

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

Appeal 07/21

And

**In the matter of an appeal to the
Chartered Professional Engineers Council
pursuant to Section 3**

Between

Ms A

Appellant

And

Mr B, CPEng, DistFEngNZ

Mr C CPEng, CMEngNZ

Respondents

Decision of the Chartered Professional Engineers Council

Dated 22 February 2022

Introduction

1. Ms A has appealed a decision, made by an Investigating Committee ('The IC') to dismiss her complaint to the Chartered Professional Engineers Registration Authority (RA) about Mr B and Mr C [BoD, p 449 – 454].
2. The Chartered Professional Engineers Council (CPEC) Panel ("the Panel") has been provided with a paginated Bundle of Documents file (BoD) held by the RA in relation to the case. References to specific documents within this file are annotated "[BoD p n]".

The Legislation

3. The right of appeal is contained in s35 of the Chartered Professional Engineers Act 2002 ("the Act"). S37 of the Act sets out the scope of the Chartered Professional Engineers Council's (the Council) jurisdiction which is to deal with the matter by way of rehearing.
4. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules") and were enacted pursuant to s40 of the Act.
5. Appeals to the Council are by way of rehearing (s37(2) of the Act). The appeal Panel is entitled to confirm, vary, or reverse a decision (s37(5) (a)) and may make any decision that could have been made by the decision authority (s37(5) (c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, the Panel is entitled to take a different view from the RA, but the appellant carries the burden of satisfying the Panel that it should do so.
6. S21 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 s22 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 practice 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 and 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 sub paragraph (i); or*
- (iii) *Produced to the authority or made use of any document knowing that it was not genuine.”*

7. The facts and evidence clearly demonstrate that the criteria established under sections 21(1)(a), and (d) of the Act do not apply in this case. The Panel is therefore tasked with considering whether there is prima facie evidence that Mr B and Mr C:

- (i) Have breached an aspect of the code of ethical conduct set out in the rules 42(A)-42(I);
and/or
- (ii) Have performed engineering services in a negligent or incompetent manner.

Chronology, submissions, communications and correspondence

- 8. The relevant legislation is set out in Schedules 1 and 2.
- 9. The works which are the subject of this complaint are located within the boundaries of Property E (“the Property” or “Site”).
- 10. Key interactions, correspondence, communications, and submissions in this appeal are listed in Schedule 3.
- 11. A timeline of events is in Schedule 4.

Grounds of appeal and outcome sought

- 12. The original resolution sought in the complaint to the RA, as set out in the Notice of Appeal from Ms A, was as stated below:

Ground of Appeal 1

“Misunderstanding by the engineers at Company D about the full slip area.”

Ground of Appeal 2

“Their [presumably Mr B and Mr C] professional authority to say that LS1, that is still exposed today, is safe.”

Ground of Appeal 3.

“The Client (being the Organisation F that I am a Trustee of) asked for LS1 to be covered, and at no point did any engineers at Company D inform the Client that they had decided not to cover LS1. Noting that Company D originally (in February 2017) did not decline that work on the basis that it didn’t need doing. In July 17, they were asked to add LS2, yet it appears that they did LS2 instead, leaving LS1 exposed (to this day) There is reference to LS1 and the outcrop being stable, however the earthquake slip was adjacent to the outcrop”.

Outcome Sought

“That the complaints be upheld unless Company D, confirms that the wall, as designed, and currently supporting LS2 encompasses LS1, given the obvious visual shortfall of the length of the wall. And that such confirmation is satisfactory to yourselves (Company D) and capable of being confirmed by an independent engineer”.

Decision being appealed and evidence considered

13. The decision under appeal is the decision made by a RA Investigating Committee to dismiss Ms A’s complaint about Mr B and Mr C on 17 March 2021 [BoD, p 449 – 454].
14. Under S15 of the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (the Regulations) the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
15. The evidence considered by the Panel in arriving at this decision included:
 - i. Engineering NZ Bundle of Documents (BoD) pages 1 to 459, and,
 - ii. Submissions as noted in Schedule 3.

Hearing

16. It was agreed by all parties that the appeal would be held “on the papers”. The Panel met by “Zoom” on 17 September 2021, 7 October 2021, 13 October 2021, and 11 November 2021. Since this date the Panel members have been interacting via email to prepare the appeal response and decision. Another Panel zoom meeting was held on 3 December to discuss aspects of the decision. Following further email interaction, the panel members reached agreement on the decision and the format of the decision in February 2022.

Discussion and Findings

17. The original complaint, and the basis of Ms A’ appeal to CPEC, concerns the actions of Mr B, Director of (and now Consultant to) Company D Ltd, and Mr C, Director of Company D Ltd.

