



Chartered Professional Engineers Council
Kāhui Kaiwetepanga Ngaio Whaimana

APPEAL NUMBER 03/18

**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

Mr A

Appellant

And

Mr B CPEng

Respondent

Decision of the Chartered Professional Engineers Council

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 Chartered Professional Engineers of New Zealand Rules (No2) 2002 (“the Rules”) and the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”).
2. The Appeal is of a decision of the Chair of an Investigating Committee (“the CIC”) acting as the Adjudicator dated 3 May 2018.

Background

3. Mr A engaged Business C to design and document an accessway to a new sub division on his land, north of Auckland. Mr B is a Director of Business C and was the Chartered Professional Engineer responsible for the project.
4. Business C issued via email on Friday 16 June 2017 (pg 153 - 174 of bundle) plans and a report. The email referred to the “...attached draft drawing and report...”. The email stated that “Mr B will be reviewing the documents on Monday, with Engineering Approval and Engineering Common Accessway application being issued on the same day”.
5. Mr A used these plans to obtain quotes for the construction of the works.
6. On 12th July 2017 Business C (Mr B) emailed Mr A advising that the plans had been approved by the Council for Building Consent and Engineering Plan Approval (pg 126 - 145).
7. A pre-construction meeting was arranged and attended by the contractors, the Council, Mr A, Mr B and Mr D (design engineer from Business C). Mr B and Mr D arrived after the meeting had started. The documents that were the basis for discussion were the draft documents that Mr A had issued to the contractor for pricing. Neither Mr B nor Mr D (nor the Council representative) noted that the plans being used for discussion were not the stamped and approved plans.
8. Business C did not inform Mr A that there were differences between the draft plans issued on 16th June and the approved plans issued on 10th and 12th July 2017. When the contractor was about to commence work based on the approved plans the differences from the draft plans that had been priced were noted. The difference resulted in the construction estimate increasing by approximately \$10,000.
9. Mr A was dissatisfied with Business C and terminated their services for the future phase of the project.
10. As the works were constructed, further changes were required to the design.

11. Mr A requested that Business C provide a Producer Statement Construction Review (PS4). Mr B confirmed on 5 October 2017 (pg 20) that they would do this but only when all of Business C's time had been invoiced and paid (pg 18).
12. Mr A engaged Consultancy E to carry out the construction monitoring of the accessway. On 21 November 2017 they proposed further changes to the approved plans (pg 114). They suggested on 28 November 2017 (pg 111) that Mr A purchase some land off his neighbour for the concrete driveway.

The Complaint

13. Mr A contacted IPENZ/Engineers New Zealand (ENZ) by telephone on 26 September 2017 (pg 17) and submitted a complaint form dated 31 October 2017 (pg 8). Mr A did not want to issue an immediate complaint as he considered this may impact on Business C providing the PS4 (pg 11).
14. Under S4 of the Act The Institution of Professional Engineers New Zealand (IPENZ) is the Registration Authority (RA).
15. Between the initial phone call and the complaint being received Mr A copied the RA with further concerns as they arose.
16. The RA contacted Mr A on 4 December 2017 to progress the "Concerns about Mr B" (pg 95). These concerns were further refined and then confirmed as correct by Mr A on 12 December 2017 (pg 109).
17. The concerns about Mr B are as follows (pg 109 - 110):
 - a. Mr B acted incompetently by using the draft plans at the meeting.
 - b. Mr B acted unprofessionally by calling Mr A an idiot for using draft plans to obtain a quote and by defending his employee's lack of communication about the difference between the draft plans and the approved plans.
 - c. Mr B acted unprofessionally by demanding payment before issuing a PS4.
 - d. Mr B acted incompetently in his role in reviewing Business C's plans for approval by the Auckland City Council because there were errors with the plans. These errors were:
 - i. The driveway design was partly on the neighbour's property.
 - ii. The driveway was impossible to implement.
 - iii. There was a technical error on page 205 top left hand corner.
18. The RA forwarded Mr A's concerns to Mr B on 14 December 2017. Mr B responded to the concerns on 22 January 2018 (pg 120).
19. The RA indicated to Mr B on 31 January 2018 that Mr A's concerns would only be resolved if Mr B issued a formal apology and a full refund. This was not acceptable to Mr B.
20. The RA decided that resolution via alternative dispute resolution process in accordance with Rule 58 d) was unlikely. They referred the complaint to the Chair of Investigating Committee (CIC) Mr David Bunting.

