

**APPEAL NUMBER 15/14**

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

**AND**

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

**Between**

Mr T CPEng MIPENZ IntPE(NZ)

**Appellant**

**And**

A C

**Respondent**

## Decision of the Chartered Professional Engineers Council dated 26 March 2015

---

### The Appeal

1. This is an appeal to the Chartered Professional Engineers Council (“the Council”) under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”). The appeal is of a decision of Disciplinary Committee (DC) dated 17 October 2014.
2. The DC found that there were grounds for discipline of Mr T under section 21 of the Act. The DC imposed the following penalties on Mr T in line with section 22 of the Act.
  - a. That the registration of Mr T be removed forthwith and that he may not reapply for registration before an expiry period of 3 years from the date of the decision..
  - b. That Mr T pays costs and expenses of, and incidental to the inquiry of \$8,000.
  - c. That the decision and Mr T’s name and the nature of the breach be published in the official journal and website of the Institute of Professional Engineers New Zealand (IPENZ).
3. The Council received a Notice of Appeal dated 17 November 2014. Mr T wrote to the Registration Authority (RA) on 14 November 2014 indicating that he was appealing the decision. Whilst the appeal had not reached the Council within the 28 day period allowed under section 35(3) of the Act. The Council has accepted that the appeal has been received in time and should be heard without the request for a waiver.
4. The Council acknowledged receipt of the Appeal in a letter dated 24 November 2014. The letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. Both parties were offered the opportunity for a hearing to be held in person if required. Both parties agreed to the matter being considered on the papers.
5. At a meeting of the Council on 12 December 2014, the Council appointed an Appeal Panel (“the Panel”) comprising Mr Jon Williams as Principal, Mr Roly Frost and Mr Anthony Wilson as members.
6. Mr T provided a further submission dated 8 December 2014 and an updated submission on 10 December 2014. A C provided their submission dated 16 December 2014. The RA provided their submission on 18 December 2014. Mr T provided his replies to the submissions dated 1 January 2015 (reply to RA) and 7 January 2015 (reply to A C).
7. The Panel considered the appeal on 5 March 2015.

## Background

8. The Appeal relates to Mr T's actions in providing structural design, construction observation and certification (provision of design (PS1), design review (PS2) and construction review (PS4) producer statements).
9. In bringing the complaint A C cited 6 projects that highlighted specific concerns they held relating to Mr T's work.
10. The A C complaint, the Investigating and Disciplinary Committee reports detail the specific aspects of the individual projects that are of concern.
11. Mr T, in his 10 December 2014 submission acknowledges that he has made mistakes in his inspections. He notes however, that for the 6 projects they have no significant structural issues except that his inspection records were poor and not up to the Council's expectations.
12. Mr T has addressed each of the items raised by Council. There is disagreement between Mr T and A C on both the accuracy of some of the statements made and the structural significance of some of the issues raised. Most issues raised had been rectified on site prior to this complaint being processed.

## Notice of Appeal

13. The basis of the Appeal is not clearly stated. From the information provided by Mr T the Panel considers these to be his key concerns:
  - a. Mr T has undertaken many such designs over the past 35 years and considers that there has been no problems with his work noted to date.
  - b. Projects have been granted Code Compliance Certificates (CCC) so must be acceptable.
  - c. A C personnel involved in the complaint do not understand the construction monitoring (CM) regime that Mr T operates under.
  - d. Specific facts relating to example cases are disputed.
  - e. The severity of the penalties compared to previously reported cases.

## Process

14. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee but the appellant carries the burden of satisfying us that we should do so.
15. In hearing the Appeal, the Panel has considered whether the DC's decision that there are grounds for discipline and the penalties imposed are correct.
16. The Panel is only considering the specific matters that have been appealed. Other documentation provided by the RA has been read and referenced in reaching the Panel's findings.

## Commentary

17. The IC and DC have both examined the individual cases cited in A C's complaint. Mr T has provided his interpretation of these in his hand marked up commentary of the DC report and in his Amended Report – Council's Complaint dated 10 December 2014.
18. The Panel has reviewed the issues raised on each project referenced. Rather than providing commentary on each project, the Panel provides an holistic view of the regime that Mr T is working within and his performance and actions.
19. The Panel's focus is on Mr T's actions and how they benchmark against the standards defined within the Act and the Rules.

