

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

Appeal 3/21

AND

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

Between

Mr A
Appellant

And

Mr B
CPEng, CMEngNZ, IntPE(NZ)
Respondent

Decision of the Chartered Professional Engineers Council
Dated 28 June 2021

1. Mr A has appealed a decision, made by an Investigating Committee to dismiss his complaint about Mr B [BOD 561-583].
2. The panel has been provided with a paginated Bundle of Documents file (BOD) held by the Registration Authority (RA) in relation to the case. References to specific documents within this file are annotated “[BOD nn]”.

The Legislation

3. The right of appeal is contained in s35 of the Chartered Professional Engineers Act 2002 ("the Act") and s37 of the Act sets out the how the hearing is to be conducted, including the scope of determinations that the Council is entitled to make.
4. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules") and were enacted pursuant to s40 of the Act.
5. The Chartered Professional Engineers of New Zealand (Appeals) regulations 2002 ("the Regulations") set out the requirements pertaining, amongst other matters, to the hearing and deciding of appeals.
6. Appeals to the Council are by way of rehearing (s37(2) of the Act). The appeal panel is entitled to confirm, vary or reverse a decision (s37(5) (a)) and may make any decision that could have been made by the decision authority (s37(5) (c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, the panel is entitled to take a different view from the RA, but the appellant carries the burden of satisfying the panel that it should do so.
7. s21 of the Act states:

“21 Grounds for discipline of chartered professional engineers

1. *The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in s22 if it is satisfied that a chartered professional engineer*

- (a) *Has been convicted, whether before or after he or she became registered, by any Court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion the commission of the offence reflects adversely on the person's fitness to practice engineering; or*
- (b) *Has breached the code of ethics contained in the rules; or*
- (c) *Has performed engineering services in a negligent or incompetent manner; or*
- (d) *Has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -*
 - (i) *Either orally or in writing, made any declaration or representation knowing it to be false and misleading in a material particular; or*
 - (ii) *Produced to the authority or made use of any document knowing it to contain a declaration or representation referred to in sub paragraph (i); or*
 - (iii) *Produced to the Authority or made use of any document knowing that it was not genuine."*

8. The facts and evidence clearly demonstrate that the criteria established under sections 21(1)(a), and (d) of the Act do not apply in this case. The panel is therefore tasked with considering whether there is a prima facie case that Mr B:
- has breached an aspect of the code of ethical conduct set out in the rules 42(A)-42(I) as amended in 2016 (s21(1)(b) of the Act); and/or
 - has performed engineering services in a negligent or incompetent manner (s21(1)(c) of the Act).

Correspondence and submissions

9. Key correspondence, communications and submissions relating to this appeal are listed Schedule 1.

Grounds of appeal and outcome sought

10. The grounds for appeal as cited by Mr A in his notice of appeal dated 15 March 2021 are:

Ground of appeal 1 – *“Mr B did not consult my self regarding the design of an unworkable seismic buffer over my property & in contact with my building, in any manner & trespassed over my roof. This has been acknowledged by Mr B.”*

Ground of appeal 2 – *“Mr B’s email 24/1/19 expressing offensive, religious, extremely abusive & disparaging comments is extremely disturbing. A failure to treat people with respect & courtesy.”*

Ground of appeal 3 – *“Mr B’s repair design, “Building Consent Exemption 21 November 2017”, for the North wall Location C was negligent.”*

Ground of appeal 4 – *“Mr B’s report 20/3/19 was negligent & in parts a personal attack on myself. His recommendation to leave the walls touching, was in breach with the Building Act thus negligent.”*

Ground of appeal 5 – *“Mr B’s ongoing comments regarding the common party wall were incorrect & negligent.”*

Ground of appeal 6 – *“Mr B’s statements to the investigating committee include a number of truth twisting & false statements & acted without honesty.”*

11. The outcome sought from the appeal was *“acknowledgment the Engineer, Mr B acted negligently & without honesty, objectivity & integrity.”*
12. The panel notes that the outcomes which it can determine under the appeal are as set down in 6 above.

The original complaint

13. In February 2019 Mr A had raised concerns with Engineering New Zealand about Mr B and Mr D in relation to engineering services provided to the owner of a commercial building in Christchurch in the aftermath of the Canterbury earthquakes. [BOD 5-11]
14. Mr A's complaint was that Mr B and Mr D acted negligently in providing the services and that they had engaged with him unprofessionally during the project.
15. Mr D was not a Chartered Professional Engineer at that time and therefore the council has no jurisdiction with regard to Mr D's conduct.

