

**APPEAL NUMBER 04/16**

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

**AND**

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

**By**

Mr A,  
**Appellant**

**And**

Mr B, CPEng  
**Respondent**

**With Cross Appeal by Mr B against  
Mr A**

## Decision of the Chartered Professional Engineers Council dated 2 December 2016

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### Background

1. In 2005 and 2008 Mr B was involved in the design of two buildings for Mr A whilst employed and as a Director of Company C.
2. In 2013, at the request of the tenants Mr A engaged Ms D CPEng to undertake a seismic review of both buildings. This review indicated issues with the compliance of both buildings with the seismic standards of the relevant codes of the time.
3. Further more detailed reviews were undertaken by engineers engaged by the tenants and by IPENZ. These reviews confirmed the issues with the design of the two buildings.
4. Mr A raised a complaint with IPENZ in June 2014.
5. The complaint was considered by a Complaints Research Officer (CRO) who issued their report on 16 September 2014 (pages 52 – 58/1213). The CRO recommended that the complaint be referred to an Investigating Committee (IC) in accordance with CPEng Rule 59(b).
6. The CRO's report was issued to the Chair of an Investigating Committee (CIC) who was acting as the Adjudicator. The CIC issued their report on 26 September 2014 (pages 45 – 51/1213). The CIC concurred with the CRO and referred the complaint to an Investigating Committee.
7. The IC decision was issued on 17 December 2015. They concluded there were no grounds for dismissing the complaint and it was referred to a Disciplinary Committee (DC) under Rule 60(a).
8. The DC issued their decision on 30 June 2016. They found:  
*That there are grounds to discipline Mr B under sections 21(1)(b) and (c) of the Chartered Professional Engineers of New Zealand Act 2002.*
9. The DC imposed the following penalties:
  - i. Mr B be censured.
  - ii. Fined \$1000.
  - iii. Pay 50% of the costs being \$6,750.00.
  - iv. Details be published in Engineering Insight in a manner that does not identify the parties or the town in which the subject buildings are situated.

### The Appeal

10. The Chartered Professional Engineers Council (Council) received two notices of appeal relating to the findings of the DC:

- i. From Mr A dated 9 September 2016.
  - ii. From Mr Morrison on behalf of Mr B (for clarity we will just refer to Mr B in this decision) dated 15 September 2016.
11. Mr A's appeal is on penalty. Mr B's appeal is against the decision that he breached clause 21(1) (b) of the Chartered Professional Engineers Act 2002 (Act).
12. Whilst both parties are appealing differing aspects of the DC's decision, the Council handled them contemporaneously.
13. The Council appointed a panel (the Panel) comprising:
  - i. Mr Jon Williams – principal
  - ii. Mr Roly Frost – member
  - iii. Ms Sue Simons – member

## Mr A's Appeal

14. In considering the penalty for Mr B the DC noted the following extenuating circumstances:
  - i. The actual events which led to the complaint occurred between 8 and 11 years ago.
  - ii. There is no evidence that Mr B acted willfully or deliberately.
  - iii. The level of cooperation Mr B displayed throughout the investigation/disciplinary process.
  - iv. The ready acceptance by Mr B of the substantive findings of Mr E, the independent peer reviewer of his designs.
  - v. Mr B's assurances that, to the best of his knowledge, this case was a departure from his usual high standards and that it was possibly influenced by significant stresses due to a situation in his personal life at that time.
  - vi. Mr Morrison's advice that his client had endeavored to maintain and improve his engineering knowledge and skill by participating regularly in continuing professional development, particularly in the field of earthquake engineering.
15. In Mr A's appeal he considers that these extenuating circumstances are not reasonable factors for a significant reduction from the maximum penalty available under the Act.
16. The relief sought by Mr A is:
  - i. Mr B's name be released;
  - ii. Suspension of Mr B's CPENG accreditation with conditions that Mr B must provide IPENZ with a number of projects of a similar nature that he has designed, between 2005 – 2008, additional to a number of recent projects, for detailed review by the CPENG Re-Assessment Committee.

## Mr B's Appeal

17. Mr B's appeal is focused on the distinction between competence and ethical conduct. It contends that the DC misdirected itself on the concept of ethics generally on the basis that Mr B did not recognize or know that his designs were substandard (hence his negligence). This absence of knowledge prevents this failure from being a breach of Rule 43 of the Code of Ethical Conduct.
18. The relief sought by Mr B is that the finding of the DC that he breached s21 (1)(b) be set aside.

