [redacted] of EQC, and [redacted] who described himself to Mr Robinson as an engineer and Director of [redacted] The purpose of the visit was to reassess the building to enable the development of a repair strategy to bring the building back to pre-earthquake condition.

323. Mr Robinson's memorandum of 7th June 2012[97] noted slack tie rods, bowing of the north wall and vertical separation between some of the horizontal boards that form the upper floor internal and external walls. He considered some features of the original building construction had contributed to the condition of the house, and needed to be addressed. However he noted he could not entirely discount that there had been recent exacerbation of the bowing and separated boards by the earthquake and recommended that some allowance be made to carry

[96] Item 6.4 8/237
[97] 177/269

out some remedial works. He also suggested additional tie rods may be required, not as earthquake repair, but as deferred maintenance and remediation of pre-existing issues.

324. On 22 September 2012, [redacted] complained to the RA about Mr Robinson because of claimed lack of professional and moral standards in his conduct and an unprofessional and dishonest assessment of her house. This was accompanied by a formal complaint to EQC dated 21 September 2012. Also at issue was an offer to cash settle the claim for $8,500 for a historical deck leak which [redacted] attributed to Mr Robinson.

325. The DC's decision sets out the background and evidence in its decision at paragraphs 5.1 through to 5.27. It found that there were breaches of s21(1)(c), Rules 43, 45 and 46.

326. With regard to Section 21(1)(c) of the CPEng Act, the DC found that Mr Robinson had performed engineering services in a negligent manner, as noted in its findings in 6.3 to 6.10.

> *"6.3 The DC then considered the matter of negligence. 'Negligent' means to fall below the standard of care a reasonable person would exercise in the same circumstances. In this case, the DC considered whether there was a lack of diligence, skill or care a reasonable chartered professional engineer would exercise in performing the engineering services."*
>
> *"6.4 In the DC's view and for reasons set out above, Mr Robinson's diligence and care fell below that reasonably expected of a chartered professional engineer in performing the engineering services he provided to EQC in making determinations on [redacted] house. The specific matters in which Mr Robinson's performance did not meet the standard of care reasonably expected of a chartered professional engineer are set out below."*
>
> *"6.5 Mr Robinson failed to identify the fact that he had insufficient experience and knowledge of how Fraemohs houses are designed and therefore how they carry and transfer structural loads. His assumption that the tie rods perform a necessary structural function was incorrect. Rather, as stated by [redacted] the tie rods were originally introduced into New Zealand Fraemohs house construction when it was found that they eliminate the noise of creaking timbers when moving with changes in moisture and temperature. In making engineering assessments in this area of his insufficient experience and expertise levels, Mr Robinson failed to exercise due care and diligence in contributing to the determination on [redacted] house."*

"6.6 Furthermore, the DC considered that it was reasonable to expect that a chartered professional engineer would call for further expert advice from an engineer or builder suitably experienced in the design and/or construction of a unique building system such as Fraemohs houses, prior to making his own engineering determinations."

327. The DC found that Mr Robinson had breached Rule 43 to take reasonable steps to safeguard health and safety, as noted in its findings in 6.13 -6.14:

"6.13 The DC considered that Mr Robinson had contravened Rule 43. He did not recognise, document nor communicate the risks associated with the [redacted] property. This was a significant safety issue with the potential to harm people."

"6.14 Both [redacted] Engineers and [redacted] memorandums state clearly that the house is unsafe and needed urgent attention to ensure stability of the north bowed wall, which supports the floor above. The DC finds Mr Robinson's failure to identify these matters was serious."

328. The DC found that Mr Robinson had breached Rule 45 to act honestly and with integrity, as noted in its findings in 6.16 -6.18:

"6.16 The DC found evidence that Mr Robinson breached Rule 45.

"6.17 Mr Robinson suggested a "cash settlement by EQC" on the earthquake damage repairs "due to a deck leak". This is evidenced in both his personal diary note dated 8 May 2012 ("Can cash settle. Deck leaks"), and the EQC Hub file note authored by [redacted] dated 9 May 2012 ("Graeme concluded the best strategy is to cash settle this claim based on a weather tightness issue with the roof deck.").

