PROCEDURAL HISTORY

A COMPLAINT ABOUT AN ENGINEER

In December 2017, the complainant raised concerns with Engineering New Zealand about an engineer, "Mr A" CMEngNZ CPEng.

The complaint was investigated by Engineering New Zealand and referred to a disciplinary committee on 15 July 2020.

Engineering New Zealand disciplinary decision

The Disciplinary Committee upheld the complaint and issued its decision on 24 September 2021. The Disciplinary Committee ordered Mr A:

1. be censured as a Chartered Professional Engineer;
2. be admonished as a Chartered Member of Engineering New Zealand;
3. be fined $3,500 fine as a Chartered Professional Engineer and Chartered Member of Engineering New Zealand; and
4. pay 50% of the costs incurred by Engineering New Zealand in investigating and hearing the matter, being $9,370 plus GST.

The Disciplinary Committee also decided to lift Mr A's name suppression.

When penalty orders are made against a Chartered Professional Engineer, Engineering New Zealand is required, subject to any appeal, to notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the orders and the reasons for them. Engineering New Zealand must also publish the decision on its website, in a press release, and in any other communication it considers appropriate.

Chartered Professional Engineers Council decision

Mr A appealed the Disciplinary Committee's decision to the Chartered Professional Engineers Council on 21 October 2021.

On 31 May 2022 the Chartered Professional Engineers Council dismissed Mr A's appeal and upheld the complaint. However, it reduced the fine to $1,750 plus GST and ordered that Mr A not be named in any publication of the disciplinary decision.

The Engineering New Zealand and Chartered Professional Engineers Council decisions are attached.

DISCIPLINARY COMMITTEE DECISION

REGARDING A COMPLAINT ABOUT AN ENGINEER

For release

In accordance with:
Engineering New Zealand Rules 2017
Engineering New Zealand Disciplinary Regulations 2017
Chartered Professional Engineers of New Zealand Act 2002
Chartered Professional Engineers of New Zealand Rules (No 2) 2002

Prepared by
Jenny Culliford FEngNZ (Ret.)
Chair of the Disciplinary Committee

David Jennings FEngNZ (Ret.) (CPEng IntPE(NZ) until 31 Dec 2020)
Michelle Grant CMEngNZ CPEng IntPE(NZ)
Hamish Wilson, nominated by Consumer New Zealand
Anita Killeen, Barrister of the High Court of New Zealand
Members of the Disciplinary Committee

24 September 2021

engineering new zealand
te ao rangahau

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EXECUTIVE SUMMARY

1. In December 2017 a member of the public (**the complainant**) raised concerns with Engineering New Zealand about an engineer (**Mr A**) CMEngNZ CPEng. The concerns related to Mr A's conduct while he was acting as the complainant's expert witness in its insurance claim during 2013 – 2016.[1]
2. The complainant owns a property in Christchurch (**the property**), which was damaged in the Canterbury Earthquake Sequence (**CES**).
3. The complainant's claim, being over-cap, was managed by Southern Response Earthquake Service (**Southern Response**).[2] On the advice of his lawyer, the complainant engaged Mr A as its structural engineer to respond to geotechnical and structural engineering reports produced for Southern Response.
4. Mr A issued several reports which the complainant found unhelpful and lacking specificity. The complainant also said Mr A communicated with him unprofessionally, caused delays in their High Court proceedings and acted outside his competence by providing geotechnical advice.

DECISION

5. Having considered the matter following the hearing held on 14 December 2020, we have found the engineering services provided by Mr A in respect of the property were not in accordance with the expected standard of a member of IPENZ and a Chartered Professional Engineer.
6. We have found that Mr A has:
    a. undertaken engineering activities outside his area of competence, by giving geotechnical engineering advice and opinions; and
    b. failed to undertake engineering activities in a careful and competent manner, by failing to perform adequate inspections of the property, providing general and nonspecific reports that were substandard and not fit for purpose.
7. The complaint is upheld.

[1] The conduct complained of took place between 2013 – 2016. At the time the conduct was complained of Mr A was a member of the Institution of Professional Engineers New Zealand (MIPENZ) and a Chartered Professional Engineer. The Institution of Professional Engineers New Zealand changed its trading name from IPENZ to Engineering New Zealand in October 2017.

The applicable IPENZ Codes of Ethical Conduct are dated 1 January 2005 and 1 July 2016. As the complaint was made in December 2017 the relevant Engineering New Zealand Rules and Disciplinary Regulations are those that came into force on 1 October 2017.

The applicable Chartered Professional Engineer Codes of Ethical Conduct are contained in Chartered Professional Engineers of New Zealand Rules (No 2) 2002 rules 43 – 53 (revoked on 1 July 2016) and the Chartered Professional Engineers of New Zealand Rules (No 2) 2002, rules 42A – 42I.

[2] Southern Response Earthquake Services is the government-owned company responsible for settling claims by AMI policyholders for Canterbury earthquake damage which occurred before 5 April 2012 (the date AMI was sold to IAG).

BACKGROUND

COMPLAINT

8. On 6 December 2017 the complainant complained to Engineering New Zealand about an engineer, Mr A. The complainant said he engaged Mr A and his consultancy in May 2013 to act as its structural engineering expert for his claim with Southern Response following damage to his property during the CES. At the time Mr A completed work for the complainant he was the sole director of an engineering consultancy (**Consultancy One**).
9. The complainant alleged Mr A may have breached the Code of Ethical Conduct because:

    a. he undertook engineering activities outside his area of competence, by giving geotechnical engineering advice;
    b. he failed to undertake engineering activities in a careful and competent manner, by failing to perform inspections of the house, providing general and nonspecific reports, containing errors;
    c. he failed to act with honesty, objectivity, and integrity by going overseas during his engagement without telling anyone, failing to disclose he had been criticised in the High Court and failing to provide time sheets when requested; and
    d. he failed to treat his client with respect and courtesy by being blunt, difficult to get hold of and ignoring requests to meet.

INVESTIGATING COMMITTEE

10. Following an initial investigation, the complaint was referred to an investigating committee for formal investigation.
11. The Investigating Committee dismissed the aspects of the complaint regarding Mr A's professionalism in respect of aspects (c) and (d) of the complaint.
12. The Investigating Committee considered, assessed as a whole, the complaint raised the question whether Mr A met the standards expected of a reasonable Chartered Professional Engineer in carrying out the role of expert witness. The Investigating Committee was not satisfied Mr A met this standard.
13. The Investigating Committee did not consider there were any grounds to dismiss the aspects of the complaint that Mr A (a) issued inadequate engineering reports and (b) acted outside his areas of engineering competence and, accordingly, determined it should be referred to a disciplinary committee on 15 July 2020.

DISCIPLINARY COMMITTEE

14. The Disciplinary Committee convened to hear the matter in Wellington on 14 December 2020. The parties appeared at the hearing via videoconference.
15. The members of the Disciplinary Committee are:

    Jenny Culliford FEngNZ (Ret.) (Chair)
    David Jennings FEngNZ (Ret.) CPEng IntPE(NZ)
    Michelle Grant CMEngNZ CPEng IntPE(NZ)
    Hamish Wilson, nominated by Consumer New Zealand
    Anita Killeen, Barrister of the High Court of New Zealand

16. The following parties attended the hearing:

The complainant	
Mr A CPEng CMEngNZ IntPE(NZ)	
Helen Smith	Counsel for Mr A
Matthew Prendergast	Counsel for Mr A
Engineering New Zealand	
Deane McNulty CPEng FEngNZ	Investigating Committee Representative
Christine Anderson	Senior Legal Advisor
Carolyn Ding	Legal Advisor

17. The parties were invited to make submissions prior to the hearing. We received submissions from Mr A which included a signed statement from himself, a signed statement from the complainant's (former) counsel, and an additional bundle of documents. The complainant did not provide submissions.
18. We also asked both parties for copies of relevant reports from Southern Response's geotechnical engineers dated May 2013,[3] August 2013,[4] November 2015[5] and December 2015;[6] along with full copies of the briefs of evidence of Southern Response's structural engineer, Mr B and Southern Response's geotechnical engineer, Mr C, which were prepared for the relevant High Court proceedings.[7] Mr A provided two reports from Southern Response's geotechnical engineers dated 8 May 2013,[8] and 1 December 2015.[9]
19. The evening before the hearing, the complainant provided two of the outstanding Southern Response's geotechnical engineer's reports dated February 2014 and November 2015. He also provided many emails during the hearing. We have not considered these reports or emails as part of the evidence before us.
20. The complainant and Mr A gave oral evidence at the hearing; counsel for Mr A also provided written and oral legal submissions.
21. All relevant information gathered has been incorporated into our report below.

INFORMATION GATHERED

PRELIMINARY

Background

22. At the hearing the complainant explained when he engaged Mr A (June 2013), he was in dispute with his insurer, Southern Response, about the scoping of the amount of work needed to remediate his

[3] The Geotechnical Assessment Report and the Foundation Rebuild Options Report.
[4] A letter assessing the slopes along a drain.
[5] Foundation Options Report
[6] Foundation Stabilisation Design report.
[7] The Investigating Committee had only been provided with excerpts.
[8] The Geotechnical Assessment Report and the Foundation Options Rebuild Report.
[9] The Foundation Stabilisation Design Report.

property following the CES. The complainant engaged counsel to act for them in this dispute, and the complainant said Mr A was recommended to him by his (then) counsel.

23. The dispute was heard in the High Court in October 2016 and settled during the trial. Mr A was no longer acting for the complainant at this point.

Other consultants

24. By the time Mr A was engaged by the complainant in June 2013, Southern Response had already instructed geotechnical and structural engineers to provide it engineering advice. Southern Response's geotechnical engineers prepared a repair method from the ground down, and its structural engineers from the ground up. Southern Response's geotechnical and structural engineers worked together where they met (i.e. the foundations).
25. Both Southern Response's geotechnical and structural engineers produced several reports between 2013 and 2015. Those reports, of which we are aware, are:
    - Southern Response geotechnical engineers: Foundation Rebuild: Geotechnical Assessment Report Rev 0, 8 May 2013;
    - Southern Response geotechnical engineers: Foundations Options Rebuild Report Rev 0, 8 May 2013;
    - Southern Response structural engineers: Repair Summary Report, 16 May 2013;
    - Southern Response geotechnical engineers: Foundation Rebuild Options Report Rev 2, February 2014;
    - Southern Response geotechnical engineers: Foundation Options Report, November 2015 (not considered);
    - Southern Response geotechnical engineers: Foundation Stabilisation Design Report Rev 0, 1 December 2015; and
    - Southern Response geotechnical engineers: Review of the complainant's geotechnical advice, 7 December 2015.
26. During Mr A's engagement, Mr A advised the complainant he did not have expertise to complete the foundation design for the property, the complainant engaged another engineering consultancy (**Consultancy Two**) to undertake the design. Consultancy Two provided sketches of their proposed design on 8 September 2015, later revised on 11 September 2015.
27. Mr A later engaged Mr D CPEng[10], a geotechnical engineer, in December 2015 to prepare a report in response to Southern Response's geotechnical engineer's report of 1 December 2015.
28. Mr C, Mr B and Mr D all provided evidence for the High Court hearing. We understand Mr A prepared a brief of evidence, but this was not filed as the complainant discontinued his contract.

Mr A

29. The complainant engaged Mr A five times between June 2013 and April 2016. Mr A provided a total of four reports during those different engagements. Two of the reports were revised and re-issued several

[10] Mr D was also a member of the Institution of Professional Engineers New Zealand (MIPENZ), a now defunct membership class, at the time of the relevant conduct. Mr D has been a Chartered Professional Engineer since August 2013. His practice field is geotechnical engineering.

times. Mr A said the revisions were issued generally following review and comment from the complainant and other consultants.

30. In summary the reports prepared by Mr A on behalf of Consultancy One are:

    - Structural Foundation Reinstatement Report - Revisions A - C, May 2014;
    - Structural Damage and Reinstatement Report - Revisions A - D, September 2014 - September 2015;
    - Structural addendum - Revision A, August 2015; and
    - Review of the Southern Response geotechnical engineering report December 2015 - Revision A, December 2015.

    The Investigating Committee referred to these reports and revisions as the first report through to the ninth report on a chronological basis.

31. The parties hold different opinions on when Mr A attended site for an inspection. Unless stated below, Mr A's reports do not state if he attended the property for a site visit, nor do they detail the findings of Mr A's inspection, if any.

INITIAL REPORTS

Geotechnical engineering reports for Southern Response

32. Southern Response engaged a geotechnical engineering consultancy to provide foundation options at the property and in May 2013, they issued two reports, "Foundation Rebuild: Geotechnical Assessment Report - Rev 0" and "Foundation Options Rebuild Report - Rev 0)". These reports confirmed the complainant's property was a TC3 site and made recommendations for rebuilding the foundations.[11]

Structural engineering report for Southern Response

33. Southern Response engaged a structural engineering consultancy to assess the structural earthquake damage to the property and recommend a repair methodology to the structural elements. On 16 May 2013, they issued their report which proposed the foundations be rebuilt, the superstructure repaired, and the garage replaced. The report also provided a design for the replacement house and garage foundations.

34. The report noted severe damage and significant settlement was identified to the house foundations with minor damage observed to the superstructure:

    > *Significant variations in floor slope were discernible across the ground floor. However, we noted a general lack of significant damage to the superstructure as a result of the differential foundation settlement. Observed typically very minor damage to internal linings. Lining damage does not appear structurally significant.*

35. This report agreed with the foundation repair strategy proposed in the Southern Response geotechnical engineer's report, stating:

    > *Southern Response Earthquake Services Ltd (SRES) propose to reinstate the existing house and superstructure on a new 'Type 2b - surface structure' foundation system in accordance*

[11] TC3 (Technical Category three) is where liquefaction damage is possible in future large earthquakes. Geotechnical engineering assessment may be required to select the appropriate foundation repair or rebuild.

with the recommendations of Part C of the MBIE Guidance and the [geotechnical engineering consultancy] *foundation options rebuild report. Given the profile of foundation damage observed on site, we believe that this proposal is consistent with the foundation assessment recommendations of the MBIE Guidance.*

36. This report recommended repair of the house superstructure, stating:

> *We expect that repair of damaged internal linings will be carried out in accordance with BRANZ Bulletin issue 548 'Repairing plasterboard after an earthquake'.*

37. The report noted the garage was proposed to be demolished and completely rebuilt.

Mr A's first engagement 8 May 2013

38. Mr A, on behalf of his consultancy (Consultancy One), and the complainant, signed a short form agreement on 27 June 2013. The scope of the engagement was:

> [P]*rovide structural engineering advice, as required to assist with settlement of the claim (including court appearance as may be required).*

39. The complainant hand wrote on the contract "please advise if bill will be over $2,500 or when account hits $2,500". In his evidence at the hearing the complainant said he eventually spent over $40,000 engaging Mr A and there were no budget constraints. Mr A disputes this.
40. In his initial response to the complaint, Mr A referred to his work for the complainant as a High Court expert witness. In his written submissions to us, Mr A said he did not consider he was being engaged to provide expert evidence or as an expert witness for the complainant's High Court proceedings at this point. He acknowledged he was being engaged to provide his expert engineering opinion. He said he knew the complainant was involved in litigation with Southern Response but was unaware what stage it was at.
41. Mr A said he did not think he was being engaged as an expert witness as the complainant's counsel did not provide a formal letter of engagement, specific instructions, or details of the proceedings; and Mr A understood the complainant's strategy in the litigation was to negotiate a settlement. Mr A said his budgeted estimate of $2,500 plus GST was for initial attendances he could foresee at the time – such as an inspection, attending a meeting, and providing advice. He understood he was required to obtain approval from the complainant to do any work beyond this budget. Mr A said he included the bracketed statement '(including court appearances as required)' so the complainant knew he could be engaged as an expert witness if needed, not that he was engaged as one at this point.
42. Mr A said this engagement was largely limited to an initial review of the Southern Response's structural engineer's report and provision of preliminary comments.
43. Mr A said he carried out a site inspection on 14 November 2013 and took photos during this site visit, however he did not take any notes or measurements. He took three photos of the property and discussed the damage with the complainant.
44. In his responses to the complaint, and at the hearing, Mr A said he did not take measurements or make site notes when he attended the property because he found he generally agreed with Southern Response's structural engineer's conclusions. Mr A said by November 2013, he had a good understanding of the property, and the complainant and Southern Response had agreed the foundations of the house and garage had to be replaced.

45. At the hearing Mr A confirmed this was the only time he had undertaken an inspection at the property and this inspection is what he had based his reports on. When we asked why Mr A had not documented his site visit Mr A said he outlined it in one of his later reports.
46. At the hearing Mr A said the complainant's house had been ruined by the CES: "[the house] was the Titanic at the bottom of the sea" and "every lining had a crack, the foundation was broken, [it was] obviously a rebuild". Mr A explained the damage was very widespread, and the house was "so significantly out of level it was out of scope of the MBIE guidance". Mr A went on to say it was not his role to say whether the house was suitable to be rebuilt as "what you do is identify the damage and the repair methodology and determine whether any other specialists' input is required".
47. Mr A invoiced the complainant in August, October, and November of 2013 for $737.50, $295 and $295, respectively.

Further geotechnical report for Southern Response

48. The same geotechnical engineering consultancy was engaged by Southern Response to provide foundation options at the property. On 19 February 2014, the geotechnical engineering consultancy issued a further report, Foundation Options Rebuild Report - Rev 2, for the property.

SITE MEETING

49. There is disagreement about when a site meeting attended by Mr A, other engineers, quantity surveyors, Southern Response, and the complainant's builder occurred. The complainant states the meeting was held in May 2014 and Mr A states this meeting occurred on 19 November 2013.
50. The parties also have different views on when Mr A first visited the property. The complainant stated as far as he is aware, the joint site meeting was the only time Mr A visited the property. Mr A says he visited the site on 14 November 2013, a few days prior to the date he says the site meeting was held.
51. The complainant says Mr A did not take any physical measurements or photographs during his site visit.
52. The complainant states at this meeting it was discussed that Southern Response had agreed to rebuild the entire garage. In response Mr A stated by May 2014 it was agreed the foundations needed to be replaced, but there was disagreement about how to do this.
53. Mr A invoiced the complainant $3,171.25 on 3 December 2013.

CONSULTANCY ONE'S STRUCTURAL FOUNDATION REINSTATEMENT REPORTS

54. In May 2014, Southern Response agreed to pay Mr A's fees to: review and provide comment on the suitability of the foundations proposed by Southern Response's geotechnical engineer for both the house and garage/gym/office; to review and provide comment on the preliminary foundation design prepared by Southern Response's structural engineer for a possible alternative solution for the garage to mitigate the flood risk; to provide written advice/recommendations on a foundation solution if Mr A disagreed with Southern Response's structural engineers alternative design; and to meet with Mr B, a structural engineer engaged by Southern Response to discuss recommendations. Confirmation of the scope of was set out in a letter to Mr A from Southern Response's lawyers dated 13 May 2014.
55. Mr A (on behalf of Consultancy One) and the complainant signed a further short form agreement on 21 May 2014. The scope of this engagement was to:
    - *Carry out structural engineering review of* [the Southern Response geotechnical engineer's] *Foundation Options Rebuild Report dated February 2014 for both the house and garage/gym/office and provide comments regarding our agreement/disagreement on the suitability of proposed foundations, including reasons for any disagreement.*

- *Carry out structural engineering review of* [the Southern Response structural engineer's] *preliminary design for a possible alternative foundation solution for the garage to mitigate the flood risk and provide our comments regarding agreement and/or disagreement, including reasons for any disagreement.*
- *Should we disagree with the recommendations of either* [Southern Response's geotechnical or structural engineers*] or both, we will provide recommendation for the foundation solution for either house or garage/gym/office or both to substantiate our disagreement.*

56. Prior to the negotiation of this short form agreement, Mr A had already invoiced the complainant a total of $5,456.50. Mr A invoiced a further $3,695.50 on 16 May 2014.
57. Mr A issued Revision A of his Structural Foundation Reinstatement Report on 25 May 2014 followed by Revisions B and C on 27 and 30 May 2014, respectively.
58. At the hearing the complainant said they expected Mr A to provide a full structural repair methodology: "We need a full comprehensive review of our current position and what was needed to repair it." He said this was the first engineering firm he had engaged in his life, and he "was [were] not looking for hypotheticals".
59. Mr A states he was not required to undertake a detailed check of Southern Response's geotechnical engineer's reports and the Southern Response structural engineer's report and calculations or do his own investigations as:
    - *Floor undulations were obvious. The* [Southern Response structural engineer's] *report stated, "significant variations in floor slope were discernible across the ground floor.* [I] *agreed with this conclusion.*
    - *Cracks in the perimeter foundation were obvious. The position or width of cracks was not recorded because it was already noted in the* [Southern Response structural engineer's] *report and there was already an agreement that the foundations required replacement.*
    - *Widespread lining damage did not have to be identified as it was noted in the* [Southern Response structural engineer's] *report.* [I] *agreed with* [Southern Response's structural engineers'] *observations.* [I] *noted in* [my] *report that further information was required before the exact scope of foundation works could be finalised.*
60. A site visit was included in the scope of the report:

    [The complainant] *has engaged* [Mr A] *to:*

    - *Carry out a brief structural non-destructive inspection of the house at* [the property], *from places where ready, safe access exists*
    - *……*
61. Mr A's reports obliquely reference the fact that a site visit has occurred at some point during the engagement. The reports also state the same foundation system proposed for the house should be used for the garage:

    The Owner advises that the garage/gym/office/laundry is Importance Level 2 structure. We agree with this assessment, as our inspection confirmed this was a clearly a habitable space. Page 10 shall be revised to reflect this.

    …

due to importance Level 2 – foundation system for garage/gym/office/laundry shall be the same as for the house.

62. Mr A submitted a (further) site visit was not required meaning he did not have any site inspection notes. Mr A said a site inspection was not required as the May 2014 agreement was a discrete engagement. The complainant disagreed, saying Mr A had been engaged as an expert witness, and Mr A could not give credible evidence if Mr A had not inspected it properly.
63. The complainant considered a (further) site inspection was required, given Mr A was to act as an expert witness for it in the High Court. Mr A said he was still not aware he was meant to be acting as an expert witness.

Structural Foundation Reinstatement Report – Rev A

64. The Consultancy One Structural Foundation Reinstatement Report - Rev A states:

> *The reviewed documents may contain information not related to structural engineering (e.g. strictly geotechnical, flooding, architectural, etc). As the review undertaken herewith is limited to structural engineering aspects as well as general "common engineering" aspects, such non "common engineering" information will generally not be reviewed and commented on.*

65. The report also states:

> *The above work is in relation to the Canterbury Earthquake Sequence, from 4 September 2010 to date of inspection.*

However, no date of inspection was given.

66. This report comments on the Building Act 2004, the Southern Response geotechnical engineer's Foundation Options Rebuild Report, and sketches by Southern Response's structural engineers dated April 2014. This report also attached the Southern Response structural engineers' sketches which Mr A had marked up, presenting them as four possible foundation options.
67. Mr A's written evidence stated he disagreed with several of the recommendations made by Southern Response's geotechnical engineers and highlighted several areas where deformation properties of the ground (or ground improvements) were not provided. Mr A recommended both buildings should be founded on a shallow foundation over ground improvement works designed by a Chartered Professional Engineer to achieve code compliance. His review also made recommendations for changes to be made to Southern Response's geotechnical engineer's report. There was one reference to an inspection, the nature of which is unclear, as noted above.
68. The report contains the following comment on MBIE Guidance:

> *Technical "solutions" suggested by MBIE Guidance document are not necessarily automatically applicable and compliant with NZ Building Code and must be carefully considered according to the circumstances of each particular case and be proven by sound engineering methods (calculations, tests, etc.).*

Structural Foundation Reinstatement Report – Rev B

69. The most noticeable difference between the first and second revisions of the Consultancy One reports is the addition of a heading "further information required to finalise foundation design" including:

    a. Detailed assessment of the site and building layouts, confirming final floor levels and site levels;

b. Appointment of full professional design/construction team;
c. Detailed design of ground improvement works; and
d. Design calculations etc.

70. Mr A submitted this revision to the report made it clear his advice was preliminary only.

Structural Foundation Reinstatement Report – Rev C

71. The complainant provided comment to Mr A by email about Consultancy One's Revision B Foundation Reinstatement Report, and on 30 May 2014 Mr A issued a further revision, Revision C, in response.
72. As noted above, Consultancy One's brief included "carry out a brief structural non-destructive inspection of [the house] from places where ready, safe access exists". At the hearing Mr A said he had carried out an inspection on 14 November 2013 and referred to the photographs he took. When asked about what other records he had of these inspections Mr A said he had other notes which affirmed what the Southern Response structural engineers had said in their report. He said the damage was so widespread, and the house was so significantly out of level it was out of scope of the MBIE guidance. We asked Mr A why he had no documentation of his inspection and he advised that his later reports outlined the damage to the house.
73. The most noticeable difference between Revisions B and C of the Consultancy One's Structural Foundation Reinstatement Report are the addition of items under a heading "further information required to finalise foundation design", which is expanded from Revision B to include:
    - Survey;
    - Detailed assessment of the site and building layouts, confirming final floor levels and site levels;
    - Input from a town planner;
    - Appointment of full professional design/construction team;
    - Serviceability limit state (SLS) cumulative diagrams for the two cone penetration tests (CPTs) carried out on site;
    - Further detailed geotechnical engineering advice (including ground bearing capacities);
    - Detailed design of ground improvement works;
    - Design calculations, drawings and PS1 signed by a CPEng structural engineer confirming foundation works unconditionally comply with the Building Code;
    - Design calculations, drawings and PS1 signed by a CPEng structural engineer confirming any other new structural works unconditionally comply with the Building Code; and
    - Design calculations by a CPEng and a formal letter, confirming as a minimum, full compliance with section 112 of the Building Act.
74. The complainant was also concerned that Southern Response had accepted the garage needed to be demolished, yet Mr A's early reports (Revisions A – C of the Consultancy One's Structural Foundation Reinstatement Reports) still discussed repairs to the garage. In response, Mr A said he requested evidence from the complainant of the agreement between the complainant and Southern Response the garage was to be demolished, but this was not provided to him. As noted earlier, Southern Response's structural engineers had proposed, on 16 May 2013, the garage be rebuilt.
75. At the hearing Mr A gave evidence the reader would know the report was preliminary as it stated the final details would need to be done by Chartered Professional Engineers (structural and geotechnical).

When asked about the fact he knew this was going to a quantity surveyor (QS) for pricing for a court case, Mr A said, "I think it's pretty clear further work is required."

76. When asked how Mr A thought this report was going to meet the client's needs Mr A said it "was a fantastic start".
77. When asked what the basis for the preferred foundation option was, Mr A did not provide any explanation of the basis for his opinions. Mr A did later comment that his opinions as a structural engineer reflected his knowledge from a large number of similar house projects with foundation works.
78. The Revision C report stated "we have no objections to the proposed [by Southern Response's geotechnical engineer's] embedment depth of 13.5m (nominal) to generally meet TC2 performance for ULS load case….. [W]e cannot assess whether 13.5m embedment (nominal) would generally meet TC2 performance for SLS load case".
79. When asked what he meant by "no objections to the proposed embedment depth" as a structural engineer, Mr A said it appeared in the right ballpark – he did not say it was the correct solution, but it should be confirmed.

JOINT EXPERT MEETING

80. On 3 July 2014 Mr A, Mr B (a structural engineer engaged by Southern Response) and Mr C (a geotechnical engineer engaged by Southern Response) (the experts) met. Mr A said the purpose of this meeting was to try and agree on the foundation design concepts for the reinstatements of the dwelling and garage/office/gym/laundry and discuss the experts' differing methodologies. At the hearing the complainant said this was part of the court process, as they had held a teleconference and the matter was put on hold until this meeting. Mr A said it was his understanding this was not a court-ordered meeting.
81. We have been provided with an outcome statement from the meeting, signed by Mr A, Mr B and Mr C and dated 3 September 2014.
82. Mr A said the experts agreed a surface structure incorporating a raised timber floor would be appropriate, following ground improvement. Mr C and Mr B agreed the MBIE Guidance was an acceptable means of demonstrating compliance with the New Zealand Building Code; however, Mr A disagreed.
83. At the hearing Mr A said he did not update the Consultancy One Structural Foundation Reinstatement Report based on the parameters discussed at this meeting. He said it was a multifaceted challenge, more than just a foundation replacement, and that at this stage he could only state his preliminary opinion.

