

CASE SUMMARY

DISCIPLINARY COMMITTEE DECISION

Summary of a Disciplinary Committee decision dated 23 May 2022 about a complaint regarding Andrew Fraser CPEng CMEngNZ IntPE(NZ).

BACKGROUND

On 21 December 2018, a member of the public raised concerns with Engineering New Zealand about Taranaki engineer Andrew Fraser CPEng CMEngNZ IntPE(NZ). The complainants' concerns related to Mr Fraser's conduct between 2016 and 2018 while he was providing engineering services to a property development company ('the developer') undertaking a subdivision. The complainants' property borders the subdivision.

The developer was undertaking earthworks in March 2016 when it made a bulk excavation vertical cut on the boundary between the complainants' property and the subdivision. The cut face was approximately 1.2 to 1.7m high.



The complainants were concerned the cut left their property unsafe, unsupported and unable to be fenced. They were also disturbed that Mr Fraser either allowed the developer to make the cut or, if he didn't, that he failed to take appropriate action to remedy the situation. Additionally, they felt Mr Fraser did not respond appropriately when they raised their concerns directly with him.

Mr Fraser's engagement with the developer

The developer verbally engaged Mr Fraser to provide engineering services for its subdivision development in March 2014 on an as-needed basis. Mr Fraser said he was not engaged as the project manager and had no control over the subdivision or site management. Mr Fraser said the last site inspection he attended was about three weeks before the developer made the cut.

Through the complaints process, Mr Fraser provided various dates and explanations of events. It was not clear whether Mr Fraser knew the developer intended to make the cut, and when he became aware of it.

On seeing the cut, Mr Fraser said his instant reaction was to immediately ask the developer, *"What did you do that for?!"*. Mr Fraser said the developer explained the complainants had asked him to make the cut because they wanted more room to build a deck on their house. The complainants denied this. Mr Fraser says he verbally advised the developer to put the earth back where it had been removed from; alternatively, if the developer was not willing to reinstate the earth, that a permanent retaining wall be constructed. Mr Fraser said his instructions to the developer were very clear, but he should have immediately put his advice in writing. He accepted a reasonable engineer in the same circumstance would have done this.

Mr Fraser agreed to provide the developer with a design for the retaining wall in November 2019. As of June 2022, the retaining remains unconstructed. Mr Fraser terminated his contract with the developer on 31 May 2021.

Mr Fraser's involvement with the complainants

Mr Fraser said he did not contact the complainants because he understood they had consented to the cut.

The complainants raised their concerns about the cut with their local council in April 2018. The Council issued a Notice to Fix to the developer, requiring the installation of a retaining wall along the boundary. A second notice was issued in November 2018 instructing the developer to reinstate the ground. The developer installed soil buttressing along the toe of the cut to "flatten" the grade-line from the bottom of the bank to the adjacent building and deck.

The complainants did not believe the remedial work was fit for purpose. They tried to contact Mr Fraser by email and phone in December 2018 to resolve the issue. They were unhappy with the way Mr Fraser responded. Mr Fraser said because the Council was dealing with the matter, he did not believe he needed to address the issues, nor did he consider it was up to him to respond to the complainants' concerns.

ENGINEERING NEW ZEALAND INVESTIGATION

During the initial investigation, Mr Fraser said the developer engaged him to provide an assessment certifying the remedial work sometime in late 2018. That assessment (dated December 2018) did not refer to any permanent retaining solutions. Mr Fraser said a senior civil engineer at his firm performed soil tests and authored the assessment, which Mr Fraser subsequently signed off. Mr Fraser provided the assessment

to the Council certifying that, in his professional opinion, the remedial works were satisfactory as a temporary solution, until a retaining wall was constructed.

The parties dispute whether Mr Fraser adequately fulfilled his responsibility at that point.

During both the initial and Investigating Committee's investigations, Mr Fraser said he saw no need to do anything more than test the compaction of the buttressing because the Council had taken charge of the issue and was actively dealing with the matter. Mr Fraser also said he believed the complainants should be responsible for fixing their property and land because they had allegedly consented to the cut. The complainants denied this.

At the hearing, Mr Fraser gave a different account. He admitted his remedial assessment report should have clarified the developer had only completed temporary remediation of the cut, and a permanent retaining wall or other permanent solution was required. He did not comment on who should be responsible for fixing the cut or providing a permanent solution.