"6.18 Both EQC employees and Mr Robinson had on several occasions stated unequivocally that Mr Robinson is not involved in costings, settlements nor financial considerations of any claims. The above discussions by Mr Robinson in connection with "cash settlement" are in direct conflict with this statement, and accordingly lack objectivity and integrity in the course of his engineering activities."

329. With regard to Rule 46, the DC found that Mr Robinson had acted outside his area of competency, as noted in its findings in 6.1 and 6.2.

"6.1 In the matter of competence, the DC considered that Mr Robinson, in considering and forming his determining opinion on the engineering performance of the Fraemohs house (which is a uniquely designed housing system) had ventured into an engineering area where he has insufficient expertise and/or experience with which to make engineering assessments relating to this type of house.

6.2 The DC found that Mr Robinson had acted outside his area of competence in this respect in making his determination of the cause of the structural deficiency in Ms Gwynne's home when he had limited experience in Fraemohs houses.

330. This finding was also reflected in paragraph 6.20 of the decision where the DC found:

"6.20 In this respect, the DC finds that when Mr Robinson made his inspection of [redacted] *property and prepared his memorandum, he was undertaking an engineering activity that was beyond his competence and accordingly breached the requirements of Rule 46."*

331. **Was there a breach of Rule 46 in acting outside his area of competence?**

332. The DC's finding that Mr Robinson had acted outside his area of competence was based on their judgement that he had no experience on Fraemohs houses and therefore should not have made engineering assessments relating to [redacted] house. During the hearing the DC received no evidence as to Mr Robinson's knowledge and experience of Fraemohs houses and made no inquiry of Mr Robinson as to his level of expertise.

333. Mr Robinson's supplemental brief of evidence outlined that he had rented a Fraemohs house during the summer of 1997, and had inspected the structure and observed its general features of construction, which he noted was similar to those in Lockwood and Initial Homes modular buildings. Further, he outlined the structural design work he had undertaken for Lockwood houses, and noted he acted as Consulting Engineer to the Hawkes Bay franchisee for [redacted] between 1980 and 1983, and undertook structural design of two Bush Haven dwellings (log buildings) in 1983. He advised that he had attended and spoken at a national conference and introduced seismic design provisions for this modular building system, which was used for residential buildings and a two story office block.

334. The Chief Executive of EQC, in his letter dated 9 December 2014, noted that Mr Robinson had considerable experience in Fraemohs buildings including:

"reviewing Fraemohs design data, including a 1982 Design Certificate by a Registered Engineer, which confirms that the earthquake design was to NZS 4203: 1976."

and:

"..had previously inspected Fraemohs home with EQC Estimators who are builders, including [redacted] *(EQC Hub Manager/Senior Estimator), who had built Lockwood and Interlock modular buildings since 1985."*

335. Evidence was also given that Mr Robinson was accompanied during the inspection of the [redacted] house by two EQC Estimators[98] (Licensed Building Practitioners) and the Fraemohs Project Manager, [redacted] who had advised him he was a qualified engineer. [redacted] is also a Director and Shareholder of [redacted] Both [redacted] and Mr Robinson, in evidence, refer to discussions they held on site about possible repair strategies. Therefore he was not solely reliant on his own knowledge when reporting on the house.

336. We also note that the DC referred to a report by [redacted] consulting engineers, and contrasted the findings within this to Mr Robinson's memorandum. However [redacted] in his report emphasised that he had little experience with this type of construction and recommended that further advice be sought from a Fraemohs expert. Subsequently [redacted] contacted Mr Robinson, and there was evidence that [redacted] had some agreement with the approach proposed by Mr Robinson[99].

337. Mr Robinson, in his specific response on [redacted] complaint states also[100]:

"To the extent that the opinions of the three engineers differ from mine, I respect them. I note that they differ between themselves, not that that makes their memorandums (or mine for that matter) any more or less valid. Their briefs differ from mine because my memorandum is addressed to EQC and I have regard for the relevant provisions in the Earthquake Commission Act."