Expert engagement

84. Mr A's written evidence states that at this stage he still did not think he was being engaged as an expert witness as the meeting was informal, there were no court orders asking the experts to meet, and the joint statement was not in the prescribed format for litigation. He said he still did not have any indication he was being asked to appear as a witness, otherwise he may not have allowed the complainant and counsel for the complainant to comment on the joint statement.
85. On 18 August 2014, Southern Response's lawyer emailed the complainant's lawyer, with a copy to the complainant, requesting that he follow up with Mr A regarding the finalisation of the report of the engineering experts' meeting which they understood was with Mr A at that time. They also stated that they needed to provide an update to the Court. The complainant forwarded this email to Mr A asking,

"[Mr A] how have you got on with Geotech design etc. For us to have an outcome with SR we need to be able to get everything quantified and priced and can not just be stuck in professional debates. We need this designed as to exactly how we will fix the land and new foundation etc so contractors can price it etc."

CONSULTANCY ONE'S STRUCTURAL DAMAGE AND REINSTATEMENT REPORTS

Structural Damage and Reinstatement Report – Rev A

86. In September 2014, Mr A says he was verbally instructed to carry out a non-destructive inspection of the property, form an opinion about the damage, and prepare a structural reinstatement strategy.
87. On 8 September 2014, Mr A issued a report titled "Structural Damage and Reinstatement report – Rev A". This report stated Mr A was engaged to:
    - *Carry out a brief structural non-destructive inspection of the house at* [the property] *from places where ready, safe access exists.*
    - *Review various technical documents prepared by third parties.*
    - *Form an opinion about the structural damage sustained by the house and garage/office/gym/laundry.*
    - *Prepare global structural reinstatement strategy for the house and garage/office/gym/laundry, and based on reinstatement to an appropriate standard prescribed by the insurance policy.*
88. This report contained information about the structural earthquake damage and a global structural reinstatement strategy. It recommended both the dwelling and the garage/gym/office/laundry should be lifted and removed off site or to the side, the damaged foundation removed, and a new foundation system compliant with the Building Code constructed.
89. The report recommended significant repairs to the house superstructure, with removal and replacement of the floor framing members, removal and reinstatement of internal linings and external claddings, allowance for replacement of first floor framing, stating:
    - *Lift the house (from bottom plate up) and remove off site or to one side.*
    - *Remove existing damaged foundation and ground level flooring framing system (bearers, joists, and flooring).*
    - *Construct new foundation system compliant with NZ Building Code, ensuring flood management zone requirements are met……..*
    - *Return the house to site, remove all interior linings and exterior cladding, release stresses built-up within framing, bring framing to level, plumb, square and true to line, re-connect to the new foundation system. …. Conservatively assume entire upper floor framing would need to be replaced.*
    - *Repair any framing damage (walls, upper floor, roof, etc.).*
    - *Install new cladding.*
    - *Install new plasterboard bracing system compliant with current NZ Building Code.*
90. This report commented on the geotechnical recommendations. Based on TC3 categorisation, one option suggested was 800mm stone columns to about 20m below ground level, stating "'Good ground" (as per NZS3604:2011) equivalent performance shall be achieved by the ground improvement. This may be difficult to achieve due to propensity of ground to lateral stretching" (option one). Alternatively, the

report then goes on to detail what would be required if TC2 like performance was to be achieved "with maximum SLS differential settlement of 25mm over 6m" (option two).

91. This report stated "exact final 'for construction' structural details of the new foundation system will be determined by specific engineering and rational analysis…. Upon completion of detail geotechnical investigation …. And may differ from the above."
92. Mr A stated by this time, he had a good understanding of the property from his review of the Southern Response's structural engineer's report and other material relating to the property, including the building consent; he said he had inspected the property in November 2013, taken photos and recorded his conclusions in the May 2014 report; and the complainant and Southern Response had agreed the foundations of the house and garage had to be replaced. Mr A said he provided a strategy which "would most likely" meet policy requirements but exact structural details would need to be determined by specific engineering after geotechnical analysis was completed. The complainant said geotechnical analysis had already been completed by the geotechnical engineer engaged by Southern Response, and he needed a finalised damage report and repair strategy that could be used for costing purposes and presented in evidence to the High Court, not "preliminary" observations.
93. This report provided the same comment on the MBIE guidance as the Foundation Reports Rev A – C, as well as additional comment, including:

> *Use of MBIE "Guidance on repairing and rebuilding houses affected by the Canterbury earthquake sequence" (Guidance) is not compulsory. Guidance is not a compliance document under New Zealand Building Code framework. Guidance is not an Acceptable Solution or Verification Method under New Zealand Building Code framework. […] Therefore, any engineering design outside codes (e.g. solely on the basis of MBIE Guidance) and without support by rational analysis is prima facie a faulty design.*

94. The complainant was concerned about the adequacy of Mr A's reports, citing "meaningless comments" that indicate Mr A had not performed competently. For example, under the heading "Structural earthquake damage identified" Mr A stated:

> *"Structural earthquake damage" is any adverse change (triggered by earthquake) of the physical state of the structural elements of the building. This adverse change can be visible-measurable (e.g. cracking, splitting, crushing, settlement, separation, movement), or could be invisible (e.g. obscured physical distress, adverse stresses/strains, reduction in factors of safety, reduction in level of structural compliance). In general, reduction of level of structural compliance as a result of earthquake equals structural earthquake damage.*
>
> *…*
>
> *Key earthquake damage identified includes, but is not limited to, the following:*
>
> - *Re-distribution of foundation loads, causing increased ground pressures along some sections of the foundation system, and reduction in pressures along other sections of the foundation system, which is unfavourable and leads to the reduction of the overall level of structural compliance. This unfavourable redistribution, in turn, causes unfavourable flexure, stresses and strains in the foundation system and timber floor structures (both ground and upper levels) of the house, which the original design did not allow for, which further decreases level of structural compliance….*

- *Distortion and stretch of the foundation system caused distortion and stretch of the ground level floor framing of the house (bearers, joists, flooring). The distortion and stretch caused adverse, unquantifiable, and therefore unacceptable stresses and strains in the floor framing structure.*

These statements were also included in the sample report Mr A provided in his submissions to us.

95. Mr A has said he agreed with Southern Response's geotechnical engineer's report which was why he did not document his damage assessment. However, Mr A had substantially different repair requirements for the superstructure than Southern Response's geotechnical engineers. Mr A said the damage was widespread and obvious. Southern Response's geotechnical engineers stated there appeared to be widespread but minor damage to linings, etc. They recommended a further inspection to assess the superstructure after the foundations had been repaired.
96. We note there would have been a large difference in cost between the two repair strategies. Mr A did not provide the basis for his opinion on the remedial work.

Structural addendum – Rev A

97. On 12 August 2015 Mr A issued a further report entitled "Structural addendum – Rev A". It stated Mr A was engaged to:
    - *Provide opinion on whether the garage/office/gym/laundry upper timber structure is repairable.*
    - *Provide further preliminary design information for the house and garage/office/gym/laundry, based on **March ground improvement proposal**, including the proposal to lift the site levels.* [Emphasis ours].
98. We have not been provided with a copy of the March ground improvement proposal. There is no reference in the addendum report to indicate the source or status of this proposal.
99. The report stated Mr A had been advised by the complainant's builder the garage/office/gym/laundry was to be reconstructed. It gives a preliminary design for the dwelling and the garage/office/gym/laundry foundations, assuming ground improvement works would provide ground with properties equivalent to TC2 and states the foundation will take the form of a 300mm thick concrete raft. There was the caveat:

    > *Exact final "for construction" structural details of the new foundation system will be determined by specific engineering and rational analysis (by Chartered Professional Engineer specialising in structures), upon completion of detailed geotechnical investigation (including design of ground improvement works) and may differ from the above.*

100. Mr A said in the report the recommendations he made were preliminary, and he had not carried out destructive investigations of the timber upper structure. Mr A noted exact structural details would need to be determined by specific engineering after geotechnical analysis was completed.
101. In response to this, the complainant said he did not require preliminary analysis from Mr A, but rather a report which could be provided to the High Court.
102. At the hearing Mr A said this report was issued because of a meeting he had with the complainant to discuss what additional information might be needed. He also said he was trying to establish whether the complainant was instructing him to carry out a developed design; and additionally, to establish further opinion on repairs to the garage and form an opinion on whether the garage might be replaced or not.

103. At the hearing we noted the Southern Response structural engineer's report of 16 May 2013 said the garage was to be rebuilt. Mr A said he accepted he was supposed to be familiar with the documents, but he expected others to lead him in the right direction.

Structural Damage and Reinstatement Report – Rev B

104. On 13 August 2015 Mr A issued the Structural Damage and Reinstatement Report – Rev B. It contained information about the structural earthquake damage and a global structural reinstatement strategy. It stated Mr A was engaged for the same purpose as the initial Revision A report.

105. In terms of the structural repair strategy for the dwelling, the report made a similar recommendation found in Revision A; that is, removal and replacement of the floor framing members, removal and reinstatement of internal linings and external claddings, allowance for replacement of first floor framing and installation of plasterboard bracing system.

106. In terms of the geotechnical repair strategy for the dwelling, the report also made a similar recommendation found in Revision A, that is, the dwelling should be lifted and removed off site or to the side, the damaged foundation removed, and a new foundation system compliant with the Building Code constructed. Based on TC3 categorisation, one option suggested was 800mm stone columns to about 20m below ground level (option one). One of the differences identified between the repair strategies between the Revision A and Revision B was the removal of Mr A's comments about 'good ground': "as per (NZS3604:2011) and this being difficult to achieve due to the propensity of the ground to lateral stretching."

107. The report then went on to detail what would be required if "TC2 like performance was to be achieved with maximum SLS differential settlement of 25mm over 6m".

108. For the garage/gym/office/laundry structure the report recommended demolition, based on the advice from the complainant's builder, and the same foundation recommendations as for the dwelling.

109. It stated the:

> *Exact structural details of the new foundation system will be determined by specific engineering and rational analysis (by Chartered Professional Engineer specialising in structures), upon completion of detail geotechnical investigation (…) and may differ from the above. The above design is "preliminary" only in its nature, and subject to at least 30% contingency at this stage.*

110. The report did not state when Mr A attended site. However, Mr A said it detailed "Key earthquake damage identified" from his inspection.

111. In Mr A's covering email to the complainant, in response to the complainant's query about vibration the previous day, Mr A stated:

> *I do not know if the building would vibrate due to traffic – this is a geotechnical engineering issue as it is related to propagation of vibration through the ground. I recommend you talk to someone from the University.*

112. At some point between Revision A and Revision B there was a meeting between Mr A and the complainant's builder. At that meeting, the complainant said Mr A told the builder he did not feel he was qualified to design a foundation to factor in the concerns the complainant had about the ground vibration. The complainant then engaged Consultancy Two to complete the design.

Consultancy Two foundation design

113. Consultancy Two were engaged by the complainant to provide a preliminary design for replacement foundations for the earthquake damaged house and garage/studio. Their design was based on recommendations in the Consultancy One Structural Damage and Reinstatement Report – Rev B prepared by Mr A. The design also considered the concerns the complainant held regarding traffic-induced ground vibrations.

114. The Consultancy Two foundation design involved ground improvement with stone columns 800mm diameter at 2m on a triangular grid to depth of 14m, 625mm of compacted hardfill on top with 300mm reinforced concreted slab with upstands supporting the house existing flooring. The garage foundation system included the same stone columns with a series of reinforced concrete upstand walls on top infilled with compacted hardfill supporting a 150mm concrete floor.

115. The Consultancy Two drawings note the sub-floor structure (i.e. bearers, joists, and flooring) was to be retained.

116. The complainant provided Mr A with the Consultancy Two design. Mr A advised the complainant by email there would be no need to include Consultancy Two's report in his own. However, the complainant requested Mr A do so.

Structural Damage and Reinstatement Report – Rev C

117. On 10 September 2015 Mr A issued a further revision to the Structural Damage and Reinstatement Report. This version is materially the same as Revision B, including the comment about the design being preliminary only, and subject to 30% contingency.

118. An additional comment was added at the end of the report which states "we have reviewed foundation design by Consultancy Two dated 8 September 2015 and we have no objections".

Structural Damage and Reinstatement Report – Rev D

119. The following day, the complainant emailed Mr A asking that he amend the Structural Damage and Reinstatement Report to better explain Consultancy Two had been engaged by the complainant to design the foundation as Mr A felt he was not qualified to design a foundation.

120. Accordingly, on 11 September 2015 Mr A issued Revision D to the Structural Damage and Reinstatement Report. This revision was materially the same as the revisions B and C, including the statement about the design being preliminary only, and subject to 30% contingency.

121. An additional comment at the end of the report stated:

> [Consultancy Two] *were engaged to design the foundation as they were more suited/qualified to design the foundation required to allow for shaking & vibration issues in the area. I have reviewed their foundation design and have no objections.*

122. Mr A recommended a reinstatement strategy which required new house foundations to be constructed following ground improvement. Mr A also made recommendations around bracing and levelling which he considered would be necessary following ground improvement and the foundation rebuild.

123. Mr A said his conclusions were incorporated into Revision D of the report, and he noted exact structural details would need to be determined by specific engineering and rational analysis.

124. The report stated that as part of the global structural reinstatement strategy: "Ground improvement: 800mm diameter stone columns in a triangular pattern, at 1.8m centre to centre spacing, extending 2m around the perimeter of the house, to about 20m below ground level."

125. At the hearing we asked Mr A why there was a difference of the embedment depths between the Structural Foundation Reinstatement Report – Rev C, where he had stated: "we have no objections to the proposed [Southern Response's geotechnical engineers] embedment depth of 13.5m" and the Structural Damage and Reinstatement Report. He said nothing had changed, and the depths were all within the approximation.

126. We asked Mr A how he had satisfied himself he had "no objections" to the embedment depth given by Consultancy Two (14m), compared to the ground improvement depths of 20m stated in his own Structural Damage and Reinstatement Report. Mr A said either you could have solid ground and a flexible foundation or vice versa and the Consultancy Two figure was an in-between. The response does not address the primary concerns of future site performance and settlement.

127. Mr A said what he meant by "no objections" was as the platform was rigid enough, he did not object to the design. We asked Mr A why he did not object to the Consultancy Two design, given it retained the subfloor (i.e. bearers, joists and flooring), and he had previously stated the subfloor was damaged beyond repair.

128. Mr A said he was not engaged to confirm the Consultancy Two design. He explained the upper structure still had to be reclad or relined no matter what the Consultancy Two report said. He said no one had asked to him say whether he agreed with the Consultancy Two recommendations and he could not say whether he agreed or not.

129. When asked how the reader could tell the difference between the various revisions of his reports, Mr A said they could put the documents side by side. He also commented it was not always prudent to show changes.

Report by Southern Response's geotechnical engineers – foundation design

130. On 1 December 2015 Southern Response's geotechnical engineers issued a further report entitled "Foundation Stabilisation Design Report". The design report was prepared for Southern Response and adopted foundation design criteria including:

> *provide a stabilised crust to reduce liquefaction-induced differential settlements under an SLS ground motion within a tolerable limited for the building foundation (i.e. maximum differential settlement) of 25mm over a horizontal distance of 6m as suggested per B1/VM4.*

131. The report provided detailed design for two ground stabilisation methods of rammed aggregate piers and stone columns. The ground improvement design depth was 4.0m, and 7.5m for the garage.

Report by Southern Response's geotechnical engineers – review of Consultancy One's report

132. On 7 December 2015 Southern Response's geotechnical engineers issued a report which responded to the geotechnical and foundation design issues in Structural Damage and Reinstatement Report – Rev D. It states:

> [Mr A's report] *does not quantify what the actual damage to the house is. For instance there is no quantification of differential settlements, crack widths to various structural elements, out of plumb measurements such as we would expect where an insurance claim for house damage is being advanced. We understand from the opening bullet point that a*

structural inspection was part of [Mr A's] *brief but we have not seen any details of what damage they believe has occurred.*

The statements made are simply generalisations of what might have occurred and no actual evidence is offered. [Mr A's report] *sets out a foundation system that demonstrably exceeds the requirements of the NZ Building Code as expressed though the MBIE Guidelines and I note that it contains distinct differences with that proposed by* [Consultancy Two's foundation design].

I note also that in the sketch from [Consultancy Two] *at the back of* [Mr A's] *letter,* [Consultancy Two] *has a 625 mm thick, compacted hardfill layer instead of the 20 mm thick sand and 300 mm thick hardfill layers, with only 14 m deep stone columns instead of 20 m deep stone columns. Which design is* [Mr A's] *preferred one is not made clear by them.*

I am surprised that given the passage of time and the availability of the geotechnical data to support detailed design that [Mr A's] *foundation option is still a "preliminary" design. The same foundation design and its preliminary nature applies to the garage in the text but appears to be different in the sketch at the back of the letter e.g., the floor structure does not have a concrete raft base and it seems the stone columns need only extend to 14 m depth (the sketch is unclear on this point).*

In Section 8 [Mr A] *states that they accept the* [Consultancy Two's] *foundation design and "have no objections". This highlights the lack of a rational basis for* [Mr A's] *design for the house as* [Consultancy Two] *only treat the ground to 14 m depth, 30% less depth. No reason for accepting such a large difference is given.*

Consultancy One's review of Southern Response geotechnical engineer'sreport

133. The complainant emailed Mr A on Monday 7 December 2015 requesting urgent advice. The complainant stated they were attending mediation with Southern Response on 11 December 2015 and had that day received reports from Southern Response's geotechnical engineers and "they are quite critical of your report and lack of information." The complainant requested Mr A "read and clarify/answer relative [sic] questions".

134. Two days later, on 9 December 2015, Mr A issued a report entitled "Review of [Southern Response's geochemical engineer's] report December 2015 – Rev A". The report stated Mr A was engaged to:

- *Carry out a review of structural engineering parts of the "Foundation Stabilisation Design Report" by* [Southern Response's geotechnical engineers] *dated December 2015.*
- *Where necessary, seek an independent geotechnical advice from* [Mr D, a geotechnical engineer that Mr A had engaged][12] *and include as part of structural engineering rational analysis.*
- *Provide relevant structural comments related to compliance of the foundation solutions (proposed in the report) with Building Act 2004. As the new foundations are new building work, S17 of Building Act 2004 requires compliance of the proposed new work with the*

[12] At the time Mr D was MIPENZ, a now defunct membership class. Mr D was, and still is, a Chartered Professional Engineer.

Building Code, therefore, relevant comments provided by [Consultancy One] *are in the light of compliance with Clause B1 (structure) of the Building Code*.

135. Mr A explicitly referred to the views of Mr D in one instance of this report: "Mr [D] says that 'the proposed Southern Response's geotechnical engineers ground improvement is in contravention of the MBIE guidelines section 15.3.8.4….'."

136. The report states "the Writer was advised that" three times following this statement.

137. We asked Mr A how he would expect to be acknowledged if a geotechnical engineer was utilising his comments and opinions in a review report of primarily structural engineering aspects of foundation works. He said the wording in his report could have been better. In an ideal world he would have had Mr D write a report and written his own on top of this.

138. Mr A's report includes comment such as:

> *Structural performance standard (prepared by Structural Engineer) determines foundation performance standard (prepared by Structural Engineer), which in turn determines ground improvement performance standard (prepared by Structural Engineer), which governs ground improvement design (carried out by Geotechnical Engineer). This process cannot be driven the other way around. The Writer found serious lack of structural performance standard in the* [Southern response geotechnical engineer's] *Report, which led him to conclude that the design of the ground improvement works was almost certainly based on an arbitrary performance standard. This is inappropriate, and for that reason, foundation and ground improvement solution presented in the* [Southern response geotechnical engineer's] *Report is rejected.*

139. Mr A's report concludes:

> *… the* [Southern Response geotechnical engineer's] *Report [of 1 December 2015] does not provide sufficient proof the that proposed ground improvement combined with a Type 2B TC3 foundation system will comply with [the] Building Code…. Foundation system and ground improvement proposed by* [Southern Response's geotechnical engineers] *is, therefore, rejected as lacking adequate proof of compliance with [the] Building Code.*

DOCUMENTS PREPARED FOR HIGH COURT PROCEEDINGS

Mr D – Geotechnical engineer engaged by Mr A

140. Mr D's witness statement is undated but, like the other briefs of evidence and witness statements we have been provided with, it refers to the next event date being the trial, set down for 16 October 2016. It does not refer to Mr A's reports.

141. Mr D's witness statement said he did not agree with Southern Response's geotechnical engineer's proposal to support the structure on a Type 2B Surface Structure. Further, the soil cement or stone columns should extend to 15m depth below ground level and beyond by at least 2m offset.

142. In Mr A's review of Southern Response's geotechnical engineer's report, Mr A said he was advised ground improvement to a depth of 20m would be required, and this was consistent with his original. The difference between ground improvement depths advised by Mr A (20m) and Mr D (15m) is significant.

Mr B – Structural engineer engaged by Southern Response

143. On 8 July 2016, Mr B filed a brief of evidence in the High Court. We have been provided with an excerpt of Mr B's brief in response to Mr A's witness statement.

144. Mr B stated he generally agreed with much of the key earthquake damage to the property identified by Mr A, but said he disagreed with six points, including: Mr A's opinion that the lateral stretch in the foundation system of the house translated to distortion and stretch of the ground floor and upper framing; his opinion that the garage framing was likewise distorted; and that the redistribution of foundation loads causing areas of increased pressure and areas of decreased pressure along the foundation system was structural damage.

145. In respect of the structural reinstatement strategy for the house Mr B said he disagreed with Mr A's recommendation for reinstating the house, in particular: "the floor joists and flooring do not require replacement, and the interior linings and exterior claddings have suffered only minor damage and do not require replacement." In terms of the proposed ground improvement, Mr B said, "as a structural engineer, I defer to [Mr C]… but otherwise, the philosophy behind Mr A's recommended foundation design is generally the same as mine."

146. In respect of the structural reinstatement strategy for the garage Mr B stated, "it is unclear what Mr A is actually proposing in terms of the foundation design for the garage."

147. Mr B specifically responds to Mr A's witness statement, stating:

> *I do not agree that the lateral stretch in the foundation system of the house has translated to distortion and stretch of the ground floor framing and distortion of the upper framing. The floor framing may be distorted by hogging in some areas, but this is not irreversible;*
>
> *I do not agree that the garage framing is likewise distorted. However, since I became involved with the property in April 2013, the proposal has always been to replace the house foundation and rebuild the garage, to [sic] this does not seem relevant.*

Mr C – Geotechnical engineer engaged by Southern Response

148. Mr C filed a witness statement in the High Court the same day as Mr B. We have been provided with an excerpt of the brief in response to Mr A's witness statement.

149. Mr C commented on several of the points made by Mr A in his witness statement, including:

> *In his third bullet point on page 2,* [Mr A] *rejects my foundation and ground improvement solution because he says, the lack of articulation of a "structural performance standard" must mean the ground improvement works are based on an arbitrary performance standard. This is incorrect. The structural performance standard is clause 81 of the Building Code and I have designed the ground improvement works to meet that standard using the methodologies set out in the MBIE Guidelines.*
>
> *In his first bullet point on page 4,* [Mr A] *says that my ground improvement recommendations "do not appear to reflect common sense." Ground Improvement design is not a matter of common sense, it's a matter of geotechnical engineering judgment. I have explained the reason for different depths of ground improvement at paragraphs 106 & 107 above.*

150. Mr C concludes his brief by stating:

> *The* [complainant's property] *performed poorly in the Canterbury Earthquake Sequence. However, the ground improvement and foundation solutions that I have suggested, are a suitable and appropriate solution for the site. Deep ground improvement* [as proposed by Mr A] *is unnecessarily conservative, and inconsistent with the current research and thinking*

about mitigation of the effects of liquefaction to achieve Building Code compliant foundation solutions.

COMPLAINT AND RESPONSES

151. The complainant is concerned Mr A's reports required further information, were "essentially useless" and this caused delays in the High Court proceedings. The complainant said Mr A's reports were general and unhelpful, and his descriptions of the damage he identified caused lengthy delays, as Southern Response's engineers did not know what Mr A meant. The complainant also said the same was true of the High Court proceedings, which meant he had to engage another engineer.

152. In response, Mr A said his Revision B and C reports were issued after he had received comments from the complainant. Mr A said these reports made it clear further information would be required before the exact scope of the foundation works could be determined.

Acting outside engineering competence

153. The complainant said when Mr A was engaged in 2013, the complainant was not aware of the differences between geotechnical and structural engineering. The complainant's view is Mr A should have recommended engaging a geotechnical engineer to review Southern Response's geotechnical engineering Foundation Options Rebuild report as it was a geotechnical report, and geotechnical engineering was not Mr A's area of expertise.

154. In response Mr A said he had acted within his competence and confirmed at the outset of his reports they only covered "structural" elements of the geotechnical reports. Mr A also said his area of knowledge as an expert witness under the Evidence Act 2006 was broader than his practice area as a Chartered Professional Engineer.

155. Mr A does not accept that he told the complainant he had geotechnical qualifications and said he did not represent that he did.

156. In his submissions to us prior to the hearing Mr A said he recommended the complainant engage a geotechnical engineer on 14 occasions. He also accepted he could have been clearer in separating out Mr D's (the geotechnical engineer he had engaged) opinions from his own.

157. The complainant is concerned Mr A has provided comment on geotechnical engineering aspects of the property, and Mr A then made changes to the proposed embedment depth three different times throughout the variations of his reports, i.e., 20m below ground level, 15m below ground level[13] and 13.5m below ground level. The complainant stated, "At no stage did he explain why he recommended three different levels of ground improvement, or even acknowledge that he had done so."

158. In his initial responses to the complaint, Mr A stated as an expert witness, he may change his opinion if he thinks it is appropriate. He also noted while there were several versions of his reports, the changes were minor and did not affect the substance. He said he made the changes on the instruction of the complainant or counsel for the complainant, and counsel for the complainant did not object to his reports. In response to this, the complainant said they dismissed their counsel during the proceedings as they were unhappy with his representation.

159. In his evidence during the hearing Mr A stated he did not think he was engaged as an expert witness.

[13] The first mention of 15m is from Mr D's witness statement. Mr A does not appear to have made this assertion.

160. The complainant said Mr A's reports included arguments about the legal status of MBIE Guidance, and this was a legal issue not an engineering issue. Mr A responded the MBIE Guidance was not mandatory and therefore could not be relied upon as an absolute measure of compliance with the Building Code and "this position had to be justified, hence the Additional Note on the MBIE Guidance in [his] reports".

161. The complainant also commented that Mr A refused to provide detailed drawings for the foundations. Mr A said he asked the complainant for information to complete detailed design drawings, but this was not provided, and without the information and approval to proceed, Mr A could not advance the matter.

162. The complainant considers that if Mr A had done a thorough inspection and prepared a comprehensive report at the beginning, much delay and stress could have been avoided.

163. Mr A said he relied on Mr D's advice to make geotechnical comments in response to Southern Response's geotechnical engineer's report dated 1 December 2015. He said Mr D did not provide written advice but provided his advice over a series of phone calls with Mr A. Mr A said he issued a draft copy of his report to Mr D for comment to ensure he understood his advice correctly and Mr D did not make any changes to this draft. Mr A did not provide us with evidence confirming his communications with Mr D.

164. Mr A said he made it clear in his December 2015 report he was not providing geotechnical advice, noting in the report the ground improvement design should be carried out by a geotechnical engineer and denoting geotechnical advice given by Mr D with wording such as "Mr [D] says that ... " and ''The Writer was advised that ... ". Mr A also said the geotechnical advice (as recorded by Mr A) was consistent with Mr D's opinion, as recorded by him in a later witness statement.

EVIDENCE OF THE COMPLAINANT

165. Most of the complainant's points have been incorporated into the Information Gathered section, above.

166. The complainant said they had attempted to settle the various issues with Mr A directly, but that the endless reports produced caused them a lot of unnecessary stress. The complainant said the QS could not price the Mr A's work based on his reports as a 30% difference in embedment depths was unacceptable. The complainant said Mr A had been acting as quasi-geotechnical engineer.

EVIDENCE OF MR A

Reflections

167. In his written submissions Mr A said he considered he met his professional obligations. However, he said there was space for improvement in his reports and some of his comments on geotechnical matters may not have been attributed to Mr D as clearly as they could have been. He said he had reflected on his behaviour and conduct and was committed to improving. He now understood the importance of better communication with the parties, and he had identified that English as his second language was still a barrier for him.