18. Mr B was the initial point of contact with Ms A on 10 February 2017 when he made his first site visit. He subsequently issued a proposal for a retaining wall to reinstate the slope and ground where a slip had occurred along the western boundary of the property at Property E [BoD p 261]. This proposal was accepted by text message, subject to some further questions from Ms A [BoD p 17].
19. Mr B visited the site again on 4 August 2017. This was after a rain event in July 2017 that had created a further larger slip (LS2) between the original small washout and the northern site boundary. This resulted in another letter from Mr B confirming that Ms A wished to proceed with the retaining wall in the area of the slip adjacent to the western boundary of the property [BoD p 263].
20. Mr B continued to lead the design team for this project, in particular the Company D engineering, planning and survey staff, and co-ordination of a geotechnical investigation which was completed by Company G as a sub-consultant on 27 September 2017. This work culminated in applications for Land Use Consent and Building Consent on 10 April 2018. Detailed design of the subject retaining wall was completed by Engineer AA, a staff engineer at Company D, in March 2018.
21. In early December 2017, Mr B was involved in final selection of the wall type (anchored poles and planking, as originally proposed, versus anchored sprayed concrete facing) [BoD p 416].
22. Mr B took leave in February 2018 and handed the Client management and oversight of the project design to Mr C.
23. Mr C oversaw the design and the designer's observation and certification of the wall including signing of the Producer Statement 1 (PS1) certificate that was part of the Building Consent application [BoD p 358].
24. The point of contact for Ms A with Company D during the lead up to, and during construction of, the wall was Engineer AA, who designed the wall and undertook four site inspections.
25. Mr C first became involved in the project in July 2017 when Mr B was overseas. He then handled a third slip event in early August 2018. A chronology of events, which includes a summary of the slip event occurrence, is provided in Schedule 4. Mr C had meetings with Ms A on and off site in October 2018, culminating in a letter to Ms A dated 2 November 2018 addressing her concerns about the wall, the safety balustrade, and the uncovered portion of the original washout [BoD p 27].
26. The panel notes that a complaint by Ms A against Engineer AA was dismissed by an Investigating Committee on 15 March 2021 on the basis that there were no applicable grounds for discipline, and that Ms A' appeal of this decision to CPEC was not allowed as Engineer AA was not a Chartered Professional Engineer.
27. The Panel has addressed the grounds of appeal in order as follows:

Ground of Appeal 1

Mis-understanding by the engineers at Company D about the full slip area.

28. The Panel has assumed that 'the Engineers 'are Mr B and Mr C, because the original complaint, and the basis of Ms A 'appeal to CPEC, concerns the actions of Mr B, Director of, and now Consultant to, Company D Ltd and Mr C, Director of Company D Ltd.
29. Mr B was the initial point of contact with Ms A on 10 February 2017 during the first site visit by Company D, and subsequent issue of their proposal to design a retaining wall to reinstate the slope where a slip had occurred along the western boundary to her property E (BoD p 261). This slip consisted of a small washout at the southern end and an area of tension cracking between the Northern boundary and this small washout. This cracking and washout occurred in 2016 as a result of the Kaikoura earthquake and a subsequent rain event and is referred to as LS1.
30. Correspondence from Mr B at the time indicated that Ms A wanted a retaining wall from the southern end of the LS1 slip to the northern boundary, an approximate 10m length. Mr B approximated that length as 7m in his letter.
31. Mr B again visited the site on 4 August 2017, after a rain event in July 2017 that created a further larger slip between the original small washout and the northern boundary. The second slip is referred to as LS2. The two slips are separated by an outcrop of soil, with LS2 fully within the area between the LS1 washout and the northern boundary. The slip LS2 encompasses the zone of tension cracking in LS1 which was inferred to have been caused by the Kaikoura earthquake.
32. After the second site visit, Mr B wrote a letter confirming that Ms A wished to proceed with the retaining wall in the area of the slip along the western boundary to the property at Property E (BoD p 263).
33. Mr B then engaged a geotechnical engineer, Company G, who visited the site and undertook a limited site investigation program which included Scala penetrometer tests. There is no evidence in written correspondence between Mr B and the geotechnical engineer prior to the site visit, (BoD p 268) that included any details of the slip(s), or their lengths.
34. The Company G report, dated 20 October 2017, appears to sketch LS2 only, in that it does not show the outcrop. (BoD p278). Such report also provides generic geotechnical design parameters to inform and enable the proposed retaining wall (and ground anchor) design by Company D.
35. A basic site plan of the slip by Company D dated 20 April 2018 also only appears to cover LS2, and not go beyond the outcrop based on the location of LS1 opposite Property H. (BoD p 301).
36. None of the evidence provided covers how the brief was passed on from Mr B to Mr C and how the slip area was defined. There is a Design Brief in the evidence bundle that was prepared by Engineer AA, the designer

of the wall (BoD p356). It appears that this was based on the correspondence between Mr B and the Client and on the Company G Geotechnical report.

37. The site plan prepared by Engineer AA in March 2018 shows a slip (Drawing 170100 SK3 on BoD p 335) which does not extend into land opposite Property H. This design has a PS1 certificate signed by Mr C (BoD p 358).
38. The panel notes that no dimensions of the wall are given in the design documentation.
39. The following table provides a schedule of the slip sizes and wall sizes as described in the various documents within the evidence presented or as interpreted by one of the panel members.