Chair of Investigating Committee Review

21. The CIC issued their decision on 3 May 2018.
22. The CIC considered each detail of the complaint. The CIC found:
 - a. There were short comings in the communications between Business C and Mr A relating to the change between the draft and approved plans. It would have prudent for Mr B to check the plans that were tabled at the pre-construction meeting. If the correct design had been priced it would have included the extra \$10,000. However, these shortcomings are insufficiently grave to warrant further investigation.
 - b. That other than Mr A's claim that Mr B had called him an idiot, there was no other information on this. The CIC noted the obvious deterioration in the relationship between Mr A and Mr B and that Mr A had sent an email with expletive language (pg 125) to Business C's staff. The CIC concluded that even if Mr B had called Mr A an idiot, this situation was insufficiently grave to warrant further investigation.
 - c. The withholding of the PS4 until payment of fees had been received is a commercial dispute and is outside the ambit of the ENZ complaints process.
 - d. The technical error, use of the neighbour's land and other design modifications would have been resolved on site with the contractor and the Council. There is nothing in the information that elaborates on the significance of these errors. They are considered insufficiently grave to warrant further investigation. The CIC also notes that engineering opinions may differ between engineers and that Mr B's design met the reasonable standards of a professional engineer.
23. The CIC dismissed the complaint under Rule 57 (ba) on the basis that the misconduct is insufficiently grave to warrant further investigation.

The Appeal

24. Mr A indicated his desire to appeal the decision of the CIC by email to the Council dated 5 June 2018.

Grounds of Appeal

25. Mr A's grounds for appeal as summarised from his 27 June 2018 email are:
 - i. Mr A disputes that:
 - The non- identification of the correct plans at the pre-construction meeting, and
 - Not notifying the client of changes to the plansare actions that are insufficiently grave to warrant further investigation. He notes that the differences in the plans impacted him in a very bad way.
 - ii. Mr A maintains that he was called an idiot by Mr B. The CIC notes that such behaviour, if it did occur, was unprofessional but in this situation would be insufficiently grave to warrant further investigation. Mr A considers that he paid for a professional service and that he didn't receive one. He disagrees that this allegation is insufficiently grave to warrant further investigation.
 - iii. Mr A considers that the withholding of the PS4 was not a commercial dispute but "obnoxious behaviour" by Mr B.
 - iv. Mr A contends that the CIC did not undertake sufficient investigation to confirm if the accessway as designed by Business C was appropriate and could be built as documented.
 - v. Mr A contends that the CIC did not consider the technical errors on "page 25".

26. In accordance with S37 (2) of the Act and appeal to the Council is a rehearing. The RA has provided a bundle of all evidence that was provided to the CIC.

Submissions

27. All parties including the RA were provided the opportunity to provide submission to the appeal panel.
- Mr A made no further submissions.
 - Mr B provided his submission on 2nd August 2018
 - The RA provided their submission on 10th August 2018.

The Hearing

28. Mr A requested that a hearing be held in person. The hearing was held via telephone conference on 4th October 2018. In attendance at the hearing were:
- Mr Jon Williams – Appeal Panel Principal
 - Ms Sandra Hardie – Appeal Panel Member
 - Ms Rebecca Knott – Appeal Panel Member
 - Mr A – Appellant
 - Mr B – Respondent
 - Ms Christine Anderson – Senior Legal Counsel for the RA.
29. Mr Williams clarified the procedure to be followed for the hearing. All parties would present their submissions, the panel would seek clarifications and parties would be able to ask questions via the Principal of the panel.
30. Mr Williams confirmed that the hearing would be recorded. Should the matter be appealed to the district court then the recording would be transcribed. If the decision was not appealed the recording would be deleted. No other party could record the hearing for use in other forums.
31. Mr Williams outlined the background to the case and asked for confirmation from all parties that this was correct. The background is provided in paragraphs 3 -12 of these findings and was agreed by all parties as being correct.
32. Mr A noted that the appeal panel contained only engineers. He considered that the panel should include a lay person. He then presented his complaint. Mr A asked the panel a question then highlighted the 10 errors that he considered were in Business C's Documentation and services provided. The topic of the question related to item "a" below:
- Business C's design for the driveway had a single drain. His concrete contractor and other engineers considered there should be more.
 - The differences between the draft and approved plans were not highlighted to the client.
 - Draft plans were used at the pre-construction meeting.
 - The difference between the plans were picked up by the contractor the day before the construction of the palisade wall. The client was not informed.
 - Where the driveway meets the road there is a 500mm high difference
 - The driveway crosses the neighbours land
 - Council would not approve a retaining wall in the road boundary
 - There was an error on "page 25".
 - The PS4 was undated