168. In his written submissions to us Mr A stated it was normally standard practice for him to clearly state the date of an inspection in his reports and he does not know why he did not do so in the reports prepared for the complainant. He said it had been part of his checklist for years and was an oversight he had not included this information.

169. He also said he recommended to the complainant on 14 separate occasions to engage a specialist geotechnical engineer. However, Mr A did not identify or provide detail on these occasions.

170. In his oral evidence Mr A said lots of things had changed and had been changing since the earthquakes, adding certainly, "what engineers did in 2010 and 2011 is different to what we do today." He said he would now ask to be engaged by the complainant's lawyer, including understanding what the litigation strategy was, asking to be given specific instructions, and make recommendations for scope of work before writing preliminary reports. He said his recommendations were honest and drew on his experience and expertise.

171. He said he would be happy to be coached into how to improve. He now has a detailed checklist of what goes into damage reports, including a requirement to take photographs. He apologised for trouble caused to the complainant and said maybe if they spoke more, they would have done better.

LEGAL SUBMISSIONS

Engagement

172. Mr A submitted that he received seven instructions from the time of his initial engagement in June 2013 through to April 2016. The instructions, together with information on services provided, and lists of reports and invoices are summarised in Schedule Two to Mr A's statement. Two of these instructions were covered by Short Form Agreements dated 27 June 2013 and 21 May 2014; two by Variation Requests dated 8 December 2015 and 18 April 2016; and the rest by email and verbal requests.

173. Mr A summarised his brief:

> *to (in broad terms) (1) provide input on the* [complainant's] *insurance claim against Southern Response (2) provide an opinion on damage, repairability and to prepare a reinstatement strategy (but in the context of instructions that the requirement to replace the foundations had already been agreed) and (3) review pre-existing reports prepared by other engineers, including on how the Property could be repaired.*

Did Mr A meet the standard of a reasonable structural Chartered Professional Engineer?

174. Mr A submitted that to categorise him as an expert witness was incorrect, as he was not aware he was being engaged as such. Additionally, he said counsel for the complainant was responsible for the insurance litigation; and he had not given Mr A a formal letter of engagement.

175. Mr A submitted that budget constraints, when combined with limited instructions, urgent instructions, and incomplete information, were justification for failing to conduct sufficient investigations and analysis. He said context and limited retainers were relevant to the assessment of what Mr A's peers would have done in the same situation.

176. Further, Mr A submitted that he carried out his professional obligations by carrying out a site visit in 2013 (even though he was not instructed to); carrying out further work for the complainant in July/August 2015; and making it clear that geotechnical advice was required from a geotechnical engineer on six occasions.

177. Mr A submitted that he took care to ensure his engagements were recorded using the Short Form Agreement and Variation documents – "simply put – he ran a clean file". He also provided a high level of service to the complainant.

Did Mr A carry out his engineering activities in a careful and competent manner?

178. Mr A submitted the reports were issued in the context of an insurance claim, on specific instructions from counsel for the complainant or the complainant. Mr A outlined the scope and limitations. Consistent with this ethical and professional obligation (and the High Court Code of Conduct for Expert Witnesses), Mr A made it clear further information was required before he could complete a more detailed report. Mr A submitted that the complainant's evidence supported this proposition. He said the complainant's evidence also supported the submission the reports, in the context of the instructions, were adequate.

179. Mr A submitted there were no grounds for discipline as there was limited guidance for professionals to follow in the post-earthquake environment, including from Engineering New Zealand; Mr A's reports were issued in response to specific instructions, and they were broadly consistent with the Code of Conduct for Expert Witnesses and Engineering New Zealand's Earthquake Damage Assessment and Reinstatement Reporting Framework (issued after Mr A had authored his reports); and again, his instructions and scope were limited. Neither counsel for the complainant, Southern Response, nor its lawyers (who paid for the 30 May 2014 report) raised concerns.

180. Mr A acknowledged he should have referred to his site visits in the reports. However, he submitted he did inspect the site on two occasions; given the damage was obvious and widespread, he generally agreed with the Southern Response structural and geotechnical engineers' observations. Additionally, not taking measurements was a cost saving measure and something counsel for the complainant agreed with. Mr A also submitted it was not necessary for him to take measurements for his brief of evidence; however, he acknowledges the absence of the information may have caused issues at trial, and in hindsight he could have required a more specific brief at the outset.

181. Mr A submitted that if we considered he had carried out inadequate investigations, and this constituted a ground of discipline, then we should also consider: the complainant was receiving legal advice at the time; Mr A regretted not having a clearer scope at the outset; and he had recommended a more developed design be prepared, which the complainant did not accept.

182. Mr A acknowledged he made broad observations in his reports. This was symptomatic of the nature and wider context of his engagement(s) because he was given limited instructions, a limited budget, and incomplete information. Mr A submitted the use of broad observations does not mean the reports were inadequate and neither counsel for the complainant nor Southern Response raised any issue with them. He submitted even if we considered this a ground of discipline, it was possibly only a breach of the Code of Ethical Conduct, not negligence or incompetence.

Did Mr A act within his area of competency?

183. Mr A submitted the line between geotechnical and structural engineering was not clear cut, and he was trying to collaborate with a geotechnical engineer from the start of his engagement. Further, he drew on previous experience when making preliminary comments on the ground conditions and carefully qualified these statements. Mr A submitted if we did consider this a ground of discipline then it was only a breach of the Code of Ethical Conduct because: there was no allegation he was negligent or incompetent; he did not provide advice that was wrong; and he did not hold himself out to be a geotechnical engineer. Further, we should only find these matters outside his competence if they were not comments a reasonable group of engineers would make.

184. In respect of attributing comments to Mr D, the geotechnical engineer, in his response to the Southern Response geotechnical engineer's comments, Mr A submitted he had acknowledged he should have been clearer. Additionally, Mr A was working under significant time constraints to prepare

the report. He only had one day to: draft the report; discuss the December 2015 Southern Response geotechnical engineer's report with Mr D; and for Mr D to ask questions about Mr A's draft report over the phone.

185. Mr A acknowledged he could have refused to incorporate comments on the geotechnical aspects of the Southern Response geotechnical engineer's report and/or more clearly labelled Mr D's opinions. Mr A submitted this does not amount to negligence or any breach of the 12 elements set out in Rule 6 of the Chartered Professional Engineers of New Zealand Rules (No.2) Rules 2002, a misrepresentation of competence, or undertaking engineering activities outside of his competency. If we disagree, Mr A submitted this was a breach of the Code of Ethical Conduct only.

OTHER EVIDENCE

Statement by the complainant's former counsel

186. The complainant's former counsel provided a statement of evidence in support of Mr A. He said he considered Mr A's reports were adequate. Further, that Mr A did not advise on matters beyond his expertise, he had outlined any limitations to his reports and had recommended the complainant obtain advice from other professionals.

DISCUSSION

THE DISCIPLINARY COMMITTEE'S ROLE

187. Professional disciplinary processes primarily exist to protect the public, uphold professional standards, and maintain public confidence in the profession and its regulation. They do this by ensuring members of the profession adhere to certain universal (or accepted) professional standards.[14]

188. The role of the Disciplinary Committee in the disciplinary process is to consider whether Mr A has acted in accordance with accepted professional standards and, if not, whether there are grounds for disciplining him in accordance with the Chartered Professional Engineers of New Zealand Act 2002 and Engineering New Zealand Rules and Disciplinary Regulations 2017.

RELEVANT STANDARDS

189. The Institution of Professional Engineers New Zealand (IPENZ) changed its trading name from IPENZ to Engineering New Zealand in October 2017.

190. The conduct complained of took place during 2013 – 2016 and two Codes of Ethical Conduct applied to Mr A during this time as a Chartered Professional Engineer and member of IPENZ.

191. The applicable Chartered Professional Engineer Code of Ethical Conduct are contained in Chartered Professional Engineers of New Zealand Rules (No 2) 2002 rules 43 – 53 (revoked on 1 July 2016) and the Chartered Professional Engineers of New Zealand Rules (No 2) 2002, rules 42A – 42I.

192. The applicable IPENZ Codes of Ethical Conduct are dated 1 January 2005 and 1 July 2016. As the complaint was made in December 2017 the relevant Engineering New Zealand Rules and Disciplinary Regulations are those that came into force on 1 October 2017.

[14] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC).

THE LEGAL TEST

193. The legal test to assess whether Mr A acted in accordance with acceptable professional standards is whether he acted in accordance with what a reasonable body of his peers would have done in the same situation.

194. The assessment of whether an engineer has acted in accordance with accepted standards may be informed by whether reasonable members of the public would "consider such an act or omission, if acceptable to the profession, were to lower the standard of that profession in the eyes of the public".[15]

195. If the evidence is Mr A acted in accordance with accepted standards, then we will dismiss the complaint. If the evidence is Mr A did not act in accordance with accepted standards, then we will uphold the complaint. Where the behaviour meets this criterion, we must consider whether the conduct "falls seriously short of accepted conduct" before imposing a disciplinary sanction.[16]

196. This means the matter for the Disciplinary Committee to decide in this case is whether the engineering services provided by Mr A, as identified in the complaint, met the standard to be reasonably expected of a Chartered Professional Engineer and member of IPENZ.

197. Our approach to this question has been to consider the standards that applied at the time, the work undertaken by Mr A, and whether his performance met those standards.

ANALYSIS

Initial engagement

198. The scope of Mr A's first engagement in June 2013 was somewhat general. It was covered by a Short Form Agreement and an initial budget of $2,500. Mr A said his estimate allowed for initial attendances he could foresee at the time – such as an inspection, attending a meeting, and providing advice. Although not stated in the agreement, an initial review of the Southern Response structural engineer's report dated 16 May 2013 was part of the brief. Mr A included a bracketed statement "(including court appearance as may be required)" in this Short Form Agreement. He said this was so the complainant knew he could be engaged as an expert witness if needed, not that he was engaged as one at this point.

199. We reject Mr A's submission that he was not engaged as an expert engineer at the outset. We consider there was a reasonable expectation that, should the need arise, he would be engaged as an expert witness.

200. Further, Mr A appears to have accepted he was engaged as an expert. In his initial responses to the complaint, Mr A stated as an expert witness, he may change his opinion if he thinks it is appropriate.

201. Mr A appears to have continued to work under this first agreement until the second agreement was signed in May 2014.

202. As we reject Mr A's submission that he was not engaged as an expert engineer the next step is to assess whether he meets the standard of a reasonable Chartered Professional Engineer with a practice area of structural engineering, and of a reasonable member of IPENZ.

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[15] *Robinson v RA* (10 July 2015, *Appeal Ruling* #29) Chartered Professional Engineers Council. Available at: https://www.cpec.org.nz/40-appeal-ruling-29-10-july-2015/file

[16] Ibid.

Adequacy of reports

203. Mr A issued four reports over the period May 2014 to December 2015.

204. Southern Response, through their lawyers, agreed to pay for Mr A to undertake work in May 2014. The scope was agreed with Southern Response and set out in the second Short Form Agreement that was signed on 21 May 2014. Mr A then issued the first of his reports, the Structural Foundation Reinstatement Report on 25 May 2014 with revisions on 27 and 30 May 2014.

205. Mr A issued his next report, the Structural Damage and Reinstatement report, on 8 September 2014. We have been told this was in response to verbal instructions from the complainant. Further revisions of this report were issued on 13 August 2015, and 10 and 11 September 2015 after email and verbal instructions from the complainant. A further report, Structural Addendum, was issued on 12 August 2015.

206. In December 2015, Mr A issued another report: Review of Southern Response's geotechnical engineer's report December 2015 - Revision A, December 2015. Variation Request No 2 dated 8 December 2015 and signed by Mr A was submitted in respect of this work.

207. With so many revisions of his reports issued, we do not understand why Mr A did not identify changes between the revisions of his reports. His comment they could be compared by placing side by side would not be helpful to a client.

208. The first time we read Mr A's reports, we struggled to understand which property he was referring to or find anything of substance which related to the complainant's property. It was unclear the four sketches at the back of the of the Structural Foundation Reinstatement Report related to the gym/garage/laundry only. There was an aerial photograph in the reports, but this was not particularly informative. We would have expected a reasonable Chartered Professional Engineer and member of IPENZ to have included photographs showing the house and the gym/garage/laundry.

209. There are non-specific references to site inspections in Mr A's reports. He states the work is in relation to the Canterbury Earthquake Sequence, from 4 September 2010 to the date of inspection. However, with no date of inspection noted, this statement is meaningless. It is clearly a generic statement as included in the sample report included in his submissions to us.

210. We consider it more likely than not Mr A went to the site twice, once on 14 November 2013 for an inspection and once on 19 November 2013 for a meeting. The invoice dated 3 December 2013 supports this conclusion.

211. Mr A has said he generally agreed with the Southern Response geotechnical and structural engineers' reports. However, this is incorrect. Mr A's reports stated all internal linings, external cladding, and sub-floor framing had to be replaced. This is in contrast with Southern Response's structural engineer's report which stated, "general lack of significant damage to the superstructure" and "lining damage does not appear structurally significant".

212. We are perturbed by the fact Mr A did not appear to keep site notes, and none of his reports reflect that he had been to site and performed a non-destructive assessment of the house. We disagree with Mr A's assertion he "ran a clean file". Mr A's lack of record keeping is unacceptable given his different opinion on damage (which was never documented), and therefore different recommendations for reinstatement.

213. Mr A quite clearly explained to us at the hearing the state of the house which was in a very poor condition. However, this was not reflected in his reports. Even if Mr A's role was not to state the house was unrepairable, for example the damage to the subfloor, we would have expected him to outline these findings at the site visit clearly in his report to advise his client accordingly.

214. We consider Mr A's reports contained generalised damage descriptions without specific links to the subject property. The wording used for building damage was vague, generic, philosophical, and of no specific value to the specific property, for example "internal stresses and strains". We note a number of these generic statements are included in the sample report provided to us. We are concerned that Mr A did not edit his report template adequately and with sufficient care to make it specific to the complainant's property and adequate for their purposes.

215. At the start of Mr A's engagement, the Southern Response structural engineer's report was provided to him. This confirmed the garage was to be demolished and re-built. This was not an area of contention. Mr A's reports then included repair strategies for the garage which introduced uncertainty to an already vexatious discussion. Mr A has acknowledged he was aware the complainant was engaged in litigation with Southern Response; and has submitted his reports made it clear that his advice was only preliminary, and the reader would know this. We disagree with this assertion.

216. We are also concerned there appeared to be no effort to reconcile the different repair strategies for the superstructure. Mr A has said that he agreed with the Southern Response structural engineer's report but has proposed a very different repair strategy which would have cost substantially more than that proposed by Southern Response structural engineers.

217. We have not received any evidence from the complainant indicating the builder or QS were also becoming unhappy with Mr A's service. However, it is clear the complainant has been frustrated by the services provided by Mr A (and counsel for the complainant), considering he disengaged both professionals during their engagements.

218. Mr A has also asserted he had incomplete information to complete his reports. We would expect a reasonable Chartered Professional Engineer and member of IPENZ to request the information they required to complete their reports.

219. In his 22 August 2014 email to Mr A, the complainant said explicitly they needed something which could by costed by a QS. Subsequent to this email, the Structural Damage and Reinstatement Reports and the Structural Addendum all state further geotechnical investigation and information was required. It is unclear to us why Mr A did not rely on the Southern Response geotechnical engineer's reports, as Southern Response structural engineers did, and subsequently as Consultancy Two (the consultancy engaged by the complainant to design the foundations) did. In any case, we do not consider Mr A needed more investigations; he needed another interpretation of the data to understand what the solutions were. We do not consider stating there was a 30% contingency on geotechnical advice, when he was not engaged to provide geotechnical advice, to be the standard expected of a reasonable Chartered Professional Engineer and member of IPENZ.

220. Mr A did not do anything to compromise the safety of anyone, but his reports did not help the client. We would expect a reasonable Chartered Professional Engineer and member of IPENZ to have advised their client they needed a robust preliminary design with input from a geotechnical engineer. On this basis, we do not consider the reports to be sufficiently specific to the complainant's requirements, or what we would have expected from a reasonable member of IPENZ and Chartered Professional Engineer.

221. Mr A has said that budget constraints limited the services he could provide to the complainant. We have not seen any evidence the complainant had limited funds to spend on Mr A's engagements. We note the complainant's comment on the initial short form agreement about notifying him if a certain cap was reached. This is the amount Mr A quoted based on a site visit, attending a meeting, and providing some advice. We consider the complainant's comment asking to be informed when fees reached the amount Mr A had quoted was simply the client monitoring expenditure. We note that Mr A

invoiced the complainant $5,457.50 between August 2013 and March 2014, before the second agreement was signed.

222. If we follow Mr A's line of reasoning, he would have produced better reports if he had more money. In the case of Mr A's Structural Foundation Reinstatement report, Mr A prepared the estimates for his services and provided them to Southern Response. Southern Response agreed to them for the second engagement. Instructions outside this were for the complainant and Mr A to negotiate between themselves.

223. We consider a reasonable Chartered Professional Engineer and member of IPENZ should be able to have conversations with their client if they thought the work they needed to do to meet the client's brief or to provide services and advice adequate for the client's stated requirements would fall outside of their budget.

224. We consider Mr A did not provide his client with reports which met his client's needs and reasonable expectations. We would expect a reasonable Chartered Professional Engineer and member of IPENZ to check with their client what they expected of their services prior to the engagement beginning, not only to manage the client's expectations around what the engineer is capable of, but also to ensure the work requested was something the engineer was competent in doing. We would have expected Mr A to have kept file notes and records of site visits. We would have expected Mr A would have asked for further clarification around this as it is clear to us the complainant needed sufficient detail for the scope of the repairs to be agreed and costed, and the insurance claim settled.

225. We consider Mr A's reports were inadequate for an engineer engaged to provide their expert opinion and did not provide the complainant with the information and advice needed.

Acting outside of competence

226. Mr A's practice area is listed as structural engineering on the Engineering New Zealand and Chartered Professional Engineer registers. We agree being registered as a structural engineer does not preclude Mr A from undertaking work with a geotechnical element provided it is within his competency.

227. We consider the opinions in Mr A's reports are on expert geotechnical matters. For example, in Structural Foundation Reinstatement report – Rev C he has undertaken a "structural engineering review" of a geotechnical engineering report where he has provided commentary and opinion on the presentation of the geotechnical engineering work undertaken by Southern Response's geotechnical engineers. There is no evidence that he has viewed the related earlier Southern Response geotechnical engineer's Geotechnical Assessment Report (May 2013) which presents ground investigation information.

228. Further, Mr A asked for clarification of a number of geotechnical matters in a manner which gave the impression of geotechnical expertise. For example, on the application of CPT test results, he sought clarification if further CPT testing was required, and he stated "no objection" to ground improvement to "the proposed embedment of 13.5m". While he has identified for the complainant that detailed design of ground improvement works are required by "an experienced CPEng" he also made similar statements regarding inputs from an experienced structural Chartered Professional Engineer. These statements do not indicate to the client his own expertise does not extend to geotechnical engineering opinions.

229. In Revision D to Mr A's structural damage and reinstatement report there is no information presented of the "review of various third party reports". He presents an opinion the new foundation system would (most likely) comprise "Ground improvement: 800mm diameter stone columns in a

triangular pattern, at 1.8m centre-to-centre spacing extending 2m around the perimeter of the house, to about 20m below ground level". No rational analysis is provided and the opinion is at odds with his previous "no objection" to 13.5m deep ground improvement. Such differences in depth should not be brushed off as "within approximation" as Mr A did during the hearing.

230. In our view Mr A has provided geotechnical advice. Mr A says this advice was based upon his experience. However, he does not have the geotechnical engineering competency to provide rational analysis to support his opinions. Mr A's responses to our questions at the hearing reinforced this view.

231. Mr A did not provide us with an answer as to why he engaged Mr D for geotechnical advice for the December 2015 report,[17] nor explained why he was not engaged from day one. The only reason which we can understand Mr A engaged Mr D for the December 2015 report was because he had received criticism from Southern Response's geotechnical engineers in their report of the same month. In our opinion, prior to this he had provided expert advice on geotechnical engineering matters, and this was outside of his competence.

232. We note Mr A "turned around" the December 2015 report in 24 hours, in the context of mediation, as Southern Response's geotechnical engineers had critiqued his earlier report. We consider the genesis for this report being required in such a tight timeframe was Mr A had been providing expert geotechnical advice, when Mr A was not a geotechnical expert, and therefore had to respond to the Southern Response geotechnical engineer's report. Mr A asserts that in 24 hours he contacted Mr D, briefed him entirely on the project, got Mr D's comments, rewrote the report, resent it to Mr D, got his approval, and then issued the report to the complainant. We have not been presented with evidence Mr A had been speaking to Mr D about matters relating to the project prior to issuing this report.

233. We do not consider Mr A's disclaimer stating he was not providing geotechnical advice is sufficient to justify giving the advice.[18] We note structural engineers including the structural engineer of Consultancy Two and Mr B (the structural engineer engaged by Southern Response) were given the same information and were able to satisfy the brief.

234. We consider Mr A should have advised the client at the outset either he would require further geotechnical advice, or he would be relying upon the findings made by Southern Response's geotechnical engineers. We note Mr B, as a structural engineer, did not comment on the Southern Response geotechnical engineer's reports, nor did he comment on statements made by Mr D. We consider Mr A should have disclosed to the complainant he was not able to comment on the Southern Response geotechnical engineer's report at the outset, as it was outside his expertise.

235. Mr A has told us that he advised the client on 14 occasions to engage a geotechnical engineer. This advice appears to be in the form of comments in reports such as, "Suitably qualified and experienced Geotechnical Chartered Professional Engineer shall carry out appropriate geotechnical investigation …". In our opinion, this does not constitute a recommendation to the complainant to engage a geotechnical engineer.

236. We reject counsel's submission that Mr A did not hold himself out to be a geotechnical engineer. Mr A has done so implicitly insofar as he has provided geotechnical advice and comment on the work of geotechnical engineers throughout, apart from when Consultancy Two and Mr D were engaged.

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[17] Review of Southern Response's geotechnical engineer's Report December 2015 – Rev A.

[18] For example, Structural Foundation Reinstatement Report – Rev A and Structural Foundation Reinstatement Report – Rev B.

Qualifying his advice by including a disclaimer in his reports is not appropriate or a sufficient justification.

237. We do not believe Mr A's advice and opinions are in line with advice and opinions a reasonable body of structural engineers that are members of Engineering New Zealand and Chartered Professional Engineers, would make in the circumstances.

Other issues

238. We were concerned that the scope of Mr A's engagements was not well documented, and deliverables and timeframes were not adequately specified. This is contrary to Mr A's submission he ran a "clean file" and was careful to document the scope of his engagement. We have seen two Short Form Agreements – one covering the initial work prior to any reports being issued and one covering work paid for by Southern Response including the first of Mr A's reports. Variation No 2 was prepared to cover the review of Southern Response's geotechnical engineer's December 2015 report and Variation No 3 to cover the preparation of Mr A's witness statement. It is not clear whether these variations were counter-signed by the client. Mr A's work for the complainant between June 2014 and September 2015 appears to be entirely in response to email and verbal instructions. Mr A has summarised the scope of his services in his reports, but this is not sufficient. It should be possible to reconcile the services provided against a brief agreed with the client.

239. Communications between the parties appear to have been erratic and poorly documented. The complainant did not have experience in engaging engineering advisers and relied on the advice of counsel for the complainant. With an absence of clear lines of communication, responsibilities, objectives, and briefs were poorly defined. Instructions were not always timely; timeframes have been poorly defined and have been protracted. We acknowledge that Mr A was placed under time pressure at times to meet various deadlines imposed to meet the requirements of the claims process. He does appear to have made attempts to clarify the scope of his work and information requirements, but these attempts have not been well documented or satisfactorily communicated to his client. All parties appear to have suffered frustrations to varying degrees.

240. We understand the complainant's lawyer was responsible for: leading the complainant's case against Southern Response; recommending Mr A to the complainant; reviewing the report of the experts' meeting; agreeing the scope of the second engagement agreement and preparing Mr A's brief of evidence. It would appear he should have been responsible for ensuring proper communication between all the parties. It seems it would have been more appropriate the complainant lawyer to be communicating with Mr A directly, rather than through the complainant. The complainant's lawyer was the person with the most experience in litigating earthquake claims in Christchurch and had responsibilities to the complainant for leading their case.

DECISION

DISCUSSION

241. We may make an order for discipline against Mr A as a Chartered Professional Engineer if we are satisfied he has performed engineering services in a negligent or incompetent manner or he has breached his obligations in the Code of Ethical Conduct.[19]

[19] CPEng Act, s 21.

242. We may also make an order for discipline against Mr A as member of Engineering New Zealand if we are satisfied he has breached his obligation to comply with the relevant IPENZ Codes of Ethical Conduct, act competently, and act as a fit and proper person.[20]

243. Our particular focus in this case is whether Mr A acted competently, and within his competency, in accordance with his obligations under Rule 4 of the Engineering New Zealand Rules and the relevant Codes of Ethical Conduct.

244. To determine whether Mr A acted competently, we refer to the decision of *Robinson v RA* which states:[21]

> *Whether engineering services have been performed in an incompetent manner is a question of whether there has been a serious lack of competence (or deficit in the required skills) judged by the areas of competence which in this case are encapsulated by Rule 6 [of the Chartered Professional Engineers Rules (No 2) 2002].*

245. We consider the Chartered Professional Engineers Council's comments in respect of the Registration Authority and its role as regulator of Chartered Professional Engineers are equally applicable to engineers who have membership with Engineering New Zealand.

246. Chartered Professional Engineers are assessed against the 12 elements set out Rule 6 of the Rules to establish their competence, they are:

> *(a) comprehend, and apply his or her knowledge of, accepted principles underpinning—*
>
> *(i) widely applied good practice for professional engineering; and*
>
> *(ii) good practice for professional engineering that is specific to New Zealand; and*
>
> *(b) define, investigate, and analyse complex engineering problems in accordance with good practice for professional engineering; and*
>
> *(c) design or develop solutions to complex engineering problems in accordance with good practice for professional engineering; and*
>
> *(d) exercise sound professional engineering judgement; and*
>
> *(e) be responsible for making decisions on part or all of 1 or more complex engineering activities; and*
>
> *(f) manage part or all of 1 or more complex engineering activities in accordance with good engineering management practice; and*
>
> *(g) identify, assess, and manage engineering risk; and*
>
> *(h) conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct; and*
>
> *(i) recognize the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally; and*

[20] Engineering New Zealand Rules 2017, r 10.5.

[21] *Robinson v RA* (10 July 2015, Appeal Ruling #29) Chartered Professional Engineers Council. Available at: https://www.cpec.org.nz/40-appeal-ruling-29-10-july-2015/file

(j) communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities; and

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

247. The Code of Ethical Conduct for Chartered Professional Engineers IPENZ members and prior to 1 July 2016 stated an IPENZ member and Chartered Professional Engineer must not misrepresent their competence and must only undertake engineering activities within their competence.[22]

248. Similarly, the Code of Ethical Conduct for Chartered Professional Engineers IPENZ members after 1 July 2016 for states an IPENZ member and Chartered Professional Engineer must not misrepresent their competence, must only undertake engineering activities within their competence and in a careful and competent manner.[23]

249. We consider that Mr A as a Chartered Professional Engineer and as a member of IPENZ had a general duty to act competently and with care in any engineering work he undertook.

250. As detailed in our analysis above, we find that Mr A did not undertake the engineering services he provided to the complainant in a careful and competent manner. His reports did not meet the standard that would reasonably be expected of a professional structural engineer in the same circumstances. We consider that a reasonable body of Mr A's peers would not accept his engineering services to be at a standard expected or acceptable to the profession. We also consider that the public should reasonably be able to expect better from a Chartered Professional Engineer and member of IPENZ.

251. We also find that Mr A provided geotechnical advice which was beyond his level of competence. The standard of his geotechnical advice and opinions fell below the standard reasonably expected of a professional engineer.

252. We find Mr A's engineering activities fell below the accepted standard of a Chartered Professional Engineer and a reasonable member of IPENZ.

