



**APPEAL NUMBER 01/18**

**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**

Mrs A

**Appellant**

**And**

Mr B

CPEng, CEngNZ, IntPE(NZ)

**Respondent**



## Introduction

1. This decision relates to 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 the Chair of Investigating Committees acting as Adjudicator (“the Adjudicator”), dated 11 December 2017.
2. The appeal relates to a complaint made by Mrs A to the Registration Authority by letter dated 11 May 2017. [PB 1]<sup>2</sup> The original complaint was made against Mr B, in relation to the performance of services he was engaged to provide, by Business C trading as D.
3. Mrs A’s complaint related to apparent discrepancies between designed and as-built characteristics of the ground works beneath the rib-raft floor slab of her newly constructed house. She had complained about Mr B allegedly not performing the duties “for (which) he was presumably being paid”; a lack of clarity around who ordered the excavation or under what instruction it was carried out; insufficient paperwork relating to excavation, fill and removal of spoil; and Mr B’s delegation of responsibility for inspection to “lesser qualified persons”.
4. For the reasons set out in her decision, the Adjudicator decided to dismiss the complaint about Mr B in accordance with Rule 57(a) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 and clause 8(a) of the Engineering New Zealand Disciplinary Regulations. Rule 57(a) states that “The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under Rule 58 that there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act...”.

## Background and context for the appeal

5. On 1 June 2016 Mrs A entered a contract with D to build a house at Address E.
6. The house is located in area F.
7. Business G had undertaken the geotechnical engineering work for the development and also produced a report, for the section which Mrs A later purchased.
8. Mr B is an independent engineer for D and was contracted to Business C to provide engineered floor Construction Review Producer Statements in support of building consents. This included structural design calculations for the rib-raft floor.
9. In her complaint Mrs A noted that she “discovered that the excavation for the home had not been done according to the consented plan”.
10. The submissions made by Mrs A in her original complaint were that:
  - i. “Mr B is not directly performing duties for [sic] he is presumably paid”

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<sup>1</sup> Reissued 18 April 2018 with corrections to Sections 14(ix), 93, 98 and 112

<sup>2</sup> [PB *nn*] refers to page in the paginated bundle of evidence

- ii. "It is not at all visible to us who ordered the excavation or under what instruction it was carried out"
  - iii. "There is insufficient paperwork, in a demonstrably earthquake prone city, relating to excavation, fill and removal of spoil"
  - iv. "He chooses to delegate his responsibility to lesser qualified persons, therefore directly or indirectly encouraging such persons to act outside their level of competence and qualification"
  - v. "He apparently considers himself sufficiently well qualified to 'authorise' others to do his work"
  - vi. He had a duty of care to us indirectly when we became a client of D.
  - vii. He has not performed his duty of care to us with the diligence and expertise that we had a right to expect."
11. In her complaint Mrs A also commented that "This issue may not be limited to Canterbury. There are other areas in which D has franchises. There are many homes recently built by D in the H area." She also questioned if Mr B was engineer for them.

## Process

12. The Registration Authority received the complaint from Mrs A on 12 May 2017 (dated 11 May 2017).
13. On 17 May 2017 the Registration Authority notified Mr B of the complaint.
14. On 16 June 2017 Mr B responded to the Registration Authority including with his response, copies of:
- i. A letter dated 30 May 2017 from D to the Ministry of Business, Innovation and Employment ("MBIE") rejecting Mrs A's related complaint to MBIE about the conduct of Mr I, a Licensed Building Practitioner employed by D
  - ii. The Code Compliance Certificate for Mrs A's house dated 10 March 2017
  - iii. A letter dated 24 May 2017 from himself to D outlining the process of training and auditing he had conducted before appointing Mr I (amongst other Construction Supervisors) as an agent to undertake inspections of rib-raft floors on his behalf and that the process established with an authorised construction supervisor placed him in a position of confidence to issue a Construction Review Producer Statement (PS4) in support of the building consent.
  - iv. The Producer Statement - PS1 – Design for the house
  - v. A schedule of inspections showing one Pre-pour inspection of DPM and placement of pods, reinforcing steel and chairs
  - vi. Drawings and calculations relating to the foundation structure
  - vii. Memorandum from licensed building practitioner: Certificate of design work signed by himself and dated 25 June 2016
  - viii. Emailed report from Mr I comprising 12 photographs dated 15 August 2015 of the foundation, pre-pour

