

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

**Appeal 10/21**

**AND**

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

**Between**

Mr A  
**Appellant**

**And**

Mr and Mrs B  
**Complainants**

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Memorandum of the Chartered Professional Engineers Council

Decision on Costs

Dated 17 December 2021

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1. On 5 November 2021 the Chartered Professional Engineers Council (“the Council”) issued its decision on the substantive matters of Mr A’s appeal against the decision of the Investigating Committee to refer a complaint against him by Mr and Mrs B, to a disciplinary committee.
2. An invitation for submissions on costs was included in the decision, with the panel noting it’s expectation that a fair outcome would be for costs to lie where they fall. The reasoning for the panel’s position was that while the panel had found in favour of the appellant on the substantive elements of the appeal, it was of the view that it was not unreasonable for the complaint to have been laid in the first instance and the decision reflected a careful balancing of the evidence from both sides.
3. Submissions were received from both parties to the complaint and the appeal, and also from the Registration Authority. References made to Engineering New Zealand, refer to the organisation’s role as the Registration Authority under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”).
4. The submission of Mr and Mrs B favoured a ruling in which costs would lie where they fall.
5. Counsel for Mr A agreed with the panel’s conclusion that it was not unreasonable for the complaint to have been laid and on that basis costs against the complainants should lie where they fall.
6. Counsel for Mr A submitted that it would be fair for the panel to make a cost award against Engineering New Zealand on the basis that it was unsuccessful in not only opposing Mr A’s appeal generally but was also unsuccessful in its challenge to the panel’s decision of 23 June 2021 regarding expert evidence.
7. Counsel for Mr A further submitted that steps taken by Engineering New Zealand caused Mr A to incur further costs as he not only had to respond to the complainant’s submissions on those matters but also on additional submissions from Engineering New Zealand which raised different issues to those raised by the complainants.
8. Counsel for Mr A also asserted that it is only fair for Engineering New Zealand to contribute to Mr A’s costs, *“consistent with the cost regime in other jurisdictions where the successful party is entitled to a contribution to its costs from the party that fails”*.

9. The submission of the Registration Authority also favoured a ruling in which costs would lie where they fall, reserving the right to make further submissions in reply should Mr A or Mr & Mrs B consider in their submissions that costs should be awarded, and provide evidence of such costs. The Registration Authority filed a submission in response on 2 December 2021.
10. In section 3 of their submission the Registration Authority addressed precedents on costs awards citing *A v RA*<sup>1</sup> as the only decision since 2006 in which the Council had ordered costs, noting also that the particular appeal concerned a decision of the Competency Assessment Board.
11. The Registration Authority submitted (3.13 – 3.15) that it was not in the public interest for the Registration Authority to bear the cost burden of the parties, noting it is a not-for-profit and self-funded body and that exposure to significant costs would impede its ability to perform its statutory function and its ability to investigate complaints.
12. In paragraphs 1.3 and 1.4 of its 2 December 2021 response, the Registration Authority submits that Mr A's claim for legal and expert costs "*equivalates to a claim for indemnity costs*" noting that for such a claim misconduct by the unsuccessful party must be established. The Registration Authority further submits that it has acted in accordance with the Act and that its actions do not constitute misconduct.
13. In paragraph 1.5 of its response, the Registration Authority submits that "*in the courts, indemnity costs are rare and the threshold to award them is high*" and notes further that "*they are the exception not the rule*" and "*can only be awarded where the party has acted vexatiously, frivolously, improperly, or unnecessary, [sic] ignored or disobeyed an order or direction of the court, or for some other reason which justifies the court making an order for indemnity costs...*". The Registration Authority then submits that none of the aforementioned reasons exist in the current situation.
14. In paragraph 1.6 of its response the Registration Authority submits that keeping CPEC's practice consistent with that of other professional disciplinary jurisdictions is central to maintaining the integrity of the CPEC appeal process and in paragraph 1.7, refers to the Health Practitioners Disciplinary Tribunal ("the HPDT") under whose proceedings a practitioner who successfully

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<sup>1</sup> [Appeal Ruling# 53: 23 March 2020 - Chartered Professional Engineers Council \(CPEC\)](#)

defends a proceeding is not entitled to costs and that costs can only be awarded to the prosecution.

15. Further to 14 above the Registration Authority notes that in the event that any costs are awarded the HPDT must apply a starting point of 50% of the costs incurred.
16. The Registration Authority submits (response paragraph 1.8) that the amount of costs sought by Mr A is unreasonable and that in the Authority's experience, the legal fees for an appeal held on paper and expert fees are both unreasonably high costs.
17. The parties to this disciplinary appeal are the complainant and the respondent/appellant.
18. Engineering New Zealand, in its role as the Registration Authority participates in this appeal, not as a stakeholder, but rather to assist the Council.
19. The panel considers that the Registration Authority participated in the appeal process in accordance with its powers and obligations under the Act.
20. The panel does not accept the assertion of counsel for the appellant that the Registration Authority caused Mr A to incur further costs. Responsibility for how Mr A approached the appeal rests entirely with him. It is not a case where the Registration Authority had, for example, conducted itself in an egregiously inappropriate or irrational way.
21. While the panel overturned the decision of the Investigating Committee, the panel's findings did not represent a finding that was compellingly in favour of Mr A. An example is illustrated in paragraph 163 of the substantive decision where the panel noted *"Mr A could have taken a different path in reporting by providing better reasoning for Company C's recommendation that differed from those in Company D's report"*.
22. The fact that the panel reached a different decision than the Investigating Committee does not mean that the Registration Authority erred. Furthermore, the Council has no jurisdiction to investigate and rule on the Registration Authority's conduct or processes, the appropriate forum for consideration of such matters being by way of judicial review.

23. In relation to the matter of costs, the panel has considered the role of the Registration Authority in the disciplinary process, the finely balanced nature of the outcome of the appeal, public interest considerations and precedents.
24. The panel sees no merit in the appellant's submission that an award of costs be made against Engineering New Zealand in favour of the appellant.
25. The decision of the panel is that costs incurred by the parties and the Registration Authority respectively shall lie where they fall.
26. In accordance with s35 of the Act a party may appeal this decision to the District Court within 28 days.

**Dated 17 December 2021**

Signed by



Chris J Harrison (Principal)



Sandra Hardie



Sue Simons