Description	Slip size	Slip area	Proposed wall face extent	Approximate wall face area
Company I Report (LS1)	3m x 4m and 1.5m x 6.0m	21 m ²	3m x 4m and 1.5m x 6.0m of shotcrete and soil anchors	21 m ²
Company J Report (LS1 and LS2)	Surface evacuation area only 10 m ²	n/a	As per Company I proposal	As per Company I report
Mr B first letter (LS1)	7m x unstated depth	n/a	7m x 2.1 m poles and ground anchors	14.7 m ²
Mr B second letter (LS1 and LS2)	Not stated	n/a	Not stated	n/a
Company G Report (LS1 and LS2)	6.0 m x 3.8 m	22.8 m ²	Not stated but noted retained height of 2.4 to 3m	n/a
Wall as designed by Engineer AA	Assumed as per the Company G report	22.8 m ²	6.0 to 6.3m wide by 4.0m high Shotcrete and ground anchors	24.6 m ²
Company K Tender	n/a	n/a	7 m inferred base x 4.43 inferred height	31 m ² (Quoted area)
As-built wall (excludes the extensions at each end of the base and the area at the top built across the LS1 washout)	n/a	n/a	7.0 m x 4.0 m (Estimated from available information)	28 m ²

40. The panel notes that the Company I and Company J reports were not sighted by Company D until after the wall had been designed and built.

41. In an email to Ms A prior to October 2018 (BoD p33), Mr C wrote:
42. *"I have discussed the extent of the wall with Mr B, and the extent as designed and constructed meets what he expected for the site. The Contractor has built a wall that covers the slip area in accordance with our documentation. Mr B has reviewed the wall and is satisfied that it is in the correct location".*
43. In a letter to Ms A dated 2 November 2018 Mr C also explains why part of the original washout in LS1 was not covered by the concrete sprayed wall and also explains that this uncovered area of the washout in LS1 is not considered to be at risk (BoD p26).
44. Correspondence to Ms A from Company D on 2 November 2018 also confirms that "the design was completed after both slips, and so the wall was designed to secure the property after both slips." (BoD p 79).
45. Company D is prepared to issue a Producer Statement 4 (PS4) certificate and the final inspection report for the wall (BoD p 258) and have already issued correspondence on 2 November 2018, (BoD p26) confirming that both slips are covered.
46. The panel considers that if there is any misunderstanding by the Engineers at Company D, it is not appreciating that Ms A's expectation was that a 10 m length of wall would be constructed which extended from the site northern boundary to the southern end of the LS1 washout. In hindsight, Company D should have communicated to Ms A at the start of the works construction (or earlier) that in their view the wall did not need to extend the full 10m width initially expected by her.
47. On the basis of this evidence, the panel concludes that there was no misunderstanding by the engineers at Company D about the full slip area and this Ground of Appeal is not proven.

Ground of Appeal 2

Their [presumably Mr B and Mr C] professional authority to say that LS1, that is still exposed today, is safe.

48. The panel has interpreted this ground of appeal to mean that Ms A is uncertain that Company D (Mr B and Mr C) has the “*professional authority to say that LS1, that is still exposed today, is safe*”.

49. We have also interpreted the phrase “*LS1, that is still exposed today, is safe*” as follows:

“LS1, that is still exposed today” is the part of LS1 between the end of the as-built retaining wall and the southernmost point of the original washed out portion of the original slip (i.e. not the area of the slip LS1 with tension cracks or the new slip LS2, that are clearly covered by the as-built wall).

“is safe” means that this small area has an appropriately low risk of failing or slipping again in the foreseeable future.

50. The Panel considers that the evidence shows the original slip LS1 had two components:

- the relatively small washed-out area probably caused by the heavy rain event around the time of the Kaikoura Earthquake (Company I EQC Reports [BoD p 189]), and,
- tension cracking in the headscarp area extending to the south of the washed-out area as shown in photograph 3 [BoD p 195 - 196]. This was described as an area of imminent risk by Company I [BoD p 190] as follows:

“Within the following 12 months (under normal rainfall conditions) and as a direct result of the landslide that has occurred, we consider that there is an imminent risk to land of:

- *Evacuation/displacement of additional land areas totaling 4m² and comprising:*
 - *Regression of the over steepened part of the slope immediately adjacent to the landslide that has occurred*
 - *Drop out of the area affected by the development of tension cracks”.*

51. The evidence also indicates that LS2 was caused by the washout and slumping of the area of the tension cracked headscarp within LS1 which had occurred in the area between the original LS1 washout area and the existing northern boundary, identified as “*at imminent risk*” in the Company I report.

52. Company D (via the Counsel L email of 12 April 2021 to the RA, [BoD p 426]) have stated that the exposed area remaining from the washout part of LS1 is a “*stable outcrop*” and that “*the completed wall covers both slip areas*” The Panel considers that Company D (Mr C or Mr B), as lead designers for the as-built wall, are in a position to assess, and if appropriate, declare that the area is safe (i.e. for Company D (Mr C or Mr B) to issue a PS 4 certificate and appropriate supporting documentation to the City Council to enable issue of the Code of Compliance Certificate for the subject landslip stabilisation works.