- ix. Producer Statement - PS4 – Construction Review dated 15 August 2016
  - x. Site notice from Christchurch City Council (“CCC”) dated 15 August 2016 confirming that the outcome of the CCC from 201 – Pre-Pour Inspection was a “Pass”
  - xi. Inspection report by Mr I dated 16 August 2016
15. The complaint was referred by the Registration Authority’s Investigations Lead to Ms J, in her role as Chair of Investigating Committees acting as Adjudicator, to make a decision as to how the complaint should proceed. After considering the information gathered in relation to the complaint, her decision dated 11 December 2017 was to dismiss the matter in accordance with Rule 57(a) of the Chartered Professional Engineers Rules (No 2) 2002 and Clause 8(a) of the Engineering New Zealand Disciplinary Regulations.<sup>3</sup>
16. Mrs A submitted her Notice of Appeal on 8 January 2018.
17. On 18 January 2018, Mr Jon Williams, Chair of the Chartered Professional Engineers Council (CPEC), wrote to the Parties:
- i. Acknowledging receipt of Mrs A’s appeal
  - ii. Outlining the process for submissions
  - iii. Providing direction regarding the matters which the appeal panel (the “Panel”) can consider, namely:
    - a. Was the adjudicator correct in her decision that Mr B was not responsible for the monitoring and sign off on the ground preparation for the site?
    - b. Has Mr B breached the ethical code that was in place at the time the actions related to the complaint occurred?
  - iv. Providing direction on matters that the Panel cannot consider, namely:
    - a. The actions of other parties not the subject of this complaint/appeal
    - b. The actions of Engineering New Zealand or the Registration Authority other than the decision they have issued
  - v. Proposing a timeline for submissions
18. On 5 February 2018, the CPEC Chair sent an email to the parties regarding composition of the panel.
19. The appeal submission was emailed to all parties by Mrs A on 15 February 2018.
20. The Registration Authority’s submission was emailed to all parties on 2 March 2018.
21. Mr B sent an email to all parties on 5 March 2018 confirming receipt of Mrs A’s Appeal submission and advising that he had no further submission to make.
22. A submission in response from Mrs A was received by email on 9 March 2018.

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<sup>3</sup> As the Chartered Professional Engineers Council only has jurisdiction under the Act the Panel offers no further commentary with regard to Clause 8(a).

23. The Panel Principal sent a letter to Mrs A and Mr B on 13 March seeking agreement to the appeal being heard based on the papers.
24. Emails were received from Mrs A (15 March 2018) and Mr B (19 March 2018) confirming agreement to the appeal being heard based on the papers.
25. The Panel held its hearing by teleconference on Wednesday 4 April 2018.

## Hearing and consideration of the appeal

26. The decision appealed in this case was that of an Adjudicator to dismiss the complaint on the basis that there was no applicable ground of discipline under section 21(1)(a) to (d) of the Act.
27. Appeals to the Council are by way of rehearing (section 37(2) of the Act). Appeal Panels are entitled to confirm, vary or reverse a decision (section 37(5) (a)) and 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 a panel is entitled to take a different view from the Investigating Committee but the appellant carries the burden of satisfying the Panel that it should do so.
28. In the hearing, the Panel considered whether there are any grounds for discipline and whether the IC's decision to dismiss the complaint was correct under section 21 of the Act and which provides as follows:

### **"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."
29. 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:

- (i) has breached an aspect of the Code of Ethical Conduct set out in the Rules 42A-42I respectively (the version of the Rules which took effect on 1 July 2016);
  - (ii) has performed engineering services in a negligent or incompetent manner
30. If the complaint had not been dismissed, then it would have proceeded to an Investigating Committee. Under section 37 of the Chartered Professional Engineers of New Zealand Act (the Act) the Council may “confirm, vary or reverse” the decision to which the appeal relates and can “make any decision that could have been made by the decision authority”.
31. So, in this matter, if the decision of the Adjudicator is confirmed, the appeal will be dismissed. If the decision is reversed, then the only relief that can be granted is for the Council to send the matter back to an Investigating Committee.