DECISION

253. Having considered all the evidence, including written submissions and the oral evidence provided at the hearing on 14 December 2020, we have decided to uphold the complaint about Mr A. We find that he has acted outside his area of competence and his engineering services have been below the standard reasonably expected of a Chartered Professional Engineer and member of IPENZ. Accordingly, we find there are grounds for disciplining Mr A under section 21 of the Chartered Professional Engineers of New Zealand Act 2002 and regulation 17 of the Engineering New Zealand Disciplinary Regulations 2017.

254. Having found Mr A in breach of his obligations as a Chartered Professional Engineer and a member of IPENZ, we need to determine what orders, if any, should be made against him.

255. There is a range of disciplinary actions available to the Disciplinary Committee as set out in section 22(1) of the Act. There is also a range of sanctions in respect of Mr A's membership with Engineering New Zealand under Engineering New Zealand's Disciplinary Regulation 17(3).

[22] Chartered Professional Engineers of New Zealand Rules (No 2) 2002, r 46 (revoked 1 July 2016) and IPENZ Code of Ethical Conduct 2005, cl 4.
[23] Chartered Professional Engineers of New Zealand Rules (No 2) 2002, r 42E and IPENZ Code of Ethical Conduct 2016, cl 4.

ORDERS

256. On 29 June 2021, our reserved decision was sent to the parties, and they were invited to make submissions on penalties. The parties made submissions on penalty by 4 August 2021. We met by videoconference on 18 August 2021 to deliberate.

RELEVANT LAW

257. In Roberts *v A Professional Conduct Committee of the Nursing Council of New Zealand* the High Court outlined a number of principles to be applied by the Health Practitioners Disciplinary Tribunal in determining the appropriate penalty to impose in disciplinary proceedings. [24] The High Court determined that a disciplinary penalty must:

a. protect the public (including through deterrence of other practitioners from engaging in similar conduct);

b. set and maintain professional standards;

c. where appropriate, rehabilitate the practitioner back to the profession;

d. be comparable with penalties imposed on practitioners in similar circumstances;

e. reflect the seriousness of the practitioner's conduct, in light of the range of penalties available;

f. be the least restrictive penalty that can reasonably be imposed in the circumstances; and

g. be fair, reasonable, and proportionate in the circumstances.

258. The High Court also stated that while penalty may have the effect of punishing a practitioner, punishment is not a necessary focus for the Tribunal in determining penalty.

259. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under section 22 of the Act and Rule 10 and they are the principles we rely on when considering the appropriate penalty orders in this case.

260. The principles have general application to professional disciplinary proceedings in light of the Supreme Court's decision in *Z v Dental Complaints Assessment Committee*.[25] In *Z,* the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:

> *Ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.*

261. This is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.

262. The Supreme Court in *Z v Dental Complaints Assessment Committee*[26] also states that while professional disciplinary proceedings are not intended to punish practitioners, they may have a punitive effect in practice. This is also consistent with the principles set out in *Roberts*, in that the penalty must be the least restrictive penalty and that punishment is not a necessary focus of a disciplinary penalty.

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[24] [2012] NZHC 3354.
[25] [2008] NZSC 55.
[26] Ibid.

263. The reasoning underlying *Roberts'* focus on practitioner rehabilitation is less relevant to penalties under the Act because the removal or suspension of a Chartered Professional Engineer's registration does not prevent the individual practising as an engineer but does prevent use of the Chartered Professional Engineer title. Similarly, the removal of an engineer's membership to Engineering New Zealand does not prevent the individual practising as an engineer but prevents the individual from claiming to be a member of Engineering New Zealand.

264. It is appropriate that disciplinary penalties mark the profession's condemnation of the relevant conduct, noting that to do otherwise would not be consistent with the purpose of the Act to establish the title of Chartered Professional Engineer as a mark of quality.[27]

SUBMISSIONS

The complainant

265. The complainant submitted Mr A should be suspended for 12 months pursuant to section 22(1)(d) of the CPEng Act, on the basis of the cumulative effect of Mr A's incompetency and the impact it had on the complainant.

266. The complainant submitted censure and/or a fine would be manifestly inadequate in relation to the seriousness of the findings made against Mr A, especially in the context that he was acting as an expert witness.

267. The complainant's submissions referred us to the previous disciplinary decisions of *Mulholland* and *Joyce*. The complainant submitted that although the cases differ, they are comparable in terms of the failures of the engineers involved. In *Joyce* and *Mulholland* there had been only one layer to the respondents' conduct, but in this case there were three layers:

- Mr A falling short of the required standard;
- Mr A acting outside his expertise; and
- Both of these elements having occurred in the context of the complainant's reliance on Mr A's services in litigation with an insurer.

268. The complainant submitted Mr A must have known the importance of what he was engaged to do, and that his work would be relied on as the platform for the complainant's claim against his insurer. Further, Mr A's work was of no use to the complainant, cost the complainant thousands of dollars in legal and expert costs and two years of unnecessary stress, all while the complainant and their partner had a newborn baby:

> *This exposed* [me] *to a probable adverse outcome had a change in engineer not been made. The change in and of itself was prejudicial to* [me] *in any event and there was little time with an impending trial date to find suitably qualified and preferable experts to pick the matter up.*
>
> *It is submitted that it is unacceptable for a Chartered Professional Engineer, acting as an expert witness, to have put a client in this position.*

269. The complainant did not make submissions in respect of Mr A's membership with Engineering New Zealand.

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[27] Chartered Professional Engineers of New Zealand Act 2002, s 3.

Mr A

270. Mr A submitted that removal or suspension from the register of Chartered Professional Engineers, and censure were inappropriate. Mr A submitted he should be fined up to $1,000 and that he contributes 30 percent of Engineering New Zealand's costs. Mr A also applied for an order that his name and any identifying details be permanently suppressed.

271. Mr A submitted that at the time he was providing advice to the complainant, relevant professional guidance later made available to engineers did not exist. He did what he thought was right based on experience, what he observed others were doing, and what he honestly understood his instructions to be. He has acknowledged he could have done things differently and told us he has changed his practice.

272. Further, Mr A submits the complainant's lawyer's involvement should be considered, he has said that:

- he thought Mr A's reports were satisfactory given the brief;
- Mr A made it clear what he could and could not advise on; and
- Mr A recommended the complainant should obtain advice from other professionals.

273. Mr A submitted he thought he had appropriately qualified his comments as preliminary and further geotechnical investigation and design would be required, and he had communicated that to the complainant on 14 occasions. He accepts the criticisms relating to attributing Mr D's geotechnical comments and separating them from his own.

> *It is submitted that while* [the complainant]*, as* […] *a lay person, may not have regarded the reports as adequate and/or fit for purpose and considered* [Mr A] *provided geotechnical advice,* [counsel for the complainant] *was under no doubt about the adequacy of* [Mr A's] *reports for the brief and the litigation strategy discussed with him and the* [complainant]*. He was also clear that* [Mr A] *was not providing geotechnical advice. His evidence confirms that.*

274. Mr A did not think he had breached his professional obligations. However, he acknowledged he could have done better and had made changes to the way he practices, including the use of the 2018 Engineering New Zealand template guidance. He has told us that the changes he has made relate to a number of the Disciplinary Committee's criticisms of his work. He submitted he engages in self-reflection and learning to identify what he could have done differently. Additionally, he keeps site notes, has implemented a checklist of what goes into damage reports, he applies the Engineering New Zealand guidance earthquake claims, provides detailed commentary and analysis for his opinions, and seeks to avoid any communication issues as a result of English being his second language.

275. Mr A submitted that costs should be set at 30 percent of Engineering New Zealand's costs on the basis that only two of the four grounds of the original complaint were upheld by the Investigating Committee, his own cooperation and attendance at the hearing, the time taken to determine the complaint and for consistency with previous decisions.

276. Mr A applied for permanent name suppression on the basis the penalty should focus on rehabilitation, the subject of the complaint is from 5 – 8 years ago and Mr A has not been the subject of any disciplinary proceedings, or even a complaint, in the intervening period. Further, the wellbeing of his clients and the outcome of their ongoing insurance claims is important to him, he has cooperated with the disciplinary process, and has not presented any risk to public safety. He submitted that transparency, accountability, and public interest considerations can still be achieved with an order for name suppression.

277. Mr A also provided a statement in support from his former client, Mr E.

DISCUSSION

278. Engineers hold significant knowledge and specialised expertise. They are capable of making judgements, applying their skills, and reaching informed decisions in relation to their work that the general public cannot. The decisions engineers make and the services they provide often do not only impact the engineer and their clients but have wide-reaching effects on the public.

279. The public places significant trust in engineers to self-regulate. As a professional, an engineer must take responsibility for being competent and acting ethically. The actions of an individual engineer also play an important role in the way in which the profession is viewed by the public.

280. The Disciplinary Committee has found that Mr A departed from what could be expected of a reasonable engineer. Mr A did not undertake the engineering services he provided to the complainant in a careful and competent manner; he provided geotechnical advice which was beyond his level of competence; and the standard of his geotechnical advice and opinions fell below the standard reasonably expected of a professional engineer. We found Mr A's engineering activities fell below the accepted standard of a Chartered Professional Engineer and a reasonable member of IPENZ.

281. In our view, Mr A's actions, if condoned, would undermine the public's trust in the engineering profession and reduce public confidence in members of Engineering New Zealand and in the Chartered Professional Engineer title. We consider that Mr A's actions are a serious breach of his obligation to act competently and within his competency, and our orders need to reflect this view.

PENALTY

Registration

282. In respect of orders relating to registration as a Chartered Professional Engineer, we may order that:

- an engineer's registration be removed, and that they may not apply for re-registration before the expiry of a specified period;
- their registration be suspended for a period of no more than 12 months or until they meet specified conditions relating to the registration;
- the engineer be censured;
- the engineer must pay a fine not exceeding $5,000.

If we order that an engineer's registration be removed we may not order a fine.

Membership

283. In respect of membership with Engineering New Zealand, we may order that an Engineering New Zealand member be:

- expelled from membership;
- suspended from membership for any period;
- suspended from membership until such time as the Engineering New Zealand member has fulfilled requirements for professional development as have been specified by the Committee;
- suspended from membership for a period if, by a given date, the member fails to fulfil requirements for professional development as has been specified by the Committee;

- fined a maximum of $5,000;
- reprimanded or admonished.

Discussion

284. As stated above, Mr A's behaviour fell below the standard expected of a professional engineer. It is important that Engineering New Zealand, in its role as a membership body and as the Registration Authority for Chartered Professional Engineers, condemns this behaviour and that this condemnation is reflected in the penalty ordered.

285. We do not consider Mr A's actions warrant removal or suspension from the register of Chartered Professional Engineers, or from membership with Engineering New Zealand. There are no issues of public safety.

286. We consider a fine, censure and admonishment an appropriate penalty in this case. We do not agree with the complainant's submission this would be a manifestly inadequate penalty.

287. Mr A submits there was no IPENZ guidance at the time he carried out his work, and this should be a mitigating factor. We disagree. A professional engineer should not require this guidance to undertake and deliver work satisfactorily. The fact a document was subsequently issued should be regarded as the provision of an additional tool for engineers and not a necessity for doing the work he undertook for the complainant.

288. We do not agree with Mr A's submission that he should be fined $1,000. Mr A's departures from expected standards were not a one off. His actions caused the complainant significant wasted time, cost, and stress.

289. While we accept the complainant's lawyer was responsible for some of the communication issues between the parties, we do not accept this mitigates Mr A giving advice outside of his area of competency. We also do not accept the complainant's lawyer bore any of the responsibility for Mr A to have acted competently.

290. In our view, acting outside one's competence is a serious matter. Whether the complainant as a lay person fully understood the implications of Mr A's reports and advice does not alter our view that Mr A acted outside his competence in providing geotechnical opinion and advice, and did not provide reports that met the complainant's needs. It is not clear to us that Mr A accepts our finding in respect of his geotechnical work. However, we are satisfied that Mr A is unlikely to undertake geotechnical work in the future.

291. We do not consider it necessary to fine Mr A both under the Act and again under the Engineering New Zealand Rules. We have set the fine across both jurisdictions at $3,500.00.

292. We have considered orders made by other disciplinary committees but note we are not constrained by their findings. We think this fine is appropriate, in recognition of not only the departures, but the ongoing nature of the departures from accepted standards. Further, a fine should be in the nature of a penalty. The fine, although towards the higher end of the spectrum, for all intents and purposes, is the least restrictive penalty.

293. As stated above, Mr A's behaviour fell below the standard expected of a professional engineer, and it is important that the Registration Authority and Engineering New Zealand condemns this behaviour and that this condemnation is reflected in the penalty ordered.

COSTS

294. The Disciplinary Committee can order that the engineer pay costs and expenses of, and incidental to, the inquiry by Engineering New Zealand. Such an order is not in the nature of a penalty.

295. When ordering costs, it is generally accepted the normal approach is to start with a 50 percent contribution. Other factors may be considered to increase or reduce that portion. The balance of costs must be met by the profession itself.

296. In respect of the medical profession, the Court in *Vatsyayann v PCC* said:[28]

> *…professional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the costs of the inquiry and a hearing; that costs are not punitive; that the practitioner's means, if known, are to be considered; that a practitioner has a right to defend himself and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.*

297. We acknowledge there has been some delay in hearing this matter. Although the investigation has taken longer than usual, we consider the costs incurred by Engineering New Zealand in investigating the matter are not disproportionate.

298. We acknowledge there were four aspects to the original complaint with two dismissed by the Investigating Committee. We do not consider these two matters would have had any material effect on the quantum of costs incurred.

299. We have not received any information about Mr A's financial position that would indicate any financial hardship or inability to pay costs.

300. The Disciplinary Committee has considered other disciplinary committees' orders of costs. We do not consider there any matters that would indicate we need to increase or reduce payment of costs.

301. Taking all factors into account, it is the decision of the Disciplinary Committee that Mr A is to pay 50 percent of the costs of Engineering New Zealand's investigation, being $9,370.00 plus GST. This is consistent with previous disciplinary orders.

NAMING

Registration

302. In addition to notifying any orders made against a Chartered Professional Engineer on the register of Chartered Professional Engineers, the Registration Authority must notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it and may publicly notify the order in any other way that it thinks fit.[29]

Membership

303. It is open to us to name Mr A, any orders made against him, the nature of the breach described in the official journal of Engineering New Zealand, the matter publicised in any other many as be

[28] [2012] NZHC 1138 at [34].

[29] Chartered Professional Engineers of New Zealand Act 2002, s 22(5).

prescribed by the Committee, or any combination of these possibilities as the Committee might prescribe.[30]

Discussion

304. Naming is the starting point and will only be inappropriate in a limited number of circumstances where the engineer's privacy outweighs the public interest. In *Y v Attorney-General*[31] the Court of Appeal explored the principles that should guide the suppression of the names of parties, witnesses, or particulars in the civil context. It stated that the starting point is the principle of open justice.

305. The question is then, 'Do the circumstances justify an exception to that principle?' In a professional disciplinary context, a practitioner is "likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[32] This is because the practitioner's existing and prospective clients have an interest in knowing details of the conduct, as this allows them to make an informed decision about the practitioner's services.[33]

306. The Act and the Disciplinary Regulations do not prescribe factors we should consider when deciding whether to name an engineer. Although the legislative powers afforded to us differ, we are guided by the public interest factors considered by the medical profession when deciding whether to name a practitioner. These include:

- openness and transparency in disciplinary proceedings;
- accountability of the disciplinary process;
- public interest in knowing the identity of the practitioner;
- the importance of freedom of speech;
- unfairly impugning other practitioners;
- where adverse disciplinary finding has been made, it is necessary for more weighty private interest factors (matters that may affect a family and their wellbeing, and rehabilitation of the practitioner) to be advanced to overcome the public interest factors for publication.[34]

307. Consistent with these precedents, the starting point is that naming of engineers who are subject to a disciplinary order is the normal expectation. This is as public protection is at the heart of disciplinary processes, and naming supports openness, transparency, and accountability.

308. Mr A submits his behaviour is less serious than that of the engineer in *House Design.*[35] The engineer in *House Design* signed a PS1 for a design prepared by a junior engineer. The engineer accepted the design was inadequate. The engineer attempted to resolve the issue with his client by reviewing and preparing an amended design, which was also found to be inadequate. We consider Mr A's behaviour

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[30] Engineering New Zealand Rules 2017, r 10.5(h).

[31] [2016] NZCA 474.

[32] Ibid at [32].

[33] Ibid at [62].

[34] *Professional Conduct Committee of the Pharmacy Council of New Zealand v El-Fadil Kardaman* 100/Phar18/424P at [113] – [114]. Under s 95(2) of the Health Practitioners Competence Assurance Act 2003, the Tribunal is required first to consider whether or not it is desirable to make an order under the section, "*after having regard to the interests of any person […] and to the public interest*." The Tribunal is then given discretion to make an order prohibiting the publication of the name of any person. We note the orders available in our jurisdictions are different. Tribunals must undertake a two-stage test before making orders to prohibit publication, whereas the Disciplinary Committee is not required to undertake any test before publicly notifying the order in any other way that we think fit.

[35] Available at: https://www.engineeringnz.org/documents/537/Disciplinary_Committee_decision_regarding_house_design.pdf

in this case to be more serious. We have found Mr A's engineering services have been below the standard reasonably expected of a Chartered Professional Engineer and member of IPENZ, and that he has acted outside his area of competence.

309. We do not consider Mr A has advanced any private interest factors that would displace the public interest factors in naming. The only private interest he has advanced is rehabilitation. While we acknowledge that Mr A has made changes to his practice, we do not consider that rehabilitation from this behaviour will be affected by his naming. This is because rehabilitation in this professional sense is not the same as rehabilitation from, for example, an addiction.

310. Mr A has also raised the wellbeing of his clients and that publication may potentially have an adverse effect on their ongoing insurance claims. We do not agree with this view. As stated in the case law above, Mr A's existing and prospective clients have an interest in knowing details of the conduct, as this allows them to make an informed decision about his services.

311. After considering the above factors, the Disciplinary Committee has decided to lift Mr A's name suppression.

312. The Registration Authority will carry out its obligation to notify the Registrar of Licensed Building Practitioners.

SUMMARY OF ORDERS

313. In exercising our delegated powers, we order that Mr A:

a. is censured as a Chartered Professional Engineer and admonished as a Member of Engineering New Zealand
b. pay a fine of $3,500 both as a Chartered Professional Engineer and a Member of Engineering New Zealand
c. pay 50 percent of the costs incurred by Engineering New Zealand in investigating and hearing this matter, being $9,370 plus GST.

314. In addition to notifying these orders in the register of Chartered Professional Engineers, the Registration Authority will, subject to any appeal by Mr A:

a. notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it; and
b. publish the Disciplinary Committee's final decision on this complaint on its website, in a public press release, and in any other communication it considers appropriate.

315. Mr A's interim name suppression is lifted.

Jenny Culliford FEngNZ (Ret.)

Disciplinary Committee Chair

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

Appeal 12/21

AND

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

Between

Mr A
Appellant

And

Mr B
Complainant

Decision of the Chartered Professional Engineers Council
Dated 31 May 2022

1. Mr A has appealed a decision made by a disciplinary committee ("the Disciplinary Committee") of the Registration Authority ("the RA"), to uphold a complaint about him, by Mr B on behalf of the BB Trust ("the Trust"). [BOD Pt 2, 436-479]

2. The appeal panel of the Chartered Professional Engineers Council ("the Council") has been provided with a paginated Bundle of Documents file held by the Registration Authority ("the RA") in relation to the case. References to specific documents within this two-part file are annotated "[BOD Pt *n*, *nn*]".

The Legislation

3. Legislation considered by the appeal panel is presented in Schedule 1 and extracts of the Chartered Professional Engineers of New Zealand Act 2002 ("the Act") and the Chartered Professional Engineers of New Zealand Rules (No 2) ("the Rules") are presented in Schedule 2.

4. Appeals to the Council are by way of rehearing (s37(2) of the Act).

5. The appeal panel is entitled to confirm, vary or reverse a decision 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. Section 21 of the Act states:

> ***(1) "21 Grounds for discipline of chartered professional engineers***
>
> *1. The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer--*
>
> *(a) has been convicted, whether before or after he or she became registered, by any Court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion the commission of the offence reflects adversely on the person's fitness to practise engineering; or*
>
> *(b) has breached the code of ethics contained in the rules; or*

(c) has performed engineering services in a negligent or incompetent manner; or

(d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -

(i) either orally or in writing, made any declaration or representation knowing it to be false 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."

7. The facts and evidence demonstrate that the criteria established under sections 21(1)(a), and (d) of the Act do not apply in this case. Under rule 66 of the Rules the panel is therefore tasked with considering whether the Disciplinary Committee was correct in deciding under s21 of the Act that there were grounds for discipline and if so, whether the Disciplinary Committee was correct in the decision issued when exercising its powers under s22 of the Act.

8. Rules 45 and 46 were revoked on 1 July 2016 and replaced by rules 42E and 42F. However, rules 45 and 46 were applicable at the time of the alleged misconduct by Mr A and it is against those rules that Mr A's conduct must be considered.

9. In addressing the threshold referred to in 7 above the panel's role is to decide whether Mr A has breached an aspect of the code of ethical conduct as set out in the rules 45 and 46; and/or has performed engineering services in a negligent or incompetent manner.

Purpose of professional disciplinary processes

10. As noted in paragraph 4.1 of the RA's submissions, the professional disciplinary process does not exist to punish individuals for their conduct or to appease persons dissatisfied with professional services they have received. The purpose is to ensure professional standards are maintained so that clients, the profession and the broader community are protected.

11. As noted in paragraph 4.2 of the RA's submission, this is addressed in *Z v Dental Complaints Assessment Committee (Z)* [1] where the Supreme Court stated:

> *"The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus."*

Correspondence and submissions

12. Key correspondence and submissions in this appeal are listed in Schedule 4.

Grounds of appeal and outcome sought

13. Mr A's Notice of Appeal dated 21 October 2021, contained a total of 86 specific grounds which were presented under six categories.

14. In introducing his grounds of appeal, Mr A noted that his reasons for appealing, and by implication his grounds, were not limited to the 86 specified grounds.

15. With reference to 14 above, the panel notes that any grounds that were not stated in the Notice of Appeal are not considered admissible and are not relied on in later submissions. The reason for this is that any sense of open-ended grounds would, in the panel's view, represent a misuse of the appeal process.

[1] [2008] NZSC 55

16. The categories of grounds cited are summarised below:

Category	**Grounds** [2]
Ms C – legal advisor for and on behalf of ENZ	1 to 5
Ms Susan Freeman-Greene – the then CEO of ENZ	6
Dr D – adjudicator	7 to 19
Investigating Committee – decision	20 to 38
Disciplinary Committee – decision	39 – 85
Disciplinary Committee – penalty decision	86

17. The outcome sought by Mr A was *"Modify ENZ's reports/decisions in light of evidence presented at the appeal, with the expectation of dismissal of the complaint"*

18. The panel notes that the outcomes which it can determine under the appeal are referred to in 5 above.

Jurisdictional Issues

19. Under the statutory framework in which the Council may hear an appeal it cannot hear matters that relate to the actions or processes of the RA. It must address the actual decision that the RA has issued. In this regard issues relating to the processes or procedures of the RA are not relevant and they are cured by the rehearing.

20. The panel notes similarities between this appeal and *E v Tauranga City Council (E)*[3], in which the Council determined that it does not have jurisdiction to consider procedural issues.

[2] Refer Schedule 3 for details
[3] CPEC Appeal 01/19

21. At paragraph 6.69 of its submissions, the RA noted *"Both the Registration Authority and CPEC do not have the jurisdiction to consider contractual matters, such as whether a client has met their obligations".*

22. The panel agrees with the RA's position regarding contractual matters.

23. Where the grounds of appeal include matters of process or procedure, or of a contractual nature, the panel acknowledges that while they may provide some context for the appeal, they do not contribute to the substantive determinations.

Admissibility of cited grounds

24. The panel must consider two aspects of the various grounds, before proceeding with the hearing of the appeal,

    (i) The timing of the specific matter being raised, and

    (ii) Whether or not the Council has jurisdiction to consider the matter.

25. With regard to the factors referred to in 24 above the panel addresses below, the categories under which Mr A has presented his grounds of appeal.

Legal advisor (Grounds 1 to 5) and Former Chief Executive Officer (Ground 6)

26. The grounds related to the Legal Advisor and former Chief Executive Officer of Engineering New Zealand respectively, generally refer to alleged procedural breaches on the part of Engineering New Zealand in the capacity of Registration Authority and therefore lie beyond the jurisdiction of the Council to consider. In any event, the 28-day period within which a notice of appeal must be filed with the Council in respect of those two categories of grounds, expired long ago. Accordingly, grounds under these two categories cannot be considered by the panel.

The Adjudicator (Grounds 7 to 19)

27. The panel notes that the Adjudicator's decision was issued in September 2018 and is therefore well outside of the 28-day period within which an appeal must

be made. Grounds under this category therefore cannot be considered by the panel and the decision of the Adjudicator effectively stands as the starting point for the Investigating Committee's deliberations.

Investigating Committee decision (Grounds 20 to 38)

28. The grounds submitted under this category all relate to the decision of the Investigating Committee, whose final report was issued in July 2020, which is well outside of the 28-day period within which an appeal must be made. Grounds under this category therefore cannot be considered by the panel and the decision of the Investigating Committee effectively stands as the start point for the Disciplinary Committee's deliberations.

29. Grounds 39 to 85 refer to the Disciplinary Committee's substantive decision which was issued on 30 June 2021. That decision upheld Mr B's complaint and was reserved, pending submissions from the parties in respect of penalties.

30. In relation to 29 above and based on a letter from counsel for Mr A dated 2 July 2021 [BOD Pt 2, 404], which, at paragraph 4(a), states *"the time for Mr A to appeal the decision does not expire until 27 July 2021"*, the panel initially declined to consider grounds 39 to 85. The panel cited the appeal being out of time as the reason for its decision on this point. (Letter from panel principal dated 24 January 2022)

31. On 25 January 2022 Mr A provided a copy of an email from the RA dated 5 July 2021, which had advised that the appeal period would commence once the final decision of the Disciplinary Committee including penalty had been issued. The referenced email from the RA had not been included in the documentation provided to the panel.

32. Based on the new information available to the panel and referred to in 31 above the panel confirmed by letter dated 27 January 2022 that it would consider the substantive decision of the Disciplinary Committee, in hearing the appeal.

33. While having confirmed that the grounds associated with the Disciplinary Committee's substantive decision would be considered, the panel reiterates advice provided in its letter to the parties dated 24 January 2022 that the Council does not have jurisdiction to rule on alleged procedural shortcomings of the RA. This point is also addressed in 19 to 23 above.

34. The panel's consideration of the grounds relating to the substantive decision of the Disciplinary Committee and the penalty decision are necessarily limited by the constraints referred to in 33 above.

The original complaint

35. In a letter dated 6 December 2017 Mr B, expressed concerns about the conduct of Mr A. [BOD Pt 1, 6-9]

36. Mr B advised that he was acting on behalf of the Trust ("the Trust") and alleged that:

> *"Mr A may have breached the Code of Ethical Conduct for Engineers as follows:*
>
> *a) he undertook engineering activities outside his area of competence;*
>
> *b) he failed to undertake engineering activities in a careful and competent manner;*
>
> *c) he failed to act with honesty, objectivity, and integrity: and*
>
> *d) he failed to treat his client with respect and courtesy"*

37. The allegations regarding Mr A's conduct involved earthquake damage related professional services in respect of a residential property at Address F, Christchurch.

Decision being appealed and evidence considered

38. The decision under appeal is the final decision of the Disciplinary Committee which was issued on 24 September 2021. [BOD Pt 2, 434-479]. The final

decision incorporates the committee's reserved decision that was issued on 29 June 2021, and which upheld the complaint against Mr A [BOD Pt 2, 365-402], and the Disciplinary Committee's disciplinary orders.

39. The decision under appeal contains two elements, (i) that Mr A acted outside of his competence, and (ii) that Mr A's engineering services were below the standard reasonably expected of a chartered professional engineer.

40. Under s15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.

41. The evidence considered by the panel in arriving at its decision included:

    i. Notice of Appeal dated 21 October 2021,

    ii. The paginated Bundle of Documents [BOD Pt 1, 1-760 & BOD Pt 2, 1-479],

    iii. Submission from Mr A received 11 February 2022,

    iv. Submission from the RA received 25 February 2022,

    v. Submission in response from Mr A received 14 March 2022

42. A submission was made by Mr B, after a deadline he had been given to seek an extension of time to make a submission had passed. His submission was determined by the panel to be inadmissible, on the basis of its lateness and it has not been considered by the panel.

