

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV-2020-085-000225
[2021] NZDC 11697**

UNDER The Chartered Professional Engineers of
New Zealand Act 2002

IN THE MATTER OF An Appeal to the District Court pursuant to
section 35(2) of the Chartered Professional
Engineers of New Zealand Act 2002

BETWEEN THE INSTITUTION OF PROFESSIONAL
ENGINEERS NEW ZEALAND
INCORPORATED TRADING AS
ENGINEERING NEW ZEALAND
Appellant

AND PIOTR NOWAK
Respondent

Hearing: 25 and 26 May 2021

Counsel: W Wilson and M K Dobie for Appellant
G Davis for Respondent

Judgment: 29 June 2021

RESERVED JUDGMENT OF JUDGE A I M TOMPKINS

Introduction

[1] For many years the respondent, Mr Piotr Nowak, has been trying to secure continued registration in New Zealand as a chartered professional engineer. Mr Nowak arrived in New Zealand in 2011 after nearly a decade of employment, first in his native Poland and subsequently in the United Kingdom, as a civil and structural

engineer. After arriving in New Zealand Mr Nowak was employed in Tauranga and then in Christchurch as a senior structural engineer.

[2] In early November 2012, Mr Nowak obtained registration as a chartered professional engineer. This was for an initial two-year period. In mid-2014, as required by the statutory scheme, Mr Nowak applied for continued registration.

[3] Since that time, in circumstances which will be described below, Mr Nowak's application has turned into something of a gordian knot. As at the hearing of this appeal, his application remains outstanding.

The Decision under Appeal

[4] By a decision dated 23 March 2020, the Chartered Professional Engineers Council ("the Council") endeavoured to cut the gordian knot. In substance, it approved Mr Nowak's continued registration as a chartered professional engineer for a two-year period commencing in 2017. Because that period had expired, by March 2020, the Council directed him to apply anew for continued registration. The Council described this decision as "the most robust outcome for this long and complicated process."

[5] As noted, Mr Nowak's initial two-year registration had, by the time of the Council's decision, expired, and the Council required him to reapply for continued registration. He did just that in May 2020. Extraordinarily, I was advised by counsel at this appeal hearing that his fresh application remains undetermined.

[6] In its decision, the Council said:

The [Council] considers that Mr Nowak has not demonstrated good professional judgment, in his engagement with the [Registration Authority] during this process. It strongly recommends that he consider how he develops a better understanding of how to communicate to achieve a desired outcome.

By its own admission, the [Registration Authority], the Competence Advisory Board and the Assessment Panel have not communicated and performed to a standard that should be expected of a professional body. The [Council] hopes that the lessons learned from the process have been communicated to all those involved in processing initial and continued registration assessment.

[7] The Council also awarded Mr Nowak costs totalling \$43,390.80.

[8] It is this decision of the Council that is now appealed to this Court. The appeal covers both the substantive decision and the awarding of costs.

[9] Mr Wilson, appearing for the appellant, encapsulated the basis of the appeal as being that the Council “quite thoroughly lost its way.” Mr Wilson submitted that in reaching the decision it did, the Council failed to do what it was required to do, but instead applied a process akin to judicial review. He asserted that, in effect, the Council deferred to a draft recommendation of an earlier-in-time constituent element of the statutory decision-making process, rather than reach its own independent conclusion on the substantive issue which, Mr Wilson submitted, was the only matter properly before the Council.

[10] Ms Dobie, also appearing for the appellant, argued that in making the costs award, the Council both improperly departed from established precedent and did so by way of a faulty reasoning process.

The Statutory Framework

[11] To understand both the context in which the Council reached the decision now appealed from, and the drawn out and convoluted process which preceded that decision, it is necessary to set out, in some detail, the statutory framework.

[12] In 2002 Parliament passed the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”). Section 3 sets out the Act’s purpose:

3 Purpose of Act

The purpose of this Act 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:
- (b) requires a code of ethics and a complaints and disciplinary process to apply to chartered professional engineers:

(c) requires a professional body to carry out the functions relating to the registration system, the code of ethics, and the complaints and disciplinary process, and establishes a statutory body to oversee aspects of those functions:

(d) repeals the Engineers Registration Act 1924.

(emphasis added)

[13] The underlined portion refers to the Council (established by s 44 of the Act) which has both appellate jurisdiction, in terms of the registration of Chartered Professional Engineers (s 45(b)), and has the oversight function referred to in s 3. As a corollary to that oversight function, the Council is required, pursuant to s 45(c):

[To] review and report to the Minister on the performance and exercise of the Registration Authority's and the Council's respective functions and powers...

[14] Registration as a Chartered Professional Engineer is not compulsory. As the purpose of the Act itself describes, registration (and the corresponding use of the title "Chartered Professional Engineer" or any words, initials or abbreviations to convey that same message) is intended to be a "mark of quality." Similarly, the Register maintained under the Act is intended, as a matter of public record, to provide both a list of current Chartered Professional Engineers, and also an appropriate historical record in relation to those persons¹.

[15] To achieve those purposes, the Chartered Professional Engineers of New Zealand Rules (No. 2) 2002, ("the Rules") provide (relevantly to this case) the criteria against which an application for continued registration as a Chartered Professional Engineer is to be measured. Rule 20 states:

20 Minimum standard for continued registration as chartered professional engineer

To meet the minimum standard for continued registration, a person must demonstrate that—

(a) he or she—

(i) is still able to practise competently in his or her current practice area to the standard of a reasonable professional engineer; or

¹ Chartered Professional Engineers of New Zealand Act 2002, s 16(2).

- (ii) if the person's practice area has changed materially since the last assessment, meets the minimum standard for registration within his or her current practice area; and
- (b) he or she has taken reasonable steps to maintain the currency of his or her professional engineering knowledge and skills within his or her current practice area since the last assessment.

[16] The phrase "minimum standard" refers back to Rule 6, and in particular, Rule 6(1):

6 Minimum standard for registration as chartered professional engineer

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

[17] A somewhat complex sequential process involving a number of steps is established by both the Act and the Rules. The Act itself defines the Registration Authority as meaning the Institution of Professional Engineers of New Zealand Incorporated – the appellant in this appeal. Section 8 of the Act provides that the Registration Authority "must" register a person if that person applies to the Registration Authority, pays the applicable fee, and:

... satisfies the Registration Authority that he or she meets the minimum standards for registration contained in the Rules.