## Commentary and Findings

32. The Panel has reviewed all of the submissions and supporting documents provided by the appellant and the responses to them by the respondent, as well as the original submissions to the Registration Authority and the March 2018 submission from the Registration Authority.
33. The essence of the complaint from Mrs A is presented in [10]<sup>4</sup> and in Notes 4.1 and 4.2 of Mrs A’s appeal submission where she states that she is appealing the decision of the Adjudicator that:
- (i) there were no grounds to uphold her complaint against Mr B because he was not responsible for the sign off of ground preparation for the site and
  - (ii) he was entitled to rely on the inspection and documentation of a licensed building practitioner to inform his decision to sign off the PS4
34. Mrs A has presented a large volume of evidence, some of which establishes background regarding her complaint about Mr B, but which could relate more to potential failings on the part of individuals or organisations other than Mr B. The Panel has endeavoured to focus on matters that relate directly to Mr B and his responsibilities concerning the house built for Mrs A.
35. The Panel now deals with each of the parts of this complaint and the appeal respectively. First, as to aspects of the original complaint, the elements of which are as presented in Mrs A’s Complaint submission [PB 11]:
- i. “Mr B is not directly performing duties for [sic] he is presumably paid”.***
36. The Panel interprets the statement at i above to mean “Mr B is not performing the duties for which he is presumably being paid”.
37. There are two elements, namely (i) whether or not there was some aspect of the work which he was engaged to perform and that he failed to perform and (ii) whether or not his reliance on inspection by others was appropriate.
38. In a letter [PB 82] dated 24 May 2017, Mr B stated that he was the “contracted engineer to Business C to provide Engineered Floor Construction Review Producer Statements (PS4) in support of the Building Consents”.

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<sup>4</sup> [nn] refers to a section within this decision document

39. Based on the statement in [38], the absence of evidence to the contrary and having also reviewed rib-raft foundation calculations, the construction drawings, and PS1 and PS4 forms, the Panel concludes that Mr B's responsibility was limited to the structural aspects of the rib-raft foundation and floor. There is no evidence to show that his responsibilities extended to geotechnical or constructional aspects of the ground beneath the rib-raft foundation which is fundamental to Mrs A's complaint / appeal.
40. Further to [39] in her conclusion on page 8 of her complaint [PB 10] Mrs A states "...D described the relationship they have with him as being that of 'authorised agent' (see above), yet they describe how they send photos of placed steel. Surely this is to do with the Foundation, not the excavation." The Panel agrees with this and sees it as consistent with Mr B's role as discussed above. Mrs A's conclusion continued "... It seems to me that no one has taken responsibility for ensuring that the excavation was as it should have been. As I understand it, that responsibility is for Mr B, because he signed the PS4 (Appendix 08), and no one else."
41. The Panel is satisfied that the PS4 signed by Mr B covered the structural element only, having reasonably concluded that the people responsible for the preparatory work had satisfactorily completed the excavation and backfill to the surface on which the rib-raft was to be constructed.
42. Mrs A takes the view that there has been a lack of follow-up on site to ensure that the excavation and preparation as specified on the drawings and in the consent document, were actually verified as compliant. However, the Panel is satisfied that Mr B was not responsible for the ground conditions. From all of the evidence provided, the various elements of the build were handled by different people or teams, according to the skills required, engaged and coordinated by D. It is outside the scope of this Appeal for the Panel to investigate the conduct or actions of third parties who are not the subject of the complaint at appeal.
43. The matter of the extent of Mr B's reliance on the work of others, which the Panel interprets to mean inspection on-site by a licensed building practitioner on his behalf is addressed in [49] to [56].
- ii. "It is not at all visible to us who ordered the excavation or under what instruction it was carried out"**
44. This is a fair statement for Mrs A to make because clearly, she had to go to some trouble to establish or even surmise exactly what had been done in terms of excavation, backfill, compaction and testing. However, the key with regard to any responsibility that may be assigned to Mr B in terms of direction or execution of the excavation is whether or not it was included in his role. This has been addressed in [43] above.
- iii. "There is insufficient paperwork, in a demonstrably earthquake prone city, relating to excavation, fill and removal of spoil"**
45. Mrs A refers to paperwork [PB 9] in the context of trying to establish what had happened regarding the earthworks and has clearly gone to considerable trouble to assess the situation. She cites interactions with D, Business G and the Christchurch City Council.
46. In this aspect she appears not to have had contact with Mr B, nor has she attempted to. In the Panel's view this is not surprising, as his role, as established elsewhere, is relatively narrow and it would not be expected that he would be the source for the full

documentation on the earthworks or on elements other than the rib raft floor, such as site development, framing, roofing etc.