Decision being appealed and evidence considered

16. The decision under appeal is the decision of the Investigating Committee to dismiss Mr A's complaint about Mr B. The complaint was lodged on 28 February, 2019 [BOD 5-11]
17. Under s15 of the Regulations the Council may receive any evidence that the Registration Authority would have been entitled to receive on the decision being appealed.
18. The evidence considered by the panel in arriving at this decision included:
 - i. The Bundle of Documents [BOD 1-583]
 - ii. Submission from Mr A received 16 April 2021.
 - iii. Submission on behalf of Mr B received 4 May 2021
 - iv. Submission from the RA received 4 May 2021
19. No submission in response was received from Mr A by the due date of 11 May 2021.

20. A subsequent request from Mr A to file a late submission was declined, on the grounds that the opportunity and the associated deadline for a submission in response had been clearly identified in the panel principal's letter dated 29 March 2021, and that consent for such extension was not given by the Respondent.

Hearing

21. The parties agreed that the appeal would be held "on the papers".
22. The panel met by "Zoom" on 16 June 2021 and 22 June 2021 and since the latter date have been interacting via email to prepare the appeal response and decision.

Discussion and Findings

23. Mr A owns a commercial building at Location E, Christchurch.
24. Mr B provided engineering services in respect of a commercial building at Location F, Christchurch, that was owned by Company G.
25. The properties referred to in 23 and 24 above share a rear boundary and both properties, like others in the vicinity, had suffered damage in the Canterbury earthquake sequence.
26. Mr B's firm was engaged initially by Company H to provide engineering services in relation to relevelling of the Location F building [BOD 161] and was later engaged by Ms I, of Company G, to carry out a Detailed Engineering Evaluation (DEE) for strengthening works at the Location F property.
27. There was no direct or contractual relationship between Mr A and Mr B.
28. There is no evidence of any complaint being laid against Mr B by those for whom he was contracted to provide engineering services.

29. The stated grounds of appeal, in Mr A's notice of appeal, have been used as the framework against which to assess if the evidence presented is sufficient to satisfy the panel that it should overturn the Investigating Committee's decision and uphold his appeal.

30. The panel has addressed the grounds of appeal as follows:

Ground of appeal 1:

"Mr B did not consult my self regarding the design of an unworkable seismic buffer over my property & in contact with my building, in any manner & trespassed over my roof. This has been acknowledged by Mr B."

31. Whether or not the seismic buffer was unworkable is addressed under grounds 3 and 4.

32. As noted in 26 and 27 above no contractual relationship or obligation existed between Mr B and Mr A and the design services provided by Mr B were for others, namely Company H and Company G.

33. The panel concludes that Mr B personally had no obligation to consult with Mr A regarding the design services he was providing, that responsibility lying with others by whom he was engaged.

34. Notwithstanding the observation in 33 above, because of clear common interest between the two adjacent property owners (Mr A and Company G), Mr B could have facilitated consultations which may have avoided some of the difficulties that are evident in the documentation, but he had no obligation to do so.

35. That Mr B accessed the roof of Mr A's building is not in dispute. [BOD 163]

36. In an email to Mr A dated 13 November 2018 [BOD 104] Mr B wrote *"...I did climb over the parapet and walk along the internal gutter to carry out closer inspection and key measurements. In doing so I did not stand on the roof itself as there was no need to do so..... there was a loose flap of butanol over a*

return wall which I did uplift to take measurements. I do appreciate that I did not have your consent to walk on your building and apologies [sic] for that. However it was the necessity of the moment, we had hired the cherry picker with the intent of accessing the Location F property only, I was up there, observed the damage but in order to accurately measure the remaining seismic gap it was necessary to climb over the parapet and carefully walk along the concealed gutter to do so.”

37. Further, in a letter to the RA dated 26 April 2019 Mr B observed [BOD 166] that he was not *“at all clear that that [sic] I have committed the offence of trespass under the Trespass Act. I am not a lawyer but the fact of the flashing in effect connecting the two buildings suggests a licence to inspect which is all I did. However to the extent that it was a trespass I have apologised.”*
38. No evidence has been produced to suggest that in accessing the roof of Mr A’s building, Mr B had other than reasonable intent, that being to inspect and measure the flashing area of adjoining buildings.
39. At worst, Mr B might be seen to have shown a lapse in courtesy through having not informed or consulted with Mr A prior to or immediately after accessing the roof.
40. The panel considers that this ground has little merit and that the evidence presented does not support any likelihood that disciplinary action would result if the matter were referred to a disciplinary committee.