[18] The sequential process established by the statutory scheme is that an Assessment Panel is first required to evaluate each individual application. That Panel makes a recommendation to the Competency Assessment Board.² The Competency Assessment Board is then required to consider the Assessment Panel's recommendations and either confirm the applicant's continued registration or remove or suspend that person's registration. If the Competency Assessment Board decides to confirm continued registration, it must then determine the term of that continued registration, up to a maximum period of six years. Procedural safeguards in relation to the application process are contained in the Rules, which in very broad summary can be characterised as an obligation to observe the rules of natural justice.

² The Assessment Panel and the Competency Assessment Board are established pursuant to Part 5 of the Rules.

[19] The Competency Assessment Board having reached its required decision, the Registration Authority must then both notify the applicant and implement the Competency Assessment Board's decision.³

[20] The Act provides for a two-stage appeal process, together with potentially a third appeal to the High Court on questions of law. The first appeal is to the Council. The second appeal is to the District Court. Both appeals are by way of re-hearing.⁴ In the case of the former, the appeal is to be conducted in accordance with the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002. In the case of the appeal to the District Court, the District Court Rules apply.

[21] The Act stipulates that the Council or the District Court, as the case may be, may on appeal:⁵

- (a) confirm, vary, or reverse the decision, or part of decision, to which the appeal relates:
- (b) refer the matter back to the decision authority for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that the Council or District Court, as the case may be, thinks fit):
- (c) make any decision that could have been made by the decision authority:
- (d) make any order as to the payment of the costs of the appeal that it thinks fit.

What Happened

[22] A chronology of events (excluding document references) leading up to the Council's decision is set out at paragraph 19 of that decision:

The following is the chronology of events leading to this appeal, the hearing and this decision. Both parties have accepted this chronology:

- (a) Mr Nowak was assessed as competent in 2012 and given a 2 year term.

³ Rule 29,

⁴ Section 37(2) and (4) of the Chartered Professional Engineers of New Zealand Act 2002 respectively.

⁵ Chartered Professional Engineers of New Zealand Act 2002, s 37(5).

- (b) Mr Nowak applied for continued registration in June 2014. This application included 6 work samples relating to projects undertaken in 2013 and 2014.
- (c) Mr Nowak was assessed via a Continued Registration Assessment (CRA). The CAB confirmed that Mr Nowak's registration would be suspended in June 2015.
- (d) Mr Nowak appealed to the Council. The Appeal was declined (BOD 576) in June 2016, but the panel considered that he had disadvantaged himself by not undertaking a second interactive. The Registration Authority (RA) was instructed to offer him this opportunity again.
- (e) The second interactive was held on 17th November 2016 with 2 of the 3 original panel members.
- (f) Following the interactive, Mr Nowak was informed verbally that the panel would be recommending to CAB that his registration be continued with a 2-year term.
- (g) The panel prepared a draft decision in November 2016 confirming that they would recommend to the CAB that his registration be granted with a term till next assessment of 2 years. (Mr Nowak subsequently obtained a copy of this draft decision via a Privacy Commission request).
- (h) Prior to the CAB meeting, the panel and the registrar discussed the application and the panel decided to reverse the draft decision. This final decision went to the CAB on 21st December 2016. The CAB confirmed the panel's decision and suspended Mr Nowak.
- (i) Mr Nowak wrote to, and subsequently met with, Engineering New Zealand CEO in February 2017. The CEO decided that the contents of Mr Nowak's letter and the discussions at the meeting be considered as a natural justice submission against the December 2016 CAB decision.
- (j) The natural justice submission and other documentation was issued to a sub-committee of the CAB. The sub-committee reported back to the Registrar. The Registrar informed Mr Nowak on 9th October 2017 that the final decision of the RA was that his registration be suspended and that he was strongly recommended to reapply for registration.
- (k) On 21st November 2017 Mr Nowak appealed the 9th October 2017 decision to the Council.

...

[23] Three broad grounds of appeal were pursued by Mr Nowak before the Council, conveniently labelled as factual errors, bias, and procedural failings. The Council set out its findings on each of these three grounds at paragraphs 120 – 132, upholding each ground (excluding document references):

120. Ground of appeal 1. “The sub-committee made significant factual errors in its appraisal of Mr Nowak’s work samples and overall competence.”
121. The level of technical evaluation of the sub-committee is discussed in paragraphs 67 and 94. It has been acknowledged that the sub-committee was “factually wrong” in some of their technical comments.
122. The decision to decline Mr Nowak’s continued registration by the [Competency Assessment Board] was heavily influenced by the sub-committee report.
123. The panel upholds grounds of appeal 1.
124. Ground of appeal 2. The [Registration Authority] was biased against Mr Nowak.
125. The relationship between Mr Nowak and the [Registration Authority] broke down following the first interactive assessment in 2015.
126. It was acknowledged (paragraph 105) that Mr Nowak’s communications had become combative. However, the [Registration Authority], [Competency Assessment Board] assessment panel and sub-committee needed to maintain objectivity throughout the entire process.
127. The attitude of the assessment panel (paragraph 82) and the admission by Mr Hobbs (paragraph 98) illustrate that the [Registration Authority] (via its delegations to the [Competency Assessment Board] and the Assessment Panel) exhibited bias against Mr Nowak.
128. The panel upholds ground of appeal 2.
129. Ground of appeal 3. Mr Nowak was disadvantaged by procedural failings of the [Registration Authority].
130. The panel considers the following to be significant procedural failings:
 - (a) Communications with Mr Nowak following the second interactive,
 - (b) Inconsistency on the adequacy of Mr Nowak’s CPD,
 - (c) Sub-committee reviewing Mr Nowak’s competence against the incorrect PAD.

131. It is unclear if the final outcome of the Mr Nowak's assessment would have been any different if these procedural issues had not occurred. However, the panel finds that Mr Nowak was disadvantaged by them.

132. The panel upholds ground of appeal 3.

[24] The Council then set out the outcome of the appeal:

133. The appeal is upheld.

134. Whilst the sub-committee made factual errors in its assessment, was biased in its decision making and there were procedural failings, it does not necessarily follow that Mr Nowak meets the current competence requirements of Rule 20.