47. Clearly Mrs A found this process frustrating but it is difficult to see how fault could be found with Mr B, provided that he produced the various documents and certificates for which he was engaged by D.
48. From the evidence provided, the Panel concludes that it is not reasonable for Mr B to be held accountable for any shortfall in the documentation with respect to execution of the earthworks in a manner totally consistent with the design assumptions, design, drawings and specification.
  - iv. ***“He chooses to delegate his responsibility to lesser qualified persons, therefore directly or indirectly encouraging such persons to act outside their level of competence and qualification”***
49. On Page 8 of her complaint submission Mrs A stated “...The PS4 for our foundation has been issued. The inspection was done by a person in the employ of D about whom we know nothing other than that he was labelled a Construction Supervisor...”
50. At issue in this appeal is Mr B’s reliance on inspection and reporting by a licensed building practitioner to inform his sign-off of the PS4.
51. Mr B’s submission to the Registration Authority after receipt of the complaint, included a letter to D [PB 82] dated 24 May 2017, in which he referred to training and auditing he had delivered before appointing Mr I, a construction supervisor for D and a licensed building practitioner, as his agent to complete inspection reports on the rib-raft floors to fulfil the Construction Monitoring (CM2) services.
52. Not all people involved in the process of designing / supervising buildings are chartered professionals and it is common for technicians or junior engineers to be involved in the detailed work involved, under guidance and supervision of others with appropriate skills and qualifications.
53. The panel is satisfied that Mr B’s use of a “lesser qualified person” for inspection has been backed by targeted training and auditing. The Panel would not see that this relieves him of ultimate responsibility for the documents he needs to sign as a Chartered Professional Engineer.

**v. *“He apparently considers himself sufficiently well qualified to ‘authorise’ others to do his work”***

54. Further to [49] to [53] above, no evidence has been presented to suggest that Mr B or anyone else in his situation is not entitled to utilise others to assist them in carrying out their work. Such arrangements are commonplace in many professional fields.
55. Mr B appears to be familiar with the formalities and processes related to the design and building of houses. The panel considers that, if in his judgment he deems it appropriate to delegate routine tasks, then it is acceptable to do so, provided the delegation is subject to adequate briefing and the application of appropriate judgment by him. The training and auditing referred to in [51] above demonstrate to the Panel that Mr B is operating in a satisfactory manner in this regard, while still retaining responsibility for signing PS4s as a Chartered Professional Engineer.
56. The key is that there has been no suggestion that Mr B does not accept responsibility for the PS4.

**vi. *He had a duty of care to us indirectly when we became a client of D.***

57. A Chartered Professional Engineer, like any provider of services, is accountable to the client for delivering the services which have been agreed under the contract or agreement between them. Under the Act, a Chartered Professional Engineer must perform services in a competent manner and must comply with the Code of Ethical Conduct - s42A to 42I of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”).
58. The Panel has not been convinced by Mrs A’s evidence that any duty of care owed by Mr B either to D, Business C or, indirectly to Mrs A has been breached.

**vii. *He has not performed his duty of care to us with the diligence and expertise that we had a right to expect.”***

59. As addressed in [38] above Mr B was contracted to provide services to D. There is no evidence of a breach of any standard of duty of care that supports a claim of negligence [58]. The Panel is therefore of the view that he has no duty of care to Mrs A.
60. The Panel now addresses the arguments put forward by Mrs A in her appeal. In essence, as outlined in [33] she has appealed the findings of the Adjudicator, that:
- (i) there were no grounds to uphold her complaint against Mr B because he was not responsible for the sign off of ground preparation for the site, and
  - (ii) he was entitled to rely on the inspection and documentation of a licensed building practitioner to inform his decision to sign off on the PS4

**i. *That the Adjudicator’s statement [PB 1279] “Mrs A believes that the ground excavation for the foundations was not completed in accordance with the consented plans” is dismissive***

61. The Panel does not see that the Adjudicator’s exact words in heading i. above were intentionally dismissive and notes that the adjudicator went on to review the complaint in some detail. In any event, the appeal is by way of a rehearing of the evidence presented to the Registration Authority and this point does not influence the Panel’s findings.