53. Ms A has submitted that she has already requested a letter with specific wording from Company D that would satisfy the Organisation F requirement for assurance that the wall as designed and built has secured both slips even though the length of LS1 is not physically covered by the wall [BoD p 437]. This request has been rejected by Company D through their lawyer Counsel L [BoD p 436] with reference to the Company D letter of 2 November 2018 [BoD p 26].
54. The panel considers that the above referenced letter dated 2 November 2018, and the explanations contained therein in conjunction with the PS4 certificate yet to be issued, represents a reasonable description by the engineers as to the general suitability of the as-built retaining wall.
55. Thus, the Panel concludes that Mr B and Mr C do have the professional authority to say, based on their assessment, that LS1, including the part that is still exposed today, is safe, and this ground of appeal is not proven.

Ground of Appeal 3.

56. *“The Client (being the Organisation F that I am a Trustee of) asked for LS1 to be covered, and at no point did any engineers at Company D inform the Client that they had decided not to cover LS1. Noting that Company D originally (in February 2017) did not decline that work on the basis that it didn’t need doing. In July 17, they were asked to add LS2, yet it appears that they did LS2 instead, leaving LS1 exposed (to this day) There is reference to LS1 and the outcrop being stable, however the earthquake slip was adjacent to the outcrop”.*
57. This ground of appeal appears to be the essence of the complaint by Ms A against Mr B and Mr C (i.e., that the engineers did not make the extent of the proposed wall clear on their drawings via precise measurements or by explaining the proposed final extent of the wall on-site to assist with the Client’s appreciation of the coverage of the two slips).
58. The panel has looked at this ground in two parts:
- had Company D decided not to cover LS1, and,
 - has the Company D design only covered LS2 instead of LS1?
59. Mr B, on his first site visit of 10 February 2017, and in the letter dated 16 February 2017 [BoD p 137], describes the work to be performed after LS1 as follows:

“We understand that you wish to construct a retaining wall along the length of the slope from the southern end of the slip area to the recently completed wall north of the slip area, a distance of approximately 7 metres. While the topography north of the slip is a little difficult to predict, we have assumed that the wall height would be 2.1 metres and that it would involve constructing anchors into the property under the dwelling. The retaining wall would consist of treated timber poles supporting treated timber planking”

60. Mr B, in his report on 8 August 2017 [BoD p 263] which followed his second site visit on 4 August 2017 (following the July 2017 rain event that created LS 2), wrote the following:
- “Further to our letter of 16th February 2017 and the writer’s inspection of 4th August 2017 we confirm you now wish to proceed with the construction of a retaining wall in the area of the slip along the western boundary to your property at Property E.”*
61. The Panel notes there are no indications of any change in the dimensions of the retaining wall originally proposed in the letter of 16th February or that the wall would “only” cover LS2.
62. Following some work in relation to Resource and Building Consents, and the need to gain neighbours’ permission (not required in the final event by Council waiver due the urgency of the work [BoD p 449 part 67]), Company D commissioned Company G to produce a geotechnical report for the general landslip locations. Engineer AA, an intermediate engineer at Company D, prepared the wall design in March 2018 [BoD p 336]. The plans SK1, SK3, and SK6 contain the note *“All dimensions are to be confirmed on site by the contractor”*.
63. A Company D staff member submitted an application to Council for a Land Use Consent for the remedial works on 10 April 2018 [BoD p302 to 319]. This application contained photographs, aerial maps, engineering details, drainage and earthworks plans which indicate the scope of the wall in sketch form only. Such application included both the Company G geotechnical report, and the Company D engineering design report prepared by Engineer AA.
64. Ms A was provided with a copy of the Council consent application documents at the time of submission to Council.
65. The Panel notes that, at this point in the project and with the information provided by them, the engineers were expecting Ms A, a lay person with little or no civil engineering design or construction experience, to undertake significant technical review on her own to interpret the plans and to establish the dimensions of the wall.
66. The resource consent was granted by Council on 19 April 2018 and the Building Consent was approved on 12 June 2018.
67. Further opportunities for Ms A to query the extent of the proposed retaining wall were afforded during the Contractor tender process and during the three site visits that were completed by Engineer AA before and during the wall construction. Again, the panel notes that Ms A, as a lay person, was unlikely to fully understand the building consent application documents and the implications of key notes contained on the drawings.
68. Engineer AA made three site visits during the wall construction and the relevant observation reports were distributed to the Contractor and Ms A [BoD p385 to 293] as they became available. These reports included

photographs of the site work. The Panel considers that while an experienced engineer or contractor should have been able to interpret these progress photographs and reports as showing the wall, if constructed to the Company D Design, was not going to cover all of the exposed portion of the washed-out section of LS1, Ms A, as a lay person, was unlikely to fully appreciate this point.

69. Following construction, Company D personnel met with Ms A on the following dates:

- 4 October 2018 (Mr B).
- 10 October 2018 (Mr C) and
- 23 October 2018 (Mr B and Mr C).