135. Our 1 November 2019 letter found that the 2013 and 2014 work samples cannot be considered "recent engineering activities" required under Rule 23. The panel cannot make a decision in 2019 to confirm Mr Nowak's current competence.

136. Placing the panel in the position of the RA in 2017, we can make any decision that the [Registration Authority] could have made at that time.

137. The draft decision recommended a term to next assessment of 2-years (from 2017). The panel finds reinstating the draft decision as being the most robust outcome for this long and complicated process.

138. The 2-year term from 2017 has now expired, requiring Mr Nowak to collate new "recent work samples" and reapply for continued registration.

This Appeal

[25] Mr Wilson submitted that the Council erred because it failed to rehear the Rule 20 question – did Mr Nowak meet, on the evidence, the minimum standard for registration? Instead Mr Wilson submitted that the Council got side-tracked, or distracted, by procedural and related questions, which he submitted were outside its jurisdiction, and so "lost its way". Indeed Mr Wilson highlighted the internal contradiction between the final sentence of the Council's paragraph 135:

The [Council] cannot make a decision in 2019 to confirm Mr Nowak's current competence" with the decision it then purported to make (wrongly in Mr Wilson's submission) two paragraphs later in paragraph 137, which the Council characterised as "the most robust outcome for this long and complicated process.

[26] Properly to understand the Council's decision, it is necessary to digress for a moment to describe what is referred to in the Council's decision as "the draft decision."

[27] As noted in the above chronology, in 2016 Mr Nowak had appealed to the Council against an earlier decision by the Competence Assessment Board declining his application for continued registration. That appeal was decided by the Council in a decision dated 6 June 2016. The Assessment Panel tasked with considering that application conducted an in-person interview with Mr Nowak, referred to relevantly as "the first interactive". Subsequently the panel sought additional evidence from Mr Nowak, and as noted in the Council's 6 June 2016 decision:

... Mr Nowak was advised the further interview would focus on the identified local knowledge gaps with elements 2 and 11 identified. No further evidence was supplied and the invitation to participate in the interactive was declined.

[28] As is also recorded in that decision, the Assessment Panel subsequently concluded that:

Mr Nowak had provided insufficient evidence of local knowledge considered to be required by a chartered professional engineer.

...

35. On its own, each of the deficiencies may be acceptable within the definition of competent. However, taken as a whole the view of the assessors based on the work samples provided by Mr Nowak was that he had not demonstrated an adequate level of competence.

36. From the evidence presented by the Appellant at the hearing the [Council] could find no reason to vary any of the decisions made by the Assessment Panel. Specifically, the [Council] concluded:

- (a) Mr Nowak had not provided sufficient evidence to overturn the decision of the Registration Authority.
- (b) The evidence of Continuing Professional Development was light and, given the significant changes in application of codes to his practice area, there was more reason to demonstrate a depth and appropriate balance in his CPD.

[29] In those circumstances the Council concluded in its June 2016 decision, that Mr Nowak had not proved that he met the requisite standard. The Council however went on to say:

41. The [Council] was concerned that because Mr Nowak declined the further interactive with all the assessors as offered by the Registration Authority he had disadvantaged himself to the point where he was not able to present the full evidence to establish his level of competence. Conversely this potentially prevented the assessors from access to evidence which may have answered their concerns and possibly provided a basis for them to alter their findings.

42. The [Council] directs the Registration Authority, subject to Mr Nowak's agreement, to hold a further interview with the assessors to establish his level of competence.

43. Should Mr Nowak decline the interview the suspension is upheld.

[30] The Registration Authority duly held a "second interactive". This was attended by two of the three members of the original assessment panel. The third member of the Assessment Panel was somewhat inexplicably and without explanation not present for this second interactive.

[31] Immediately following the second interactive Mr Nowak was telephoned and told that the Assessment Panel intended to approve his application for continued registration. That conversation was followed up by an email to the Registration Authority which stated, in part:

The Panel has now completed this assessment and is inclined to recommend continued registration with a time to next assessment of two years.

[32] Some five days later on 22 November 2016 the Registration Authority was emailed with what became known throughout this appeal as the "draft decision". The covering email stated:

Here is the draft report. Let me know if there are any changes required. I have not been able to contact ...; and as you know he didn't attend the second interactive or forewarn of his absence. Perhaps IPENZ can make contact and obtain his affirmation – I am done with this now.

[33] The draft decision in substance concluded that Mr Nowak "demonstrates competence, but early review recommended". In the body of the draft decision the Assessment Panel concluded, variously, that:

Piotr has sufficiently understanding of timber design in the New Zealand context to be able to practice competently.

Piotr had demonstrated marginally acceptable knowledge of steel design in the New Zealand context to be able to practice competently.

Piotr had demonstrated marginally acceptable knowledge of masonry design in the New Zealand context to be able to practice competently.

Piotr has improved his effort in obtaining the knowledge necessary to practice competently in New Zealand.

The Panel judged Piotr's knowledge and application of accepted principles underpinning good practice in New Zealand as marginally acceptable.

Piotr is taking reasonable steps to maintain currency of knowledge and skills and is able to practice competently.

[34] What then happened was at the time somewhat obscure. It remains so. Some 10 days after the draft decision had been emailed and approved, as set out above, a few moments before midday on Friday 2 December the Chair of the Assessment Panel emailed the Registration Authority, with copies to the other two members. It seems that, the day before, a video conference discussion had occurred involving the Registrar of the Registration Authority (a Mr Mike Fermanis), and the three Assessment Panel members. It is unclear what role, if any, Mr Fermanis played in these discussions. But the result was that the Assessment Panel changed their collective mind. At 11:56 am on Friday 2 December 2016 the Chair of the Assessment Panel sent the email referred to earlier in this paragraph which read:

Hello Mike [Mr Fermanis]

This email is to confirm video conference discussions between yourself and the panel on Thursday 1 Dec. The panel has undertaken further deliberation and is no longer comfortable in recommending Piotr for continued registration. The reasons for the change of mind are:

1. Extra insight recently gained from investigation of six Masterton Buildings that brought into question the competence of three CPEng structural engineers.
2. Extra insight recently gained from investigation of a low rise commercial building in Auckland that brought into question the competence of as CPEng structural engineer and the response of his employing practice company.
3. Recorded marginal response to three of the four technical areas examined by the panel.
4. Dissatisfaction of the panel at Piotr's refusal to comply with the panel's reasonable request for completion of a technical assignment that would have provided further written evidence

for the panel to assess Piotr's competence against work actually performed by him.