**ii. *That the adjudicator’s statement [PB 1281] “On 25 July 2016, the Christchurch City Council (the Council) issued building consent for the development” was incorrect***

62. The Panel notes the factual correction provided by Mrs A.
- iii. That the Adjudicator's statement [PB 1282] "Mrs A raised her concerns directly with the developer, she then raised the issue with the council" was incorrect**
63. The Panel notes the factual correction provided by Mrs A.
- iv. The Adjudicator's statement [PB 1282] "However, the earthworks have been signed off by a Chartered Professional Engineer (Mr B), and you should be able to rely on his expertise in this matter."**
64. As discussed elsewhere including in [39] above, the Panel does not consider that Mr B was responsible, nor has he exercised responsibility for verification of the work specified beneath the rib-raft foundation. In the Panel's view he has based his design on parameters stated in the geotechnical reports of Business G and has reasonably assumed, that the excavation, backfilling and compaction have been carried out in a manner compliant with the consented drawings and specification.
65. No evidence has been presented regarding any knowledge he had of the earthwork construction activity, the testing or absence of it, or any possible reason why the as-built platform was not built in the manner specified. This highlights a verification gap which all parties to the design and construction should be aware of and take some action to fill for future building projects. While this is strictly not the direct responsibility of Mr B, in his somewhat limited scope of work on Mrs A's house project, the Panel would urge that, in future he concern himself with sighting evidence that construction, on which his component of work depends, has been built in a manner compliant with the consented design details.
- v. The Adjudicator's statement [PB 1282] "Further to this in an email to the Council Mr K noted that "while I do not believe that 'good practice' has been followed in this case we have no reason to consider that the long-term security of the dwelling has been compromised"**
66. In section 1.5 of her appeal submission Mrs A notes "This statement was about a report to me for insurance purposes, which I paid for, and which the Council representative (RG) obtained from Business G without my knowledge and which he then attempted to use to stop me from querying further. I have been assured by his manager, since then, that this behaviour has been dealt with. Taken out of context, it does not give a total picture".
67. Based on the Panel's conclusion that Mr B had no responsibility for the earthworks or ground preparation [39] the issue in [66] above is not considered relevant to the outcome of this appeal.

**vi. The Adjudicator's statement [PB 1282, 1283] "Mr B stated that it is his understanding that Mrs A is aggrieved for some commercial reason against the company (D) ... and has waged a campaign of making wide ranging complaints to everyone and any organisation who will listen. Such behaviours should be seen as an abuse of process."**

68. In section 1.6 of her appeal submission Mrs A has commented:

"I should not have to deal with this type of comment. It is irrelevant to the matter at issue in my complaint and I am very upset to find it herein. I feel I should respond however, if only to bring to your attention the inappropriateness of repeating such gossip.

I find it hard to credit that this statement could be made by a practising chartered professional engineer who is obliged to adhere to Engineering New Zealand's Code of Ethics. If he does not understand his obligations, why was the fact that it was inappropriate not brought to this attention? That such a personal attack is included in a letter dismissing my appeal shows bias toward me on the part of the letter writer. So was my complaint taken seriously, or was it dismissed because the writer was influenced by it?

This is a personal attack on me, from someone I have never met, who does not live in Christchurch. He cannot have any personal knowledge basis for this statement, so it must be regarded as anecdotal at best. Where did it come from? Why is it in this decision? What is the relevance? Abuse of process has a specific meaning in common law. The intent of its use in the statement above is unclear, unless it is an attempt to denigrate my actions. Since code compliance was issued, I have been in contact with D, the CCC, the LBPB and Engineering New Zealand in an attempt to have accountability for what has happened. Two of these are directly related to the adverse event which has had such an effect on me, and two are organisations which purport to ensure their members are accountable for their actions."

69. Anything that is said by either party in the process of submissions and responses might reasonably be expected to be referred to or addressed in hearing the matter, so the presence of these comments in the Adjudicator's findings is not unreasonable. However, the matters raised in [68] have not influenced the Panel's deliberations.

**vii. Ground preparation [PB 1284] – Section 1.7 of appeal submission**

70. Mrs A raised the Adjudicator's use of the term "adequately compacted" [PB 1284].
71. The Panel, in rehearing the evidence available to the Registration Authority acknowledges the detailed recommendations of Business G [PB 698] and notes that those recommendations were included as requirements on the drawings which were part of the consent documentation. Accordingly, if there are any doubts about what constitutes "adequate compaction" then they would be settled by reference to these requirements on the drawings, the Business G report referred to, and the specifications. The use of the term "adequately compacted" is not considered key to the concerns being addressed.
72. Mrs A has also again questioned where it is stated that Mr B's involvement was to be limited to the structural elements of the foundation design and where it is stated that he was not responsible for the ground preparation. As discussed in [39], the panel has seen no evidence that Mr B had responsibility for ground preparation. Further it is clear that drawings which he has stamped and which formed part of the consent

documentation incorporate, verbatim, the excavation and ground preparation measures recommended by Business G.