Hearing

43. With the agreement of the parties the panel conducted the hearing on the papers.

44. The panel met by video link on 31 March 2022, 21 April 2022, 20 May 2022 and 26 May 2022 to deliberate and consequently reach a unanimous decision.

Discussion and Findings

Standard of care expected of a chartered professional engineer

45. The role of the panel is to determine whether or not the Disciplinary Committee made the correct decision regarding the two elements of the complaint against Mr A referred to in 39 above.

46. With regard to 45 above the panel considers that the benchmarks against which Mr A's conduct is measured are contained in rules 45 and 46 of the Rules, those provisions, while now superseded, being current during the period of alleged misconduct.

Act with honesty, objectivity, and integrity

47. Rule 45 (Act with honesty, objectivity, and integrity) was revoked and replaced on 1 July 2016 by rules 42F (Behave appropriately). The particular provisions of rule 45 are: *"A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.",* the equivalent of rule 42F(a)(i).

Not misrepresent competence

48. Rule 46 (Not misrepresent competence) was revoked and replaced on 1 July 2016 by rule 42 E (Act competently). The provisions of rule 46 are: *"A chartered professional engineer must —*

    a) *not misrepresent his or her competence; and*

    b) *undertake engineering activities only within his or her competence; and*

    c) *not knowingly permit engineers whose work he or she is responsible for to breach paragraph (a) or paragraph (b)."*

49. The provisions of rule 46 a) are equivalent to rule 42E (b)(i).

50. The provisions of rule 46(b) are equivalent to 42E (a)(ii)

51. The provisions of rule 46(c) are similar to rule 42E (b)(ii). However, in the panel's view the matter being appealed does not encompass the provisions of rule 46(c).

52. The panel has considered whether or not the alleged misconduct by Mr A is proven, by establishing whether or not it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Viewed another way, as a question - would the conduct complained of, if acceptable, tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?

Discussion on elements of the appeal

53. The various elements relating to the substantive decision being appealed (grounds 39 to 85) are addressed below in the context of the requirements of the above-mentioned rules, and in a manner consistent with the panel's position stated in 33 and 34 above.

54. The panel considers below, the grounds in groupings based on their nature and whether or not they are within the Council's jurisdiction.

55. In addressing each ground of appeal, the panel's focus is on addressing what is actually stated in the respective ground. This process has not been aided by the fact that Mr A has not made clear reference in his submissions to the respective grounds of appeal. Consequently, the panel has had to carry out extensive word searches of Mr A's submissions and the bundle of documents, which has been complicated and time consuming.

Contractual grounds

Ground 50

"Did not acknowledge that Mr B failed to provide information and instructions required by myself (on several occasions) to progress engineering work"

56. The panel agrees with the RA's submission (6.68 and 6.69) that this ground is a contractual matter and not one which on which a determination can be made by the RA or the Council.

57. Further to 56 the panel notes that the subject of the complaint is Mr A's, not his client at the time.

Ground 67

*"Did not consider that Mr B failed to meet some of the obligations under the contract for professional services - for instance, that "The Client shall provide to the Consultant, free of cost, as soon as practicable following **any** request for information, **all information** in his or her power to obtain which may relate to the Services." (my emphasis). My numerous requests for information were not fulfilled by Mr B."*

58. As noted in 56 and 57 above this matter is contractual and beyond the jurisdiction of the Council.

Ground 72

"Accepted Mr B's expectations which were inconsistent with his behaviour (e.g. expectation of high standard of service on one hand, and on the other hand, refusing to instruct me to do the work needed to achieve the expectations, refusing to provide information required by me to do the work, overdue invoices)."

59. The RA in its submission (6.45 to 6.48) addressed this ground as three allegations – (i) concerning inconsistency between Mr B's expectations of high standard of service and failure to instruct Mr A on work to meet those expectations, (ii) Mr B's refusal to provide information requested by Mr A's, and (iii) overdue invoices.

60. The first allegation is addressed elsewhere including in paragraphs 305, 318, and 325.

61. The second and third allegations are contractual matters and beyond the jurisdiction of the Council.

Procedural grounds

62. Paragraphs 63 to 127 address grounds which the panel considers to be procedural or to include procedural elements.

Ground 39

"*Failed to provide any charge or statement of case before the hearing. Considering the gravity of the situation, this was unreasonable. The hearing, therefore, became inquisitorial in its nature, during which I was put under time pressure to submit "ad hoc" oral evidence and find relevant information, without being given a fair chance to prepare specific responses prior to the hearing."*

63. In its submissions (6.57) the RA refutes the allegations in this ground.

64. In any event, the panel notes this ground is focussed entirely on the actions of the RA and any alleged shortcomings, even if proven are cured by way of rehearing.

Ground 40

"*Disregarded my proposal (prior to the hearing) to prepare a written technical submission demonstrating the competence in the engineering matters on which I advised the Trust*."

65. The RA submitted (6.58) that it has no record of Mr A asking if he could submit a proposal before the hearing, adding that the RA provided Mr A the opportunity to provide any further evidence he wished to the submit to the Disciplinary Committee. [BOD Pt 2, 32].

66. The panel considers that as this ground is focussed on alleged procedural shortcomings of the RA the ground is beyond the jurisdiction of the panel and in any event is cured by the rehearing.

Ground 42

"Used my "without prejudice" correspondence in their decision (originally provided to ENZ as general response to queries, intended to resolve Mr B's concerns in good faith)."

67. The RA submitted (6.59) *"Without prejudice means a document cannot be used in a court of law. However, the Disciplinary Committee is not a court of law. As a result the Disciplinary Committee was entitled to consider any information whether labelled "without prejudice" or not, in its investigation."*

68. The RA also submitted (6.60) that it considers a reasonable respondent would understand from the advice given by the RA that any information provided by the respondent will be shared with the other party and the RA's decision makers to resolve the concerns raised.

69. In his submission in response (17) Mr A asserted that the matter was not formally classified at the time as a complaint and alleges that the RA breached rule 58(a) of the Rules, requiring that he be notified of the complaint before commencing the investigation.

70. Mr B had first expressed concerns on behalf of the Trust on 6 December 2017 [BOD Pt 1, 6] and as far as the panel is aware the first engagement between the RA and Mr A took the form of an email dated 11 January 2018 from Ms C to Mr A (submission from Mr A paragraph 21).

71. Mr A also referred to "without prejudice' in the context of the law protecting settlement negotiations and made reference to fair play, submitting that he was *"enticed by Ms C into good faith compromise negotiation to resolve Mr B's concerns, which was then "mined" by ENZ for concessions utilized later in the disciplinary proceedings"*.

72. The panel considers that at the time of the email referred to in 70 above Mr A could not reasonably have drawn any conclusion other than that the RA was in receipt of a statement of grievance about him by one of his clients. As submitted

by the RA (68 above) he should have understood that any information provided by him could be utilised to resolve the concerns raised.

73. Whether the grievance filed by Mr B is referred to as a "concern" or a "complaint" is a matter of semantics and a distraction from the substance and merits of the matter under appeal.

74. In the view of the panel the email from Ms C to Mr A on 11 January 2018 is reasonably consistent with RA's obligations under rule 58(a) of the Rules, the elapsed time between receipt of notification of the Trust's concerns and the email from Ms C being relatively insignificant considering it spanned the Christmas / New Year break.

75. The panel considers that Ground 42 has no merit.

Ground 44

"Did not check my latest CPEng assessment - a simple reference to my 2016 CPEng submission would have revealed to Disciplinary Committee that ENZ accepted that I had competence in providing engineering advice comparable to what I provided to the Trust."

76. The RA submitted (6.54) that Mr A's belief that the information concerned was relevant to the Disciplinary Committee's investigation, was not correct.

77. The panel considers that it is not the role of a party to the complaint to dictate what material the decision authority (in this case the Disciplinary Committee) should consider, and that it is therefore not unreasonable for the Disciplinary Committee to have determined such information to be irrelevant.

78. Further, a procedural breach is alleged under this ground, which is beyond the jurisdiction of the panel.

79. No weighting is given to this ground by the panel.

Ground 47

"Did not verify accuracy of Mr B's claims and published them as true (or represented that they are true and accepted). Many of Mr B's claims referred to by Disciplinary Committee are incorrect. Disciplinary Committee based arguments on top of these inaccuracies."

80. The RA submitted (6.56) that Mr A was incorrect in alleging that the Disciplinary Committee did not verify the accuracy of (Mr B's) information, adding that the Disciplinary Committee assessed the weight and reliance placed on the evidence and thus its accuracy.

81. Mr A in his response submitted (16) that Mr B had *"submitted many statements during the DC hearing (as well as in the email correspondence with the Panel) that were not (and could not be) substantiated by evidence and therefore should not be admissible."*

82. The panel notes that Mr A's assertions with regard to the hearing in particular are general in nature with no evidence provided.

83. In considering the matter being appealed, the panel's focus is on the bundle of documents and the formal submissions, and no weight is generally being given to emails except where clearly stated in this decision.

84. Ground 47 as written alleges procedural breaches by the RA which are beyond the jurisdiction of the panel.

85. The panel is responsible for making its own decision as to the substance of the complaint based on the evidence available.

86. This ground does not provide a basis for the decision of the Disciplinary Committee to be overturned. Any alleged shortcomings are cured by the rehearing.

Ground 56

"Did not include all relevant information in its deliberations."

87. In its submissions (6.50) the RA categorised Ground 56 as unclear as Mr A has not provided information in support of the ground.

88. The panel considers this ground to be purely procedural and therefore beyond its jurisdiction under the Act and cured by rehearing.

Ground 57

"Considered irrelevant matter such as opinions of Company G and Company H in respect of my work, without calling those engineers as witnesses, nor was there enough opportunity for me to properly consider this matter during the hearing."

89. The RA submitted (6.61) that the Disciplinary Committee *"did not have questions for the experts who prepared the opinions of Company G and Company H. On that basis, they decided not to call them as witnesses. The Company G and Company H reports stood on their own as opinion evidence. Additionally, their conclusions were not being scrutinised, rather, it was Mr A's reports that were under scrutiny."*

90. The panel agrees that there was no obligation on the part of the RA to call the engineers from Company G Or Company H, with the Disciplinary Committee determining they were able to decide whether or not Mr A's reports were of the standard reasonably expected of a Chartered Professional Engineer, without the experts present.

91. Further to 90 above the panel notes that the Ground as written, alleges procedural breaches by the Disciplinary Committee. These allegations do not represent evidence regarding the substance of the complaint and are beyond the jurisdiction of the panel.

92. Any shortcomings alleged in Ground 57 are cured by rehearing, where the panel makes its own assessment of the facts based on the evidence available.

Ground 58

"Made comments about Company I project file without asking to see the file or examining the file."

93. The RA's submissions on Ground 44 include Ground 58 and are addressed in 76 and 77 above.

94. This ground represents an allegation regarding the procedures followed by the Disciplinary Committee and is beyond the jurisdiction of the panel.

95. The panel considers that Ground 58 has no merit and will make its own decision relating to the substance of the complaint based on the evidence available.

Ground 59

"Did not sufficiently investigate facts that could be established by simple enquiry – e.g. when I visited the site, how much Company I charged the Trust, etc."

96. In their submissions (6.52) the RA has categorised Ground 59 as procedural.

97. The panel considers that it is the role of the Disciplinary Committee to determine what material it should consider and not the role of either party to the complaint. This is addressed in 77 above.

98. The panel agrees with the RA's categorisation of this ground as procedural which means that the matter is beyond the jurisdiction of the panel.

99. No weighting is given to Ground 59.

Ground 60

"Did not acknowledge the potential for vexatious nature of Mr B's complaint (e.g. Mr B losing at Dispute Tribunal and its decision that he must pay Company I)"

100. The RA submitted (6.62) that *"the Adjudicator and the Investigating Committee did not consider the complaint to be vexatious. The Disciplinary Committee clearly did not consider the complaint vexatious, as it upheld it."*

101. Rule 57(c) of the Rules (*".. the complaint is frivolous or vexatious…"* is one of seven grounds available to the RA for not referring a complaint to an investigating committee.

102. The RA's decision effectively means that the complaint was not considered to be vexatious, a decision that the Rules entitle the RA to make.

103. There is no evidence that Mr A appealed the decision of the Investigating Committee, an avenue that was available to him within the applicable appeal period after issue of the Investigating Committee's Decision.

104. The panel considers the allegation by Mr A under Ground 60 to be procedural with no evidence-based contribution to the consideration of the substance of the complaint. It is therefore considered to have no merit.

Ground 63

"*Did not ask me whether High Court previously accepted my engineering evidence comparable to the advice I provided to the Trust (it did – Case J and Case K cases that preceded my involvement with the Trust)."*

105. The panel considers Ground 63 to be similar to Ground 44 in that it represents allegations of a procedural breach by the Disciplinary Committee. It is not the role of a party to the complaint to dictate how the complaint should be conducted or what thresholds of investigation or deliberation are applicable.

106. Ground 63 does not provide evidence that addresses the substance of the complaint and is therefore considered by the panel to have no merit.

Ground 74

"*Did not acknowledge that the Trust and their lawyer Mr L never provided me with a clear direction and litigation strategy."*

107. The RA's submissions on Ground 44 include Ground 74 and are addressed in 76 and 77 above.

108. Ground 74 alleges a procedural shortcoming by the RA and also has a contractual element which both place it beyond the jurisdiction of the panel.

109. The panel is not able to address this ground but if it were to do so an apparent lack of ownership on the part of Mr A, a Professional Engineer, to resolve a lack of *"clear direction and litigation strategy"* would be of concern.

Ground 75

"Did not acknowledge that the Trust managed the matter personally by its beneficiary (Mr B) and in a piecemeal manner over a long period of time (almost 3 years)."

110. As written Ground 75 is an allegation of a procedural breach by the Disciplinary Committee which places it beyond the jurisdiction of the panel.

111. While the panel gives the ground no weighting in its deliberations and can see no relevance to the substance of the complaint, it does provide some context as to Mr A's perceptions of the environment in which he was working for the Trust.

Ground 76

"Did not acknowledge Mr B's unwillingness to spend fees on services required and requested to achieve his desired outcomes."

112. This ground contains a further allegation of procedural shortcomings by the RA and its context is primarily contractual. Therefore, it is not a matter which the panel has jurisdiction to deliberate on and the ground is given no weighting.

Ground 79

"Did not acknowledge and consider the adverse effects of the disorganised and piecemeal environment (created by Messrs B and L) on my ability to provide engineering services."

113. This ground has similarities to Ground 75 in that it alleges procedural shortcomings by the RA with a contractual element.

114. The panel considers that the ground is not supported by evidence which is relevant to the substance of the complaint and, as it is beyond the jurisdiction of the panel, no weighting is given to the ground.

Ground 81

"Used opinions of third party engineers (hearsay) without calling them to give evidence and giving me opportunity to respond (non-conformance with principles of natural justice)."

115. Ground 81 appears to refer to the opinions of the authors of reports by *Company G and Company H*, relating to Ground 57 which the panel has addressed in 89 to 92 above.

116. The allegations embodied in Ground 81 relate to matters of procedure.

117. The panel does not have jurisdiction to address alleged breaches of procedure by the RA. Allegations of any breaches of natural justice would normally be the subject of Judicial Review in the High Court.

118. The panel considers that no evidence is available under this ground that it has jurisdiction to consider and that is relevant to the substance of the complaint. Accordingly Ground 81 is given no weighting.

Ground 83

"Were guided by the public interest factors considered by the medical profession. I consider this excessive as medical professional issues usually carry risk of personal harm, which is not the case in this matter."

119. The RA submitted (6.64) that *"Section 26 of the CPEng Act states that the Registration Authority can regulate its own process, provided such process is not already provided for in that Act. As a result, the Disciplinary Committee was entitled to be guided by any interest factors related to the medical profession when it made its decision."*

120. The panel agrees with the statement and interpretation of the RA in 119 above but notes that the ground effectively alleges a procedural fault on the part of the RA, which lies beyond the jurisdiction of the panel.

121. Ground 83 is given no weighting and the panel notes that the alleged breach is cured by rehearing in which the panel will weigh the evidence available and make its own decision, including reference to case precedents that it considers relevant.

Ground 84

"Referred to "openness and transparency in disciplinary proceedings" and yet, as demonstrated above, did not carefully follow those principles."

122. The RA submitted (6.65), with references to the bundle of documents that *"the Disciplinary Committee ensured openness and transparency throughout the proceedings"* and *"the post hearing stage where Mr A's counsel was provided with the Disciplinary Committee's decision and opportunity to make submissions on that decision"*.

123. Mr A submitted in response (18) *"There is no evidence that DC provided my legal advisor with the provisional decision and an opportunity to make a submission on that decision. DC's reference (BoD, part 2, 406-432) relates to offering an opportunity to make a submission on penalty only."*

124. Whether or not the opportunity was provided to counsel for Mr A to review the Disciplinary Committee's provisional decision, the issue is not relevant to the substance of the complaint and is clearly a matter of the procedure followed by the RA, which lies beyond the panel's jurisdiction.

125. Ground 84 is given no weighting by the panel.

Ground 85

"Due to the inquisitorial nature of the hearing (under time pressure and without knowing the charges prior to the hearing), Disciplinary Committee's factual inaccuracies, reference to irrelevant matters, silence on significant amount of

relevant matter and reference to the hearsay matter on which I was not given opportunity to respond, Disciplinary Committee's decision has a "flavour" of injustice."

126. In respect of Ground 85 the RA submitted (6.66) *"It ground appears to be a summary statement. In any case, the majority of points Mr A refers to are addressed above* [sic]*"*

127. The panel agrees that Ground 85 presents as a summary statement and rather than accompanying evidence that is relevant to the substance of the complaint the ground refers to the actions or processes of the RA. The ground is not given weight and the panel notes that alleged shortcomings are cured by rehearing under the appeal.

Substantive grounds

Ground 41

"Did not acknowledge that structural engineers routinely interpret and use information obtained from complex geotechnical reports in structural engineering work (e.g. foundation design). I was assessed by ENZ as competent in foundation design, and therefore competent to understand and interpret geotechnical reports."

128. The RA submitted (6.5) *"The Disciplinary Committee did acknowledge that structural engineers can undertake geotechnical work."* adding *"Nonetheless, the Disciplinary Committee found the geotechnical work Mr A undertook was beyond his competence."*

129. Further the RA referred to a statement from paragraph 225 of the Disciplinary Committee's Decision which read *"Mr A's practice area is listed as structural engineering on the Engineering New Zealand and Chartered Professional Engineer registers. We agree being registered as a structural engineer does not preclude Mr A from undertaking work with a geotechnical element provided it is within his competency.* [BOD Pt 2, 466]

130. Mr A in response (7) to this and the RA's comments on other grounds submitted *"There is no evidence submitted by the DC that they established the boundaries of my competency..."*, a statement which does not establish the merits of this particular ground.

131. The RA rightly makes a distinction between (i) a structural engineer undertaking geotechnical work or not being precluded from undertaking such work, and (ii) that work being beyond the structural engineer's competence. This distinction lies at the centre of the matter being appealed and is addressed where relevant under other grounds.

132. While the RA did not specifically use Mr A's words *"routinely interpret and use information obtained from complex geotechnical reports in structural engineering work"* in their submission, the panel considers that the Disciplinary Committee's statement in paragraph 225 (129 above) effectively contradicts the first sentence of Ground 41, and there is no evidence that the Disciplinary Committee's statement is untrue.

133. In relation to the second sentence of Ground 41 the RA submitted (6.6) *"The decision before the Disciplinary Committee was to decide whether to uphold the complaint or not. That was, whether Mr A acted competently and in accordance with good practice at the time. The role of the Disciplinary [Committee] was not to assess Mr A's current competence…."*

134. The panel agrees and considers that Mr A's assessed competence at another time is not relevant.

135. Ground 41 focusses on two factual statements, neither of which represents evidence that the decision of the Disciplinary Committee should be overturned. Whether or not Mr A met the expected performance threshold in relation to his work relating to the Trust's property, is addressed under the relevant grounds and the panel considers that Ground 41 has no merit.

Ground 43

"Did not acknowledge that I was asked by Mr B for opinion on various occasions and that I provided the opinion sought. Disciplinary Committee failed to recognise that it is not engineer's job to assess whether such opinion was useful or not – this is job of a litigation lawyer. Mr L considered my opinions useful."

136. Regarding the allegation that the RA did not acknowledge Mr A was asked for opinion on various occasions and provided his opinion, the RA submitted (6.9) that it did acknowledge both points and cited several references in support of that. The RA also commented that it was unsure what point Mr A was trying to advance with this ground of appeal.

137. In the view of the panel, the evidence provided by the RA contradicts the first element of this ground.

138. With respect to the allegation that the Disciplinary Committee failed to recognise it is not an engineer's job to assess whether an opinion is useful, but a litigation lawyer's job, the RA submitted (6.10) that the Disciplinary Committee had considered the matter and added that the Disciplinary Committee also considered it important for an engineer to consider how helpful their report will be to their client. The RA also referred to the Disciplinary Committee's decision where the adequacy of reports was addressed [BOD Pt 2 464-466].

139. Mr A submitted in response (8) *"There is no evidence provided by the DC that they analysed or decided on the helpfulness of my reports – this remains Trust's [sic] unproven allegation…"*

140. The panel is satisfied that the Disciplinary Committee did consider and assess the merits of Mr A's reporting addressing the subject in paragraphs 202 to 224 of their decision.

141. With regard to Mr L considering Mr A's reports useful the RA submitted (6.11) that the Disciplinary Committee was not tasked with considering whether Mr B's

former counsel found Mr A's reports useful. The RA further submitted that the task before the Disciplinary Committee was to decide if Mr A acted competently.

142. The panel notes that it was Mr B who laid the complaint, not Mr L and the panel therefore does not see the relevance of the third element of the ground.

143. The panel considers that Ground 43 does not contribute evidence as to Mr A's competence and performance as a Chartered Professional Engineer and accordingly finds that the ground has no merit.

Ground 45

"Claimed the information was not provided when the said information was not requested of me."

144. The RA submitted (6.50) that it categorised this ground as unclear.

145. Mr A has made no clear reference to the situation that this ground is based on.

146. It appears that this ground may be related to Mr A's submission (249 at page 52) where he states *"I note that I do not recollect that I was requested by DC to provide details of occasions when I requested Mr B engage geotechnical engineer."*

147. No further detail has been submitted by Mr A in support of this ground and, as the onus is on the appellant to demonstrate why the decision at appeal should be overturned, the panel has no basis to consider the point further.

148. Ground 45 is considered to have no merit.

Ground 46

"Makes irrelevant adverse statements about Mr L without giving him opportunity to respond. This gives the reader an (incorrect) impression of my association with Mr L and that I was somehow responsible for his actions (or inactions)."

149. The RA submitted (6.50) that it categorised this ground as unclear.

150. Mr A has not tied his submission content clearly or directly to his grounds of appeal, but it appears to the panel that Ground 46 could related to one or all of three paragraphs in his submission as follows:

    (i) (23(d) at page 7) – a statement that the Disciplinary Committee carried out an assessment of Mr L's work, without giving him the opportunity to respond.

    (ii) (240 at page 51) – A statement that he considers the fact that the Trust dismissed Mr L irrelevant to his disciplinary process and that it should not be admissible.

    (iii) (268 at page 55) – reference to paragraph 216 of the Disciplinary Committee Decision submitting *"There is no evidence provided by DC to back their position in this paragraph. The matter of Mr L is wholly irrelevant and should not be admissible…"*

151. Statement (i) (150 above) is seen by the panel as predominantly a matter of procedure on the part of the Disciplinary Committee, outside of the panel's jurisdiction and cured by the rehearing.

152. Statements (ii) and (iii) (150 above) both submit that matters about Mr L should not be admissible.

153. In addressing ground 43 (141 and 142 above) the panel concluded that the opinions of Mr L were not relevant to the matter being appealed.

154. The panel acknowledges that it is not Mr L who is the subject of Mr B's complaint, but the panel sees no clear reason why comments about Mr L, which are included in the evidence before the panel, should be considered inadmissible noting that they contribute to the context of the matter being appealed.

155. Notwithstanding 154 above, the outcome of the decision is not reliant on evidence relating to Mr L and no weighting is given to the ground

Ground 48

"Erroneously implied that I should have automatically used other engineers' reports in my work without reasonable inquiry and verification of their suitability (e.g. that I should have accepted Company H report foundation recommendations, or that, based on Company G's report, I should have taken it as a given that the garage is to be demolished and rebuilt)."

156. The point made by the Disciplinary Committee [BOD Pt 2, 465, 218] was simply that it was unclear *"why Mr A did not rely on the Company H reports, as Company G did, and subsequently as Company V did.",* further submitting *"In any case, we do not consider Mr A needed more investigations."*

157. The panel shares the Disciplinary Committee's view that it was unclear why Mr A did not rely on the Company H reports and a statement in a letter from Company G's Principal Geotechnical Engineer Mr M, dated 7 December 2015 [BOD Pt 2, 155, bullet point 4] supports this, where it states *"I am surprised that given the passage of time and the availability of the geotechnical data to support detailed design that Company I foundation option is still a "preliminary" design."*

158. The panel considers that the position of the Disciplinary Committee, referred to in Ground 48 was a reasonable one for it to hold and accordingly the ground is considered to have no merit.

Ground 49

"*Provided factual inaccuracies (e.g. that I agreed with Company G's report, or that I said that I was not qualified to design a foundation, or that Mr N did not make any changes to my draft report, etc.)"*

159. The ground as presented contains three specific alleged factual inaccuracies which the panel addresses in turn below with the inclusion of the words "e.g." and "etc", implying alleged other factual inaccuracies.

160. The RA submitted (6.18) "Mr A has not stated what other facts he believes were factually wrong in the decision.

161. In response Mr A submitted (11) *"My submission dated 11 February 2022 explains which facts were wrong in the DC's decision"*. The panel notes that in doing so Mr A has provided no detail as to where in his lengthy submission the details may be found, which is unhelpful.

162. Further to 161 the panel notes that clearly there are a number of points of disagreement which is why the matter is before an appeal panel. However, a statement of disagreement does not automatically establish that the "facts" in dispute are wrong. It is the task of the panel to form its own view and the points of disagreement are addressed by the panel under the relevant grounds of appeal.

163. On the matter of Mr A agreeing with Company G's report, the panel notes submissions from the RA (6.15) that the Disciplinary Committee stated that *"he [Mr A] generally agreed with Company G's conclusions"*. [BOD Pt 2, 443, paragraph 43] and *"he generally agreed with the Company H and Company G reports"*. [BOD Pt 2, 464, 210]

164. In paragraph 19(a) of his 14 December 2020 Statement to the Disciplinary Committee [BOD Pt 2, 103] Mr A submitted *"Because the damage was widespread and common, and I generally agree with the structural observations made by Company G and the measurements taken from the first Company H Associates' Report (but not the conclusions), I did not take notes or measurements."*

165. It is unclear whether the bracketed reference *"(but not the conclusions)"* applied to the Company H Associates Report only or to the observations by Company G as well.

166. The conclusion of the panel is that Mr A at least generally agreed with Company G's report but there is no evidence that he agreed with it in total as may have been inferred by the RA.

167. On the matter of Mr A not being qualified to design a foundation the RA submitted (6.16) *"Mr A told the Trust that he was not able to complete a*

foundation design as he was not qualified in foundation design" referring to paragraphs 111, 118 and 120 of the Disciplinary Committee Decision.

168. Paragraph 111 of the decision [BOD Pt 2, 452] stated *"the Trust said Mr A told the builder he did not feel he was qualified to design a foundation to factor in the concerns the Trust had about ground vibration"* which in the panel's view clearly focused on the particular area of ground vibrations rather than Mr A's wider foundation design capability. Paragraph 120 [BOD Pt, 453] supports this view.

169. The panel has seen no evidence to suggest that Mr A does not see himself as having the expertise to undertake the structural aspects of foundation design and considers that the positions of Mr A and the RA differ in terms of context and semantics. The panel's comments under this ground of appeal do not address the separate issue of whether or not Mr A undertook geotechnical engineering work that was outside of his area of expertise.

170. Regarding the matter of Mr N not making any changes to Mr A's draft report, the RA referred in their submissions (6.17) to paragraph 162 of the Disciplinary Committee Decision [BOD Pt 2, 459] which stated that Mr N did not make any changes to Mr A's draft report. The panel notes that the same paragraph records that Mr N provided his advice over a series of phone calls.

