

**APPEAL NUMBER 02/17**

**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 IntPE(NZ) MIPENZ

Respondent

## Decision of the Chartered Professional Engineers Council dated December 2017

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### Background

1. Mr A originally requested information from Company C relating to a property at Address D on 9 October 2016. (pg12). Mr A directed his request to Mr E. Mr E was the author of a Producer Statement for the design associated with earthquake repairs. When the request was received Mr E no longer worked for Company C.
2. When asked by Company C who he was representing (Email 9:56 10 October 2016) Mr A responded (Email 10:00 10 October 2016) that he was acting for himself.
3. Mr A subsequently directed his request to Mr B who is a Director and Principal Engineer for Company C. (Email sent 10:29 14 October 2016. pg29).
4. Mr B responded to Mr A. (Email sent 9:06, 18 October 2016. pg29). The complaint relates to this email.
5. The contents of Mr B's 18 October 2016 email that Mr A is complaining about include:
  - a) *Mr A, you are a loose cannon. A little information with you is a dangerous thing as you will twist it and use it for your own preconceived addenda to do myself and others harm.*
  - b) *What did Mr A do? He jumped straight on Southern Non-Responses unedited Website (previously used to send a death threat to a Southern Response board member) and effectively slapped Southern Response over the face with the "olive branch" they had pro-offered! Claiming that they had admitted they were wrong and going off in some half-cocked direction over his pet hobby horse at the Time of packing and jacking piles.*
  - c) *Mr A you are in my view a totally irresponsible menace and trouble maker intent on puffing yourself up with showmanship and pulling others down. But before you throw another rock, take a long hard look at yourself.*
  - d) *In Matthew 7:6 it is written; "Give not that which is holy unto the dogs, neither cast ye your pearls before swine, lest they trample them under their feet, and turn again and rend you". I appreciate that it is a pretty hash word, but "if the hat fits wear it".*
  - e) *Mr A you need a Christ encounter. Like Paul on the way to Damascus to bind and imprison the early saints. You need to be knocked off that high donkey of yours, and have your eyes opened*
6. Mr B also raised an issue relating to a court case that he and Mr A had previously been involved in property at (Address F). Mr B questioned evidence provided by Mr A.

- a) *The paperwork you hung your evidence on related to the neighboring property NOT the property in question. You were wrong! Totally and unquestionably wrong! In doing so you brought into question my integrity, cost me considerable grief and heartache and cost me personally financially enough to buy a new car.*
  - b) *You have helped to slam dunk an innocent man. I pray whenever I think of you; "God, help me not to hate the man, I know you created him and love him"*
7. Mr B also states in his email *"I have reviewed your query and I know the answer, however I am not going to share it"*.
  8. Mr A responded (Email 9:35 18 October 2016 pg27) restating his request for information.
  9. Mr B replied (Email 11:02, 18 October 2016 pg27) with *"No. Go away"*

## Mr A's Complaint

10. On 7 February 2017 Mr A complained to Institute of Professional Engineers (IPENZ) (pg1). The basis of the complaint was:
  - a) That Mr B failed to meet the requirements as a CPEng engineer and member of IPENZ
  - b) That Mr B threatened and intimidated Mr A in his capacity as an independent High Court Witness
11. In his complaint Mr A notes that (pg2):
  - a) The proceedings related to the property at Address F were settled in August 2016, prior to the email exchange that is the subject of this complaint.
12. High Court proceedings for a property at Address G where Mr B was acting for the defendants, were live when the exchange of emails occurred. It is not clear from the documentation if Mr A was representing the homeowners. However, Mr B in his response to the complaint (pg78) confirms that at the time of the approach, Mr A was involved in a case "affecting my firm's client, M".
13. Mr A noted that the delay in issuing the complaint was that he did not wish to prejudice the ongoing high court proceeding (pg4).
14. Mr A indicated in his complaint to IPENZ that he did not wish for this matter to be dealt with through IPENZ's early resolution approach
15. IPENZ in its capacity as the Registration Authority (RA) responded to Mr A on 8 February 2017 (pg32). They sought clarification of some issue which Mr A provided on 9 February 2017 (pg34).
16. Mr A's complaint and clarification were forwarded to Mr B by the RA on 10 March 2017 (pg37).