73. Making reference to the consented plan drawings [PB 647-686] Mrs A has drawn attention to a note "Prior to any construction starting plans must be reviewed by all contractors and any issues involving information or workability for their own trade and for following trades must be notified to the 'The designer' so that those issues can be resolved before construction starts."
74. The note referred to in [73] is acknowledged but the Panel has seen no evidence of any such issues having been brought to the attention of Mr B by contractors suggesting that the point has no bearing on the findings of the Appeal. The outcome of the Appeal is not influenced by the interpretation of the term "The designer" and whether it refers to the Company for which Mr B appears to work or is a generic term referring to the person who undertook the design.
75. Mrs A's question as to why the requirement that the foundation excavation be "inspected and approved by a suitably experienced geotechnical specialist" was not done, is perfectly reasonable and is at the centre of the issue. However, as discussed earlier the Panel sees this as a matter beyond the scope of Mr D's responsibilities.
76. Under note 7 in section 1.7 of the appeal submission, referring to the Adjudicator's statement that "...Mr B did not provide the geotechnical design..." Mrs A notes "I cannot deduce from this that BC was unaware of, or did not consider that ground factors were important or at least relevant to his design".
77. The Panel is satisfied from perusal of the paginated bundle of evidence that Mr B has relied on the findings of Business G reports in proceeding with the rib-raft slab design and has incorporated the recommended geotechnical parameters and provisions from those reports in his design. He was clearly aware of the ground factors and incorporated them in his calculations and the drawings on which consent was based. The Panel has seen no reason to find fault with Mr B on these points. Again, the issue is execution of ground preparation as stipulated in the drawings, which was not Mr B's responsibility. [39]

**viii. "That the dismissal of my complaint is in error because there are applicable grounds for discipline in the Chartered Professional Engineers of New Zealand Act 2002, under sections 21(1)b and 21(1)(c)**

78. As outlined in [28] and [29] above the Panel has considered whether there is prima facie evidence that Mr B:
  - (i) has breached an aspect of the Code of Ethical Conduct set out in the Rules 42A to 42I;
  - (ii) has performed engineering services in a negligent or incompetent manner.

These points are discussed below.

**ix. Obligations in the public interest 42 - take reasonable steps to safeguard health and safety**

79. Mrs A has cited Rules 42B, 42E, 42F in her appeal.
80. Rule 42B states "A chartered professional engineer must, in the course of the engineer's engineering activities, take reasonable steps to safeguard the health and safety of people."

81. On page 17 of her submission Mrs A contends that Mr B did not take reasonable steps to safeguard the health and safety of the people who would eventually live in the home for which he designed the foundation. She further commented that the process has been upsetting and that she cannot have the confidence of knowing that the job was done as specified.
82. No evidence has been produced that Mr B's design is faulty or that what he has designed has been built in a manner which can reasonably be expected to imperil the health and safety of any person.
83. While understanding the concerns expressed by Mrs A, those concerns do not convince the Panel that there has been a breach of Rule 42B. This is because:
- (i) No complaints have been made about the structural element of the rib-raft slab, the only complaints made referring to the ground preparation for which he was not responsible [39].
  - (ii) A statement from Business G [PB 1091-2] notes that "limited ground testing of the area around the placed slab element does not indicate any long-term settlement concerns".
  - (iii) The Panel is of the view that indirect effects such as distress and inability to be confident fall outside of the intent of Health and Safety provisions of Rule 42B even if it had been determined that Mr B had responsibility for the ground preparation.
84. Rule 42E (Act Competently) states "A chartered professional engineer—
- (a) must—
    - (i) ensure that the engineer's relevant knowledge and skills are kept up to date; and
    - (ii) only undertake engineering activities that are within the engineer's competence; and
    - (iii) undertake engineering activities in a careful and competent manner; and
  - (b) must not—
    - (i) misrepresent, or permit others to misrepresent, the engineer's competence; or
    - (ii) knowingly permit other engineers for whose engineering activities the engineer is responsible to breach paragraph (a)(ii) or (iii) or subparagraph (i)"
85. On page 21 of her appeal submission Mrs A comments "if Mr B is entitled to reject his responsibility for ground preparation ... then why were the ground factors from the geotechnical report included in his design document and why did he have an arrangement that looks on the face of it as though he was receiving a report from a LBP that the building consent and the excavation have been checked?"