- j) Other engineers consider that shear keys are required in the steeper sections of the driveway.
 - k) Business C maintain that they have done a good job.
33. Mr A noted that his expectations were that he was to be provided with a professional service. He wanted to know if the panel/RA considered this had been provided. Mr Williams noted that it was not appropriate for the RA to answer this question and that the panel's decision would be contained in the published findings in the appeal. Mr A also made reference to expectations under the consumer guarantees act.
34. Mr A asked that 3 questions be answered by the RA:
- a) What should be expected of the performance of a "reasonable" engineer?
 - b) What is the bar that the "insufficiently grave" test is judged against?
 - c) How was Mr Bunting selected to be the CIC?
35. Mr B presented his response to the complaint. He reconfirmed the statements made in his submission and previous correspondence with the RA during the complaints process. He reiterated the following points:
- a) Business C's commission was to design and document the accessway to obtain Building Consent and Engineering Plan Approval from Auckland Council. These has been obtained. He also noted that a vehicle crossing consent has been obtained from Auckland Transport.
 - b) Mr A had decided that he would not engage Business C for the construction observation of the works.
 - c) It was Mr A who requested that Business C (Mr D) issue him plans on the 16th June 2018.
 - d) He noted that the only difference between the draft plans and the approved plans was the pile size and spacing of the piles for the palisade wall.
 - e) They did not have a complete survey and geotechnical information around the road entrance to the property, so this part of the design needed to be "worked out on site". If these works required a retaining wall in the road reserve then they had obtained approval for this on previous projects.
 - f) He noted that the plans that the contractors should use for constructing are the Council stamped and approved plans not the plans issued by the Consultant, as the Council may have added additional requirements.
 - g) That he considered Business C's design was appropriate and met Council requirements. He did not consider that the alternative design solutions proposed by other designers implied that the Business C's design was incorrect.
36. Ms Anderson stated their submission outlined the position of the RA. She noted:
- a) That the professional disciplinary processes do not exist to punish the individual, but to ensure professional standards are maintained.
 - b) She noted that the CIC had indicated that there were some lessons that could be learned from this matter:
 - i. The status of plans being used at meetings should be confirmed.
 - ii. When updated plans are issued, the issue note should include an indication of the changes that had been made.
 - c) She confirmed that it was the CIC's role to consider if there were grounds to dismiss Mr A's complaint. The RA considered that the CIC had done this and had provided the grounds required to dismiss the complaint in his report.

37. Mr Williams asked Mr B two questions:
- Was the only difference between the draft and approved plans the piles for the palisade wall? Mr B noted that he did not have the plans with him but he thought that this was the case.
 - What date were the approved plans issued to Mr A? Mr B confirmed that plans associated with the Building Consent were issued on 10 July 2017 and those associated with the Engineering Plan Approval were issued on 12 July 2017.
38. Mr Williams asked Mr A to clarify specifically what error was referred to as being on page 25 (or 205) of the documents? Neither Mr A nor Mr B could identify in the bundle of evidence the page being referred to.
39. Ms Knott asked Mr B;
- In what way are the differences between draft and final plans highlighted? Mr B noted that this would be indicated as a different revision of the drawing with some notes in the “revision box” of the drawing.
40. Ms Hardie asked Mr B:
- If the plans included on pg 160 of the bundle were the draft plans issued to Mr A on 16th June 2017. Mr B did not have the bundle with him but indicated if these were the plans with the email then they probably were.
41. Mr Williams asked Ms Anderson the questions that had been raised by Mr A:
- What should be expected of the performance of a “reasonable” engineer?
 - What is the bar that the “insufficiently grave test” is judged against?
 - How was Mr Bunting selected to be the CIC?
42. Ms Anderson responded:
- That the consideration of the complaints process and this appeal was not against the requirements of the consumer guarantees act. It was an assessment of the performance of a Chartered Professional Engineer compared to their peers.
 - In assessing the performance of an engineer the CIC had to consider what would a reasonable engineer have done at the time of the occurrence.
 - Mr Bunting is a life fellow of Engineering New Zealand. He is one of a number of CIC’s. Who is selected for a specific complaint depends on work load. Ms Anderson was unaware of who specifically selected Mr Bunting for this case.
43. Mr Williams closed the hearing and confirmed that the next steps were for the panel to meet to consider the appeal and issue the findings to all parties.