171. In paragraph 54(b) of his 14 December 2020 Statement to the Disciplinary Committee [BOD Pt 2, 113] Mr A described how Mr N had provided geotechnical advice regarding his draft and stated *"Mr N reviewed the draft report and commented on it. The comments were adopted.."*

172. It is clear from 170 and 171 above that the RA and Mr A have the same interpretation as to the telephone calls between Mr A and Mr N leading up to issue of the report concerned, but unless Mr A told the Disciplinary Committee something that was different from his comments referred to in 171 above, the panel concludes that changes were made as a consequence of Mr N's advice/review, contrary to the RA's submission (6.16).

173. Mr N may not have physically made changes to Mr A's report which may have been the reason for the wording in the Disciplinary Committee Decision, but it is reasonable to conclude that Mr N's Geotechnical expertise was contributed. However, it is less than ideal that Mr N's inputs were not contributed in a manner which involves a document trail.

174. The elements of this ground all appear to reflect differences which could be seen to relate to semantics and do not contribute in a material way to the substance of the appeal.

Ground 51

"*Implied that there was onus on me to manage the case. I was only engaged to provide engineering opinion "if required" and on "as requested basis"*

175. Mr A has not directly addressed this ground in his submission, but it appears that it may relate to a statement in his submission (236 at page 50) where he submitted "*[D152] I did not manage claims/litigation strategy and therefore could not say which professional should do which work…"*

176. *"[D152]"* in 175 above refers to paragraph 152 of the Disciplinary Committee Decision [BOD Pt 2, 458] which stated *"The Trust said when Mr A was engaged in 2013, it was not aware of the differences between geotechnical and structural engineering. The Trust's view is Mr A should have recommended engaging a geotechnical engineer to review the Company H Foundation Options Rebuild report as it was a geotechnical report, and geotechnical engineering was not Mr A's area of expertise.*

177. The extract presented in 176 above is simply a statement by the Disciplinary Committee reporting the Trust's view. The panel considers that this cannot be interpreted as anything being implied by the Disciplinary Committee, as the ground alleges.

178. The RA submitted (6.50) that it had categorised Ground 51 along with seven others as unclear *"as Mr A had not provided any information to support these grounds of appeal".* Mr A made no submission in response on this point.

179. In the absence of any information in support of Ground 51, the panel considers that it has no merit.

Ground 52

"*Implied that other engineers' disagreement with my opinion indicated my incompetence or lack of care."*

180. The RA submitted (6.19) that it does not consider that the Disciplinary Committee Decision implied that other engineers' disagreement with Mr A's opinion meant he was incompetent or lacked care.

181. The RA further submitted (6.20 and 6.21) that the Disciplinary Committee considered all evidence before it, including written and oral hearing evidence [BOD Pt 2, P 470, 252] adding "*Based on its review of all the evidence, the Disciplinary Committee made the decision to uphold the complaint (BoD part 2, p 470 at 252). The Disciplinary Committee found a reasonable body of Mr A's peers would not accept his engineering services to be at a standard expected or acceptable to the profession and the public should reasonably be able to expect better from a Chartered Professional Engineer …"*

182. In response Mr A submitted (12) *"There is no evidence that DC established "standard expected or acceptable to the profession" and how my work measured against it. DC only alleged that my work was not up to a standard. I cannot see how DC could assess whether I met a particular standard without actually setting the standard, then reviewing my work (DC said they did not "peer review respondent's work") and then comparing it against the standard."*

183. There is no requirement for the Disciplinary Committee to establish, in a formal sense, as it appears Mr A suggests, *"a standard expected or acceptable to the profession"*. Rather, it is the Disciplinary Committee's role to consider all of the

evidence in a manner compliant and consistent with the Act and the Rules and make its decision. The panel is satisfied that the Disciplinary Committee has fulfilled that role.

184. The panel considers that the RA is in a better position than any other organisation to assemble a Disciplinary Committee whose members can function as the reasonable body of peers whose task is to carefully consider all of the evidence available and, based on that, exercise a decision as to whether or not the work in question meets the appropriate standard.

185. The panel has no reason to question the credentials of the Disciplinary Committee to carry out its function and no evidence has been presented that questions those credentials.

186. The submissions and in particular Mr A's response address matters which go beyond the allegations in the ground of appeal and which arise under other grounds.

187. The panel considers that Ground 52 is not proven.

Ground 53

"Disagreed with some of my technical opinions. I consider that engineering disagreement is not a reason for discipline. It is common that engineers disagree between themselves."

188. The RA submitted (6.22) that its submissions regarding Ground 52 apply to this ground. (180 and 181 above)

189. The panel considers that engineering disagreement on its own is not a reason for discipline, a view which can be inferred also from the RA's submissions (6.19) in relation to ground 52.

190. The matter under appeal relates to a complaint about the engineering services of Mr A and in the panel's view any evidence involving disagreements between engineers is incidental. It is the substance of the complaint that is now being

considered by the panel whose members recognise the need to establish not simply that there was disagreement with some of Mr A's technical opinions but whether or not any of those opinions were not appropriate for a Chartered Professional Engineer to have held.

191. The ground as stated appears to reflect a view that is not disputed and which does not affect the panel's deliberations.

Ground 54

"Did not demonstrate which parts of my work (if any) were incorrect or exactly what, if anything, could have been provided in the given circumstances (only a vague statement was made that a "robust preliminary design" should have been provided)."

192. This ground contains two elements, (i) that the Disciplinary Committee did not demonstrate which parts of Mr A's work were incorrect, and (ii) the Disciplinary Committee did not demonstrate what if anything could have been provided.

193. With regard to the first element the RA submitted (6.24) that *"In its decision, the Disciplinary Committee discussed initial engagement, adequacy of the reports, acting outside competence and other issues in the 'Analysis' section of their decision"* [BOD Pt 2, 463–468]

194. The panel has viewed the pages of the Disciplinary Committee Decision, referred to in 193 above and is satisfied that the Disciplinary Committee did in fact make it clear what they had determined were the shortcomings of Mr A's work, disproving the first element of Ground 54.

195. With regard to the second element the RA submitted (6.25) *"The role of the Disciplinary Committee was to determine whether at the time Mr A met the standard reasonably expected of a Chartered Professional Engineer .."* [BOD Pt 2, 462 at paragraph 252]. The RA also submitted *"Although Disciplinary Committee's* [sic] *may include educational comment the Disciplinary Committee's role is not to peer review a respondent's work and give feedback."*

196. Mr A in response submitted (12) *"There is no evidence that DC established "standard expected or acceptable to the profession" and how my work measured against it. DC only alleged that my work was not up to a standard. I cannot see how DC could assess whether I met a particular standard without actually setting the standard, then reviewing my work (DC said they did not "peer review respondent's work") and then comparing it against the standard."*

197. Mr A's response applied also to two other grounds and only loosely relates to Ground 54 and has been addressed under Ground 52 (183 to 185 above).

198. The panel agrees that it is not the role of the Disciplinary Committee to peer review a respondent's work and provide feedback.

199. The panel concludes that Ground 54 is not proven.

Ground 55

"*Did not acknowledge that an essential skill of structural engineers is to understand ground and geotechnical reports. We routinely use geotechnical data to design foundations."*

200. The panel agrees with the RA's submission (6.2) that this ground is the same as Ground 41 concerning competency in geotechnical matters.

201. The panel has addressed Ground 41 in 128 to 135 above and for the reasons applicable to Ground 41 finds that Ground 55 has no merit.

Ground 61

"*Expected me to comment on insurance policy matter (e.g. whether house is a rebuild or not)."*

202. This ground is one of eight categorised by the RA's submission (6.50) as unclear.

203. The panel has seen no clear reference made by Mr A between this ground and his submission but concludes that he is referring to paragraph 164 at page 30 of his submission in which he refers to paragraphs 31 to 36 of the Disciplinary

Committee Decision [BOD Pt 2, 442, 443] and states *"DC summarises various Company H and Company G reports but fails to acknowledge that none of them refer to correct "as new" standard of reinstatement prescribed by insurance policy terms and conditions."*

204. The panel can find no explanation by Mr A as to why he made this statement and more particularly has not seen any evidence that the Disciplinary Committee expected Mr A to comment on an insurance matter as alleged.

205. The purpose of Ground 61 is not clear and based on the absence of evidence to support the allegation contained in the stated ground of appeal, the panel finds that the ground is not proven.

Ground 62

"It appears that Disciplinary Committee's intent was to show that engineers generally disagree with me. This is incorrect. Also, two Judges accepted my opinion after intense and proper cross-examination (J and K cases)."

206. Ground 52 is addressed in two parts – (i) the allegation that engineers generally disagree with Mr A, and (ii) the statement that two judges accepted his opinion.

207. The RA's submission (6.28 and 6.29) in relation to the first part of this ground referred to the role of the Disciplinary Committee and stated *"Their role was not to show engineers generally disagree with Mr A."* The RA further submitted *"Mr A has not provided evidence to support that* [sic] *allegation…."*.

208. Mr A did not address the RA's submissions referred to in 207 above in his submission in response.

209. The panel has seen no evidence that supports Mr A's allegation regarding the Disciplinary Committee's intent to show that engineers generally disagree with him.

210. With regard to Mr A's statement that two judges accepted his opinion in the J and K cases, the panel agrees with the submission of the RA (6.30) that the cases referred to did not form a part of the complaint.

211. Based on the absence of evidence in support of the first part of the ground and the irrelevance of the second part to the matter being appealed, the panel considers Ground 62 to be without merit.

Ground 64

"Did not provide justification for conclusions made about professional conduct alleged not to have been followed."

212. This ground is limited to establishing whether or not the Disciplinary Committee provided justification for its conclusions made about Mr A's conduct. The ground does not address the correctness of the Disciplinary Committee's conclusions, and accordingly the panel limits its discussion to the adequacy of justification provided by the Disciplinary Committee.

213. The RA submitted (6.31) *"The Disciplinary Committee provided thorough reasons for its decision under the "Analysis" section of the decision, in which the Disciplinary Committee discussed the adequacy of reports" (BoD part 2, p 464- 466), acting outside of competence from (BoD part 2, p 466 – 468) and other issues from (BoD part 2, p 468)."*

214. The parts of the decision referred to in 213 above contain multiple clear statements which in the view of the panel provide an appropriate level of detailed reasoning for the conclusions of the Disciplinary Committee, or in other words, justification for their conclusions. The panel considers that Ground 64 is not proven.

Ground 65

"Incorrectly considered that only final engineering designs are costed by quantity surveyors."

215. The RA submitted (6.34) *"The Disciplinary Committee did not consider that only final engineering designs are costed by quantity surveyors"* and referred (6.35) to paragraph BOD Pt 2, 465 paragraph 218] where the Disciplinary Committee discussed Mr B's need for *"something that could be costed by a QS"*.

216. The panel has seen no evidence that supports the allegation contained in Ground 65, that the Disciplinary Committee considered that only final engineering designs are costed by quantity surveyors and therefore concludes that the ground is not proven.

Ground 66

"Made unfounded allegations of my intents and behaviours."

217. The only reference that the panel has been able to locate, which relates to this ground, is In Mr A's submission (Page 7, 23h,) which reads *"DC made unfounded allegations of my intents and behaviours without giving me opportunity to consider the matter and respond."* a statement which indicates an allegation of procedural breach by the Disciplinary Committee, which would be beyond the panel's jurisdiction to consider.

218. It appears to the panel that the ground represents a summary statement addressing one of Mr A's concerns.

219. Simply restating Ground 66 in paragraph 23h of Mr A's submission without reference to supporting detail does not prove the ground.

220. In the absence of any evidence in support of Ground 66 the panel can only consider the ground unproven.

Ground 68

"Presented my trivial and not uncommon oversights, which caused no harm to anyone and that could be easily rectified (e.g. not putting the date of site visit in my report) as detrimental to profession's standing in the public eye."

221. Mr A has addressed Ground 68 in two paragraphs of his submission. On page 52 at paragraph 248, referring to paragraph 167 of the Disciplinary Committee Decision he stated *"I note that omitting the inspection date from the report was a trivial error that could have been easily rectified upon notification."*

222. Mr A also submitted (Page 53 at paragraph 260), with reference to paragraph 208 of the Disciplinary Committee Decision *"I accepted that missing the date of inspection was an error. However, I consider the error to be trivial and easily corrected once pointed out. It does not change the essence of the report."*

223. Mr A appears to have been very selective in analysing just one matter in citing and addressing this ground which in the panel's view does not paint a full picture of the factors contributing to the Disciplinary Committee Decision.

224. Further to 223 above the panel notes that paragraph 208 of the Disciplinary Committee Decision [BOD Pt 1, 459] is one of 23 paragraphs addressing the adequacy of Mr A's reports, including amongst other matters:

- not identifying changes between revisions of reports (paragraph 206),
- difficulty to understand his reports on first reading (paragraph 207),
- criticism of Mr A's failure to keep notes on his site visit/activity (paragraph 211),
- generalised damage descriptions without links to the subject property (paragraph 213)

225. The panel considers that the Disciplinary Committee provided helpful context in paragraph 219 of its decision [BOD Pt 2, 465] where it stated *"Mr A did not do anything to compromise the safety of anyone, but his reports did not help the client. We would expect a reasonable Chartered Professional Engineer and member of IPENZ to have advised their client they needed a robust preliminary design with input from a geotechnical engineer. On this basis, we do not consider the reports to be sufficiently specific to the Trust's requirements, or*

what we would have expected from a reasonable member of IPENZ and Chartered Professional Engineer."

226. The RA submitted that it considers the Disciplinary Committee Decision robust and fair (6.36) and stated that the overarching role of the Disciplinary Committee is to protect the reputation of the engineering profession and the public from harm (6.37).

227. After addressing the process followed by the Disciplinary Committee (6.38), the RA cited extracts of the Disciplinary Committee's findings [BOD Pt 2, 465 paragraph 213 and 470 paragraph 249] as follows: *"We consider Mr A's reports contained generalised damage descriptions without specific links to the subject property. The wording used for building damage was vague, generic, philosophical, and of no specific value to the specific property, for example "internal stresses and strains". We note a number of these generic statements are included in the sample report provided to us. We are concerned that Mr A did not edit his report template adequately and with sufficient care to make it specific to the Trust's property and adequate for their purposes."*

"His [Mr A's] *reports did not meet the standard that would reasonably be expected of a professional structural engineer in the same circumstances. We consider that a reasonable body of Mr A's peers would not accept his engineering services to be at a standard expected or acceptable to the profession. We also consider that the public should reasonably be able to expect better from a Chartered Professional Engineer and member of IPENZ."*

228. Mr A submitted in response (12 page 4) *"There is no evidence that DC established "standard expected or acceptable to the profession….."*

229. The matter referred to in 228 above does not relate to the stated ground of appeal and is addressed under Ground 52 at 182 to 184 above.

230. Having considered the broader context of the matter addressed in the ground and the selective approach that Mr A has taken to address it, the panel considers Ground 68 to be unproven.

Ground 69

"Stated that I did not explain how I arrived at my conclusions and then, when pointed to explanations, stated that they were "theoretical" (which in my view they should be, as all engineering stems from theoretical background). Also see [40]."

231. The panel has seen no explanation in Mr A's submissions that addresses the Ground clearly and assumes that Mr A is referring to paragraph 213 of the Disciplinary Committee Decision [BOD Pt 2, 465] which read *"We consider Mr A's reports contained generalised damage descriptions without specific links to the subject property. The wording used for building damage was vague, generic, philosophical, and of no specific value to the specific property, for example "internal stresses and strains". We note a number of these generic statements are included in the sample report provided to us….."*.

232. The RA submitted (6.41-6.43) that they agree with the two elements of the statement contained in the ground of appeal.

233. The panel has viewed the various revisions of Mr A's reports and notes with respect to his report, revision D dated 11 September 2015 [BOD Pt 1, 88-100], that while section 4 (Structural Earthquake Damage Identified) makes site specific observations about liquefaction ejecta, albeit unquantified, the bulleted list of key earthquake damage lacks specificity to the Trust's property.

234. Further to 233 the panel considers this to be of little value and agrees with the conclusion of the Disciplinary Committee referred to in 231 above that *"the wording used for the building damage was vague, generic, philosophical, and of no specific value to the specific property"*.

235. The panel considers that the statement contained in the first sentence of the ground of appeal is a reasonable statement of fact but contrary to the presumed intention of Mr A does not contribute evidence that would support the appeal being upheld.

236. Mr A's inclusion of the words *"Also see [40]"* in this ground refers to Ground 40 which related to his proposal to prepare a written technical submission. That matter has been addressed at 65 and 66 above and has no relevance to Ground 69.

Ground 70

"Presented certain behaviours as widely accepted by other engineers, whereas they are not."

237. The panel has seen no information in Mr A's submissions, that supports this ground, nor is there any direction by Mr A to any specific statement(s) in the Disciplinary Committee Decision which could provide a basis for the panel to consider the matter.

238. In the absence of supporting evidence the panel gives no weighting to Ground 70.

Ground 71

"Presented Disciplinary Committee's mere disagreement with my engineering opinion as a sufficient demonstration of my not meeting minimum professional standards, without justifying their position."

239. The panel considers that the central issue of this ground of appeal is the allegation that the Disciplinary Committee did not provide justification for their findings that Mr A did not meet the minimum expected professional standards.

240. This ground addresses the same issue as Ground 64, which has been addressed at 212 to 214.

Ground 72

"Accepted Mr B's expectations which were inconsistent with his behaviour (e.g. expectation of high standard of service on one hand, and on the other hand, refusing to instruct me to do the work needed to achieve the expectations, refusing to provide information required by me to do the work, overdue invoices)."

241. The RA in its submission (6.45 to 6.48) addressed this ground as three allegations - (i) concerning inconsistency between Mr B's expectations of high standard of service, and failure to instruct Mr A on work to meet those expectations, (ii) Mr B's refusal to provide information requested by Mr A, and (iii) overdue invoices.

242. As noted in 61 the second and third allegations are contractual matters and beyond the jurisdiction of the Council.

243. With regard to the first allegation, the RA submitted (6.47) *"The standard Mr A was held to was not the standard expected by Mr B, rather it was to the standard reasonably expected of a chartered professional engineer and member of IPENZ (BoD part 2, p 470 at 252). Mr B's views were recorded in the Disciplinary Committee's decision, in accordance with the principles of natural justice."*

244. Mr A's wording of the first part of this ground is consistent with other information provided by or attributed to Mr A about Mr B's behaviour and contributes context to the environment in which Mr A was engaged and providing services to the Trust. However, the panel acknowledges that the benchmark against which Mr A's behaviour is assessed is the standard reasonably expected of a chartered professional engineer as submitted by the RA (243 above).

245. The panel considers that the first part of Ground 72 does not provide a basis for the appeal to be upheld but does contribute context for the panel to take into account in its decision.

Ground 73

"Disregarded and criticised my open-mindedness and willingness to consider other engineer's opinion when presented to me."

246. The panel has seen no information in Mr A's submissions, that supports this ground, nor is there any direction by Mr A to any specific statement(s) in the Disciplinary Committee Decision which could provide a basis for the panel to consider the matter.

247. In the absence of supporting evidence the panel gives no weighting to Ground 73.

Ground 77

"Implied that my work was not suitable for costing by a quantity surveyor (QS), whereas the costing was done without any queries from QS brought to my attention."

248. The panel has seen no information presented by Mr A in support of this ground of appeal, nor has the panel seen any statement in the Disciplinary Committee Decision which could represent an implication on the part of the Disciplinary Committee that Mr A's work was not suitable as alleged.

249. Paragraph 165 of the Disciplinary Committee Decision [BOD Pt 2, 459] under the heading *"Evidence from Mr B"*, reads "Mr B *said he had attempted to settle the various issues with Mr A directly, but that the endless reports produced caused him a lot of unnecessary stress. He said the QS could not price the Mr A's work based on his reports as a 30% difference in embedment depths was unacceptable….."*

250. Paragraph 218 of the Disciplinary Committee Decision [BOD Pt 2, 465], under the headings *"Analysis, Adequacy of reports"* read *"In his 22 August 2014 email to Mr A, Mr B said explicitly they needed something which could by costed by a QS. Subsequent to this email, the Structural Damage and Reinstatement Reports and the Structural Addendum all state further geotechnical investigation and information was required."*

251. The statements referred in 249 and 250 above appear to be the only statements in the Disciplinary Committee Decision to which Ground 77 might apply. Furthermore, as they both represent statements by Mr B, with no conclusions made by the Disciplinary Committee the panel is unable to see any evidence that the Disciplinary Committee implied that Mr A's work was not suitable for costing by a quantity surveyor.

252. The panel considers that Ground 77 is not proven.

Ground 78

"Erroneously assigned the role of High Court expert witness to me from the outset of my commission (whereas I was in fact instructed to appear in court only in April 2016, almost 3 years after my engagement)."

253. Mr A described his initial engagement with the Trust in his 14 December 2020 statement to the Disciplinary Committee [BOD Pt2, 101] submitting *"13 – I was first engaged by Mr B in or around June / July 2013. Mr L emailed me on 17 June 2013 asking if I had capacity to be involved in the matter: This is a single house case against Southern Response. Please let me know if you have time to be involved."* and *"14 - I confirmed that I had capacity and provided Mr L with a copy of the Short Form Agreement for Consultant Engagement. It was signed by me on 27 June 2013. The scope of this was broad, and included: Structural Engineering advice, as required to assist with the settlement of the claim (including court appearances as may be required)".*

254. Mr A was engaged by the Trust on the recommendation of Mr L, counsel for the Trust. Mr L's role would logically have been focussed on the litigation process relating to remediation of the Trust's property.

255. In the Disciplinary Committee Decision [BOD Pt 2, 443] the Disciplinary Committee stated *"In his initial response to the Trust's complaint, Mr A referred to his work as a High Court expert witness. In his written submissions to us, Mr A said he did not consider he was being engaged to provide expert evidence or as an expert witness for the Trust's High Court proceedings at this point. He acknowledged he was being engaged to provide his expert engineering opinion. He said he knew the Trust was involved in litigation with Southern Response but was unaware what stage it was at.*

256. The RA (6.49) cited paragraph 198 of the Disciplinary Committee decision [BOD Pt 2, 463] which read *"We reject Counsel's submission that Mr A was not engaged as an expert engineer at the outset. We consider there was a reasonable expectation that, should the need arise, he would be engaged as an expert witness."*

257. The panel notes the proviso *"should the need arise"* in the statement cited in 256 above.

258. The panel concludes that while Mr A only received instructions in March 2016 to perform the functions of an expert witness for the High Court, he can have been under no illusions that from the beginning of the engagement his work was contributing in one way or another to a process which included High Court proceedings, and that he was engaged by the Trust with such involvement clearly in mind.

259. Regardless of whether or not Mr A was specifically instructed to act throughout the entire period of his engagement by the Trust as an expert witness, his obligations and the standards of professional services applicable as a chartered professional engineer are no different. Consequently, the panel is of the view that this ground whether proven or not does not define the outcome of the appeal.

Ground 80

"Assessed my work against certain industry-standards, without demonstrating how such standards were established (e.g. that engineering reports must contain photographs, etc.)."

260. The pivotal issue in regard to this ground of appeal is the allegation that the Disciplinary Committee assessed Mr A's work against industry standards without demonstrating how those standards were established.

261. In response to the RA's submissions regarding Ground 52 Mr A submitted (12) *"There is no evidence that DC established "standard expected or acceptable to the profession" and how my work measured against it. DC only alleged that my work was not up to a standard. I cannot see how DC could assess whether I met a particular standard without actually setting the standard, then reviewing my work (DC said they did not "peer review respondent's work") and then comparing it against the standard."*

262. Mr A's submission referred to in 261, which also addresses the substance of Ground 80, has been addressed under Ground 52 (183 to 186 above).

263. The panel also refers to reference made to industry standards by Mr A in his submission (294) which read "*I was engaged in 2013 to provide structural engineering services to the Trust for the purpose of assisting with the insurance claim for earthquake damage. In my contract I committed to "exercise the degree of skill, care and diligence normally expected of a competent professional. However, until 2018 there were no industry standards that guided professional conduct related to insurance claims for earthquake damage."*

264. Mr A's statement that there were no industry standards that guided professional conduct related to insurance claims for earthquake damage, suggests to the panel that he believes that it there is no basis or benchmark for a disciplinary ruling to be made regarding such matters.

265. Situations such as referred to by Mr A in 263 can be viewed as complex engineering, an essential competency for a chartered professional engineer which is described in rules 6 and 7 of the Rules. In particular the panel refers to the description of complex engineering problems in rule 7(b) and 7(d) (underlined below).

> ***(2) "7 Definitions for purpose of minimum standard for registration***
>
> *For the purposes of rule 6,—*
>
> *….*
>
> ***complex engineering problems** means engineering problems that have some or all of the following characteristics:*
>
> *(a) involve wide-ranging or conflicting technical, engineering, and other issues:*
>
> *(b) <u>have no obvious solution and require originality in analysis:</u>*
>
> *(c) involve infrequently encountered issues:*
>
> *(d) <u>are outside problems encompassed by standards and codes of practice for professional engineering:</u>*
>
> *(e) involve diverse groups of stakeholders with widely varying needs:*
>
> *(f) have significant consequences in a range of contexts:*

(g) cannot be resolved without in-depth engineering knowledge."

266. Further to 265 the panel considers that just as an applicant for registration or renewal of registration as a Chartered professional Engineer can fail through his/her inability to demonstrate competence in complex engineering, there is no reason why matters relating to disciplinary matters with characteristics similar to those described in Rule 7(b) and 7(c) above cannot be properly and fairly considered and ruled upon.

267. The panel considers that its conclusions presented under Ground 52 concerning the disciplinary committee, its credentials and findings are equally applicable to addressing Mr A's submission referred to at 263 above.

268. The panel finds that Ground 80 is not proven.

Ground 82

"Referred to the irrelevant topic of fees that Company I charged the Trust. Also, the references were incomplete, and some were factually incorrect."

269. The Disciplinary Committee in paragraph 38 of its decision stated *"Mr B hand wrote on the contract "please advise if bill will be over $2,500 or when account hits $2,500". In his evidence at the hearing Mr B said he eventually spent over $40,000 engaging Mr A and there were no budget constraints. Mr A disputes this."*

270. With reference to the Disciplinary Committee's statement at 269 above Mr A submitted (165) that "*The total fees paid to Company I by the Trust were $11,873.75 exclusive of GST, considering $3,250 (exc. GST) reimbursement Trust received from Southern Response. This is significantly less than the extraordinary claim that Mr B "spent over $40,000 engaging Mr A". Whilst I acknowledge that DC stated that I disagreed with Mr B's claim, the matter of fees was wrapped-up by Investigative Committee and was not relevant to DC's deliberations. Also, DC did not seek to verify the amount claimed by Mr B, even though they appear to have a complete set of Company I's invoices (referred to*

throughout their decision). The fact that Mr B misrepresented the fees by inflating them 3.3 times, it raises the question as to what other things he also misrepresented.

271. Earlier Mr A submitted (18(e)) *"All commercial matter* [sic] *related to the fees the Trust was charged by my employer Company I for my work, because this was dismissed by the Investigative Committee. The fee analysis by DC was also incomplete and not reflective of all the background work that had to be done (i.e., respond to emails, phone calls, meetings, etc.) However, I discussed below the matter of delayed payments and Mr B's misrepresentation of the fees he paid to Company I."*. This was under the heading Admissibility of Evidence and was part of a list of evidence that Mr A considered should not be admissible.

272. The panel has not seen any detail in support of the *"incomplete"* or *"factually incorrect"* references contained in Ground 82.

273. Based on the evidence viewed, the panel does not consider Ground 82 to have relevance to the substance of the appeal and gives no weighting to the ground.

Key questions for panel to consider

274. While the multiple grounds of appeal have been addressed, their focus, in the view of the panel was in large part on matters incidental to the appeal. In determining whether or not the appeal should be upheld the panel must consider three questions to establish if Mr A departed from standards that should be expected of a reasonable Chartered Professional Engineer.

    (i) Did the standard of Mr A's advice and opinions fall below the standard reasonably expected of a Chartered Professional Engineer?

    (ii) Did Mr A provide geotechnical advice that was beyond his level of competence? and

    (iii) Did Mr A undertake the engineering services he provided to the Trust in a manner reasonably expected of Chartered Professional Engineer?