Please withdraw the draft CRA report from being forwarded to the next CAB meeting. The panel will revise the report and make a recommendation to discontinue registration.

The panel had already advised Piotr by email that it intended to recommend Continued Registration with a period of next assessment of 2 years. The panel now intends to withdraw this advice in an email to Piotr with the following content. Once I have your acceptance of the content below I will email Piotr:

Dear Piotr,

Re CRA Assessment and Evidence of Continued Competence.

I am writing to advise that the panel has given further consideration to the written evidence you have provided and your responses to questions at the interactives. After further careful consideration the panel has concluded that your responses did not demonstrate sufficient competence for the panel to be comfortable with its initial assessment and proposed recommendation for continuation. Accordingly the panel has amended its report to a recommendation for discontinuation. I regret to have to inform you of this decision. No doubt you will have some questions. These should be addressed directly to Mike Fermanis at IPENZ.

[35] Mr Nowak was then emailed in accordance with the above draft:

Dear Piotr,

I am writing to advise that the panel has given further consideration to the written evidence you have provided and your responses to questions at the interactives. After further careful consideration the panel has concluded that your responses did not demonstrate sufficient competence for the panel to be comfortable with its initial assessment and proposed recommendation for continuation.

Accordingly the panel has amended its report to a recommendation for discontinuation. I regret to have to inform you of this decision. No doubt you will have some questions. These should be addressed directly to Mike Fermanis at IPENZ.

Kind Regards

[36] A little over three hours later Mr Fermanis responded to the members of the Assessment Panel, and also including inhouse counsel at the Registration Authority and a senior manager at the authority:

Thanks for all your work with this case and I know the reasons for the change are more about context than they are about influencing the decision to decline Mr Nowak. We just need to be sure the assessment decision is based on the

concerns that the panel have on the evidence that Mr Nowak has provided and aren't influenced by unrelated matters regarding structural engineers in another place.

As an organisation IPENZ has been very clear that with regards to Masterton no findings have been made against any individual engineers and even at this stage no engineers have been investigated.

The CAB will be keen to see the specific reasons for the decline as outlined by ... in our meeting.

Thanks

[37] Some eight minutes later the Chair replied to Mr Fermanis:

Hi Mike

Sorry if gave the wrong impression. As you have interpreted this is merely context. The panel will make its judgment only on the evidence presented by Piotr.

Kind Regards

(underlining in the original)

[38] I note that on appeal before me, the circumstances of the "six Masterton buildings" and the "low rise commercial building in Auckland" were not traversed evidence.

[39] I also note that given the abrupt and substantive change represented by the Assessment Panel's change of mind, it is likely (although I did not hear submissions on this, and in substance this aspect was overtaken by later events) there had occurred a significant breach of the rules of natural justice. Mr Nowak, having been told in a telephone conversation on 17 November 2016 that his application had been approved, then received an email on Friday 2 December 2016 completely to the opposite effect.

[40] Following that final and significantly altered report from the Assessment Panel, the Competence Assessment Board of the Registration Authority noted on 21 December 2016 that "Mr Nowak has now had a second interactive with another Assessment Panel". The Board recommended to the Registration Authority that "Mr Nowak remains suspended on the register, as per the panel's recommendation". Pursuant to its statutory obligation to notify Mr Nowak, the Registration Board emailed Mr Nowak to that effect on 9 January 2017:

Hi Piotr

I've tried to make contact with you a couple of times to talk to you about the outcome of the CAB meeting. As you know the panel recommended that your application for continued registration be declined and the CAB made the decision to uphold that recommendation.

I have attached the report submitted by the panel and happy to discuss where to from here. Will try to ring you again at the end of the week.

Nga mihi / regards

[41] About a month later Mr Nowak's employer sent a strongly worded letter to the Registration Authority critiquing the process Mr Nowak had been going through (characterising the process as "his struggle with the IPENZ Assessment Panel)", and concluding:

I remain of the view that Piotr has not been fairly treated and as one of our most competent engineers in the company it is a continual and incredible frustration that our own professional organisation continues to behave in the complete opposite manner. Suspending his chartered status is frankly ridiculous.

[42] This was followed by a letter from the Registration Authority's Chief Executive to Mr Nowak dated 20 March 2017. The Chief Executive acknowledged deficiencies with the process, and:

Finally, I acknowledge that it must have been distressing for you to be told following the interactive that the Panel was going to recommend continued registration only for you to later receive the decision declining it.

[43] The Chief Executive proposed that the earlier, and supposedly final, decision of the Registration Authority, as communicated to Mr Nowak in December 2016, be treated as "a proposed decision" with a further opportunity afforded to Mr Nowak to make a further submission. This further submission would, together with earlier correspondence from Mr Nowak and Mr Nowak's employer:

... be treated as a submission on a proposed decision. The Competence Assessment Board will fully and fairly consider your submissions, seeking input from the panel, as appropriate, prior to making a final decision; or you submit a new application for continued registration, which is your right even following a decision to decline an application, and a new review process is triggered that way with a new panel.

[44] In early April 2017 the Competency Assessment Board in effect approved the Chief Executive's first suggestion, and established a sub-committee of the Competency Assessment Board to review the further material.

[45] Some six months then passed. On 3 October 2017, the sub-committee recommended to the Competency Assessment Board that it:

review and discuss the sub-committee report (attachment 1) and endorse the recommendations provided by the sub-committee to suspend Mr Nowak from the Register of Chartered Professional Engineers, and strongly recommend that Mr Nowak reapply for registration.

[46] In its attached recommendation the sub-committee concluded:

Overall, the [Practice Area Description] is unsupported and on the basis of the evidence submitted we support the decision to decline Mr Nowak's application for continued registration. We recommend that Mr Nowak's registration be suspended.

This has been a long and stressful process for Mr Nowak. It began in mid-2014. The decision now does not necessarily reflect his current competence. We recommend that Mr Nowak consult a mentor and reapply for registration. His application should specifically support the areas of his proposed [Practice Area Description] (possibly amended).