Ms A was unable to resolve her concerns during the above meetings (refer adjudicators report [BoD p 99]).

70. Mr C emailed a letter dated 2 November 2018 to Ms A [BoD p 26] which provided the following explanation as to why the approximate 1 m length of the residual slip face to the southern end was not covered by concrete spray:

“We note that the location of the wall ended up closer to the dwelling than our design and understand that this was as a result of the lack of clarity about the location of the boundary, and you (Ms A) were aware of this situation. This was not a decision that we were involved in. As a result of this relocation of the wall, the last approximate [sic] one metre length of residual slip face to the southern end was not covered by concrete spray.”

71. However, site observations were carried out by Company D, and they have indicated that they are prepared to sign a Producer Statement (PS4 certificate) indicating that the wall fulfils the design criteria, pending resolution of a dispute referred to below.

72. In summary, the panel has looked at the various components of Ground of Appeal 3 as follows:

Had Company D decided not to cover LS1?

73. Coverage of LS1 was the original request following the Kaikoura Earthquake and the rain event in November 2016. As discussed above, LS1 appears to have had two components:

- the small washout caused by the rain event soon after the earthquake, and,
- a much larger zone of tension cracking caused by the earthquake.

74. The original Company D proposal contained the following statement:

“We understand that you wish to construct a retaining wall along the length of the slope from the southern end of the slip area to the recently completed wall north of the slip area, a distance of approximately 7 metres”

The panel considers that this measurement, while based on a visual inspection, resulted in the wall proposed being approximately 7m long by 2.1m high and comprised an anchored pole and lagging construction which has been confirmed to be designed to prevent further slippage and potential damage to the dwelling.

75. The panel has not been presented with evidence that the as-built retaining wall is not of sufficient length to meet the brief of preventing further slippage and protecting the dwelling from potential damage.

Did the wall cover LS2 instead of LS1?

76. The panel considers that Mr B could have explained more clearly on his second visit, and in his subsequent letter of 8 August 2017, the two parts of slip LS 1 and its relationship with LS2, and his proposed solution to protect the dwelling from both slips.

Exposure of LS1

77. The panel considers the evidence shows the LS2 slip following the July 2017 rain event was the washout of the tension cracked area of the original LS1 and the only part of LS1 now exposed is a portion of the original washout created after the November 2016 earthquake and rain event. The panel notes from the relevant Company D evidence (Counsel L submission item 28, p6) that this washout has been stable for the at least 4 years since it was created.
78. The reason given by Mr C for the uncovered portion of LS1 was noted in the 2 November 2018 letter to Ms A [BoD p 26].
79. Thus, the Panel considers that Ground of Appeal 3 is not proven.

Outcome Sought

80. *“That the complaints be upheld unless the Company D, confirm that the wall, as designed, and currently supporting LS2 encompasses LS1, given the obvious visual shortfall of the length of the wall, and that such confirmation is satisfactory to yourselves (Company D) and capable of being confirmed by an independent engineer”.*
81. The role of Council is to appoint a panel of three CPEC Board Members to hear appeals to decisions made by the RA about issues relating to Chartered Professional Engineers as individuals.

82. The Panel is charged with reviewing the decision being appealed (in this case by an RA Investigating Committee), calling for submissions from the Appellant (Ms A), from the RA and the Engineers involved in the complaint (Mr B and Mr C) and then submissions in reply from the Appellant.
83. The outcome of this appeal will be either to dismiss or uphold the appeal and, if upheld, directing the RA to submit the complaint back to an Investigating Committee or on to a Disciplinary Committee hearing.
84. The outcome sought by Ms A, as worded above, is beyond the scope of CPEC as explained in Ground of Appeal 2 above.
85. The panel notes that Ms A has made an offer to settle the dispute with Company D in a letter to their legal representative, Mr M, on Monday 19 April 2021 [BoD p 433]. This letter contains conditions relating to payment (but such commercial conditions are beyond the scope of the disciplinary process under the Act).
86. The panel considers that the outcome sought, if granted, would be an inappropriate application of the provisions of the Act. There is clearly a commercial dispute between the two parties with Ms A withholding payment until receipt of a specifically worded letter and the documentation required to secure the Council Code of Compliance Certificate [BoD p 437], and Company D withholding such requested documentation until payment of their outstanding invoice(s) is made [BoD p 258].
87. Thus, the outcome sought by Ms A is not available under the Chartered Professional Engineers Act as the Council only has jurisdiction to consider the professional conduct and actions of the two Chartered Professional Engineers who were the subject of the original complaint.

Discussion

88. As noted in Paragraph 7 above, the panel is required to determine whether there is prima facie evidence that Mr B and Mr C, as individuals:
- (i) Have breached an aspect of the code of ethical conduct set out in the rules 42(A)-42(I) or
 - (ii) Have performed engineering services in a negligent or incompetent manner.

