

DISCIPLINARY COMMITTEE DECISION

COMPLAINT ABOUT A CHARTERED PROFESSIONAL ENGINEER AND CHARTERED MEMBER OF ENGINEERING NEW ZEALAND

In accordance with:

Chartered Professional Engineers of New Zealand Act 2002

Chartered Professional Engineers of New Zealand Rules (No 2) 2002

Institution of Professional Engineers Rules

Institution of Professional Engineers Disciplinary Regulations

Prepared by:

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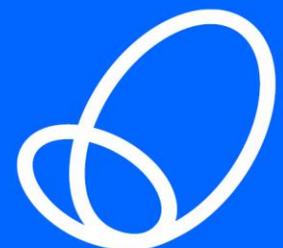
Chair of Disciplinary Committee

Trevor Robertson FEngNZ CPEng IntPE(NZ)

Hamish Wilson, nominated by Consumer New Zealand

Members of the Disciplinary Committee

18 October 2019



engineering
new zealand
Institute of Engineering Professionals

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EXECUTIVE SUMMARY

1. In October 2014 the complainant engaged an engineering firm (**company A**) to provide detailed design and construction monitoring of an architecturally designed house. The respondent engineer signed off the Producer Statement – Design (**PS1**) on-behalf of company A.
2. In June 2015 the council approved the design, and construction of the complainant’s house began in October 2015.
3. In April 2016, in response to the issues raised by the complainant, the respondent amended the design. Following this, the complainant engaged an engineer from another firm (**company B**) to review the design. Company B raised concerns about the bracing with the respondent and the design was amended twice before being finalised.
4. After discussions with the new engineer and the respondent, the complainant was unhappy with the respondent’s amended design and the contract between the parties ended.
5. In October 2016 the complainant complained to Engineering New Zealand about the respondent’s performance. This investigation relates to the respondent’s design of the complainant’s home in 2015.

DECISION

6. Having considered the reasons given by the Investigating Committee, and the parties’ joint memorandum to us accepting the Investigating Committee’s decision to refer this matter to a disciplinary committee, and accepting that the reasons for their decision constitute a ground of discipline; the Disciplinary Committee finds that the engineering services provided by the respondent in signing the PS1 and preparing the amended design for the complainant’s house did not meet the standard to be reasonably expected from a Chartered Professional Engineer and a Chartered Member of Engineering New Zealand. Accordingly, the Disciplinary Committee has upheld the complaint.

BACKGROUND

COMPLAINT

7. In October 2014, the complainant engaged company A to prepare a structural design for their house. The respondent engineer of company A subsequently signed off the PS1 for the structural design. After construction began, the complainant raised concerns with company A about the adequacy of the framing and foundations in the design. The complainant was not satisfied with the response to their concerns.
8. On 3 October 2016, the complainant complained to Engineering New Zealand¹ about the respondent. The complainant complained that the respondent:
 - a. acted incompetently when overseeing the structural design of the complainant's house;
 - b. failed to adequately respond to the complainant's initial concerns about the structural design;
 - c. acted incompetently when preparing updated structural designs for company B; and
 - d. failed to co-operate with the complainant and others to address the complainant's concerns.
9. Following an initial investigation, the complaint about the respondent's failure to respond or co-operate with the complainant was dismissed but the complaints about the adequacy of the respondent's engineering work was referred to an Investigating Committee for formal investigation.

INVESTIGATING COMMITTEE'S DECISION

10. The issues referred to the Investigating Committee for investigation were:
 - a. whether the designs authorised (by signing the PS1) or subsequently provided by the respondent, including the initial, amended, and final designs, were adequate; and
 - b. if not, did the respondent meet the competency standards expected of a reasonable engineer in providing engineering services for the initial, amended and final designs.
11. The Investigating Committee engaged Principal Structural Engineer CMEngNZ CPEng IntPE(NZ) from Opus International Consultants (**the expert**) to provide independent expert advice.
12. On 11 December 2018, the Investigating Committee dismissed the aspect of the complaint relating to the adequacy of the final designs.
13. The matter referred to us for determination by the Investigating Committee is whether the respondent acted competently and in accordance with the Code of Ethical Conduct in approving the original design by signing the PS1 and his involvement in preparing the amended design of the complainant's house.

DISCIPLINARY COMMITTEE

14. The members of the Disciplinary Committee are:
 - Jeff Jones FEngNZ
 - Trevor Robertson FEngNZ CPEng IntPE(NZ)

¹ On 1 October 2017, The Institution of Professional Engineers New Zealand changed their trading name to Engineering New Zealand. The Institution of Professional Engineers New Zealand remains Engineering New Zealand's legal name.