DISCIPLINARY COMMITTEE DECISION

In his submissions and evidence at the hearing in November 2021, Mr Fraser accepted that his conduct fell below the standard expected of a reasonable Chartered Professional Engineer in the circumstances. He accepted he had failed to meet his obligations to undertake engineering activities in a careful and competent manner as required by the Code of Ethical Conduct and that his conduct constituted a ground for discipline, but that this did not call into question his competency as an engineer. The Committee agreed that Mr Fraser's failures related more to poor communication and failure to document his recommendations; the shortcomings were discrete and there was no evidence of wide-ranging competency issues.

Mr Fraser admitted he should have done more after he became aware of the cut. He conceded he should have recorded in writing the advice he gave to the developer about retaining the cut, clarified his scope of engagement in his assessment of the buttressing work his client completed, and stated that a permanent retaining wall or other solution was required. He accepted he should have been more courteous and helpful to the complainants when they contacted him in December 2018 and should have engaged with Engineering New Zealand earlier in the complaints process.

The Disciplinary Committee considered it was unlikely that the complainants asked for the cut to be made in the way that it was done – especially being so close to their property. Even if he believed the complainants had consented to the cut, the Committee said that having seen it, Mr Fraser should have made enquiries to satisfy himself that the complainants understood its seriousness and that someone was taking actions to remedy it. The obligation to safeguard the health and safety of people applied regardless of whether Mr Fraser thought the complainants had agreed to the cut being made and regardless of the fact the complainants were not Mr Fraser's client.

Decision to uphold the complaint

The Disciplinary Committee found Mr Fraser acted inappropriately when the developer made him aware of the cut. The Disciplinary Committee considered there was an obligation on Mr Fraser to safeguard the health and safety of people started as soon as he became aware of the cut. The Committee did not consider verbal advice in this situation to be adequate. As the cut posed a significant risk to the complainants' property, and as the only consulting engineer involved in the project, Mr Fraser should have been aware that only he could make a recommendation on the need for remediation and how it should be

done. They found that Mr Fraser should have put his advice to the developer in writing. Although Mr Fraser did not design the remedial buttressing work, his response was inadequate. In the Committee's view, Mr Fraser breached his obligation to take reasonable steps to safeguard the health and safety of people in the course of his engineering activities.

The Committee found there was no evidence that Mr Fraser followed up with the developer about the cut after his initial advice in April 2018. The Disciplinary Committee was concerned Mr Fraser did not take the opportunity to reaffirm and repeat his advice in that a permanent solution was necessary in his December 2018 report. They found there was no evidence that Mr Fraser checked his advice was being heeded nor took any additional action to ensure this, nor involved the Council. Mr Fraser should have understood his client and the Council would expect him to sign off the development and therefore ensured his client was doing something about the cut.

Apart from fully informing his client (the developer), the Disciplinary Committee expected a reasonable engineer would have communicated the risk of the cut to any affected parties – in this case, the complainants – and the Council. The Code of Ethical Conduct obliges engineers to report adverse consequences, to act when they come across an engineering issue that they think is likely to cause significant harm to people or the environment. At a minimum, engineers must make enquiries to satisfy themselves, on reasonable grounds, the engineering matter of concern is being managed appropriately. If, after making enquiries, the engineer still has concerns, the engineer should consider whether there are confidentiality considerations in reporting the matter. If, after these steps, the engineer still has concerns that the matter will not be addressed in an appropriate manner, engineers must report it to the appropriate regulatory body.

The Committee was concerned that when the complainants contacted Mr Fraser in December 2018, he did not engage in the conversation, instead directing them to discuss it with the developer. The Committee disapproved of the tone and manner of Mr Fraser's communication with the complainants. Mr Fraser recognised he should have been more courteous and helpful. Although he could have, and himself agreed that he should have, treated the complainants with more respect and courtesy, the Disciplinary Committee found his behaviour was not unreasonable enough to constitute a breach of the Code.

Having considered all the evidence, and the parties' submissions, the Disciplinary Committee was satisfied that on the balance of probabilities the grounds for discipline were met. Accordingly, it decided to uphold the complaint about Mr Fraser.

Penalties

The Disciplinary Committee ordered that Mr Fraser be reprimanded as a Member of Engineering New Zealand and censured as a Chartered Professional Engineer. It ordered Mr Fraser to pay a fine of \$2,500. He was also ordered to pay 60% of the costs incurred by Engineering New Zealand in investigating and hearing this matter, being \$10,389 plus GST.

The Disciplinary Committee directed Engineering New Zealand to publish a summary of its decision. The Committee's suppression order covering Mr Fraser's identity was lifted.