Discussion

44. 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.

45. The RA has followed the process outlined in the Rules. Rule 57 states:

57 Grounds for not referring complaint to investigating committee

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—

- a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or*
- b) the subject matter of the complaint is trivial; or*
- ba) the alleged misconduct is insufficiently grave to warrant further investigation; or*
- c) the complaint is frivolous or vexatious or is not made in good faith; or*
- d) the person alleged to be aggrieved does not wish action to be taken or continued; or*
- e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or*
- f) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*

46. The panel considers that:

- a. The subject of the matter is not trivial. Mr A considers that he has been significantly impacted by the actions of Mr B. Rule 57 b) does not apply.
- b. The complaint is not frivolous or vexatious. Mr A has potentially been financially impacted and whilst Mr A is emotive in the manner of his complaint, the panel does not consider the actions to be of a vexatious nature. Rule 57 c) does not apply.
- c. Mr A clearly wants to proceed with the action. Rule 57 d) does not apply.
- d. Mr A has a clear personal interest in the matter. Rule 57 e) does not apply.
- e. It is still possible for the complaint to be investigated. Rule 57 f) does not apply.

47. This leaves the panel to consider Rule 57 a):

- a. Are there applicable ground of discipline under section 21(1)(a) to (d) of the Act and if so are they sufficiently grave to warrant further investigation; Section 21 of the Act states:

21 Grounds for discipline of chartered professional engineers

(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in 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.*

The panel considers that S 21 1 (a), and (d) are clearly not applicable to this case.

48. To summarise paragraphs 45 – 47. The panel needs to determine if Mr B has:
- i. Breached the code of ethics contained in the rules – Rule 21b, or
 - ii. Performed engineering services in a negligent or incompetent manner – Rule 21c to an extent that is significantly grave to warrant further investigation.
49. Under Rule 56, the CIC is conducting an initial investigation of the complaint in accordance with Rule 58. Rule 58 states:

58 Way in which decision on whether or not to refer complaint to investigating committee must be made

The Registration Authority must carry out an initial investigation of a complaint against the grounds in rule 57 in the following way:

- (a) the Registration Authority must notify the person complained about of the general nature of the complaint before commencing the investigation; and*
- (b) a complaints research officer must carry out the initial investigation of the complaint and recommend to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 57; and*
- (c) the complaints research officer, or chairperson of investigating committees, may seek to verify the information provided in the complaint by a statutory declaration from the complainant; and*
- (d) after considering the complaints research officer’s recommendation, the chairperson may explore (with the complainant and the person complained about) the possibility of the complaint being referred to conciliation, mediation, or another dispute resolution process for 60 days or any other time period that the chairperson thinks fit; and*
- (e) if alternative dispute resolution is not used or if it fails to resolve the dispute within the requisite time period, the chairperson must decide whether the complaint should be—*
 - (i) referred to an investigating committee in accordance with rule 59(b); or*
 - (ii) dismissed on a ground in rule 57.*

50. In accordance with Rule 58 (d) the CIC and the RA did consider if there was a possibility of resolving the dispute under another dispute resolution process. The panel agrees with the CIC that given the state of the relationship between Mr A and Mr B, resolution under another dispute resolution process was unlikely to be successful.
51. Rule 60 provides that:
- An investigating committee must, as soon as practicable after receiving a complaint or inquiry, investigate the matter and—*
- (a) refer the matter to a disciplinary committee; or*
 - (b) dismiss the matter on a ground in paragraphs (a) to (f) of rule 57.*
52. Notably therefore, while both the CIC and an Investigating Committee can dismiss a complaint on the basis of a ground in Rule 57, the standard of inquiry is different. Under Rule 58 the CIC carries out an initial investigation. Under Rule 60 the Investigating Committee must investigate the matter.
53. The Investigating Committee has considerable powers under Rule 61.