[47] On 4 October 2017 the Competence Assessment Board met and accepted the sub-committee's recommendation. This was followed on 9 October 2017 with a letter from the Registration Authority to Mr Nowak, enclosing a (slightly edited) copy of the sub-committee's report, and confirming that the Competence Assessment Board had:

... come to a consensus view agreeing with the recommendations from the sub-committee to

- Suspend you from the Register for Chartered Professional Engineers and
- Strongly recommend that you reapply for registration.

[48] Mr Nowak then appealed to the Council. It is that appeal which resulted in the Council issuing its decision dated 23 March 2020, that being the decision under the current appeal.

The Appellant's Submissions

[49] Mr Wilson submitted that the Council should have dismissed the appeal because on the rehearing it conducted it did not have the evidential foundation to determine whether Mr Nowak met the threshold test for continued registration. Alternatively, Mr Wilson submitted that, as the Council had done in the earlier appeal by Mr Nowak, it should have invited Mr Nowak to supply current work examples so as to allow a rehearing to proceed on a sufficient evidential foundation.

[50] Mr Wilson then submitted that, just as the Council did not have a proper evidential foundation to determine on appeal the competency issue, so to this court does not have any better evidential foundation, so that the court should now allow the appeal and remit the matter back to the Registration Authority/Competency Assessment Board for substantive rehearing pursuant to the power in s 37(5)(b).

[51] Mr Wilson identified, as an exemplar of how the Council should have approached its task, the Council's earlier (and in fact its first substantive decision following the passage of the Act) in *B v IPENZ*.⁶ Mr Wilson noted that in *B v IPENZ* issue was taken with the "fairness of the Competency Assessment Board's decision in light of the procedural issues that have already been mentioned". The Council in that decision noted that procedural irregularities would normally be able to be cured on appeal but here, Mr Wilson submitted, the Council did not adopt that approach.

[52] Likewise Mr Wilson also noted that Mr Nowak had not taken advantage of an independent procedural review of the assessment panel's recommendation, as is provided for by Rule 31 of the Rules, and which does not limit statutory appeal rights.

[53] Mr Wilson accepted, unavoidably, that Mr Nowak's application has had an unduly prolonged history. It has been characterised by a number of missteps, some of which are referred to above. He submitted that, perhaps because of the emphasis put by Mr Nowak in his written submissions to the Council and in the hearing, the Council headed down what Mr Wilson termed a "side path" of investigating and deciding non-determinative procedural issues, rather than determining what Mr Wilson

⁶ *B v IPENZ* Chartered Professional Engineers Council; Appeal 01/07; 15 August 2007.

submitted was the crucial, sole and substantive issue: has Mr Nowak demonstrated that he meets the minimum standard for continued registration? Thus, Mr Wilson submitted, the Council erred in law by misunderstanding its own jurisdiction, leading to the erroneous conclusion that, despite its admitted inability to confirm Mr Nowak's current competence:

Placing the panel in the position of the registering authority in 2017, we can make any decision that the registering authority could have made at that time. The draft decision recommended a term to next assessment of two years (from 2017). The panel finds reinstating the draft decision as being the most robust outcome for this long and complicated process. The two year term from 2017 has now expired requiring Mr Nowak to collate new "recent work samples" and reapply for continued registration.

[54] Mr Wilson submitted that the Council had but one job: to make the Rule 20 decision. The Council, he argued, failed in that one job. Accordingly the decision should be overturned.

Mr Nowak's Submissions

[55] Summarising the main thrust of Mr Nowak's submissions in support of the Council's decision, Mr Davis submitted that the Council got their decision completely right. He submitted that on this appeal the appellant has mischaracterised both appeals to the Council and to this court, because although the process started as a standard competency assessment, given both the time that elapsed and the numerous procedural and other missteps along the way, by the time the appeal to the Council was heard this had become an extraordinary and unique case which the Council had to deal with, and was entitled to deal with in the way it did.

[56] Mr Davis submitted that the Council in fact did determine that at the time of the decision under appeal (October 2017) Mr Nowak did meet the minimum requirements. He argued that the issue for determination by the Council, which it did in fact decide, was: what should the Registration Authority's 20 October 2017 decision have been at that time? To decide that question was the only way the Council was able to discharge its oversight functions, give effect to Mr Nowak's appeal rights, and observe, in substance, the rules of natural justice.

[57] Put another way, Mr Nowak does not accept that the only thing the Council had to decide was whether he met the minimum standard for registration. Rather, the Council had to decide whether the October 2017 decision was wrong, and because, by the time of the Council's appeal hearing in December 2019, the relevant work samples were too dated to be "recent engineering activities" and thus representative of Mr Nowak's current competence as at December 2019, the Council crafted what it termed "the most robust outcome for this long and complicated process, and properly and quite lawfully discharged its statutory obligations". Mr Davis argued that the decision the Council in fact reached was a decision that it could properly reach regardless of the dated nature of the work samples.

[58] Accordingly Mr Davis submitted that:

The [Council] did not err in law in deciding the appeal in any way. It undertook a careful analysis of the sub-committee's findings, and came to its own view on the issues. In doing so, the [Council] acted appropriately within its jurisdiction, with a correct understanding of the scope of the appeal and the key issue for determination. By the time of the [2019] hearing it had already given careful consideration to these matters, and was consistent in its treatment of him in the decision. The result it reached was likewise appropriate and lawful.

[59] In oral argument Mr Davis reformulated that approach:

The "key issue" was the October 2017 decision correct? And, what in 2019 should be done?

[60] In answer to those questions Mr Davis submitted that this court on appeal should conclude, just as the Council concluded, that Mr Nowak should have had his registration continued for two years (which it was) and then that he should lodge a new application for registration (which he has done).

[61] In more detail, Mr Davis submitted that throughout the prolonged assessment process, up to and including the sub-committee process, Mr Nowak had maintained that he had in fact demonstrated his current competence and that the Registration Authority had erred in finding otherwise. Before the Council, on appeal, Mr Nowak then relied on three broad grounds in order to establish that the October 2017 decision reached by the Competency Assessment Board, and confirmed by the Registration Authority, was wrong:

- (a) that the sub-committee made a number of significant factual errors in its appraisal of Mr Nowak's work samples and overall competence (which was the main ground of appeal);
- (b) that the RA (in particular, the lead assessor and the sub-committee assessor) was biased against him; and
- (c) that the assessment process which led to the Final Decision was adversely affected by a series of procedural failings.