275. Drawing where relevant on the discussion under each of the respective grounds the panel addresses these three questions below.

Did the standard of Mr A's advice and opinions fall below the standard reasonably expected of a Chartered Professional Engineer?

276. Central to this question is the matter of Mr A's reporting, which is the primary product of his engagement to provide professional services to the Trust.

277. On page 2 of his 6 December 2017 letter to Engineering New Zealand [BOD, Pt 1, 7] Mr B stated *"I believe the structural engineering reports prepared by Mr A were neither careful nor competent. He failed to take any physical measurements and he took no photographs…"* and *"Mr A's structural damage and reinstatement reports were extremely general and recorded no specific items of damage. The identified damage was described in very general, non-specific terms (e.g. "Distortion and stretch of the foundation system caused distortion and stretch of the ground level floor framing of the house (bearers, joists, flooring). The distortion and stretch caused adverse, unquantifiable, and therefore unacceptable stresses and strains in the floor framing structure"), and the reinstatement recommendations often did not related to the damage he had identified."* This was addressed in the subsequent investigations by the Registration Authority and ultimately by the Disciplinary Committee whose decision is the subject of this appeal.

278. The Disciplinary Committee addressed the matter of Mr A's reporting at some length in their decision including:

    (i) under the heading *"Structural damage and reinstatement report"* [BOD Pt 2, 449-456]

    (ii) Under the heading *"Adequacy of reports"* [BOD Pt 2, 464-466]

    (iii) Under the heading / subheading *"Decision / Discussion"* [BOD Pt 2, 470 paragraph 249]

279. Paragraph 249 of the Disciplinary Committee Decision read *"As detailed in our analysis above, we find that Mr A did not undertake the engineering services he provided to the Trust in a careful and competent manner. His reports did not meet the standard that would reasonably be expected of a professional structural engineer in the same circumstances. We consider that a reasonable body of Mr A's peers would not accept his engineering services to be at a standard expected or acceptable to the profession. We also consider that the public should reasonably be able to expect better from a Chartered Professional Engineer and member of IPENZ."*

280. Mr A's reporting was at the centre of Ground 69 which is addressed at 231 to 235 above.

281. As noted with respect to Ground 69, the panel, having reviewed Mr A's reports presented in the Bundle of Documents, is concerned with the lack of specificity in the bulleted list of key earthquake damage, (for example the Company I report dated 8 September 2014 [BOD Pt 1, 47]). This observation aligns with and supports the wording in Mr B's 6 December 2017 letter (277 above) and is consistent with the findings of the Disciplinary Committee.

282. The panel also notes with concern that Mr A did not identify changes between revisions of his reports, which the panel regards as sloppy practice.

283. The panel also notes the following submissions by Mr A in his 14 December 2020 statement to the Disciplinary Committee

    (i) Paragraph 78(b) – *"I acknowledge that I made a number of broad observations. I accept that these could have been detailed with greater specificity, should there have been an associated scope variation approval by Mr B. I think the context of my engagement is important to explain some of my observations - I was frequently asked to provide advice on an urgent basis, with a broad instruction, incomplete information and a limited budget."* [BOD Pt 2, 122]

(ii) Paragraph 78(c) – "*But, despite these pressures, I acknowledge that I could have been clearer with my inspections, reporting, and language use. In hindsight, given the cost constraints, I could have provided Mr B with a choice between a broad report and a more detailed and specific report at the onset….*"

(iii) Paragraph 79 – *"I have reflected on my practice. To ensure that my reports always meet the client's instructions, I have implemented a report "checklist" to ensure all required matters are included in each of my reports, and a clear on boarding process for new clients to clarify the nature and expectations of my engagement."*

284. The statements of Mr A referred to in 283 acknowledge his acceptance that there were shortcomings in his reporting. It is to Mr A's credit that he has accepted the need to do better and while the panel appreciates that it may have been difficult getting appropriate and adequate instructions from his client, it was his duty to ensure that he was adequately briefed / instructed by his client and was not so constrained by the alleged lack of response from his client as to risk compromising his professionalism. In the view of the panel, not receiving adequate brief or instructions from a client is not a justification for failing to meet the standards reasonably expected of a professional engineer.

285. Having viewed the evidence available the panel finds that on the basis of shortcomings with his reporting, the standard of Mr A's advice and opinions fell below the standard reasonably expected of a Chartered Professional Engineer.

<u>Did Mr A provide geotechnical advice that was beyond his level of competence?</u>

286. On page 1 and 2 of his 6 December 2017 letter to Engineering New Zealand [BOD, Pt 1, 6 and 7] Mr B stated (under the heading *"Undertaking engineering activities outside of his areas of competence"*) *"When Mr A was engaged in 2013, the Trust and I were unaware there was any distinction between structural engineering and geotechnical engineering…. I am now aware of the distinction between structural and geotechnical engineering. I believe Mr A should not have*

commented on the Company H's reports as he is a structural engineer, not a geotechnical engineer. I do not recall instructing him to comment on the Company H's reports, but if I did, then he should have refused to do so."

287. The panel addresses in 288 to 305 below a number of statements from the Disciplinary Committee Decision under the heading / sub-heading "Analysis" / "Acting outside of competence" [BOD Pt 2, 466-468], along with Mr A's related submitted responses. The paragraph references are shown in brackets (DCnn).

288. (DC225) **"***Mr* A's *practice area is listed as structural engineering on the Engineering New Zealand and Chartered Professional Engineer registers. We agree being registered as a structural engineer does not preclude Mr A from undertaking work with a geotechnical element provided it is within his competency."*

289. Regarding the Disciplinary Committee's statement at 288 above, Mr A submitted (page 56, paragraph 277) *"In their 2016 assessment, ENZ agreed that the work similar to what I have done for the Trust was competent."* The thrust of this response has been addressed by the panel under Ground 44 (76 to 79 above) and found to have no merit.

290. (DC226) *"We consider the opinions in Mr A's reports are on expert geotechnical matters. For example, in Structural Foundation Reinstatement report – Rev C he has undertaken a "structural engineering review" of a geotechnical engineering report where he has provided commentary and opinion on the presentation of the geotechnical engineering work undertaken by Company H."*

291. Regarding the Disciplinary Committee's statement at 290 above, Mr A submitted (page 56, paragraph 278) *"I reject DC's allegation that I provided expert advice on "geotechnical matter". See [A01]. In their reports Company H provided geotechnical and structural opinions and I commented on structural ones.".*

292. The panel does not agree with Mr A's statement (291 above) on the basis that his reports contained statements about geotechnical matters, such as opinions and/or commentary on the ground improvement options.

293. (DC227) *"Further, Mr A asked for clarification of a number of geotechnical matters in a manner which gave the impression of geotechnical expertise. For example, on the application of CPT test results, he sought clarification if further CPT testing was required, and he stated "no objection" to ground improvement to "the proposed embedment of 13.5m". While he has identified for the Trust that detailed design of ground improvement works are required by "an experienced CPEng" he also made similar statements regarding inputs from an experienced structural Chartered Professional Engineer. These statements do not indicate to the client his own expertise does not extend to geotechnical engineering opinions."*

294. With regard to the Disciplinary Committee's statement at 293 above, Mr A submitted (page 56, paragraph 279) *"It is structural engineer's role to collaborate with geotechnical engineers. This involves asking questions and clarifications. My engagement letters state I was providing structural engineering services and exclude geotechnical engineering."*

295. The panel considers that Mr A's actions in expressing opinions on ground improvement solutions clearly went beyond the structural engineering boundary referred to in his response at 294 above. See further related discussion at 306 to 316 below.

296. (DC228) *"In Revision D to Mr A's structural damage and reinstatement report there is no information presented of the "review of various third party reports". He presents an opinion the new foundation system would (most likely) comprise "Ground improvement: 800mm diameter stone columns in a triangular pattern, at 1.8m centre-to-centre spacing extending 2m around the perimeter of the house, to about 20m below ground level". No rational analysis is provided and the opinion is at odds with his previous "no objection" to 13.5m deep ground improvement…"* The panel notes that the 13.5 m depth was one of a range of Company H options. It was not the specific design.

297. Referring to the Disciplinary Committee's statement at 296 above, Mr A submitted (page 57, paragraph 280) *"It was Company H's recommendation, not*

mine, that ground improvements extend 13.5m into the ground. It was my opinion that that number requires verification by design. Company H later changed their opinion and recommended 4m and 7m embedment. Why is no one asking them why they changed their opinion?"

298. The panel considers that Mr A's response at 297 makes it clear that even by Mr A's own words he has been expressing opinions which are geotechnical in nature or imply geotechnical knowledge/expertise. The panel cites as examples Mr A's statements of no objection to the ground improvement solution proposals and expressing the opinion that a numerical value produced by a geotechnical engineer on a geotechnical matter *"requires verification by design"*. The panel cannot see what credentials Mr A has for making the latter statement.

299. Further to 297 and 298 the panel also notes that it is Mr A, not Company H who is the subject of the disciplinary matter being appealed and any question as to *"why they changed their opinion"* is irrelevant to the matter being addressed.

300. (DC229) *"In our view Mr A has provided geotechnical advice. Mr A says this advice was based upon his experience. However, he does not have the geotechnical engineering competency to provide rational analysis to support his opinions…"*

301. Responding to the Disciplinary Committee's statement at 300 above Mr A submitted (page 57 paragraph 281) *"I disagree with DC's view that I did not have competences to provide opinions I did. In 2016 ENZ agreed I was competent. Judges for Case J and Case K similarly agreed with my views. I believe that due to compressed time at the hearing and lack of notification* [footnote reference by Mr A *"Notification is required to achieve natural justice"*]*, there exists a possibility that DC did not quite understand where I was coming from. I felt that there was very little opportunity at the hearing to properly consider questions and provide answers – prior notification of DC's questions would have alleviated this. I note I did offer to prepare technical paper for DC's consideration, but that was declined by DC."*

302. The matter of Mr A's 2016 competency assessment noted again by Mr A (301 above) has been addressed under Ground 44 and considered to be without merit, and similarly Mr A's reference to the Case J and Case K cases was discussed under Ground 62 (210 above) where it was noted as not forming part of the complaint. The reference to J and K cases is accordingly irrelevant. The matter of Mr A's offer to prepare a technical paper was discussed under Ground 40 (66 above) and was considered by the panel to represent an alleged procedural breach on the part of the Registration Authority and therefore beyond the panel's jurisdiction.

303. (DC230) "*Mr A did not provide us with an answer as to why he engaged Mr N for geotechnical advice for the December 2015 report, nor explained why he was not engaged from day one. The only reason which we can understand Mr A engaged Mr N for the December 2015 report was because he had received criticism from Company H in their report of the same month. In our opinion, prior to this he had provided expert advice on geotechnical engineering matters, and this was outside of his competence."*

304. Addressing the Disciplinary Committee's statement at 303 Mr A submitted (page 57 paragraph 282) *"It was not for me to engage Mr N. I recommended involvement of geotechnical engineer from the onset. DC is incorrect in stating that I engaged Mr N in December 2015 – it was the Trust that engaged him, upon my recommendation. This recommendation was one of many in line of recommendations. DC should ask the Trust why they followed that particular recommendation and engaged Mr N in December 2015 and not from day one. I forcefully reject DC's speculation about the reasoning behind engagement of Mr N, including that I provided "expert advice on geotechnical engineering matters" – DC's position is not correlated to the truth of the matter."*

305. The panel notes two distinctly differing opinions as to the reason why Mr N was not engaged much earlier but, for reasons discussed above (292, 295, 298) agrees with the Disciplinary Committee that prior to Mr N's engagement Mr A did provide expert advice that was beyond his expertise. The panel accepts that

Mr A may have been under pressure from Mr B to make progress without the latter necessarily assigning adequate resources. However, this does not relieve Mr A from his obligations to practice within his area of competence.

306. Further to 305 above, the panel observes that the first reference to Mr N was in the introduction to the Company I report labelled I, dated 9 December 2015 [BOD Pt 1, 101] which noted that where necessary, Company I were *"to seek an* [sic] *independent geotechnical advice from Mr N and include as part of structural engineering rational analysis"*. There is no record of the advice that Mr N gave Company I, but he appears to have been quoted on page 4 of the report [BOD Pt 1, 104, bullet points 2 and 3] in relation to alternative ground improvement to that proposed by Company H.

307. Having addressed above Mr A's statements regarding the findings of the Disciplinary Committee, the panel addresses in 308 to 316 below a number of report-based references which relate to Mr A's involvement with geotechnical matters.

308. Report A, dated 25 May 2014 [BOD Pt 1, 14 bullet point 5] notes *"Deep soil mixing, stone columns and low mobility grout columns – we have no objections to the proposed embedment depth of 13.5m (nominal) to generally meet TC2 performance for ULS Load case."* and then states [page 15 - bullet point 1] *"We believe …… For now, and without further substantiation, Foundation Style "Specific Design" shall be labelled 'not suitable'."*

309. Bullet point 3 of Report A [BOD Pt 1, 15] states *"It is our opinion that both the house and the garage/gym/office/laundry shall be founded on shallow foundation (e.g. reinforced raft) over ground improvement works designed to achieve performance equivalent to TC2)"* and then [BOD Pt 1, 21 to 25] Company I includes marked up design sketches by Company G, four of these marked up with stone columns, the latter being a geotechnical detail.

310. Report B dated 30 May 2014 appears to be an expanded version of Report A and at bullet point 5 [BOD Pt 1, 30] Company I in relation to the 13.5 m stone

columns in report A notes *"SLS cumulative diagrams shall be provided before exact scope of foundation works can be finalised"*.

311. Report D, dated 8 September 2014 [BOD Pt 1, 44] appears to be a revision of the first two reports with two additional sections - Part 6 on the NZ Building Act 2004 framework, and Part 7 with Company I's opinions on a Global Structural Reinstatement Strategy. Part 7 [BOD Pt 1, 49 bullet point 3] is the first mention by Company I of 20m deep stone columns for both the house and the outbuilding [BOD Pt 1, 51 bullet point 6]. The panel notes here Mr A's statement on ground improvement.

312. The purpose of Report E dated 12 August 2015 [BOD Pt 1, 59] was to address the repairability of the upper timber structure of the garage/office/gym/laundry and to provide further preliminary design information on the House and the garage/office/gym/laundry based on the Company O ground improvement proposal (not sighted by the panel). There was no mention in this two-page report about the ground improvements proposed by Company O but the structural foundation design provided by Company I assumed *"ground with properties equivalent to TC2 and static ultimate bearing pressure of 200 kPa"*.

313. Report F dated 13 August 2015 [BOD Pt 1, 62] is a further revision of Report D [BOD Pt 1, 67 and 69] and continues to propose the same 20m stone columns first mentioned in Report D. There is no mention of the Company O ground improvement proposal in this report or subsequent reports. The structural designs of the foundation and floor systems proposed in this report were subject to at least 30% contingency.

314. Report G dated 10 September 2015 [BOD Pt 1, 75] is a revision of Report F above, but differs in that the owner's builder has confirmed to Company I that the outbuilding's framework and roofing/cladding is not repairable, so the global structural reinstatement strategy was altered accordingly. Part 8 was added [BOD Pt 1, 83] in which Company I stated *"We have reviewed foundation design by Company V dated 8 September, 2015, and have no objections."* Company V's report [BOD Pt 2, 293 to 297] proposes two different foundations for the

dwelling and the outbuilding, but both are founded on stone columns, founded 14m below ground level.

315. In section 8 of Report H dated 11 September 2015 [BOD Pt 1, 96] in addressing Company V foundation design, Company I states "Mr P of Company V Engineering were [sic] engaged to design the foundation as they were more suited/qualified to design the foundation required to allow for shaking & vibration transfer in the area. I have reviewed their foundation design and have no objections." The last sentence is noted by the panel as being particularly relevant to the matter being addressed.

316. It is the view of the panel that the examples addressed in 308 to 315 all indicate occasions when Mr A can be seen to have been practicing / producing outputs in an area requiring geotechnical expertise with no documented evidence provided that his reporting on ground conditions and/or ground improvement solutions was backed by appropriate geotechnical expertise.

317. The panel also notes the following submissions by Mr A in his 14 December 2020 statement to the Disciplinary Committee [BOD Pt 2, 123]

    (i) Paragraph 78(f) – *"I regret not clarifying the scope of my services and making it clear that I should have been engaged as an expert witness from the outset. The basis of Mr B's complaint stems from the initial broad instructions(s) developing into one instruction to be an expert witness that was required to comment on very specific issues. In hindsight, I could have either from the outset - or as the engagement developed - required a specific email or letter of instruction that set out detail of the dispute and what I was required to advise on. I agree with the Investigation Committee that the lack of clear direction on my role within Mr B's dispute with Southern Response contributed towards the matters raised in the complaint."*

    (ii) Paragraph 79 – *"I have reflected on my practice. To ensure that my reports always meet the client's instructions, I have implemented a report*

"checklist" to ensure all required matters are included in each of my reports, and a clear on boarding process for new clients to clarify the nature and expectations of my engagement."

318. The statements of Mr A referred to in 317 indicate that he has reflected on the matters complained about and as noted in 284 it is to his credit that he has accepted the need to do better. Again, while the panel appreciates that it may have been difficult getting appropriate and adequate instructions from his client, it was his duty to ensure that he was adequately briefed / instructed by his client and was not so constrained as to risk compromising his professionalism. This reiterates the panel's comments in 284, that not receiving adequate brief or instructions from a client is not a justification for failing to meet the standards reasonably expected of a professional engineer.

319. In the view of the panel, Mr A may not have blatantly sought to practice as a geotechnical engineer, but his work has clearly crossed into the area requiring geotechnical expertise and the evidence demonstrates that this continued for much of the duration of his engagement by the Trust.

320. The conclusion of the panel, based on its assessment of the available evidence, is that Mr A did provide geotechnical advice that was beyond his level of competence.

<u>Did Mr A undertake the engineering services he provided to the Trust in a manner reasonably expected of Chartered Professional Engineer?</u>

321. The relevant parts of rule 46 of the Rules, which was revoked on 1 July 2016, requires that a Chartered Professional Engineer must:

"……

(a) not misrepresent his or her competence; and

(b) undertake engineering activities only within his or her competence; …."

322. Similarly, the relevant provisions of rule 42E of the Rules require that a chartered professional engineer:

"....

(a) must—

(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

323. The panel agrees with the summary statement of the Disciplinary Committee [BOD Pt 2, 470 paragraph 248] that *"Mr A had a general duty to act competently and with care in any work he undertook"* but considers the matter in the context of Rule 46, being the rule applicable at the time. Competence and care were appropriate principles, although not specifically stated in the Rule 46.

324. In addition to statements in his 14 December 2020 statement to the Disciplinary Committee [BOD Pt 2, 123] referred to at 307 above the panel notes the following additional statements made by Mr A in the same document, which give some additional perspective to the manner in which he conducted his engineering services on his work for the Trust.

(i) Paragraph 78 – *"Reflecting on the work I completed for Mr B, whilst I consider it broadly consistent with mainstream engineering practice of the day, I agree there are areas that can be improved (many of which I have already identified and addressed).."*

(ii) Paragraph 78(a) – *"It is normally a standard practice for me to clearly state the date of an inspection in my reports. I did not do that in the reports I prepared for Mr B. I have no explanation for this - I cannot explain why I did not state the date of the inspection in the reports, which is unfortunate and clearly a mistake on my behalf. As best as I can recall, I have not made this mistake on other matters. Including date(s) of inspection is part of my reporting checklist for many years now and part*

of my usual practice meaning it will not likely happen again. It appears to have been an oversight in this case."

(iii) Paragraph 78(b) – *"I acknowledge that I made a number of broad observations. I accept that these could have been detailed with greater specificity, should there have been an associated scope variation approval by Mr B. I think the context of my engagement is important to explain some of my observations - I was frequently asked to provide advice on an urgent basis, with a broad instruction, incomplete information and a limited budget."*

(iv) Paragraph 78(c) – *"…But, despite these pressures, I acknowledge that I could have been clearer with my inspections, reporting, and language use. In hindsight, given the cost constraints, I could have provided Mr B with a choice between a broad report and a more detailed and specific report at the onset, rather than at later stages (see para 45[b] and 59). As I have said above, I could have been firmer in requiring input from a geotechnical engineer and other disciplines."*

(v) Paragraph 78(d) – *"I also acknowledge that I could have made it clearer in my reports that I agreed with Company G's assessment of the damage to the Property."*

(vi) Paragraph 80 – *"I am of course disappointed to be appearing before the Disciplinary Committee. But I have used this experience to reflect on my practice and my work for Mr B. As, I have said, I acknowledge that there is space for improvements to work I did for Mr B. Some of these issues were caused by the nature of my engagement with Mr B - but I acknowledge that I must (and do) take responsibility for my own actions and for maintaining my own professional standards.*

325. Notwithstanding Mr A's observations about Mr B's apparent unwillingness at times to provide clear, adequate and timely instructions, the panel notes that it

was the duty of Mr A to ensure that he at no point undertook work that was outside of his area of expertise.

326. Further to 325 the panel considers that Mr A should have persisted to ensure that he was adequately briefed and that sufficient and appropriate resources, including geotechnical expertise were provided by the client at the appropriate time to ensure that his work was able to meet the standards that would be reasonably expected of him as a Chartered Professional Engineer.

327. Based on the evidence it has seen the panel agrees with the findings of the Disciplinary Committee that:

    (i) Mr A did not undertake his services in a manner reasonably expected of a Chartered Professional Engineer, his reports not meeting the standard that would reasonably be expected of a professional structural engineer in the same circumstances, and

    (ii) Mr A provided geotechnical advice that was beyond his level of competence.

Penalty orders

328. Ground of appeal 86 refers to the penalties ordered by the Disciplinary Committee and is addressed below.

Ground 86

"According to NZ Bill of Rights 1990 ("Everyone has the right not to be subjected to disproportionally severe treatment or punishment"), the proposed punishment is grossly disproportional to the alleged offence as publishing my name threatens my reputation and therefore my and my family's livelihood."

329. Mr A provided no evidence in his submission in support of the alleged impact of publication of his name, nor did he respond to the Registration Authority's submission on the specific ground.

330. The Registration Authority submitted (6.67) in respect of Ground 86 – "*The Disciplinary Committee's ability to name engineers in their decision is a power given to them in the CPEng Act. Parliament does not consider naming an engineer to be unjust, as such a power is given to disciplinary committee's* [sic] *as a statutory power."*

331. The panel agrees with the Registration Authority regarding the ability to name engineers in decisions as established by the Act and discusses the matter of proportionality of the orders in the following paragraphs.

332. Having decided that the Disciplinary Committee was correct in finding that Mr A did not undertake engineering services in a manner reasonably expected of a Chartered Professional Engineer and that he provided geotechnical advice that was beyond his level of competence, the panel has considered the matter of penalty orders.

333. Under s22(1) of the Act, the RA may order that:

> *" (a) the person's registration be removed, and that the person may not apply for re-registration before the expiry of a specified period:*
>
> *(b) the person's registration be suspended for a period of no more than 12 months or until the person meets specified conditions relating to the registration (but, in any case, not for a period of more than 12 months):*
>
> *(c) the person be censured:*
>
> *(d) the person must pay a fine not exceeding $5,000."*

334. Limitations applying to the types of orders that may be made are set down in s22(2) of the Act which states:

> *" The Registration Authority may make only 1 type of order in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(d) in addition to an order under subsection (1)(b) or subsection (1)(c)."*

335. The provisions for orders relating to costs and expenses are set down in s22(4) of the Act which -:

> *" In any case to which section 21 applies, the Registration Authority may order that the person must pay costs and expenses of, and incidental to, the inquiry by the Authority."*

336. Notification requirements are set down in s22(5) of the Act which states that in addition to notifying the order in the register the Registration Authority:

> *"(a) must notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it; and*
>
> *(b) may publicly notify the order in any other way that it thinks fit."*

337. The Disciplinary Committee ordered [BOD Pt 2, 478 paragraph 312] that "*Mr A:*

> *a) is censured as a Chartered Professional Engineer and admonished as a Member of Engineering New Zealand*
>
> *b) pay a fine of $3,500 both as a Chartered Professional Engineer and a Member of Engineering New Zealand*
>
> c) *pay 50 percent of the costs incurred by Engineering New Zealand in investigating and hearing this matter, being $9,370 plus GST."*

338. The Disciplinary committee also ruled [BOD Pt 2, 478 paragraph 313] that *"In addition to notifying these orders in the register of Chartered Professional Engineers, the Registration Authority will, subject to any appeal by Mr A:*

> *a) notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it; and*
>
> *b) publish the Disciplinary Committee's final decision on this complaint on its website, in a public press release, and in any other communication it considers appropriate."*

339. In addressing the matter of orders, the Disciplinary Committee cited [BOD Pt 2, 471 paragraph 256] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*[4] in which the High Court determined a number of principles that must apply.

340. Reference is made to *Z v Dental* in 11 above and the panel notes and acknowledges the Disciplinary Committee's statement regarding consistency of

[4] [2012] NZHC 3354

Z v Dental with *Roberts* at paragraph 260 [BOD Pt 2 471] *"as Roberts lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty"*.

341. In Ground 83 Mr A alleged that the Disciplinary Committee *"were guided by the public interest factors considered by the medical profession"* adding that he considered this *"excessive as medical professional issues usually carry risk of personal harm, which is not the case in this matter."*

342. The matter referred to in 341 above was addressed in paragraphs 119 to 121 above. The panel accepts that the principles involved in *Roberts* and *Z v Dental* are applicable to this appeal.

343. The Council has no jurisdiction to consider the matter against the provisions of the Engineering New Zealand Rules and Disciplinary Regulations and accordingly does not address the matter of admonishment of Mr A as a member of Engineering New Zealand, which is referred to in 337 above. Similarly, the panel's consideration of any fine and / or order in respect of costs is based on the provisions of the Act and the Rules and makes no reference to the Engineering New Zealand Rules and Disciplinary Regulations.

344. With reference to the penalty order in the Disciplinary Committee Decision Mr A submitted (303) *"I was censured, admonished, ordered to pay a $3,500 fine and 50% of ENZ's costs, with my name being published in the decision. I feel it only reasonable to refer to a recent decision against Mr Q in which he signed-off faulty designs for five buildings in Masterton and was also fined $3,500 but without admonition, plus he was ordered to pay only 40% of costs. Although faulty designs did not actually fail, due to buildings' deficiencies there was an increased risk to occupants' lives. Potential adverse effects of Mr Q's misconduct are evidently more severe than anything adverse that could have, or did come out of the high-level insurance claim opinions I provided Mr B. My opinions did not put any lives at danger and did not cause any financial losses. Hypothetical designs I prepared for Mr B's insurance claim would have never been built – It is my opinion that Mr B's was merely interested in obtaining as*

high a pay out from the insurer as he possibly could. On the evidence I have provided, the punishment I was handed down is therefore disproportionate to the alleged offending."

345. The panel agrees with Mr A that the potential adverse effects of Mr Q's conduct[5] are more severe than any attributable to Mr A in respect of the Trust's property and this is a factor considered by the panel in relation to penalty orders.

346. Notwithstanding the statement at 345 above the panel notes that the finding of misconduct on the part of Mr A, in particular that he provided geotechnical advice beyond his level of competence, is a serious matter which does warrant a disciplinary response and which also justified the investigation that took place via the complaints process.

Removal or suspension of registration under s22(1)(a) and s22(1)(b) of the Act

347. The Disciplinary Committee did not make any order for removal or suspension of Mr A's CPEng, both being orders that the Registration Authority is entitled to make.

348. The panel has seen no evidence that Mr A represents a risk to the public and notes that he has made a number of changes to his processes as a consequence of the disciplinary action against him.

349. The panel also notes that a significant amount of time has elapsed since the conduct, which was the subject of the complaint, took place.

350. Based on consideration of the factors referred to in 348 to 349 the panel agrees that the Disciplinary Committee was correct in its decision not to order removal or suspension of Mr A's registration.

351. The panel makes no order regarding removal or suspension of Mr A's CPEng registration.

[5] Disciplinary Committee Decision (18 June 2021) on complaint about Mr Q

Censure under s22(1)(c) of the Act

352. As no order is made under s22(1)(a) or (b) s22(2) an order may be made in respect of censure.

353. Mr A has made no submission specifically challenging the order of censure and the panel concludes from his submission (paragraph 303) comparing the orders made against him with the orders made against Mr Qr, that his main focus was on the magnitude of fine imposed and the percentage share of cost ordered.