61 Powers of investigating committee

An investigating committee may—

- (a) make, or appoint a person to make, any preliminary inquiries it considers necessary;*
- (b) engage counsel, who may be present at a hearing of the committee, to advise the committee on matters of law, procedure, and evidence;*
- (c) request the person complained about or the complainant to provide to the committee, within a specified period of at least 14 days that the committee thinks fit, any documents, things, or information that are in the possession or control of the person and that are relevant to the investigation;*
- (d) take copies of any documents provided to it;*
- (e) request the person complained about or the complainant to attend before the committee, at that person's own cost, on at least 14 days' notice;*
- (f) receive any evidence that it thinks fit;*
- (g) receive evidence on oath and otherwise in accordance with section 27 of the Act;*
- (h) require a person giving evidence to verify a statement by oath or statutory declaration;*
- (i) use the powers to summon witnesses under section 28 of the Act;*
- (j) provide information to assist the complainant and the person complained about in obtaining counsel or other advocacy assistance.*

Importantly, an Investigating Committee has significant powers which a CIC does not have.

Findings

- 54. The question that this panel needs to consider is, Based on the limited powers of investigation open to the CIC, has it been shown on the balance of probabilities, that Mr B has not breached his ethical obligations or performed engineering services in a negligent or incompetent manner.
- 55. The panel cannot conduct its own investigation. Under S 37 (6) of the Act the Council has no power to review any part of the decision other than the part to which the appeal relates.
- 56. With reference to paragraph 48. Has Mr B breached the code of ethics? The panel considers the only applicable matter is Rule 42 F.

42F Behave appropriately

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*

- 57. The panel does not immediately agree that a claim that a Chartered Professional Engineer called their client an idiot is insufficiently grave in the context of "behaving appropriately". Regardless of any deterioration of the relationship between the engineer and the client, the Chartered Professional Engineer must maintain appropriate professional behaviour. If evidence were provided to support the claim, it would be worthy of investigation.

58. The RA, in paragraph 10.4 of their submission references a previous Council appeal number 02/17. This appeal related to alleged threats being made by one party to another. There is an earlier finding of an RA disciplinary committee that came to appeal (appeal 03/13 S v L). In this case the disciplinary committee found that Mr S should be censured, fined \$3000, pay costs of \$7,000 and have the findings published in Engineering Dimensions. The complaint related to alleged inappropriate comments made by Mr S on a LinkedIn posting.
59. The panel finds that further investigation is required to determine if Mr B has breached the code of ethics to an extent that would provide grounds for discipline under S 21 (1) (b) of the Act.
60. With reference to paragraph 48. Has Mr B performed engineering services in a negligent or incompetent manner?
61. The panel considers that incompetence is a more serious allegation than negligence. A person may be negligent without being incompetent, though it is unlikely someone who is incompetent is not also negligent.
62. The panel does not consider that Mr B is incompetent. At the hearing and in his written submission he has displayed a sound engineering knowledge with respect to the design processes and procedures required for the work that is the subject of this complaint.
63. Paragraphs 27 – 38 of a Council Appeal Finding H v A December 2010 provide a consideration of the standard of negligence that an Engineer should be judged against.

27. We do 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. 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 practise as a barrister or solicitor or as to tend to bring the profession into disrepute...

28. We appreciate that this adds a qualifier that is not present in the Act that we have to consider but we do not consider that this makes the reasoning of the High Court any less relevant in this case, nor any less binding on us.

29. The High Court set out a number of authorities concerning what the threshold was for a disciplinary finding in negligence to be upheld.

30. Section 106 of the Law Practitioners Act 1982 contains various types of charge that might be laid following a complaint. In relation to this the High Court stated:

[80] In our view each of the sub-paragraphs of s106 are intended to capture different kinds of conduct which may be more or less serious in a particular case. ... There is no hierarchy of seriousness as between the sub-paragraphs. ... Conduct is to be assessed in respect of the particular charge that has been brought.

31. So in this case, we place little store on the fact that the grounds of discipline contained in other sub-paragraphs in the same section are for matters that might be said to be more grievous than an act of negligence. Indeed, that does not necessarily follow at all as an

act of negligence can have very serious consequences in terms of health and safety which may well have very significant ramifications. As the High Court noted in the Canterbury Decision “No gloss should be placed on the statutory test”.