- Hamish Wilson (nominated by Consumer New Zealand).

Pre-hearing matters

15. On 13 May 2019, counsel for the parties filed a joint memorandum that:
 - a. The complainant and the respondent accept the facts as set out in the Investigating Committee's decision and that these constitute a ground of discipline; and
 - b. The parties consider the Disciplinary Committee can proceed straight to penalty.
16. On 24 May 2019, Engineering New Zealand, on the Disciplinary Committee's behalf, accepted the parties' request to dispense with a hearing of this matter. Annexed is a copy of the Investigating Committee's decision.

DISCUSSION

THE DISCIPLINARY COMMITTEE'S ROLE

17. 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 that members of the profession adhere to certain universal (or accepted) professional standards.²
18. The role of the Disciplinary Committee in the disciplinary process is to consider whether the respondent 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 the IPENZ Rules and Disciplinary Regulations.³

THE LEGAL TEST

19. The legal test to assess whether the respondent acted in accordance with acceptable professional standards is whether they acted in accordance with what a reasonable body of their peers would have done in the same situation.
20. 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".⁴
21. If the evidence is that the respondent acted in accordance with accepted standards, then we will dismiss the complaint. If the evidence is that the respondent did not act in accordance with accepted standards, then we will uphold the complaint. If the behaviour meets the latter criterion, we must consider whether the conduct "falls seriously short of accepted conduct" before imposing a disciplinary sanction.⁵

² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC).

³ When referring to the Rules or Disciplinary Regulations, we refer to IPENZ Rules and the accompanying Disciplinary Regulations that were in place at the relevant time.

⁴ *Robinson v RA* (10 July 2015, *Appeal Ruling #21*) Chartered Professional Engineers Council. Available at: <http://www.cpec.org.nz/appeal-rulings/appeal-21-10-july-2015-robinson-v-ra>.

⁵ *Ibid.*

22. This means that the matter for the Disciplinary Committee to decide in this case is whether the engineering services provided by the respondent, as agreed to by the parties, met the standard to be reasonably expected of a Chartered Professional Engineer and a Chartered Member of Engineering New Zealand.
23. Our approach to this question has been to consider the analysis and findings of the Investigating Committee as accepted by the parties, and the information that formed the basis of that decision.

ANALYSIS

24. We have considered the Investigating Committee's discussion contained in paragraphs 79 to 86 of their decision around the original design and the amended design contained in paragraphs 87 to 92 of their decision. We agree with the Investigating Committee's reasons for referring this matter to a disciplinary committee.

25. In particular, in respect of original design, we agree with the findings of Investigating Committee:

...it is concerning to us that the respondent has then gone on to sign a PS1. That is, they gave their professional opinion that these designs would be compliant with the Building Code. We do not believe the evidence reasonably supports that opinion in this case.

26. In respect of the amended design, we agree with the findings of the Investigating Committee:

We defer to the independent expert on this matter and favour [the expert's] view, that the design of 10 March 2016 was not adequate. We do not consider this to be the standard of performance that is expected of a competent professional engineer.

27. We note the parties accept the Investigating Committee's decision to refer this matter to a disciplinary committee, and that the reasons for their decision constitute a ground of discipline.

DECISION OF THE DISCIPLINARY COMMITTEE

GROUNDS OF DISCIPLINE

28. The Disciplinary Committee may make an order for discipline against a Chartered Professional Engineer and a Chartered Member of Engineering New Zealand if it is satisfied that the engineer concerned has performed engineering services in a negligent or incompetent manner.
29. To determine whether the respondent acted negligently or incompetently we refer to the decision of the Chartered Professional Engineers Council in *R v K*.⁶

The starting point is to consider what standard sets the benchmark for negligent or incompetent behaviour. We consider that incompetence is a more serious allegation than negligence. One can be negligent without being incompetent, but it is highly unlikely that someone who is incompetent is not also negligent.

⁶ *R v K*, Appeal Ruling 11/14, Chartered Professional Engineers Council at [36] and [38].

30. Further, *Robinson v RA* states:⁷

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 (the Rules)].

31. 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) recognise the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally; and

(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.

32. For the reasons set out in paragraphs 79 to 92 of the Investigating Committees decision, which we agree with, we find that the respondent failed to provide engineering services at a competent and acceptable standard that is reasonably to be expected of a Chartered Professional Engineer and Chartered Member of Engineering New Zealand.

33. In our view, the respondent's actions were not consistent with the elements of competence required of a Chartered Professional Engineer found in Rule 6 and in Rule 4.3 of the IPENZ Rules.