89. The provisions of the relevant rules are outlined below.

Take reasonable steps to safeguard health and safety

90. Rule 42B of the Rules requires that 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.”*

Act Competently

91. Rule 42E of the Rules is presented in Schedule 2 and of particular relevance to the matter being appealed are requirements contained in that rule that *“a chartered professional engineer must ... (ii) only undertake engineering activities that are within the engineer’s competence; and (iii) undertake engineering activities in a careful and competent manner...”*
92. The technical elements of the matter being appealed are addressed below in the context of the requirements of the Rule 42E (a), (ii) and (iii).

Behave appropriately

93. Rule 42F of the Rules is presented in Schedule 2 and of particular relevance to the matter being appealed is the requirement of clause (a) that *“a chartered professional engineer, in performing or in connection with the engineer’s engineering activities, - (a) must (i) act with honesty, objectivity and integrity.”*

Specific elements of the appeal

94. The various elements of the matter being appealed are addressed below in the context of the requirements of the above-mentioned rules.
95. In regard to a breach of rule 42B, no evidence has been presented to the Panel that either of the Chartered Professional Engineers have not taken reasonable steps to safeguard the health and safety of people.
96. In regard to a breach of rule 42 F, behave appropriately, the panel has not been presented with specific evidence that this rule has been breached by Mr B or Mr C.

97. With reference to Paragraph 90 above, possible performance of engineering services in a negligent or incompetent manner is addressed below.

Take reasonable steps to safeguard health and safety

98. Ms A has agreed that the wall is adequate albeit of less length than she expected. However, no evidence has been presented alleging any breach of the obligations of Messrs B and C under the health and safety provisions of the Rules.

Act Competently

99. The Investigating Committee have expressed confidence in the technical solution and the execution of the site inspections and reporting [BoD p 452] (all performed by a Company D intermediate engineer, Engineer AA). Engineer AA's design and inspection services were all supervised and approved by either Mr B or Mr C as Chartered Professional Engineers and Directors of Company D.
100. Having reviewed the evidence presented, the panel agrees with the conclusion of the Investigating Committee regarding technical performance.
101. A PS4 certificate is required to conclude the implementation of the solution. The panel has assumed that a Company D Chartered Professional Engineer will issue this on resolution of the commercial dispute.
102. The panel has considered Ms A's submission that the Company D engineers were instructed to cover the slips from the southern end of slip LS1 through slip LS2 to the existing wall at the northern boundary, apparently a distance of 10 m. Although no evidence of the accurate distance from point to point or the actual dimensions of the as-built wall has been tabled for the Panel, it is assumed that 10 m is a fair approximation of the actual distance that was requested to be covered.
103. Mr B's February 2017 estimate of the length of wall required to cover the initial slip and the tension cracked area (that eventually became LS2 after the July 2017) was approximately 7 metres (BoD p 260). The panel considers this estimate could have been checked via site measurements at the time and the actual length included in the letter. While the panel considers this less than satisfactory, it was a preliminary site visit and visual assessment made before any design work was done. This inaccurate estimate of length would normally have been corrected at either the second Mr B visit or by a site visit by the design engineer prior to the design being undertaken if the intent was a 3m longer wall. Any shortcomings in this instance is considered to be at the lower end of the scale.
104. After his second visit of 4 August 2017, Mr B confirmed in a letter (BoD p 262) that:

“you now wish to proceed with the construction of a retaining wall in the area of the slip along the western boundary to your property at Property E”.

105. The panel notes that no mention is made in this letter of the type and size of the wall.
106. It is noted that the initial Company I report contained a preliminary assessment of a possible solution to prevent further slipping, not to reinstate any of the land lost. Company J considered this solution to be adequate for the second slip as well, and that reclamation of any land was not practical [BoD p 178].
107. Engineer AA, using the Company G Report, based his design on the parameters outlined in the Company G report and this resulted in the design of a wall of 6.15m average width by 4.0m average height with a proviso that *“All dimensions are to be confirmed on site by the Contractor”*.
108. The as-built retaining wall was designed to recover as much useable land as possible from the slippage area in front of the dwelling. This is a significant change from the initial Company D proposal and the wall scheme outlined by Company I and endorsed by Company J after LS2 had occurred. It is further noted that this change was made at the request of Ms A. This change, from protecting the dwelling and the slope from further damage to a wall that was designed to protect the dwelling and to recover a significant proportion of the washed-out land, and the implications this change had to the geometry of the wall, were not fully explained to the Client at the time.
109. The panel considers that the design sketches produced by Engineer AA with the note *“All dimensions are to be confirmed on site by the Contractor”*, while not an un-common condition on construction drawings for civil works, does not absolve the designer of design responsibility, and so would not account for a wall length difference of 3m. The panel also notes that this did not take account that Ms A, as a lay person, was going to act as the Project Manager during the construction phase of the project. The design work and subsequent construction inspections that were undertaken by Engineer AA were supervised by either Mr B or Mr C whose ultimate responsibility was to ensure that what was designed and built met the reasonable expectations of Ms A.
110. The Company D counsel submits that the 2 November 2018 letter [BoD p26] from Mr C to Ms A states that the as-built wall does meet the key requirements, but Ms A has requested confirmation of this, for her peace of mind and for future sale of the property, in the form of a letter with specific wording [BoD p 435].
111. The panel considers the efforts made by Mr B and Mr C, in the series of meetings with Ms A in October 2018, culminating in the letter to Ms A dated 2 November 2018, [BoD p 26], was not sufficient to allay her concerns. Nor did they explain the transition from her initial request to cover both the slips from the southern end of the initial washout to the northern boundary, to the final retaining wall as designed by Company D and built by Company K.
112. The panel considers that the lack of a clear explanation (by Mr B in his initial proposals and lead-up to the design and consenting, and by Mr C as supervisor of Engineer AA in the design and inspections, and as