[62] Mr Davis submitted that all three grounds were substantively established, noting in particular the Council's detailed consideration and conclusions regarding each of the 38 identified factual errors, the admission (as recorded in the Council's decision at its paragraph 116) that a member of the sub-committee was in fact biased against Mr Nowak and that that bias had tainted the sub-committee's report, and that the various procedural missteps had in fact occurred.

[63] Mr Davis submitted that the Council's decision includes:

A finding that Mr Nowak was disadvantaged by 'significant procedural failings', namely communications with Mr Nowak following the second interactive interview, inconsistency on the adequacy of Mr Nowak's CPD records, and the sub-committee reviewing Mr Nowak's competence against the wrong PAD.

[64] Mr Davis noted that those findings provide the evidential foundation for the Council's conclusion, and that the decision under appeal demonstrates that the Council:

Took care to explore the substance of the decision under appeal (keeping in mind that the sub-committee's report was the basis for the October 2017 decision) in order to determine whether it was correct.

[65] Mr Davis argued that the Council's appellate jurisdiction under the Act is not restricted in the way the appellant contends. Given that appeals to both the Council and to this court are rehearings, this means that:

„, the Council [and this court] can decide the case as if it were hearing it at first instance, on the basis of the evidence [that was] before the Registering Authority. However, it can also admit further evidence, at its discretion, and hear from witnesses. It has broad powers to determine appeals, including confirming, varying and reversing the decision, and making "any decision that could have been made" by the Registration Authority.

[66] Mr Davis stressed that in circumstances analogous to these, courts have determined appeals by way of rehearing even though, strictly speaking, an application for judicial review may have been more appropriate.⁷

[67] Adopting that approach, Mr Davis argued that the Council's approach here was not erroneous, and properly met the requirement placed on the Council both to observe the rules of natural justice and to decide appeals with "as little formality as it considers is consistent with a fair and efficient process and a just and quick determination of the appeal".

[68] Mr Davis submitted that because of the extraordinary nature of this particular process, the Council rightly determined that the question of the applicant's current competence could not, as at the time of the appeal, properly be determined. However, Mr Davis submitted that the Council was entirely correct when it decided, given that the dated nature of the work samples had not been an issue for the Registering Authority in 2017, that that feature did not impact on whether that decision had been wrongly made. For that reason then, the grounds advanced by Mr Nowak at the appeal hearing before the Council were grounds directly related to the substantive merits of his application for continued registration. That was because if the Registering Authority had:

Assessed his work samples and PAD properly; and not been biased against him; and he had not been procedurally disadvantaged in his application process, then the October 2017 assessment would have correctly found him to be sufficiently competent and would have registered him for a period of two years (as indeed the draft decision did).

[69] That, Mr Davis emphasised, was the issue. It was an issue that the Council both determined it could, and in fact did, decide.

[70] Mr Davis noted that the sub-committee process had been "an unmitigated failure". Nevertheless it was the sub-committee's assessment which formed the basis of the October 2017 decision. Accordingly, the sub-committee's failings fatally

⁷ *Wyeth (New Zealand) Ltd v Ancare New Zealand Ltd* HC Wellington, CIV 2006-485-2596, 18 June 2007, Wild J at [69], following *ACC v District Court at Wellington* (2000) 14 PRNZ 507; [2001] NZAR 265 and *Phillpott v Chief Executive of the Department of Labour* HC Wellington, CIV 2005-485-713, 21 October, Ronald Young J.

tainted the substantive decision by the Competency Assessment Board to suspend Mr Nowak's registration. In particular Mr Davis noted that the Council had rightly concluded that the sub-committee had made a number of errors which had not been present in the draft decision. Therefore the Council's decision, which was not erroneous in law, and which was quite properly available to it on a reasoned and evidentially supported basis, was to reinstate that draft decision as the correct assessment of Mr Nowak's competency as the Competency Assessment Board should have (but did not) do. Reinstating the draft decision was not an arbitrary decision, and given the way in which the Council traversed in detail the content of the draft decision, in contra distinction to the sub-committee's errors, this was a proper decision reached on an appropriate evidential foundation.

Decision

[71] Despite Mr Wilson's submissions, it is quite clear that the Council does have a substantive oversight function in terms of the registration structure created by the Act. This is evident not only in the Council's obligations to review and report to the Minister, but also in light of the fact that one of the purposes of the Act is to establish "a statutory body to oversee aspects of those functions".

[72] The exercising of such an oversight function is also apparent from the statutory provisions setting out the required qualifications and appointment processes for the members of the various hierarchical levels in the registration process, culminating in the Council.

[73] The registration (and indeed disciplinary) structure created by the Act is still relatively new. Even more novel is the Council's role both as an appellate body and as the body charged by Parliament with the obligation "to oversee", *inter alia*, registration and disciplinary matters relating to the registration of engineers and chartered professional engineers. The relative novelty of the Council's role is illustrated by the fact, as advised to the Court at the hearing of this appeal, that there have, since the Council commenced those functions, been only six prior decisions of the Council: four relate to an application for initial or original registration as a

chartered professional engineer, and two relate to applications for continuing registration (the last being the Council's earlier decision relating to Mr Nowak).

[74] In those circumstances it was entirely appropriate for the Council, in the opening two paragraphs of its first decision,⁸ to recognise that and in that decision to provide a narrative description both of the purpose of registration and the registration process:

This is the first substantive appeal to the Chartered Professional Engineers Council under the Chartered Professional Engineers of New Zealand Act 2002, from a decision of a Competence Assessment Board of the Registration Authority refusing the registration of the appellant, Mr B, as a chartered professional engineer.

As this is the first such appeal we consider it important to set out in this decision the purpose of registration and the process that applicants go through by way of assessment.

[75] In a similar vein, and in the decision under appeal, it was likewise entirely appropriate for the Council to traverse the factual, procedural and natural justice errors that had bedevilled and derailed Mr Nowak's application, and caused it to be unreasonably and unfortunately both delayed and prolonged.