## Submissions

19. Submissions from all parties were sought. The following were received:
  - i. Submission from Mr F on behalf of Mr B dated 7 October 2016.
  - ii. Submission from Ms Davidson on behalf of the Registration Authority dated 7 October 2016.
20. No submission was provided by Mr A or response from Mr A to the submission and cross appeal provided by Mr F or the submission provided by the Registration Authority. The Panel considered the information contained in Mr A's Notice of Appeal to be the substantive basis of his appeal.
21. All parties confirmed that they accepted that the hearing be considered on the papers.

## Hearing

22. The Appeal was heard on the papers at a meeting held in Wellington on 2 December 2016.

## With Respect to Penalty

23. The Panel agrees with the Registration Authority submission that *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* High Court provides sound guidance in determining the appropriate penalty to impose in disciplinary proceedings. A disciplinary penalty must:
  - i. protect the public (including by deterring other practitioners from engaging in similar conduct);
  - ii. set and maintain professional standards;
  - iii. where appropriate, rehabilitate the practitioner back into the profession;
  - iv. be comparable with penalties imposed on practitioners in similar circumstances;
  - v. reflect the seriousness of the practitioner's conduct, in the light of the range of penalties available;
  - vi. be the 'least restrictive penalty that can reasonably be imposed in the circumstances'; and
  - vii. be fair, reasonable, and proportionate in the circumstances.

24. The Panel reviewed the penalties imposed in 18 previous DC findings where the engineer has been censured. Fines were imposed in 9 of these and ranged from \$1000 to \$2000.
25. The Panel considered that the level of negligence shown justified a fine being imposed. The \$1,000 fine imposed by the DC is not inconsistent with previous findings. The Panel finds no reason to change the DC's decision with respect to fine.
26. In considering the guidance provided in paragraph 23 above. The Panel does not consider that the public naming of Mr B meets any of the tests noted.
27. The Panel has some sympathy for Mr A's request that a number of other projects designed by Mr B be subjected to a detailed review. The two projects that are the subject of this complaint/appeal were undertaken 3 years apart. Despite Mr B's assurances that these are isolated instances, it is not unreasonable to consider that there may be other projects with similar design issues.
28. The penalties that may be imposed by the DC and this Panel are limited by section 22 of the Act. The imposition of further reviews of projects designed by Mr B is not an option available to the Council. However, the Panel will discuss with the Registration Authority how a review of some of Mr B's other projects may be incorporated into either his next reassessment for CPEng or into a wider investigation being undertaken by IPENZ.

## **With Respect to Ethics**

29. The DC report at (21) (6/1213) and (45) (11/1213) lists the issues noted with Mr B's designs. It is generally agreed by all parties (including Mr B) that the designs fall below the standard expected of a Chartered Professional Engineer. This has resulted in Mr B being found negligent. This finding of negligence is not the subject of this appeal.
30. For the Building G the DC report from para 21 to 39 (6-10/1213) outlines the shortcomings in the design. It is however clear that Mr B followed a reasonable design process.
31. For the Building H para 51 (12/1213) the DC report states "...but noted those issues were more subject to engineering judgment than Building G's shortcomings."
32. In previous decisions of this Council (e.g. Robinson v Various (26)) we have derived assistance from *v W (NZLR 514)*.

*[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]...It is behavior or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it.*

33. The above case references "particular conduct" and "behavior or actions". The Panel considers that with respect to an ethical breach, there needs to be a level of intent in the test of the conduct, action or inaction being considered.

34. On this basis the tests framed by the Panel were:

- i. In the design and design review of the buildings was Mr B “intentionally negligent”, did he knowingly not put enough time, skill or effort into what he designed. Or,
- ii. Did he do what he thought was the right thing and just “got it wrong”? And,
- iii. Did he have systems and processes in place that a “reasonable engineer” would do to undertake this type of work? Did he follow these processes but made an error in a calculation or with an assumption?

35. The Panel can find no evidence to support the contention that there was any intent in Mr B’s negligent actions.

### Findings – Mr A’s Appeal

36. The Panel declines the appeal. It finds no reason to change the Orders of the DC contained in paragraphs 89 – 97 (19-20/1213) of the DC Decision

### Findings – Mr B’s Appeal

37. The Panel upholds the appeal. Whilst there are grounds for discipline under section 21(1)(c) of the Act, there are no grounds for disciplining Mr B under section 21(1)(b) of the Act.

### Costs and Publication

38. The costs incurred by all parties for this appeal shall remain where they lie. This appeal decision will be published on the Councils website with the names of all parties redacted.

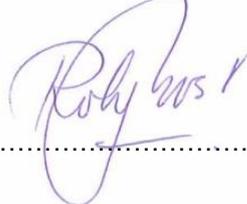
Dated this 13<sup>th</sup> day of December 2016

Mr Jon Williams



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Mr Roly Frost



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Ms Sue Simons



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