## Mr B's Response

17. Mr B responded to the complaint on 29 March 2017 (pg78). The key aspects of Mr B's response are:

a) *"At the time of his initial approach to my firm in October 2016 Mr A was involved in a case affecting my firm's client, M. He did not approach me directly but one of my staff, referring to a property he had no interest in."*

b) *I was very concerned at what appeared to be Mr A's less than transparent process and was somewhat frustrated at his persistence and claim that the matter was "somewhat urgent"*

c) *I accept the criticism that I have expressed myself more strongly than I should have, but to have supinely done what Mr A wanted, or to have ignored him, were not options"*

d) *I herewith apologise to Mr A if I have caused him any distress, and believe the matter should rest here.*

18. In their covering email (Email 3:33, 30 March 2017 pg 94) with Mr B's response the RA notes *"IPENZ considers that this is an appropriate response to the concerns you have raised, and, with your agreement, considers that this matter can be closed as resolved"*.

## Mr A's Reply

19. Mr A sought clarification from the RA (email 3:59 30 March 2017 pg93) on the basis for their considering that the matter could be closed and confirmed (email 10:01 3 March 2017 pg 92) that he did not accept that the matter should be closed.

20. Mr A provided a reply to Mr B's response on 27 April 2017 (pg95). Mr A refuted the comments made by Mr B in his response. Key points are:

a) He approached Mr E directly (as opposed to Mr B) as it was Mr E's name on the Producer Statements

b) Mr A's "interest" in the property at Address D is not commercial or legal. He is "intellectually interested" in the justification for the solution proposed.

c) Subsequent emails between Mr A and Mr E between 31 October 2016 and 25 November 2016 (pg 80-87) are after the email that are the subject of this complaint and therefore not relevant.

d) Mr A reiterated the unacceptable nature of Mr B's comments and that he considered he was being threatened in relation to the court proceedings that were in progress at that time (Address G).

e) *"In simple terms – writing such an email to a high court expert while one's client is a defendant in proceedings is not, and should never be, acceptable – particularly so when one is a CPEng engineer"*

21. The RA (email 12:20 29 May 2017 pg107 and email 2:23 13 June 2017 pg 113) confirmed that the matter was to be referred to the Adjudicator for a decision as to if it should be progressed to an Investigating Committee (IC).

## Adjudicators Decision

22. The Adjudicators decision dated 20 June 2017 (pg116) was issued to all parties. The Adjudicator summarised the allegations as:
- a) Mr B has not met his ethical obligations, and has not acted professionally, or with integrity.
  - b) Mr B has not met his good character obligations, by not conducting himself in a manner consistent with being a fit and proper person.
  - c) Mr B has not met his obligations to act with honesty, objectivity, and integrity, and to treat people with respect and courtesy.
  - d) Mr B has failed to comply with his obligations to safeguard health and safety. Mr A states that Mr B's comments have caused him "a great deal of stress, nervousness, and mental grief". He states that Mr B's behaviour has contributed to "a degradation of [his] mental health and safety".
  - e) Mr B has failed to comply with the IPENZ code of ethics by not behaving appropriately.
23. The key points of the decision are:
- a) *"Mr B has acted in a professional manner in not providing the information that Mr A requested as he considered that his obligations of confidentiality to his client precluded him answering the request. However I consider that the tone of Mr B's email reply was not very professional."*
  - b) With respect to the email communication with Mr E (refer para 20 iii).  
*"While this email train commences after the date of the email from Mr B that is the basis of the complaint it does demonstrate the extent that Mr A was prepared to go to in order to obtain some information regarding a job in which he had no apparent "interest".*
  - c) *"I can see no evidence to indicate that Mr B threatened Mr A. The closest thing to a threat which I can see in the emails is a statement made by Mr B that Mr A needed to be "knocked off that high donkey". Although inappropriate I do not consider this to be a threat."*
  - d) *"Although Mr B made some judgmental errors, he has acknowledged these and apologised. I do not consider that the errors in this instance have reached the level required to be considered not fit and proper."*
  - e) *"I consider that whilst Mr B did act inappropriately he has acknowledged this and apologised."*
  - f) *"Whilst Mr B's choice of words was unfortunate, I do not consider that he put Mr A's health and safety at risk."*
  - g) *"Whilst Mr B did act inappropriately he has acknowledged this and apologised. I have determined that this allegation be dismissed on the ground that the alleged misconduct is insufficiently grave to warrant further investigation"*