Ground of appeal 2:

“Mr B’s email 24/1/19 expressing offensive, religious, extremely abusive & disparaging comments is extremely disturbing. A failure to treat people with respect & courtesy.”

41. The panel assumes that the correspondence referred to under Mr A’s second ground of appeal is Mr B’s emailed letter dated 24 January 2019. [BOD 107]

42. In item 7 of his submission dated 4 May 2021, counsel for Mr B has asserted *“the fact that someone can claim to be offended by the comments of another does not make those comments offensive while the way in which the respondent expressed himself, including reference to his deeply held religious beliefs, might not be the way most would do so in the circumstances, objectively considered his email of 24 January 2019 is not such as to require further disciplinary processes beyond the investigation already completed”*.
43. As observed by the Investigating Committee [BOD 582] the letter was sent *“in the context of almost a two-year dispute relating to the project, and that Mr B said he was under considerable stress when he wrote the letter.”*
44. It is accepted that some of Mr B’s words, to which Mr A has taken exception, reflect an ongoing stressful situation and a degree of frustration.
45. There is no evidence to suggest that any of Mr B’s comments were backed by negative intent, but the panel considers Mr B’s choice of words could have been better.
46. The panel agrees with the finding of the Investigating Committee [BOD 582] that *“Mr B should have remained professional in his responses”*.
47. This ground is not considered to have been established as the basis for referral to a disciplinary committee, with a reasonable prospect of a disciplinary ruling against Mr B.

Ground of appeal 3:

“Mr B’s repair design, “Building Consent Exemption 21 November 2017”, for the North wall Location C was negligent.”

Ground of Appeal 4:

“Mr B’s report 20/3/19 was negligent & in parts a personal attack on myself. His recommendation to leave the walls touching, was in breach with the Building Act thus negligent.”

48. As grounds 3 and 4 overlap, the panel has elected to consider them together.
49. In the last paragraph of page 1 of his 16 April 2021 submission, Mr A notes *“The Building Act 2004 Reprint 1 December 2020 sub part 4 Outlines an Engineers responsibilities under the act & clearly states that an Engineer cannot give a recommendation which fails to comply with the Building Act. Mr B’s recommendation to leave the buildings touching is clearly in breach of the Building Act, thus he is negligent.”*
50. In the appendix to his submission, Mr A included an extract from the Building Act, Part1, Subpart 4, pertaining to the designer which reads as follows:

14D Responsibilities of designer

- (1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.
 - (2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code if the building work were properly completed in accordance with those plans and specifications or that advice.
51. As is evident in 50 above, Mr A’s quoted description referring to provisions of 14D, Part 1, Subpart 4 of the Building Act in 49 above, is an overstatement of the Act’s provisions.
52. In paragraph 4, page 3 of his submission of 16 April 2021, Mr A refers to the Christchurch City Council consent approval [BOD 217], highlighting a quote from that page *“All building work must comply with the Building Act, building code,...”*.
53. In his following paragraph 5, Mr A refers to Mr B’s letter of 19 March 2018, [BOD 210-211] quoting *“Mr B declares “I believe on reasonable grounds [that] the*

*revelling [sic] works have been completed in accordance with good practice".
The north wall was not levelled & the in contact buildings were not separated".*

54. That the walls along parts of their length remain in contact is not in dispute.
55. No evidence has been presented to support Mr A's assertion that leaving the buildings touching is a breach of the Building Act.
56. Section 6 of the *"Structural Engineering Report – Boundary & Seismic Separation"* report by Enform [BOD 520] states *"...adequate separation between the buildings is required to avoid potential damage due to "pounding" during an earthquake. This is a requirement of the NZ Buildings Regulations 1992, clause B1 – Structure, which is attached in full as Appendix A for ease of reference. Regarding seismic separation in particular, parts of performance clause B1.3.3 are of note, as follows: B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework including:*
 - (f) Earthquake,*
 - (j) Impact,*
 - (o) Adverse effects due to insufficient separation from other buildings...."*
57. The statements referred to in 56 above would likely be widely agreed with as sound practice in the context of new buildings, but the buildings in question already exist and for a number of reasons have walls that are now in contact, leaving scope for engineering judgment to be applied with consideration being given to code requirements, interruption of use of the buildings and cost, amongst other factors.
58. B1.3.3 referred to in 56 requires amongst other factors that *"account be taken of adverse effects due to insufficient separation from other buildings"*, but the provision does not preclude a solution with insufficient or no gap.