338. As we have noted earlier, Mr Robinson is regarded as an expert in assessing earthquake damage to properties. In this particular instance,

[98] 262/269
[99] 91/269
[100] 241/269 para 59

we find that Mr Robinson clearly understood the issues associated with the assessment he was asked to make.

339. Given this evidence we do not accept that Mr Robinson was acting outside his competence in proposing a repair strategy. We find that there was no breach of Rule 46.

340. **Was there a breach of s21(1)(c)?**

341. As noted previously in this decision we do not believe that Mr Robinson lacked the competence to make assessment of [redacted] Fraemohs house, particularly since [redacted] was present and contributed to the inspection. Therefore, we do not accept that he failed to exercise due care and diligence in his contribution to the determination on [redacted] house. It follows that this cannot be regarded as a deficiency in Mr Robinson's conduct and therefore not a matter to be considered in an assessment whether Mr Robinson had performed engineering services in an incompetent or negligent manner.

342. Given this evidence we do not accept that Mr Robinson was acting in a negligent manner in proposing a repair strategy.

343. **Was there a breach of Rule 43?**

344. Counsel for the RA submitted that a reasonable step to safeguard the health and safety of [redacted] would have been for Mr Robinson to mention stability issues in his memorandum as other professionals had done. Three key matters have been brought to our attention in this matter.

345. EQC, in its letter to the Chair of CPEC dated 9 December 2014 notes that:

"Mr Robinson was contracted to provide technical advice to EQC on a claim by claim basis as requested by EQC's estimators. Mr Robinson's brief was often limited."

346. In this instance, Mr Robinson was asked to assess the earthquake damage to [redacted] house.

347. However Mr Robinson did note some risk factors in the building. In his memorandum to EQC dated 7 June 2012, Mr Robinson states:

"It is very evident that there are features of the original building construction that need to be addressed.....it is obvious that the existing rods are not all properly screwed tight."

348. Secondly, Mr Robinson went on to note:

"It is likely that some additional tie rods may be required, as well as an allowance being made to tighten the existing rods that are slack. This work is not work required to remedy recent earthquake damage, but rather is work that might be considered to be deferred maintenance and remediation of existing issues."

349. The panel considers that that given the context of his brief, this is adequate identification of the risk factors of the building.

350. Lastly, in its decision, the DC referenced

'[redacted] Engineers and [redacted] memorandums state clearly that the house is unsafe and needed urgent attention to ensure stability of the north bowed wall, which supports the floor above."

351. Given our finding that Mr Robinson had experience with Fraemohs buildings and had [redacted] with him during the inspection, we do not agree with the reliance put on [redacted] memorandum regarding safety issues as [redacted] had noted in his statement[101]:

"As discussed on site, I was unaware that I was inspecting a Fraemohs building and I have little experience with this type of construction." .

352. Irrespective of this, our consideration is that Mr Robinson adequately discharged his obligations in identifying structural risk factors of the building in his memorandum, given the context of his brief and that more detailed work would be done by others implementing any repair strategy. We understand that the house is still standing and has not suffered any kind of catastrophic failure which also assists in putting matters into perspective.

353. The panel finds that there was no breach of Rule 43.

354. **Was there a breach of Rule 45?**

[101] (85/269, Letter from [redacted] dated 25 January, 2013, second paragraph)

355. The DC referenced in 6.18 that they had received evidence that Mr Robinson is not involved in costings, settlements nor financial consideration of any claims. However they preferred to put weight on their interpretation of a personal diary note and an EQC file note.

356. In evidence, the DC heard from Hamish Foote (590/730, DC Hearings transcript)

"Is it okay if I briefly address the Committee, as counsel for EQC, and I confess not familiar with the specifics of [redacted] *claim. Listening to her today though and with every empathy for her position, I think that she is conflating two issues. The first is, what is the earthquake damage, or in the language of the Act, the natural disaster damage? So that is a case of identifying the damage that is caused by the earthquake as distinct from damage that might be pre-existing, and then having identified the earthquake damage, assessing what the appropriate repair strategy for that is, to repair it to the standard in the Act, and then it is a process for EQC to cost that."*