86. Having reviewed the large volume of evidence submitted, the Panel makes the following observations:

- (i) There is no evidence to suggest fault in performance of the tasks for which he was engaged by D. This does not mean there were not faults on the part of others.
- (ii) He has applied the recommendations of the geotechnical specialist in his calculations and design documentation.
- (iii) The design process that he followed and the documents produced do not appear lacking in detail or appropriate provision.
- (iv) There has been no suggestion that he has purported to act as a geotechnical specialist or in any other field that is outside of his area of knowledge and expertise.
- (v) He cannot be held responsible for any apparent lapse in execution or supervision that was the responsibility of others.

87. Rule 42F (Behave appropriately) states “A chartered professional engineer, in performing, or in connection with, the engineer’s engineering activities,—

(a) must—

- (i) act with honesty, objectivity, and integrity; and
- (ii) treat people with respect and courtesy; and
- (iii) disclose and appropriately manage conflicts of interest; and

(b) must not—

- (i) offer or promise to give to any person anything intended to improperly influence a decision relating to the engineer’s engineering activities; or
- (ii) accept from any person anything intended to improperly influence the engineer’s engineering activities; or
- (iii) otherwise engage in, or support, corrupt practices”

88. On Page 23 of her appeal submission, apparently referring to the Rule 42E(b)(ii) in the Code of Ethical Conduct, Mrs A states “

“The code above is significant, in that it says, “...knowingly permit other engineers for whose engineering activities you [sic] are responsible...”. It does not appear to even countenance that a LBP might be doing work the engineer should be doing or directly supervising.

In all of this, I am not suggesting that BC has deliberately set out to deceive. It is distinctly possible that the process he has developed with D is simply ill thought through without adequate consideration of foreseeable consequences. He needs to be honest and objective enough to realise when this process has failed. If the process used will not stand up to scrutiny, one has to question its integrity.

Care for the client (in society) is not apparent when BC simply denies responsibility and appears to think that is sufficient response to critique of his actions. Neither is he being objective when he repeats hearsay and opinion in an attempt to justify his behaviour after the event.”

89. Mr B's use of inspection by and reporting from a licenced building practitioner to inform his signing of the PS4 has been discussed at [49] to [56] above.
90. Based on the training and auditing process with the licensed building practitioner's appointment as agent for inspection and further on the absence of any evidence that Mr B has not applied judgment nor disavowed his responsibility as signatory to the PS4 the Panel concludes that he is not in breach of Rule 42E.

**x. *Obligations to act competently***

91. In reviewing Page 21 of Mrs A's appeal submission relating to Rule 42E – Act Competently Mrs A has posed the question “If BC is entitled to reject his responsibility as an engineer for the ground preparation for Business L, then why were the ground factors from the geotechnical report included in his design document and why did he have an arrangement that looks, on the face of it, as though he was receiving a report from a LBP that the building consent and the excavation had been checked?”
92. Discussion in [36] to [43] above addresses Mr B's reliance on site inspection by a licensed building practitioner.
93. The matter of inclusion of ground factors from the geotechnical report in his design document is addressed in [86] and would be regarded as sound practice.
94. The logistical and commercial matters regarding the relationship between Mr B and D are beyond the jurisdiction of the Panel.

**xi. *Has performed engineering services in a negligent or incompetent manner***

95. Under section 5 of her appeal submission Mrs A argues “as though” Mr B did owe her a duty of care and that he has breached it and she then introduced the question as to whether he has been negligent and/or incompetent.
96. She cited the minimum standard for registration (Rule 6, Part 2 of the Chartered Professional Engineers of New Zealand Act Rules (No 2) 2002) which reads:
  - (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.

97. In section 5.6 of her appeal submission Mrs A refers to ground preparation and ground improvement issues based on which she believes Mr B has breached rule 6(1) in that “he did not practise to the standard of a reasonable professional engineer” and with reference to 6(2)(a<sup>5</sup>)(i) and (ii) she claims that “he did not use widely applied good practice, nor good practice for professional engineering in New Zealand.