## Producer Statements and Construction Monitoring

20. Building Consent Authorities (BCA's) like A C, have a two tiered approach to confirming that the design and construction of buildings complies with the relevant parts of the New Zealand Building Code and associated Standards:
  - a. Their quality control process and checklists including office based review and site inspections.
  - b. The certification provided by the designers and constructors of the buildings.
21. The Licensed Building Practitioner (LBP) scheme. This was introduced in November 2007. From 1 March 2012, building practitioners must be licensed in order to carry out or supervise work on homes and small-medium sized apartment buildings that is critical to the integrity of the building.
22. Producer Statement Scheme. BCA's request Producer Statements from the designers and constructors of buildings. These statements are signed by appropriately qualified people and confirm that:
  - i. PS1 Design and PS2 Design Review – That if the building is constructed in accordance with the drawings, specifications will comply with the relevant provisions of the Building Code.
  - ii. PS4 Construction review – That the building works have been completed in accordance with the relevant requirements of the Building Consent and Building Consent Amendments
23. Whilst the Producer Statements have no statutory status under the Building Act 2004 A C has continued to promote this process as a part of their building consenting strategy.
24. IPENZ has produced Practice Note 1, Guidelines on Producer Statements. This Practice Note comments that BCA's are likely to rely on Producer Statements and that engineers should be mindful of the responsibility and potential liability that may arise from signing a Producer Statement. The Practice Note also states all work should be subject to appropriate quality assurance processes (checking and review).

25. The Practice Note (Section 5) is clear that when a design Producer Statement is issued full detailed design documentation (drawings, calculations, details etc.) should be provided.
26. The BCA can place a requirement within the building consent documentation that a specific level of construction monitoring is required for the project. Prior to providing a construction monitoring service, the engineer should ensure that the level of service he is offering aligns with the BCA's requirements.
27. Construction Monitoring (CM) levels from 1 to 5 are defined by ACENZ.
28. CM2 level service requires that the engineer review a sample of each important work procedure. CM3 requires the engineer review random samples of important work procedures.
29. It is important to note that whilst the quantity of reviews will change between CM levels the quality of review should not change.

### Mr T's Actions

30. Mr T states he has completed more than 1000 structural designs for councils in New Zealand. It is reasonable to expect that he should have a very clear understanding of Producer Statements, the standard of work or review that should be completed before they are issued and the reliance that the BCA's place on them.
31. Mr T admits in his 10 December 2014 Report that he has made mistakes in his inspections and that his inspection records were poor and not up to the Council's expectation.
32. Mr T states in his 10 December 2014 report "...building inspectors are also to double check the CPEng observation records/inspections to ensure the CPEng have done their work in accordance with the drawings and to the inspector's satisfaction". And "...Therefore, if any step being missed after the CPEng has inspected the work, it would be either the Council's inspector or the LBP's responsibility ..."
33. In a number of instances Mr T comments that his work cannot be considered sub-standard as the Council has issued Code Compliance Certificates for the properties.
34. The Panel has reviewed the notes from discussions by the Council and Mr T relating to each property. The types of concerns noted by the Council include:
  - a. Changes to consented plans not documented
  - b. Items missed during inspections
  - c. Producer Statements issued for items not inspected.
  - d. Poor quality inspection records
  - e. Potentially dangerous site conditions not noted