"The second issue, which is the one that I think [redacted] *conflates with the first, is how EQC should settle that claim. And EQC has two options. It can cash settle, or it can repair or reinstate, which is* [redacted] *the Canterbury Home Repair Programme. Whether EQC decides to cash settle, or to manage the repair, through EQR, is entirely its discretion. It has some general rules. Originally under $10,000, and then under $15,000 it cash settled, but also, it cash settles some other properties where it thinks that it's appropriate to do so. One of those in a few instances is where it considers that there are weathertight risk factors. Now, to the extent that the leak is current, or past, is perhaps neither here nor there, because it's not necessarily constructive or positive for EQC to get into a situation where it is in a debate with a customer as to whether those risk factors exist. The point is, it is EQC's discretion."*

357. Following this, the DC heard from [redacted] (592/730, DC Hearings transcript):

".....It probably should be me on trial in that it was my call to class the house with the weather tightness issue and I'll just read a file note I put on CMS. I'm not sure that everyone here has it. It's dated the 24th of April 2012, which is prior to when Graeme Robinson addressed the site. And it reads: "Following a call from [redacted] *from EQC yesterday, I visited the property with the customer,* [redacted] *and estimator* [redacted] *We observed some movement in the Fraemohs designed home with a possible, which is possibly EQ-related."*

"We also noted the dwelling is suffering from lack of maintenance to the exterior with evidence of water ingress from the butynol clad deck within the roof space on the second level. The repair strategy suggested by Fraemohs Homes and [ ], the customer's engineers, it is considerably more involved than either EQC's scope of works or what I would consider necessary to bring the building back to a pre-earthquake condition. I have spoken to

Mr Robinson and we will endeavour to complete a reassessment together next week. A message to this effect was left on the customer's answerphone." So, in actual fact, what I am saying in that is that we did an inspection approximately 2 weeks prior to Graeme Robinson attending the site, and the decision regarding the weather tightness and other issues had already been made at that time."

358. The conclusion made by the DC that Mr Robinson's diary note *"Can cash settle"* was evidence that he made the settlement decision, we consider to be unsubstantiated. We do not agree. Just because someone writes *"Can cash settle"* doesn't mean that the decision was made by Mr Robinson, or that he had authority or lacked objectivity. Further, given [redacted] evidence that the decision was made prior to Mr Robinson's inspection, we do not accept the DC's logic in its decision that Mr Robinson lacked objectivity and integrity in the course of his engineering activities.

359. We also observe that there should be no prohibition on Mr Robinson discussing such matters with his client, EQC, in any event. While Mr Robinson's role was to propose a remedial strategy, it would not be inappropriate for him to advise his client if that strategy was patently going to cost below the threshold of $100,000. That does not mean he made the decision, or that his evidence that he did not make the decision was somehow called into question.

360. The panel finds that there was no breach of Rule 45.

361. **Conclusion**

362. The Appeal Panel therefore determines that the appeals are successful in their entirety.

363. The decisions of the DC are quashed in their entirety and replaced with decisions that the complaints are dismissed.

364. **Publication**

365. This decision is being made available to all parties without any names being redacted.

366. We observe that the original DC hearings were held in public with members of the press present. We are also aware that Mr Robinson has been named in newspaper articles. The Council was required by regulation to hold the appeal in private.

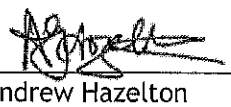
367. It is our view that our decision should be published. The only consideration is whether names should be redacted from this.

368. We provide all parties 7 days in which to make any submissions to us that they wish to make as to whether publication should occur, and if so whether names should be redacted.

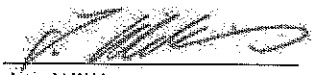
Costs

369. Our initial view is that costs should lie where they fall. We are prepared to hear submissions however which should be filed within 14 days of today.

Dated this 10 day of July 2015



Andrew Hazelton
Solicitor
Chair



Jon Williams
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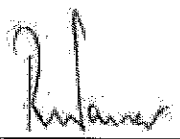

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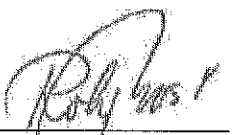

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