24. For each allegation in the complaint the Adjudicator has dismissed the allegation with reference to the following sections of the Chartered Professional Engineers Rules (no2) 2002):

a)Rule 57 (a) there is no applicable grounds for discipline under section 21(1)(a) to (d) of the Act.

b)Rule 57 (ba) the alleged misconduct is insufficiently grave to warrant further investigation.

Note: Appeals to the Chartered Professional Engineers Council (CPEC) relate to discipline under the Chartered Professional Engineers Act 2002 and Chartered Professional Engineers Rules (no2) 2002. We do not consider the IPENZ Disciplinary Regulations referenced by the Adjudicator

25. The outcome of the Adjudicators decision was that the allegations listed in paragraph 22 be dismissed on the grounds that:

a)there is no applicable ground for discipline as there is no applicable grounds for discipline in relation to allegations i, ii and iv;

b)the alleged misconduct is insufficiently grave to warrant further investigation in relation to allegations iii and v.

26. The Adjudicator also recommended that Mr B:

a)provide a written apology to Mr A for the tone of and wording included in his email of 18 October 2016;

b)review the IPENZ Practice Note number 06 “Developing and Maintaining Client Relationships – November 2005”;

c)attend the professional development course “Client Care and Customer Service” when it is next offered by IPENZ

27. Mr A declined the opportunity to comment on the decision. The final decision dated 7 July 2017 (pg135) was issued to all parties.

28. As directed Mr B issued a formal apology to Mr A dated 13 July 2017 (pg140).

## **The Appeal**

29. Mr A contacted the CPEC on 3 August 2017 to lodge an appeal. The email was addressed to both CPEC and IPENZ and implied that CPEC had been involved through the complaints process.

30. The Chair of CPEC replied to Mr A on 3 August 2017 indicating that:

a)CPEC was an entirely separate body from IPENZ and the RA.

b)The process to be followed to raise an appeal

c)Confirmed that Mr A's 3 August 2017 email would be considered the Notice of Appeal.

d)Outlined the process for submissions for further submissions from Mr A, Mr B, and the RA.

31. The CPEC appointed a panel (the Panel) comprising:
- a) Mr Jon Williams – principal
  - b) Ms Sandra Hardie – member
  - c) Ms Sue Simons – member
32. In his appeal, Mr A contended that IPENZ have not conducted an investigation into the complaint, they have limited their review to the information submitted by Mr A. For clarity and ease of consideration Mr A's 3 August 2017 email and his grounds for appeal are:
- a) IPENZ has only looked at what Mr A has submitted? Why is it not applying its own judgments and standards and investigation to what Mr B has stated to him?
  - b) IPENZ have not considered the comments/threats in the context of the High Court proceedings that were underway.
  - c) Mr A did have an "interest" in the property at Address D but did not disclose this due to client confidentiality. He was not being "persistent" he was doing his job.
  - d) IPENZ have failed to carry out their duties impartially and have made biased statements.
  - e) Mr A interprets the comments in Mr B's email in a literal way. In the context of the High Court action he took these seriously.
  - f) Mr A disagrees with the Adjudicator that the actions of Mr B are those of a fit and proper person.
  - g) Mr A disagrees with the Adjudicator that any ethical breaches are insufficiently grave to warrant further investigation.
  - h) Mr A contends that the Adjudicator is not qualified to comment on any impacts the events may have had on Mr A's health.
  - i) That obligations placed on Mr B to read IPENZ practice notes and attend training are not relevant as Mr A is a peer not a client.
33. CPEC received notification that Mr John Morrison, Barrister, was to act on behalf of Mr B.
34. The RA provided a complete bundle of all documentation relating to the complaint electronically on 31 August 2018.
35. No submission was received from Mr A by the due date including a granted 10 day extension. The Panel informed all parties that no further submission would be accepted from Mr A via letter dated 26 September 2017.
36. Submissions were received as follows:
- a) From the RA – 5 October 2017
  - b) From Mr Morrison – 6 October