contact person with Ms A in the post-construction stage) as to the size and coverage of the retaining wall design in language and/or drawings that a lay person could clearly understand, was less than satisfactory. It is not uncommon for Professional Engineers to expend extra effort to communicate with non-professional Clients and/or inexperienced contractors to ensure their client's requirements and expectations have been met. These shortcomings are, however, considered to be at the lower end of the scale.

Behave Appropriately

113. The Panel agrees with the Investigating Committee regarding the handover of the project design lead role from Mr B to Mr C [BoD p 453 para 103 p 454, para 109] but considers the communication of the transfer could have been handled better from the Client's perspective.
114. The above shortfall in communications appears to have contributed to the current situation whereby the Client does not believe one of the key design brief requirements has been met (i.e. full coverage of initial Slip LS 1 and, after the second rain event in 2017, LS2).

Other matters

115. The appellant has suggested in her 5 August 2021 submission to the Panel that an onsite meeting with all parties be arranged for the following reason:

"so that instead of arguments with the written word, we can see the slips and the wall and talk through the obvious mis-understandings"

Such a meeting is beyond the jurisdiction of the Panel.

116. In their submission, the RA submitted that the Investigating Committee were satisfied the retaining wall was built in accordance with the Company D consented design. In response, Ms A has submitted that *"we agree with this, but that the issue is that the design was too short and starting from the wrong place"*.

117. The panel has considered this argument and notes the following:

The wall clearly had to start at the existing concrete wall on the northern boundary as the LS2 slip had evacuated soil from that point back towards the original LS1 washout, some 7.0 m away to the south, and Company D confirmed in writing on 2 November 2018, (BoD p26) that *"the wall was designed to secure the property after both slips"*.

118. The panel also acknowledges the situation Ms A has endured both during and since the wall construction, with still no confirmation to her satisfaction that the original slip is safe, apart from letters from Company D and their legal representative. The Panel confirms that the appeal process cannot offer an outcome that will provide the confirmation Ms A has requested.

119. The RA and the respondents submitted that the Investigation Committee made the correct decision based on the information available and that the conduct complained of was insufficiently grave to warrant further investigation. Ms A responded to this, in her 10 September 2021 response to the RA submission as follows:

“We believe that the delays, the natural fears of Ms A as a widowed solo parent of young children, and the wall not securing the earthquake slip absolute (sic) meets the definition of grave. The slip is not secure and still at risk to this day.”

120. Ms A also stated:

“We contend the committee’s decision is in error, given the wall, as designed, did not cover LS1 ...

... This is negligent of the engineers and sufficiently grave and is below the standard of what a reasonable member of the public would expect of a professional engineer”

121. The panel notes that the gravity of the matter at appeal is a factor in the determination of whether or not grounds exist to dismiss the appeal and it has already been noted that the communications by the engineers involved in this project do have shortcomings during both the execution of the design and construction of the retaining wall.

122. The reason that a portion of the initial LS1 washout is still exposed has been answered by Company D in their letter dated 2 November 2018 [BoD p 26] and included the following statement:

“We do not consider that this area is at risk.”

123. The Panel considers that the Investigation Committee had sufficient information to make their decision and that we have not been presented with any new evidence or further information to persuade us to make an alternative decision.

124. As noted above the outcome sought by Ms A is outside the scope of the disciplinary processes under the Act.

Outcome of the Appeal

125. The Panel have reviewed all three grounds of appeal and assesses that none are proven.

126. The Panel has reviewed the outcome sought by Ms A and has declined to deliver this outcome on the basis it is outside the scope of the Act.

127. The Panel has not found any prima facie evidence that Mr B or Mr C:

- (i) Have breached an aspect of the code of ethical conduct set out in the rules 42(A)-42(I) as amended in 2016; and/or
- (ii) Have performed engineering services in a negligent or incompetent manner.

128. Thus, the Panel's decision is to dismiss the appeal under rule 57(ba) of the Chartered Professional Engineers Rules (No 2) 2002, on the grounds that any alleged misconduct is insufficiently grave to warrant disciplinary proceedings.

129. In accordance with s35 of the Act, either party may appeal this decision to the District Court within 28 days of receipt of the decision.

Costs

130. The Panel rules that any costs generated by any parties to this appeal shall lie where they fall.

Dated the 22nd day of February 2022.