59. It is clear to the panel from the various reports and correspondence of Mr B, that he has taken account of the effect of inadequate separation in the remedial design and that the installation of the buffer is a plausible measure in that regard.
60. With regard to 57 above, Mr B has demonstrated, in his February 2018 Detailed Engineering Evaluation [BOD 21], and again in his letter of 20 March 2019 [BOD 97] a sound understanding of the situation regarding the gap or lack thereof and has applied appropriate engineering judgment in considering the alternatives available and arriving at a solution, that in the view of the panel represents no evidence of negligence.
61. Furthermore, Mr B's decision not to endeavour to jack the buildings apart where they were in contact, in order to install the buffer along the full length of wall, was, in the panel's view, a reasoned and plausible solution, with no evidence of negligence.
62. The panel has seen no evidence that Mr B's report of 20 March 2019 was in parts a personal attack as Mr A has alleged in ground 4.
63. The panel considers that grounds 3 and 4 have no merit.

Ground of Appeal 5:

"Mr B's ongoing comments regarding the common party wall were incorrect & negligent."

64. Mr A addresses his concerns regarding the matter of the "*common party wall*" in Item B on page two of his submission, pointing out that Mr B was negligent in his comment and not qualified to comment on surveying matters.
65. As submitted by Mr B's counsel, Mr B's comment was based on his experience [BOD 165] with common party walls and there is no suggestion that he was trying to make a determination on a legal matter.

66. Mr B acknowledged in his response to Mr A's concerns [BOD 165] his acceptance that the definition of the wall *"is disputed and is an issue to be determined by survey"*.
67. Mr B's references to the common party wall / common boundary wall appear to the panel to be of little consequence, having nothing to do with the engineering services that he was contracted to provide for Mainmark and for Cooper Developments.
68. The panel finds that this ground has no merit.

Ground of appeal 6:

"Mr B's statements to the investigating committee include a number of truth twisting & false statements & acted without honesty."

69. In his submission, Mr A has not provided any evidence in support of this ground.
70. The panel agrees with Mr B's counsel's contention that simply restating the ground or allegation does not represent evidence that could prove the ground.
71. The panel concludes that this ground is not proven.

Outcome of Appeal

72. The panel members have reviewed all six grounds of appeal.
73. Under grounds 1 and 2 the panel found insufficient evidence to warrant referral to a disciplinary committee, with any likelihood of a case being proven against Mr B.
74. Grounds 3, 4, 5 and 6 were considered as either lacking merit or not proven.
75. The panel's decision is to dismiss the appeal under rule 57(ba) of the Chartered Professional Engineers Rules (No 2) 2002, on the grounds that any alleged misconduct is insufficiently grave to warrant further investigation.

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

Costs

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

Dated 28 June 2021

Signed by the Appeal Panel



Chris J Harrison (Principal)



Manjit Devgun (Member)



Alan A Winwood (Member)

Schedule 1

Key interactions, correspondence, submissions and communications in this Appeal

- (a) Paginated bundle of documents provided by the RA on 25 March 2021 via OneDrive link, containing:
 - i. The complaint about Mr B dated 28 February 2019 [BOD 5-108]
 - ii. The complaint in respect of Mr C dated 23 July 2019 (outside of jurisdiction of CPEC) [BOD 109-146]
 - iii. Engineering NZ correspondence with Mr A - various dates [BOD 147-160]
 - iv. Response by CA to complaint dated 26 April 2019 [BOD 161-188]
 - v. Response by Mr C (outside of jurisdiction for CPEC) dated 18 September 2019 [BOD 189-195]
 - vi. Adjudicator's decision dated 13 November 2019 [BOD 196-208]
 - vii. Building consent documentation from CCC dated 9 May 2019 [BOD 209-464]
 - viii. Further info provided to investigating committee [BOD 465-558]
 - ix. Letters to the parties dated 25 February 2021 [BOD 559-560]
 - x. Investigating committee's decision dated 23 February 2021 [BOD561-583] End
- (b) Notice of Appeal dated 15 March 2021
- (c) Letter from CPEC chair regarding panel composition, appeal process, submission deadlines and communications, dated 29 March 2021
- (d) Appeal submission from Mr A dated 16 April 2021
- (e) Submission on behalf of Mr B by counsel Mr J dated 4 May 2021.

- (f) RA Submission dated 4 May 2021
- (g) Email correspondence regarding an unsuccessful request by Mr A for extension of time to submit in response dated 14-17 May 2021