[76] For the Council's jurisdiction to be hobbled in the way argued for by the appellant in this appeal would deprive the New Zealand engineering community, interested overseas readers (including potential engineering immigrants to this country), and both the District and High Courts of the considered view of the statutorily created oversight body, charged with both reporting to Parliament through the Minister and with exercising oversight functions in relation to registration and disciplinary processes, of the Council's informed views on those matters, appropriately illuminated by the Council members' relevant expertise.

[77] Whilst, of course, a court is not obliged slavishly to accept such a body's informed view, but obliged rather to reach its own independent view on the merits of the appeal before it, nevertheless a court exercising the supervisory jurisdiction as is

⁸ *B v IPENZ*; Appeal 01/07; 15 August 2007.

conferred by the Act is entitled both to receive such informed views, and to take such informed views into account when forming its own view as to the merits.⁹

[78] I accept Mr Davis' submission that in this appeal, advanced as it is on the basis that the Council erred in law, the appropriate approach, supplemented by the principle that for a decision under appeal to be overturned on the basis of an error of law requires that the error materially affected the result, is as summarised by the High Court in *Klepacki v IPENZ*.¹⁰

An error of law is made out if the decision maker failed to take into account a relevant matter, took into account an irrelevant matter, failed to apply a statutory provision correctly, or the decision maker made a finding of fact that is so clearly untenable that the only reasonable conclusion contradicts that finding.

[79] I also accept Mr Davis' submission that in this appeal the appellant has not sought to overturn any of the factual findings made by the Council. As is apparent from the Council's decision, its findings on the sub-committee's assessment of the adequacy of Mr Nowak's CPD records and PAD, were technical or specialised findings made on the basis of appropriate evidence, including oral evidence from both Mr Nowak and the sub-committee's assessor at the hearing before the Council.

[80] It therefore follows that this appeal should be decided without disturbing those factual findings.

[81] It is also entirely appropriate to recognise the peculiar and indeed unique set of circumstances which confronted the Council when it heard the appeal. At that stage Mr Nowak's endeavours to obtain continuing registration had been underway for six frustrating years. The decision being appealed to the Council was the Registration Authority's October 27 decision, as encapsulated in the final report of the Assessment Panel, following on from the u-turn made from the substantive conclusions in the draft decision, together with an error ridden sub-committee's report. For this Court now to overturn the Council's decision, and remit Mr Nowak's application back to the Registration Authority to enable a fresh process to take place would necessarily require

⁹ *Austin, Nicholls and Co v Stichting Lodestar* SC 21/2007; [2007] NZSC 103.

¹⁰ *Klepacki v IPENZ* [2017] NZHC 3300.

the Court to overlook (as the Council explicitly did not) the fact that the draft decision prior to the u-turn had been reached by a substantive and informed process, which had reached defensible conclusions on the evidential material then available. Amongst those conclusions was the conclusion that registration would be continued but for a relatively limited period of two years, after which a further application would be required. That unavoidable factor was explicitly before the Council on the appeal, and motivated the Council to reach what it termed its “robust outcome” which would both appropriately recognise (as the Assessment Panel had itself initially done in the draft decision) Mr Nowak’s current competency, whilst at the same time vindicate his natural justice and appellate rights.

[82] In my view, not only was the outcome the Council reached robust and pragmatic, it was indeed an elegant, fair and entirely appropriate result reached after a chaotic and overly prolonged process.

[83] In particular, the reasons for the u-turn by the Assessment Panel are still, as noted above, opaque. However, it is hard to read the contemporary correspondence, as partially set out earlier in this judgment, without being driven to the conclusion that the u-turn was triggered by entirely extraneous considerations, which the Panel should not have allowed to intrude.

[84] Another reason not to overturn the Council’s decision and remit the application by Mr Nowak back to the Registration Authority for the process to begin all over again is the (in all the circumstances) quite remarkable fact that after the Council promulgated its March 2020 decision, Mr Nowak did in fact file a fresh application for continued registration, in May 2020. But a year later I am advised that that application remains undetermined. The fact that the Registration Authority has apparently been, for whatever reason, unable to decide that application in a timely fashion, both gives no grounds for confidence that if this Court were to remit Mr Nowak’s application back to the Registration Authority, it would be considered and determined in a timely fashion, and causes grounds for a concern that a (albeit not as bad) *Jarndyce v Jarndyce*¹¹ situation would not in time reoccur.

¹¹ Charles Dickens, *Bleak House* (serialised March 1852-September 1853), Chapter 1:

... Never can there come fog too thick, never can there come mud and mire too deep, to assort

[85] That the Council's oversight function properly extended to procedural matters was recognised during the passage of the Act through Parliament, when the creation of the Council was inserted into the Act by a supplementary order paper:¹²

The SOP proposes the formation of a Council to provide oversight over the Authorities' [the Registration Authorities] standards and performance, and an avenue of appeal from decisions by the Registration Authority. The oversight of the Authorities' Professional Engineers' registration regime and standards by the Council is from a procedural perspective and is considered important because of the regime needs to protect public health and safety, and be credible to overseas economies and achieve the confidence of business and consumers.

[86] For the above reasons, this appeal must fail. I have reached my own conclusion on the merits of the Council's decision, and I conclude that substantively, jurisdictionally and procedurally, the Council's decision is unimpeachable. As appellant, the Registration Authority bore the onus of persuading the Court to reach a conclusion different from that reached by the Council. It has failed to do that. Not only, in the particular and unique circumstances of Mr Nowak's appeal to the Council, was the decision reached by the Council both procedurally and substantively fair and appropriate, it was in the particular circumstances of the case, and as already noted, elegant, efficient and fair. It was substantively based on an appropriate evidential foundation. It recognised the particular chronological constraints presented by Mr Nowak's circumstances. It crafted an outcome - deciding that Mr Nowak should be registered for a two year term (which had by then expired) and required to apply anew for continued registration (which he did) - which preserved the integrity of the register, addressed the procedural and natural justice errors which had bedevilled the process, and vindicated Mr Nowak's appeal rights.

[87] The fact that the Registration Authority has itself failed to determine Mr Nowak's renewed application is, as already noted, quite remarkable.

with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, hold this day in the sight of heaven and earth. ... *Jarndyce v Jarndyce* drones on. The scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand at least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises.

¹² Chartered Professional Engineers of New Zealand Bill 2002 (25-2).