37. Mr A was offered the opportunity to respond to these submission (email 1:36 11 October 2017). No response was received.
38. All parties were informed (email 3:42, 25 October 2017) that the Panel would consider the matter on the papers based on:
  - a)The bundle provided by the RA
  - b)Mr A's 3 August 2017 Notice of Appeal
  - c)Submissions received from the RA and Mr Morrison.

## Hearing

39. The Appeal was heard on the papers via telephone conference on 15 December 2015.
40. The Appeal panel noted the following:
  - a)Whilst Mr A may have an "intellectual interest" in the remediations to the property at Address D, he has no "legal interest" in it.
  - b)Mr B would have been in breach of his obligations to his client if he had released information to Mr A.
  - c)The role of expert witness exists within the confines of a specific case. It has no bearing outside of this.
  - d)The 18 October 2016 email from Mr B is unprofessional and inappropriate.
  - e)The email was marked "Without Prejudice, Private and Confidential"
  - f) There has been no evidence provided that substantiates that the statements made in the email related to real physical threats from Mr B to Mr A.
  - g)Mr B has acknowledged that the tone and word of his correspondence was in appropriate and has issued an apology.
  - h)Other than the 3 August 2017 email initiating this appeal, Mr A has made no further submissions or responded to any communications from the appeal panel.

## Findings

41. Mr A's appeal (email 3 August 2017) is directed at "IPENZ/CPEC". The Chartered Professional Engineers Council (CPEC) is an entirely separate body from IPENZ and the RA. The functions of the Council include reporting on the performance of the RA and hearing appeals from decisions of the RA. This separation of function was outlined to Mr A in the Council's 7 August 2017 letter.
42. Appeals to the Council are by way of a 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.

43. In hearing the Appeal, the Panel has considered whether there are any grounds for discipline under section 21 of the Act, and whether the Adjudicator's decision to dismiss the complaint was correct i.e.

**Section 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 section 22 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 practise 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 or 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 subparagraph (i); or

(iii) produced to the Authority or made use of any document knowing that it was not genuine.

44. Clearly, the criteria established under Sections 21 (1) (a), and (d) of the Act do not apply in this case. The question that the Panel has therefore considered is whether there is prima facie evidence that Mr B:

a) Has performed engineering services in negligent/incompetent manner.

b) Has breached an aspect of the Code of Ethical conduct set out in the Rules (43-53 respectively).

45. It is important to note that the Appeal Panel is not investigating the complaint. This is for the Investigating Committee of the RA. The Appeal Panel needs to determine if there is sufficient evidence to warrant further investigation.

46. The Panel has considered each of the grounds for appeal given in Mr A's 3 August 2017 email

*a) IPENZ has only looked at what Mr A has submitted? Why is it not applying its own judgments and standards and investigation to what Mr B has stated to him?*

The Panel finds that the Adjudicator has followed the process outlined in the Rules (s57 and s58). The Adjudicator has considered the information provided by both Mr A and Mr B. The Adjudicator's decision is referenced to the grounds for discipline of a professional engineer contained in s21 (1) (a) – (d) of the Act.

The Panel is not reviewing the performance of the RA, the Panel is considering the grounds for complaint and subsequent appeal against the requirements of the Act and the Rules.

The Panel finds no relevance of this ground to the appeal.

*b) IPENZ has not considered the comments/threats in the context of the High Court proceedings that were underway.*

The Panel finds that whilst Mr B's 18 October 2016 email is unprofessional and inappropriate, there is no evidence of any intended physical threat. There is no reference in the email to the High Court proceedings for the property at Address G that was underway at the time the email was written.