Signed by the Appeal Panel



Alan Winwood – Principal



Sarah Sinclair



Anthony Fairclough

Schedule 1 - Legislation

1. The right of appeal is contained in s35 of the Chartered Professional Engineers Act 2002 ("the Act"). S37 of the Act sets out the scope of the Chartered Professional Engineers Council's (the Council) jurisdiction which is to deal with the matter by way of rehearing.
2. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules") that were enacted pursuant to s40 of the Act.
3. The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 ("the Regulations") set out the requirements pertaining, amongst other matters, to the hearing and deciding of appeals.

Schedule 2 – Extracts of the Act and the Rules

s21 of the Act:

“21 Grounds for discipline of chartered professional engineers

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 practice 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 and 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.”*

Rule 42B

“42B Take reasonable steps to safeguard health and safety

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.”

Rule 42E

“42E Act competently

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).*

Rule 42F

"42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer's engineering activities, —

(a) must—

(iii) act with honesty, objectivity, and integrity; and

(iv) treat people with respect and courtesy; and

(v) 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.

Rule 56

"56 Registration Authority must refer complaint to investigating committee unless grounds for not doing so

The Registration Authority must, as soon as practicable after receiving a complaint, carry out an initial investigation of the complaint in accordance with rule 58 and—

(a) refer the complaint to an investigating committee in accordance with rule 59(b); or

(b) dismiss the complaint on a ground in rule 57.

Rule 57

"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.

Rule 58:

“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:

- (b) the Registration Authority must notify the person complained about of the general nature of the complaint before commencing the investigation; and*
- (c) 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*
- (d) 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*
- (e) 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*
- (f) 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”*

Schedule 3

Key interactions, correspondence, submissions and communications in this Appeal

- (a) 15 April 2021. Initial notice of appeal to CPEC
- (b) 9 June 2021. Email from CPEC Chair to both parties acknowledging the appeal, advising the Panel members, requesting all correspondence is directed to the Panel principal and members, and the other parties, and requesting the RA provide the paginated bundles of relevant documentation.
- (c) 21 July 2021. Email to Ms A to confirm she is satisfied with the information contained in the Bundle of Documents.
- (d) 23 July 2021. Email from the Panel principal (Alan Winwood) to the parties setting out the Basis of Appeal, the Appeal Grounds, the onus on the Appellant to provide, in her submission, the reasons why the decision of the Investigation Committee should be overturned.
- (e) 11 August 2021. Email from Alan Winwood to all parties relating to the potential conflict of interest of one of the Panel, Mr Tony Fairclough.
- (f) 11 August 2021. Three emails from all parties with no objections to Mr Fairclough as a Panelist.
- (g) 5 August 2021. Ms A's Submission.
- (h) 30 August 2021. Registration Authority Submission.
- (i) 30 August 2021 Company D's submission.
- (j) 10 September 2021 Ms A' submission in Reply.
- (k) 19 September 2021. Email from AAW to the parties requesting agreement to holding the appeal "on the papers".
- (l) 19 September 2021. Emails from the parties agreeing to the appeal being held "on the papers".
- (m) 12 October 2021. Email from AAW to the parties regarding progress.

Schedule 4 Timeline of key events in this case

- 1) 14 November 2016, Kaikoura Earthquake.
- 2) 15-16 November 2016, Wellington heavy rain event.
- 3) Landslip event LS1 occurred after events a and/or b above.
- 4) 10 February 2017, Mr B's initial visit to Property E.
- 5) 16 February 2017, Company D Proposal for a retaining wall.
- 6) 12 June 2017, Company I visit on behalf of EQC.
- 7) Early July 2017, significant Rain event(s).
- 8) Landslip event LS2 occurred after event 7 above.
- 9) Landslip event LS3 appears to have occurred around or at the same time as LS2. LS3 (referenced as LS2 in the Company J report and as described below under event j, is not part of this current appeal.
- 10) 19 July 2017, Company J visit on behalf of EQC.
- 11) 4 August 2017, Mr B's second visit to Property E.
- 12) 8 August 2017, Mr B's confirmation of engagement to design the retaining wall.
- 13) 21 September 2017, Company G Site visit to Property E.
- 14) 8 February 2018, handover project control from Mr B to Mr C
- 15) 10 April 2018, Application to Council for land use consent, granted 19 April 2018.
- 16) 12 June 2018, Council issued Building Consent.
- 17) 11 June 2018, Tender from Company K.
- 18) 23 August 2018, first site visit by Engineer AA.
- 19) 30 August 2018, second site visit by Engineer A.
- 20) 12 September 2018, third site visit by Engineer AA.
- 21) Unknown date in 2018, fourth Site visit by Engineer AA (on completion of wall).

- 22) 18 October 2018, Ms A visits Mr C
- 23) 23 October 2018, Mr B and Mr C visit Ms A.
- 24) 02 November 2018, Company D letter relating to the design and construction of the completed wall.
- 25) 21 February 2019, Complaint about Mr B to Engineering NZ by Ms A.
- 26) 31 June 2019, Complaint about Mr C to Engineering NZ by Ms A.
- 27) 30 April 2020, Adjudicator decision released.
- 28) 15 March 2021, Investigation Committee decision released.
- 29) 15 April 2021, Initial notice of appeal to CPEC.