[88] Furthermore, and in an entirely appropriate manifestation of its oversight function as conferred upon it by Parliament, the Council identified for the benefit of those affected by the Act, the relevant and other errors so as to endeavour to ensure that such errors were not in the future repeated.

[89] In all of those circumstances, there has been no error warranting overturning the Council's decision. Rather the Council is to be commended for crafting the result it did which, as noted, successfully brought to a close, in an entirely appropriate and just fashion, an overly prolonged process.

Costs

[90] The appellant also seeks on this appeal to overturn the Council's award of costs, seeking rather that costs should lie where they fall.

[91] Section 37(5)(d) of the Act quite simply provides that the Council or District Court, on an appeal such as this, may:

make any order as to the payment of the costs of the appeal that it thinks fit.

[92] Given that this part of the appeal is an appeal from the exercise of a discretion, then the appellant must satisfy the Court that in making the challenged costs award the Council:¹³

- (a) Acted on a wrong principle; or
- (b) Failed to take into account some relevant matter; or
- (c) Took account of some irrelevant matter; or
- (d) Was plainly wrong.

[93] In her submissions on this point Ms Dobie made much of the fact that in none of its previous decisions has the Council made a costs award. The Council itself

¹³ *May v May* (1982) 1 NZFLR 165 at [170].

recognised that. The appellant argues that, in ordering costs, and thus departing from its own earlier decisions, the Council failed adequately to justify its departure from its own precedents. Ms Dobie submitted that, given the overriding obligation on any decision maker to act consistently,¹⁴ then the reasons provided by the Council for its departure in this case (in substance that this was one of only two appeals the Council had heard relating to a decision not to continue registration, that Mr Nowak had had legal representation, and that the central issue was asserted factual errors in the assessment process) then those were insufficient to provide a rational basis for a departure from the earlier precedents.

[94] Secondly, Ms Dobie argued that the Council's arguing by analogy from the District Court Rules was both inappropriate and in any event, and in light of the Council describing the appeal it heard as analogous to a category 3 proceeding under the District Court Rules, "manifestly incorrect". Ms Dobie argued that this was an appeal rather than a substantive proceeding (which might otherwise properly be categorised as a category 3 proceeding under the District Court Rules), and illustrated the asserted error the Council made by hypothetically quantifying appropriate costs had either 2A or 2B scale costs been applied, in the amounts of \$5,061.50 and \$9,836.50 respectively. In those circumstances she submitted that the award in total of \$43,390.80 by the Council was manifestly excessive and unreasonable.

[95] Mr Davidson's submissions as to costs was, in broad summary:

5.17 This part of the RA's submission can be dealt with succinctly. The sub-committee process was an unmitigated failure. It was the sub-committee's assessment which was primarily under appeal. As is clear from the CPEC's unchallenged factual findings, the sub-committee incorrectly assessed Mr Nowak's work samples, CPD records and PAD, and had a bias against him which affected the outcome of his assessment. far from 'curing' anything, the sub-committee inflamed the issues.

Decision

[96] This aspect of the appeal can be dealt with quite shortly. The statute confers a broad discretion on the Council with respect to costs. Whilst this discretion must be

¹⁴ *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102 (HC) at [111].

exercised judicially, the Council cannot render that statutory discretion nugatory by considering itself rigidly bound by earlier costs decisions in unrelated appeals where, in the individual circumstances of those earlier appeals, no costs awards were made. The Council was obligated to consider, with respect to costs, Mr Nowak's appeal in light of Parliament conferring on it a broad discretionary power to award costs in appropriate cases. Mr Nowak's appeal was significantly, substantively and procedurally quite different from any other appeal the Council had to date heard. The procedural and other missteps which had occurred prior to the Council being seized of a case upon appeal were unique. In those circumstances the Council quite rightly considered that it was not precluded from awarding costs. To conclude otherwise would have been wrongly to sidestep a substantive consideration of whether the Council's discretionary costs jurisdiction should be exercised. The Council was bound properly to consider exercising its discretion, and it did.

[97] In exercising that discretion, the Council likewise and quite properly looked to the District Court Rules for guidance as to the exercise of its discretion. In the circumstances the District Court Rules provided useful guidance, but not a strait-jacket. The Council was, if it considered it appropriate and if the facts and circumstances of the appeal it was hearing justified it, both free, and indeed required, to reach its own independent decision. Its adoption of a two thirds approach was, in all those circumstances, rational, appropriate and justified. Given the factual and procedural complexity which the earlier missteps in the process had created, looking to category 3 of cases under the District Court Rules for guidance was factually and legally justified, and useful. The Council was not obliged to examine critically and in detail the substance of the legal costs as incurred by Mr Nowak, as evidenced by the legal costs he had actually incurred. The Council appropriately balanced the interests of Mr Nowak on the one hand, and the Registration Authority on the other, by declining Mr Nowak's submission that the initial two thirds starting point should be uplifted by a further 25 per cent.

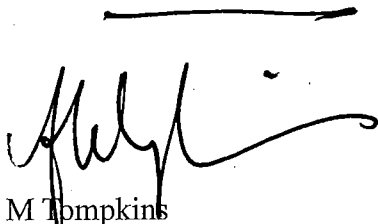
[98] With respect to costs, then, the Registration Authority has failed to identify any material error in the approach taken by the Council both in deciding to award costs and in quantifying those costs. This aspect of the appeal thus likewise fails.

Costs on this Appeal

[99] I did not hear submissions in relation to costs on this appeal. Counsel should confer and endeavour to agree on costs on this appeal payable by the Registration Authority to Mr Nowak. It will not have escaped counsels' notice, reading this judgment, both that Mr Nowak has succeeded on this appeal, and that he might properly be said to have comprehensively succeeded. In those circumstances, that should be reflected in the quantum of the appeal costs that Mr Nowak receives.

Mr Nowak's Current Application for Continued Registration

[100] As noted above, in May 2020 Mr Nowak submitted a fresh application for continued registration. It is both remarkable and extraordinary that fully a year on from that the Registration Authority has not considered and determined that application. To avoid further censure from the Council, or indeed from the Court if a further appeal reaches the Court, that application must now promptly and appropriately be considered and determined by the Registration Authority in accordance both with the letter and spirit of the Act.



A I M Tompkins
District Court Judge