354. The panel acknowledges the seriousness of findings against Mr A, in particular that he provided geotechnical advice beyond his level of competence and considers that an order for censure is entirely appropriate.

Fine under s22(1)(d) of the Act

355. The panel has considered the two elements of the disciplinary finding against Mr A in addressing the appropriateness and magnitude of fine imposed, namely (i) not undertaking engineering services in a manner reasonably expected of a Chartered Professional Engineer, and (ii) providing geotechnical advice that was beyond his level of competence.

356. The finding that Mr A did not undertake engineering services in a manner reasonably expected of a Chartered Professional Engineer, and the panel's conclusion that this is a reflection of the adequacy of his reporting, is considered the lesser of the two findings.

357. The panel also notes that the Rules which were current at the time of the conduct complained about, did not contain the specific provisions of Rule 42E(a)(iii) – *"undertake engineering activities in a careful and competent manner"* that was enacted on 1 July 2016. The panel notes however that s21(1)(c) of the Act establishes the performance of engineering services *"in a negligent of incompetent manner"* as a ground for discipline.

358. The panel considers the second element, that Mr A provided geotechnical advice beyond his level of competence to be far more troubling and a matter

that both Mr A and other practitioners should be left in no doubt is unacceptable, this being for reasons of protecting the public and the reputation of the CPEng quality mark.

359. The panel acknowledges Mr A's submission that the penalties ordered by the Disciplinary Committee were disproportionate when the breaches in the respective cases against Mr Q and Mr A are compared.

360. As noted in 345 the panel acknowledges that Mr A's work in respect of the Trust's residential property did not result in any constructed outcome, whereas in the case of Mr Q, multiple inadequately designed buildings were constructed.

361. The panel considers that a fine of $3,500, which is at the upper end of the $5,000 range available was excessive in the circumstances based on the factors discussed in 355 to 360 above.

362. The panel considers a fine of $1,750 to be fair and appropriate.

Order in respect of costs and expenses under s22(4) of the Act

363. The panel accepts that the starting point for attributing costs and expenses of the Registration Authority is 50% of the total.

364. Reference is again made to 344 above where Mr A submitted that the penalties ordered against him in comparison to those against Mr Q *"were disproportionate to the alleged offending"*. In the case of Mr Q, a cost order was made for 40% of the Registration Authority's costs whereas the Disciplinary Committee made a cost order of 50% against Mr A.

365. One clear distinction between the two situations is that Mr Q reached agreement with the Registration Authority as to the allegations against him so that the Disciplinary Committee only had to consider the matter of penalties, whereas Mr A in appealing both the substantive and penalty elements of the decision continues to argue that he was not in the wrong.

366. Mr A's closing submission (305) in effect claims that he has nothing to answer for. However, as a consequence of the complaint process he has acknowledged some shortcomings and also acknowledged having since made a number of changes to his operating procedures (283, 318 and 324 above) which together with the panel's findings on the substantive elements of the appeal justify Mr A carrying a fair share of the Registration Authority's costs involved in the matter. Put differently, the panel does not see why a concession should be made with respect to costs, which would be at the further expense of Mr A's peers.

367. The panel agrees with the cost order against Mr A of 50%, being $9,370 plus GST.

Notification under s22(5) of the Act

368. The Registration Authority is obliged by s22(5)(a) of the Act to notify the Registrar of Licensed Building Practitioners of the order and the reasons for it, subject to the appeal provisions referred to in s22(6) of the Act.

369. Under s22(5)(b) of the Act the Registration Authority *"may publicly notify the order in any way it thinks fit"*.

370. A significant factor in considering an order in respect of public notification is the need for condemnation of any situation where a practitioner provides professional services which are beyond his/her level of competence and for that to be made clear both to the public and to the engineering profession, in order to maintain both the public's confidence in the profession and the profession's reputation.

371. Censure, a fine and an order in respect of costs, combined with obligatory notification of the decision to the Registrar of Licenced Building Practitioners, collectively represent a clear message to Mr A that the misconduct that has been found proven is not acceptable.

372. Notwithstanding the statement in 370 above the panel has also considered a number of mitigating factors with respect to publication. These include the

significant time that has elapsed since the misconduct occurred, the absence of any constructed issues or physical failures that could have been attributed to Mr A, the acknowledgement of shortcomings and changes made in response by Mr A and acceptance both by the Disciplinary Committee and the panel that his actions / conduct did not warrant removal or suspension of registration.

373. Having considered all of the factors addressed in 370 and 372 above the panel finds that on balance, publication under s22(5)(b) of the Act would be unduly harsh as an additional penalty order. A requirement not to publish Mr A's name would not prevent the RA from publishing redacted details to utilise the opportunity to share the learnings from the case.

374. The panel directs that any publicity regarding the appeal shall not name or identify Mr A. This direction shall also apply to censure.

Outcome of Appeal

375. The decision of the panel is to uphold the decision of the Disciplinary Committee that Mr A's engineering services have been below the standard reasonably expected of a Chartered Professional Engineer and that he has acted outside of his area of competence.

376. In respect of the misconduct referred to in 375 above the decision of the panel is that the penalty orders of the Disciplinary Committee are replaced with orders that Mr A:

    (i) be censured as a Chartered Professional Engineer,

    (ii) pay a fine of $1,750, and

    (iii) pay 50% of the costs incurred by Engineering New Zealand in investigating and hearing the complaint, the amount payable being $9,370 plus GST.

377. The panel notes the Registration Authority's obligations under s22(5)(a) of the Act in relation to notification on the Register, and notifying the Registrar of

Licensed Building Practitioners, subject to the appeal provisions set down in s22(6) of the Act.

378. In respect of the public notification provisions of s22(5)(b) the panel rules that Mr A may not be named in any publication relating to the case.

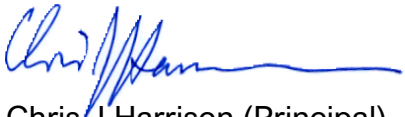
379. In accordance with s35 of the Act either party may appeal this decision to the District Court within 28 days.

Costs

380. The panel rules that any costs incurred by the parties in relation to this appeal shall lie where they fall.

Dated 31 May 2022

Signed by the Appeal Panel



Chris J Harrison (Principal)

Manjit Devgun

Alan A Winwood

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.

4. Appeals to the Council are by way of rehearing (s37(2) of the Act).

Schedule 2 – Extracts of the Act and the Rules

s21 of the Act:

(3) "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 practise engineering; or

(b) has breached the code of ethics contained in the rules; or

(c) has performed engineering services in a negligent or incompetent manner; or

(d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -

(i) either orally or in writing, made any declaration or representation knowing it to be false 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 45 (Revoked 1 July 2016)

(4) "45 Act with honesty, objectivity, and integrity

A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities."

Rule 46 (Revoked 1 July 2016)

(5) "46 Not misrepresent competence

A chartered professional engineer must—

(a) not misrepresent his or her competence; and

(b) undertake engineering activities only within his or her competence; and

(c) not knowingly permit engineers whose work he or she is responsible for to breach paragraph (a) or paragraph (b)."

Rule 42B (Took effect 1 July 2016)

(6) "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 (Took effect 1 July 2016)

(7) "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

(8) "42F Behave appropriately

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

(a) must—

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

(ii) treat people with respect and courtesy; and

(iii) disclose and appropriately manage conflicts of interest; and

(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 66

(9) "66 Disciplinary committee must determine complaint or inquiry

A disciplinary committee must, as soon as practicable after receiving a complaint or inquiry, hear the matter and decide—

(a) whether or not there are grounds for disciplining the person complained about under section 21 of the Act; and

(b) if so, whether and how to exercise the Registration Authority's powers under section 22 of the Act.

Rule 67

(10) "67 Powers of disciplinary committee

A disciplinary committee may—

(a) make, or appoint a person to make, any preliminary inquiries it considers necessary:

(b) engage counsel, who may be present at a hearing of the committee, to advise the committee on matters of law, procedure, and evidence:

(c) request the person complained about or the complainant to provide to the committee, within a specified period of at least 14 days that the committee thinks fit, any documents, things, or information that are in the possession or control of the person and that are relevant to the investigation:

(d) take copies of any documents provided to it:

(e) request the person complained about or the complainant to attend before the committee, at that person's own cost, on at least 14 days' notice:

(f) receive any evidence that it thinks fit:

(g) receive evidence on oath and otherwise in accordance with section 27 of the Act:

(h) require a person giving evidence to verify a statement by oath or statutory declaration:

(i) use the powers to summon witnesses under section 28 of the Act:

(j) provide information to assist the complainant and the person complained about in obtaining counsel or other advocacy assistance.

Rule 68

"68 Way in which disciplinary committee must consider disciplinary matter

(11) Before making the decision under rule 66 on a complaint or inquiry, the disciplinary committee must—

(a) Send details of the complaint or inquiry to the person complained about; and

(b) invite him or her to respond in writing to the complaint or inquiry within a specified period (which must be at least 14 days); and

(c) give the complainant, the person complained about, and any person alleged to be aggrieved (if not the complainant) at least 28 days' notification of—

(i) the time and place of the hearing; and

(ii) the right of those persons to be heard and represented at the hearing; and

(d) advise each of the persons in paragraph (c) that the person must notify the committee within a specified period (which must be at least 14 days) if the person wishes to be heard by the committee on the complaint or inquiry.

(12) *The complainant, the person complained about, and any person alleged to be aggrieved have the right to be heard and represented at the hearing.*

Rule 69

"69 Way in which disciplinary committee's decision must be made

The disciplinary committee's decision under rule 66 on a complaint or inquiry must be made in the following way:

(a) the committee must make its decision as soon as practicable, but may delay making the decision until the outcome is known of any other legal proceedings that may affect its findings; and

(b) if the committee is not unanimous, the decision of the majority of the committee is the decision of the committee (but dissenting members may issue dissenting views).

Schedule 3

Grounds

The grounds as cited in Mr A's Notice of Appeal are presented verbatim below.

" ***Ms C – Legal Advisor for and on behalf of ENZ:***

1. *Did not disclose to me when the Adjudicator became involved.*

2. *Passed my "without prejudice" communication with her (provided prior to formal proceedings and intended for good faith resolution of Trust's concerns) to the Adjudicator to decide on disciplinary matter under the Chartered Professional Engineer of New Zealand Act 2002. Some of my "without prejudice" communication was later used against me by the Adjudicator.*

3. *Seems to have not advised Adjudicator that, in his decision, he used my "without prejudice" communications which were intended solely in good faith to assist resolution of Trust's concerns.*

4. *Did not advise me (on her own volition) when the status of the matter changed from informal resolution of Trust's concerns to a formal complaint against me.*

5. *There is no evidence provided to me to show that ENZ carried out an examination of whether the complaint was made in bad faith, even though Mr B complained against me after losing in Disputes Tribunal and failed to pay the fees that the Tribunal ordered him to pay. Based on the documents provided by ENZ to me, no statutory declaration was required by ENZ from Mr B.*

Ms Susan Freeman-Greene - the then CEO of ENZ:

6. *Accepted the Adjudicator's report and passed it to Investigating Committee despite it being based on my "without prejudice" communications and containing other procedural/factual deficiencies listed below.*

Dr D - adjudicator:

7. *Accepted Mr B's factual claims without verification by at least requiring him to submit a statutory declaration.*

8. *Used my "without prejudice" correspondence in his deliberations, including using parts of it as a reason to refer the matter to Investigating Committee.*

9. *Did not establish veracity of facts (including facts provided by Mr B) that could have been easily established by simple enquiry. Therefore, effectively and based on hearsay/unverified statements from Mr B, Adjudicator referred the matter to Investigating Committee instead of dismissing the complaint as unsubstantiated.*

10. *Made erroneous statements such as that the "Trust relied on Mr A's advice before making the costly decision on whether to start legal proceedings against the insurer." I was engaged after litigation already commenced and the advice on whether to start legal proceedings was a legal, not engineering advice anyhow.*

11. *When provided with my "without prejudice" correspondence, Adjudicator did not request me to make it "on record".*

12. *Prejudicially referred to irrelevant matter (e.g. Case R and that Mr L was dismissed by the Trust)*

13. *It appears that Adjudicator did not read my reports in their entirety (e.g. Adjudicator stated, in relation to my 9 December 2015 report, that there is uncertainty about whether I sought geotechnical advice, whereas my report refers to advice provided by geotechnical engineer Mr N).*

14. *Used alleged opinion of another engineer (hearsay) without calling that engineer as a witness and giving me opportunity to respond (non-conformance with principles of natural justice).*

15. *Did not enquire whether I was satisfied that the brief provided to me was adequate and whether I was provided all approvals and information that I needed to do my work.*

16. *Did not take into account the fact that I advised the Trust that the witness statement skeleton proposed by Mr L was too light and that I recommended that more engineering information was included.*

17. *Lacked balance in relying on Mander J's views on my opinion in case R and disregarded J and K cases in which the High Court judges accepted my opinion.*

18. *Lacked balance in not considering that engineering opinions differ and that it is not necessarily the sign of inadequate engineering that judges do not always accept engineer's opinions.*

19. *Did not ask me whether High Court previously accepted my engineering evidence comparable to the advice I provided to the Trust (it did – J and K cases that preceded my involvement with the Trust).*

Investigating Committee – decision

The Investigating Committee:

20. *Did not declare conflict of interest of Mr S, director of Company T. I have had numerous antagonistic engineering disagreements (about earthquake damage and repairs) with Company T's engineers over the years and therefore Mr S should have recused himself.*

21. *Did not recognise ENZ's policy that geotechnical engineers can do structural engineering and that structural engineers can do geotechnical work. This policy is referred to in Adjudicator's report.*

22. *Misinterpreted various facts (e.g. that I did not state findings of my inspections in my reports, whereas I did, etc.)*

23. *Did not establish all relevant facts by enquiry or witness evidence.*

24. *Did not establish veracity of facts submitted by Mr B.*

25. *Made incorrect statements about my instructions from the Client.*

26. *Stated my work was insufficient without providing evidence of what more an engineer could have delivered with the same information and instruction (or lack thereof) which was provided to me.*

27. *Did not compare my work with the similar work of other engineers from the same period. Against the background of hundreds of reports by other engineers that*

I have on file (including the reports about Trust's property), my engineering work provided for the Trust is at least of comparable extent and quality.

28. *Did not acknowledge that my engineering reports concerning the Trust's property were the only ones that, according to ENZ's 2018 guidelines, correctly refer to the insurance policy terms and conditions as the source of the standard of reinstatement. No other engineer involved with the Trust's property (Company V and Company G) referred to the policy terms and conditions.*

29. *Used my "without prejudice" correspondence in their decision (originally provided to ENZ as general response to queries, intended to resolve Mr B's concerns in good faith).*

30. *Assessed my work from period 2013-2016 against ENZ recommendations published in 2018.*

31. *Assessed my work against certain industry-standards, without demonstrating how such standards were established. For instance, Investigating Committee says that engineer's reports have to refer to insurance policy – I can demonstrate engineering reports (possibly hundreds) which do not refer to the policy, including reports by Mr S's own company Company T. In any case, I referred to the insurance policy terms and conditions.*

32. *Turned a mere technical engineering disagreement (between Investigating Committee members and myself) into my not meeting professional standards. Xxx rephrase* [sic]

33. *Used incorrect definition of earthquake damage (correct one is defined in Parkin v Vero).*

34. *Claimed that it is engineer's job to assess what is required to bring an insurance claim to resolution.*

35. *Claimed I acted outside my area of competence without attempting to establish what that area of competence is. A simple reference to my 2016 CPEng submission would have revealed to Investigating Committee that ENZ accepted that I had competence in providing engineering advice comparable to what I provided to the Trust.*

36. *Did not ask me whether High Court previously accepted my engineering evidence comparable to the advice I provided to the Trust (it did, in J and K cases that preceded my involvement with the Trust).*

37. *Gave undue weight to the semantics of my references to advice received from geotechnical engineer.*

38. *Did not acknowledge that no engineering errors were found in my work.*

Disciplinary Committee - decision

In reaching their decision, the Disciplinary Committee:

39. *Failed to provide any charge or statement of case before the hearing. Considering the gravity of the situation, this was unreasonable. The hearing, therefore, became inquisitorial in its nature, during which I was put under time pressure to submit "ad hoc" oral evidence and find relevant information, without being given a fair chance to prepare specific responses prior to the hearing.*

40. *Disregarded my proposal (prior to the hearing) to prepare a written technical submission demonstrating the competence in the engineering matters on which I advised the Trust.*

41. *Did not acknowledge that structural engineers routinely interpret and use information obtained from complex geotechnical reports in structural engineering work (e.g. foundation design). I was assessed by ENZ as competent in foundation design, and therefore competent to understand and interpret geotechnical reports.*

42. *Used my "without prejudice" correspondence in their decision (originally provided to ENZ as general response to queries, intended to resolve Mr B's concerns in good faith).*

43. *Did not acknowledge that I was asked by Mr B for opinion on various occasions and that I provided the opinion sought. Disciplinary Committee failed to recognise that it is not engineer's job to assess whether such opinion was useful or not – this is job of a litigation lawyer. Mr L considered my opinions useful.*

44. *Did not check my latest CPEng assessment - a simple reference to my 2016 CPEng submission would have revealed to Disciplinary Committee that ENZ accepted that I had competence in providing engineering advice comparable to what I provided to the Trust.*

45. *Claimed the information was not provided when the said information was not requested of me.*

46. *Makes irrelevant adverse statements about Mr L without giving him opportunity to respond. This gives the reader an (incorrect) impression of my association with Mr L and that I was somehow responsible for his actions (or inactions).*

47. *Did not verify accuracy of Mr B's claims and published them as true (or represented that they are true and accepted). Many of Mr B's claims referred to by Disciplinary Committee are incorrect. Disciplinary Committee based arguments on top of these inaccuracies.*

48. *Erroneously implied that I should have automatically used other engineers' reports in my work without reasonable inquiry and verification of their suitability (e.g. that I should have accepted Company H report foundation recommendations, or that, based on Company G's report, I should have taken it as a given that the garage is to be demolished and rebuilt).*

49. *Provided factual inaccuracies (e.g. that I agreed with Company G's report, or that I said that I was not qualified to design a foundation, or that Mr N did not make any changes to my draft report, etc.)*

50. *Did not acknowledge that Mr B failed to provide information and instructions required by myself (on several occasions) to progress engineering work.*

51. *Implied that there was onus on me to manage the case. I was only engaged to provide engineering opinion "if required" and on "as requested" basis.*

52. *Implied that other engineers' disagreement with my opinion indicated my incompetence or lack of care.*

53. *Disagreed with some of my technical opinions. I consider that engineering disagreement is not a reason for discipline. It is common that engineers disagree between themselves.*

54. *Did not demonstrate which parts of my work (if any) were incorrect or exactly what, if anything, could have been provided in the given circumstances (only a vague statement was made that a "robust preliminary design" should have been provided).*

55. *Did not acknowledge that an essential skill of structural engineers is to understand ground and geotechnical reports. We routinely use geotechnical data to design foundations.*

56. *Did not include all relevant information in its deliberations.*

57. *Considered irrelevant matter such as opinions of Company G and Company H in respect of my work, without calling those engineers as witnesses, nor was there enough opportunity for me to properly consider this matter during the hearing.*

58. *Made comments about Company I project file without asking to see the file or examining the file.*

59. *Did not sufficiently investigate facts that could be established by simple enquiry – e.g. when I visited the site, how much Company I charged the Trust, etc.*

60. *Did not acknowledge the potential for vexatious nature of Mr B's complaint (e.g. Mr B losing at Dispute Tribunal and its decision that he must pay Company I)*

61. *Expected me to comment on insurance policy matter (e.g. whether house is a rebuild or not).*

62. *It appears that Disciplinary Committee's intent was to show that engineers generally disagree with me. This is incorrect. Also, two Judges accepted my opinion after intense and proper cross-examination (J and K cases).*

63. *Did not ask me whether High Court previously accepted my engineering evidence comparable to the advice I provided to the Trust (it did – J and K cases that preceded my involvement with the Trust).*

64. *Did not provide justification for conclusions made about professional conduct alleged not to have been followed.*

65. *Incorrectly considered that only final engineering designs are costed by quantity surveyors.*

66. *Made unfounded allegations of my intents and behaviours.*

67. *Did not consider that Mr B failed to meet some of the obligations under the contract for professional services – for instance, that "The Client shall provide to the Consultant, free of cost, as soon as practicable following any request for information, all information in his or her power to obtain which may relate to the Services." (my emphasis). My numerous requests for information were not fulfilled by Mr B.*

68. *Presented my trivial and not uncommon oversights, which caused no harm to anyone and that could be easily rectified (e.g. not putting the date of site visit in my report) as detrimental to profession's standing in the public eye.*

69. *Stated that I did not explain how I arrived at my conclusions and then, when pointed to explanations, stated that they were "theoretical" (which in my view they should be, as all engineering stems from theoretical background). Also see [40].*

70. *Presented certain behaviours as widely accepted by other engineers, whereas they are not.*

71. *Presented Disciplinary Committee's mere disagreement with my engineering opinion as a sufficient demonstration of my not meeting minimum professional standards, without justifying their position.*

72. *Accepted Mr B's expectations which were inconsistent with his behaviour (e.g. expectation of high standard of service on one hand, and on the other hand, refusing to instruct me to do the work needed to achieve the expectations,*

refusing to provide information required by me to do the work, overdue invoices).

73. *Disregarded and criticised my open-mindedness and willingness to consider other engineer's opinion when presented to me.*

74. *Did not acknowledge that the Trust and their lawyer Mr L never provided me with a clear direction and litigation strategy.*

75. *Did not acknowledge that the Trust managed the matter personally by its beneficiary (Mr B) and in a piecemeal manner over a long period of time (almost 3 years).*

76. *Did not acknowledge Mr B's unwillingness to spend fees on services required and requested to achieve his desired outcomes.*

77. *Implied that my work was not suitable for costing by a quantity surveyor (QS), whereas the costing was done without any queries from QS brought to my attention.*

78. *Erroneously assigned the role of High Court expert witness to me from the outset of my commission (whereas I was in fact instructed to appear in court only in April 2016, almost 3 years after my engagement).*

79. *Did not acknowledge and consider the adverse effects of the disorganised and piecemeal environment (created by Messrs B and L) on my ability to provide engineering services.*

80. *Assessed my work against certain industry-standards, without demonstrating how such standards were established (e.g. that engineering reports must contain photographs, etc.).*

81. *Used opinions of third party engineers (hearsay) without calling them to give evidence and giving me opportunity to respond (non-conformance with principles of natural justice).*

82. *Referred to the irrelevant topic of fees that Company I charged the Trust. Also, the references were incomplete, and some were factually incorrect.*

83. *Were guided by the public interest factors considered by the medical profession. I consider this excessive as medical professional issues usually carry risk of personal harm, which is not the case in this matter.*

84. *Referred to "openness and transparency in disciplinary proceedings" and yet, as demonstrated above, did not carefully follow those principles.*

85. *Due to the inquisitorial nature of the hearing (under time pressure and without knowing the charges prior to the hearing), Disciplinary Committee's factual inaccuracies, reference to irrelevant matters, silence on significant amount of relevant matter and reference to the hearsay matter on which I was not given opportunity to respond, Disciplinary Committee's decision has a "flavour" of injustice.*

Disciplinary Committee - penalty decision:

86. *According to NZ Bill of Rights 1990 ("Everyone has the right not to be subjected to disproportionally severe treatment or punishment"), the proposed punishment is grossly disproportional to the alleged offence as publishing my name threatens my reputation and therefore my and my family's livelihood.*

Schedule 4

Key correspondence and submissions

A. Paginated documentation pack (Part 1 of 2) (760 pages) provided by RA:

B. Paginated documentation pack (Part 2 of 2) (479 pages) provided by RA:

C. Notice of Appeal dated 21 October 2021

D. Email from CPEC Chair to parties and RA confirming receipt of Notice of Appeal, referring to accompanying documents and instructions to RA – 21 October 2021

E. Email from Ms M, confirming that the RA wishes to make submissions and naming Ms U ?? as the RA's primary contact – 29 October 2021

F. Email from Ms U to CPEC Chair containing links to the two parts of the bundle of documents – 24 November 2021

G. Email from CPEC Chair confirming distribution of links to bundle of documents, and providing update on panel appointment and communications – 24 November 2021

H. Email from CPEC Chair to the parties, cc'd to RA, naming appeal panel and seeking agreement to panel members – 16 December 2021

I. Email from Mr A raising potential conflict of interest on the part of the proposed panel principal – 22 December 2021

J. Email from Mr B, in response to Mr A's email (I above) – 22 December 2021

K. Email from CPEC Chair responding to Mr A's concerns re conflict of interest and proposing self as an alternative panel principal – 23 December 2021

L. Further email from Mr B regarding (I above) 23 December 2021

M. Email from Mr A accepting proposition of Chris Harrison being panel principal – 23 December 2021

N. Email from CPEC Chair confirming that Chris Harrison would be panel principal – 23 December 2021

O. Email and letter from panel principal addressing grounds and scope of appeal, including appeal being limited to penalty decision, proposed submission schedule, hearing arrangements and communications – 24 January 2022

P. Email from Mr A providing clarification of timing of commencement of appeal period applicable to Disciplinary Committee's substantive decision – 25 January 2022

Q. Email from panel principal to Mr B and RA inviting responses to Mr A's email (P above) – 25 January 2022

R. Email from Ms U in response to panel principal's email (Q above) – 25 January 2022

S. Email from Mr B in response to panel principal's email (Q above) – 27 January 2022

T. Email and letter from panel principal agreeing that the appeal could consider the substantive decision and establishing an amended submission schedule – 27 January 2022

U. Email with links to appellant's submission from Mr A –11 February 2022

V. Email and RA submission from Ms U – 25 February 2021 5:31 pm

W. Email from Mr A noting absence of submissions from the RA and Mr B at the time of the applicable deadline, and opining that he would therefore not need to file a submission in response – 25 February 2022

X. Further email from Mr A objecting to the panel accepting a late submission from the RA and from *"Mr B … if it arrives"* – 25 February 2022

Y. Email from Mr B in response to Mr A's email at X above – 25 February 2022

Z. Email from panel principal to Mr B asking if he wished the panel to consider allowing further time for him to respond – 28 February 2022

AA. Email from Mr A restating his objection to late submissions being accepted and asking for the basis of such acceptance – 28 February 2022

BB. Email from panel principal to Mr B seeking his advice on three matters, (including if he wished the panel to consider allowing additional time for submission) by not later than 5:00pm 4 March 2022 – 2 March 2022

CC. Email from panel principal to Mr A in respect of his objections regarding acceptance of late submissions – 2 March 2022

DD. Further email from Mr A regarding objections to late submissions – 3 March 2022

EE. Email from Mr B in response to Mr A's email at DD above stating *"I am filing today"* – 3 March 2022

FF. Email from panel principal to Mr A in response to his email at DD above – 3 March 2022

GG. Email from Mr A acknowledging that he would have five working days to prepare (submission in) response – 3 March 2022

HH. Email from panel principal to Mr A, noting that in the absence of any submission from Mr B by the 4 March 2022 deadline, he was now in a position to file a submission in response to the RA's submission, by 14 March 2022-7 March 2022

II. Email from Mr B with submission – 7 March 2022 6:05 pm

JJ. Email from panel principal to the parties and RA advising, with reasons that Mr B's submission would be treated as inadmissible – 8 March 2022

KK. Email from Mr B regarding inadmissibility of his late submission, and seeking a review of the decision – 8 March 2022

LL. Email from panel principal to Mr B cc'd to all addressing his email at KK above – 9 March 2022

MM. Email from Mr A with clarification of a point raised in Mr B's email at KK above – 9 March 2022

NN. Email from Mr B in response to Mr A's email at MM above – 10 March 2022

OO. Email from panel principal confirming that the panel's decision regarding inadmissibility of Mr B's 7 March 2022 email and submission would stand – 11 March 2022

PP. Email from Mr A with Dropbox link to his submission in response – 14 March 2022

QQ. Email from panel principal to the parties, cc to RA proposing that the appeal be heard on the papers and seeking advice as to any objections – 4 April 2022

RR. Email from Mr B agreeing to the proposal to hear the matter on the papers – 4 April 2022

SS. Email from Mr A agreeing to the proposal to hear the matter on the papers – 6 April 2022