The Panel finds that there are no applicable grounds for discipline under s21 (1) (a) – (d) of the Act.

*c) Mr A did have an "interest" in the property at Address D property but did not disclose this due to client confidentiality. He was not being "persistent" he was doing his job.*

The basis of the complaint and this appeal is the communication from Mr B to Mr A dated 18 October 2016. Whilst Mr A's interest or lack thereof in the property at Address D may have been the catalyst for the communication, it is not the subject of the complaint or this appeal.

The Panel finds no relevance of this ground to the appeal.

*d) IPENZ have failed to carry out their duties impartially and have made biased statements.*

As noted in paragraph 42 above, appeals to the Council are by way of a rehearing. The Panel has considered the evidence that was provided to the RA independently from the decision provided by the Adjudicator. The Panel is not reviewing the performance of the RA, the Panel is considering the grounds for complaint and subsequent appeal against the requirements of the Act and the Rules.

The Panel finds no relevance of this ground to the appeal.

*e) Mr A interprets the comments in Mr B's email in a literal way. In the context of the High Court action he took these seriously.*

The Panel has addressed this ground under sub-paragraph (b) above.

The Panel finds that there are no applicable grounds for discipline under s21 (1) (a) – (d) of the Act.

- f) *Mr A disagrees with the Adjudicator that the actions of Mr B are those of a fit and proper person.*

The Panel has considered the performance of Mr B against the requirements of the Act and the Rules. Specifically against the applicable grounds for discipline contained in s21 of the Act. “Fit and proper person” is not a test used within the Act or Rules.

The Panel finds no relevance of this ground to the appeal.

- g) *Mr A disagrees with the Adjudicator that any ethical breaches are insufficiently grave to warrant further investigation.*

Rule 42F (a) (ii) requires a chartered professional engineer to *treat people with respect and courtesy*. It is worth noting that this rule was introduced in July 2016. The previous rule 45 required a chartered professional engineer to act with honesty, objectivity and integrity.

The Panel considers that Mr B’s communication was “unprofessional and inappropriate”. He has not treated Mr A with respect and courtesy. To this end Mr B has breached his ethical obligations as a Chartered Professional Engineer.

The Panel considers the gravity of the breach to be at the minor end of the scale. The 18 October 2016 communication is an emotive response that draws heavily on the individuals particular beliefs. The Panel considers there was no intent to cause emotional or physical harm.

The Panel finds that the breach of ethical behavior is insufficiently grave to warrant further investigation. S57 (ba) of the Rules

- h) *Mr A contends that the Adjudicator is not qualified to comment on any impacts the events may have had on Mr A’s health.*

Mr A has provided no evidence of any impact on his health or safety. As noted above the 18 October 2016 communication is an emotive response that draws heavily on the individuals particular beliefs. The Panel considers there was no intent to cause emotional or physical harm.

The Panel finds that there are no applicable grounds for discipline under s21 (1) (a) – (d) of the Act.

- i) *That obligations placed on Mr B to read IPENZ practice notes and attend training are not relevant as Mr A is a peer not a client.*

The Panel acknowledges that Practice Note 06 is focused on the benefits of developing and maintaining client relationships. However, many of the process and philosophies outlined in the practice note are equally as applicable to peer to peer relationships.

The Panel finds that the recommendation for Mr B to read this practice note and attend further professional development courses is appropriate. Further comment is made below under appeal outcomes.

## Outcome

47. The Panel declines the appeal on the basis outlined in paragraph 46.
48. The Panel notes that it did find that Mr B had breached Rule 42F by not treating Mr A with respect and courtesy. Whilst the Panel found the breach was insufficiently grave to warrant further investigation, it is still a breach. The Panel request that Mr B familiarise himself with the updated code of ethics and ensure that he follows these in all his engineering activities.
49. The Panel finds that costs associated with this appeal should fall where they lie.

Dated this 18<sup>th</sup> December 2017

Mr Jon Williams - Principal



Ms Sue Simons - Member



Ms Sandra Hardie - Member