32. That leaves us still having to consider what is the standard, which if an engineer falls below, the conduct will be considered grave enough for disciplinary action to follow.

33. In the Canterbury Decision the High Court said following its review of the previous authorities:

[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] In our view it was negligence of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standard required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law provision should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

34. So here, we consider that we have to assess whether the Disciplinary Committee was correct in making a finding that the appellant’s conduct was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Put slightly differently, would the acts complained of if acceptable tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?

35. We consider that this test aligns well with the purpose of the Act which is:

*... to reform the law relating to the registration of engineers and to establish the title of chartered professional engineer as a mark of quality; and, to those ends, this Act—
(a) establishes a registration system for chartered professional engineers, under which persons who wish to be chartered professional engineers must meet minimum standards to be, and continue to be, registered; [emphasis added]*

36. We also note that the Act requires Chartered Professional Engineers to be currently competent. The standards against which Chartered Professional Engineers are assessed are those set out in under Rule 6. Subsection 1 states:

To meet the minimum standard for registration, a person must demonstrate that he or she is able to practice competently in his or her practice area to the standard of a reasonable professional engineer.

37. Subsection (2) of Rule 6 sets out 12 attributes that will be considered in making an overall assessment of competence. Of relevance to this appeal are the following:

*(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*

...

(d) exercise sound professional engineering judgement; and

...

(g) identify, assess, and manage engineering risk; and

...

(k) maintain the currency of his or her professional engineering knowledge and skills.

38. We consider that these criteria can be read in conjunction with the test that was set out in the Canterbury Decision and can assist in directing us to consider what aspects of a Chartered Professional Engineer's practice we should have particular regard to in assessing whether disciplinary action should be taken or not in response to an allegation of negligence.

64. With reference to this case, we would add:

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;

to paragraph 37 of the H v A finding.

65. From paragraph 34 of this finding we take this following as an appropriate bar to assess the negligence or otherwise of a Chartered Professional Engineer.

Would the acts complained of if acceptable tend to lower the standing of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public.

66. The panel has reviewed the documentation provided in the bundle. This includes:

- The plans issued on 16 June 2017 (pg 159 – 174).
- The stamped Approved Engineering Plans issued on 10th and 12th July 2017 (pg 128 – 142).

67. The panel notes that:

- Both sets of plans have the same revision reference and date (Rev A 13/06/17).
- The report issued on 16th June had a “Draft” watermark, but the drawings did not.
- The draft plans (Dwg. No. 200, pg 166) appear to show the new accessway crossing the neighbouring boundary. This has been moved on the approved plans (pg 135).
- The draft plans (Dwg. No. 200, pg 166) show a 355 m long accessway. This is reduced to 255 m on the approved plans (pg 135).
- The draft plans (Dwg. 112 pg 165) requires columns at 1.8 m centres. The approved plans require columns at 1.35 m centres. This change was noted by Mr B during the hearing.
- In various emails (e.g. 4 August 2017 pg 26) and at the hearing Mr B acknowledged that a number of aspects of the design would need to be “worked out on site”.

68. The panel is not qualified to review the correctness of the engineering design shown on the plans. The above changes have been identified by comparing the drawings.

69. The panel has the following questions:

- i. Regardless of their draft status were the drawings provided to Mr A on 16 June 2017 “issued”?
- ii. Is making significant changes to an issued drawing and not highlighting and noting these changes on the drawings appropriate?
- iii. Is making significant changes to the design and not discussing these with the client appropriate?
- iv. Is the extent of detailing to be “worked out on site” (with no annotation to this effect on the drawings) appropriate?

70. From the “initial investigation” the CIC found that the failures in communications and any potential shortfalls in the design were insufficiently grave to warrant further investigation.

71. The panel does not agree with this finding of the CIC. The panel finds that further investigation is required to determine if Mr B has performed engineering services in a manner, that if acceptable, would tend to lower the standing of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public. Or more specifically has Mr B performed engineering services in a negligent manner to an extent that would provide grounds for discipline under S 21 (1) (c) of the Act.

Outcome

72. The appeal is upheld. In accordance with Rule 56 (a) the RA must refer the complaint to an investigating committee in accordance with Rule 59 (b).
73. The panel considers that all costs associated with this appeal should fall where they lie.

Dated this 12th day of October 2018

Mr Jon Williams
Principal



Ms Rebecca Knott



Ms Sandra Hardie