98. With regard to [97] the Panel notes that as the basis for this specific element of Mrs A’s complaint is the ground beneath the rib-raft foundation, Mr B cannot be found in breach. The Panel is satisfied that the ground element was outside the scope of his work as discussed in [36] to [39] above. Further, with regard to rule 6(2)(a)(i) and (ii) [86] above the Panel has not seen evidence of noncompliance in the work Mr B has done within the scope of his role for this project.

99. Mrs A has also cited rule 6(2)(g) above contending that Mr B has been negligent.

100. Again, the basis of Mrs A’s complaint is that the ground preparation was not built in accordance with the consented design. As this element was outside the scope of Mr B’s role the Panel does not agree that he can be found negligent or incompetent.

101. The Panel has reviewed the Registration Authority’s Submission dated 2 March 2018 [20] and Mrs A’s Submission in Response dated 9 March 2018 [22] and has seen no matters which alter its conclusions. In particular the Panel’s view of the scope of Mr B’s role and responsibilities on the project based on all of the evidence provided, is not altered and this is key to the outcome of the appeal.

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<sup>5</sup> “(a)” appears to have been omitted in Mrs A’s statement

## Conclusions

102. The Panel acknowledges Mrs A's concerns, such as expressed in her complaint [PB 69] - "...from the casual disregard of the importance of adhering to plans and specifications and seeming lack of accountability of those concerned". From the evidence provided these concerns relate to the as-built ground conditions beneath the rib-raft foundation of her home.

103. The two key questions identified in [17 iii] as those which it is appropriate for the panel to consider are:

(i) Was the adjudicator correct in her decision that Mr B was not responsible for the monitoring and sign off on the ground preparation for the site?

(ii) Has Mr B breached the ethical code that was in place at the time the actions related to the complaint occurred?

104. Under the Commentary and Findings section [32 to 101] above, the panel has addressed the material presented in the paginated bundle and in subsequent submissions to establish whether or not there is evidence that Mr B:

(i) has breached an aspect of the Code of Ethical Conduct set out in the Rules 42A-42I respectively, or

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

105. For the complaint to be placed before an Investigation Committee, the Panel would have to be satisfied that clear evidence exists under either or both [104(i) and 104(ii)] above. The panel now addresses these in turn.

***Is there evidence that Mr B has breached an aspect of the Code of Ethical Conduct set out in the Rules 42A-42I respectively***

106. The evidence presented by Mrs A in support of her contention that Mr B has been in breach of Rules 42B, E and F of the Chartered Professional Engineers of New Zealand (No 2) 2002 is all based on the ground beneath the rib-raft. The Panel is satisfied that Mr B was only responsible for the structural aspects of the rib-raft and had no role in the ground preparation. [36] to [43]

107. The Panel therefore concludes that Mr B has not breached an aspect of the Code of Ethical Conduct set out in the Rules 42A-I respectively.

***Is there evidence that Mr B has performed engineering services in negligent/incompetent manner***

108. Three factors are key to the deliberations and findings of the Panel –

(i) Whether the problem that caused Mrs A's complaint was based entirely on the observed discrepancy between the designed and as-built ground preparation,

(ii) the extent of Mr B's role with regard to the design and construction of Mrs A's home and

(iii) whether it was reasonable and appropriate for him to rely on an inspection carried out by another person to inform his decision to sign off the PS4.

109. From review of all material submitted the Panel concludes that if Mrs A had not had concerns that the ground preparation had not been completed in a manner compliant with the consented design then there would not have been a basis for this complaint.
110. The Panel is satisfied that Mr B was not responsible for the ground preparation, his role being limited to the structural aspects of the rib-raft floor.
111. The matter of Mr B's use of a licenced building practitioner for site inspection on his behalf has been addressed in [49] to [56] above. The panel is satisfied that Mr B's actions in this regard have been reasonable, the person on site having been specifically appointed and evidence presented of training and auditing.
112. The process followed by Mr B for the design of the rib-raft slab has been considered and is addressed at section [86] above. No evidence has been presented which suggests that there is any shortcoming with the design and construction of the rib-raft structure itself.
113. The Panel therefore concludes that there is no evidence that Mr B has performed engineering services in a negligent/incompetent manner.

## Decision

114. The Appeal is declined, and the decision of the Adjudicator is upheld.

## Costs

115. It is the decision of the Panel that the costs incurred by all parties to this appeal should remain where they lie.

**Dated this 17<sup>th</sup> day of April 2018**



Chris J Harrison  
Principal



Sue Simons



Alan Winwood