## Findings of the Appeal Panel

35. There is evidence provided by Mr T that indicates that he can undertake design and site based observation to a level that is considered appropriate for a Chartered Professional Engineer.
36. A Chartered Professional Engineer can make mistakes without being considered negligent or incompetent. However, it is expected that a Chartered Professional Engineer will follow process and procedures that minimizes the chance of mistakes being made.
37. To practice as Chartered Professional Engineer the process and procedures associated with undertaking engineering activities are important. A Chartered Professional Engineer must interact and communicate with other parties in a professional manner.
38. The Panel considers that Mr T is wrong to place reliance on the building inspectors to pick up issues that the engineer may have missed.
39. The Panel finds that the standard of Mr T's engineering activities when considered holistically fall below that expected of a Chartered Professional Engineer. He has shown himself to be a capable designer but has not met the required standard of site observation and reporting that would be expected of a Chartered Professional Engineer operating in this field.
40. Section 21 (1)(c) of the Act provides that there are grounds for discipline if an engineer has performed work in a negligent or incompetent manner.
41. The Panel does not consider that Mr T is incompetent. In April 2014 Mr T's competence was confirmed by the RA.
42. There are a number of tests that have been provided for negligence by engineers. The DC has stated negligence as "falling below the standard of care a reasonable person would exercise in the same circumstances".
43. The Panel does not consider that the standard of negligence that a Chartered Professional Engineer is to be judged by is the civil standard as one might expect in a case where a party pursues another for damages.
44. In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 a full bench of the High Court was called upon to consider an appeal from a Law Society Disciplinary Committee. In that case the allegation against the practitioner was framed under section 106(3)(c) of the Law Practitioners Act 1982 and was that the practitioner: ... has been guilty of negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect upon his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute ...
45. The Panel finds that Mr T's expectations that his mistakes would be picked up the building inspectors and the quality of his site observation procedures reflects on his fitness to practice as an engineer and could bring the profession in to disrepute.
46. The Panel finds that Mr T has breached section 21 (c) of the Act by performing engineering services in negligent or incompetent manner.

47. In confirming its decision the Panel has considered “Could Mr T’s actions cause a risk to the public?” Whilst the issues that have been identified by A C have been resolved, there is no guarantee that future failings of Mr T’s performance will be noticed and rectified prior to them posing a risk to others.
48. The Panel finds that the DC was correct in concluding that Mr T should be disciplined in accordance with section 22 of the Act.

## Penalties

### - Registration

49. The Panel finds that the DC was correct to remove Mr T’s registration.
50. Mr T needs to demonstrate that he understands the role and responsibilities of a Chartered Professional Engineer with respect to issuing of Producer Statements and interacting with the BCA’s.
51. Mr T needs to demonstrate that he incorporates appropriate quality control and verification procedures within his work practices.
52. The Panel considers that Mr T is a competent engineer, and with appropriate training and mentoring should be able operate as a Chartered Professional Engineer. The Panel considers that 12 months from the issuing of these findings should be an adequate period for Mr T to develop the required changes to the way that he operates.
53. The Panel confirms the DC’s decision to remove Mr T’s registration forthwith. The Panel has reduced the period before Mr T can reapply for re-registration to one (1) year from the date of this decision.
54. The Assessment Panel and the Competency Assessment Board will have the information relating to the disciplinary process available to them when Mr T applies for re-registration.

### - Costs

55. The established practice of taking 50% of the reasonable costs and disbursements as a starting point of determining costs is accepted. The Panel considers that Mr T has not been uncooperative in the progression of this matter and should therefore be not subject to any greater costs than this. His disputing of the evidence and transfer of blame are contributory facts to the finding of negligence noted above.
56. The Panel confirms the DC’s decision to apportion costs. The Panel has reduced the costs imposed to the established practice of 50% of reasonable costs and disbursements. Mr T must pay the costs of \$5,492.95

### - Publication

57. The Panel agrees with the DC that there is a need to demonstrate accountability in the disciplinary process. One of the main reasons for publishing details of complaints and disciplinary decisions is to educate other Chartered Professional Engineers to prevent similar issues arising. The Council considers that it is not necessary to publish Mr T’s name to achieve this.

58. Pursuant to section 22(5)(b) of the Act the summary of the DC's decision, the nature of the breach and the findings of this Appeal be published in the official journal and website of IPENZ. The RA is required under section 22(5)(a) to notify the Registrar of Licensed Building Practitioners.
59. The Council will publish this decision on the Councils website.
60. In all publications the names of those involved should be removed.

### Costs

61. The costs associated with this Appeal shall remain where they fall.

Dated this 26 March 2015.

Mr Jon Williams  
Principal



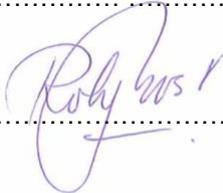
.....

Mr Anthony Wilson



.....

Mr Roly Frost



.....