⁷ *Robinson v RA* (10 July 2015, *Appeal Ruling #21*) Chartered Professional Engineers Council at [40(c)].

34. We therefore conclude that the respondent has met the grounds for discipline under section 21 of the Chartered Professional Engineers of New Zealand Act 2002 and regulation 17 of the IPENZ Disciplinary Regulations.

DECISION

35. Having considered all the evidence, and the parties' joint submission, we have decided to uphold the complaint about the respondent. We find that the respondent did not meet the competency standards expected of a reasonable engineer in providing engineering services for the initial and amended designs for the complainant's house.
36. Having found the respondent in breach of their obligations to act competently, we need to determine what orders, if any, should be made against them.
37. There are a range of disciplinary actions available to the Disciplinary Committee as set out in section 22(1) of the Act. There are also a range of sanctions in respect of the respondent's membership with Engineering New Zealand under IPENZ Disciplinary Regulation 17(3).

ORDERS

38. On 7 August 2019, our reserved decision was sent to the parties and they were invited to make submissions on penalties. The complainant provided submissions on 21 August 2019. The respondent provided submissions on 18 September 2019.

RELEVANT LAW

39. In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*⁸ 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. 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.
40. 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.

⁸ [2012] NZHC 3354.

41. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under section 22 of the Act and IPENZ Disciplinary Regulation 17 and they are the principles we rely on when considering the appropriate penalty orders in this case.
42. The principles have general application to professional disciplinary proceedings in the light of the Supreme Court's decision in *Z v Dental Complaints Assessment Committee*.⁹ 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.*
43. This is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.
44. The Supreme Court in *Z v Dental Complaints Assessment Committee*¹⁰ 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.
45. The reasoning underlying *Roberts*' focus on practitioner rehabilitation is less relevant to penalties under the Act in light of the fact that 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.
46. 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.¹¹

THE COMPLAINANT'S SUBMISSIONS

47. The complainant submitted the appropriate penalty should be that the respondent:
- a. have their registration as a Chartered Professional Engineer and membership with Engineering New Zealand suspended for 12 months;
 - b. is fined \$5,000; and
 - c. is named and publicised in Engineering New Zealand's journal.
48. The complainant also submitted that the public should be notified, along with the notification to the Registrar of Licensed Building Practitioners.
49. The complainant also seeks a contribution to the costs of, and incidental to, bringing the complaint.

⁹ [2008] NZSC 55.

¹⁰ *Ibid.*

¹¹ Chartered Professional Engineers of New Zealand Act 2002, s 3.

THE RESPONDENT'S SUBMISSIONS

50. The respondent submitted that the appropriate penalty should be that:
- they are censured;
 - if a fine was ordered, that it be in the range of \$1,500 to \$2,500;
 - they are to pay Engineering New Zealand's costs of \$4,000.
51. The respondent acknowledged that any orders made by the Disciplinary Committee, and their reasons for it, would have to be notified to the Registrar of Licensed Building Practitioners, but submitted that their name and the name of company A should not be published in any other forum.

DISCUSSION

52. 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.
53. The Disciplinary Committee has found that the respondent has departed from what could be expected of a reasonable engineer. That is, the respondent has breached their professional obligation to act competently.
54. In our view, the respondent's actions, if condoned, would undermine the public's trust in the engineering profession and reduce the public confidence in the Chartered Professional Engineer title and membership with Engineering New Zealand. The respondent's actions showed a lack of judgement; however, the departure from expected standards is at the lower end of the scale, and our orders need to reflect our view of the breach.

Registration and membership

55. In respect of orders relating to registration as a Chartered Professional Engineer, the Disciplinary Committee may order that:¹²
- an engineer's registration be removed, and that they may not apply for re-registration before the expiry of a specified period;
 - that their registration be suspended for a period of no more than 12 months or until they meet specified conditions relating to the registration;
 - that the engineer be censured;
56. In respect of orders relating to membership with Engineering New Zealand, the Disciplinary Committee may order that an Engineering New Zealand member be:¹³
- expelled from membership;
 - suspended from membership for any period;
 - suspended from membership until such time as the member has fulfilled requirements for professional development as have been specified by the Committee;

¹² Chartered Professional Engineers of New Zealand Act 2002, s 22.

¹³ IPENZ Disciplinary Regulations, reg 17(3)(a) – (d).

- suspended from membership for a period of time if by a prescribed date, the member fails to fulfil requirements for professional development as has been specified by the Committee.

57. In *A v Professional Conduct Committee*¹⁴ the High Court said, in relation to a decision to cancel or suspend a professionals' registration, that four points could be expressly and a fifth impliedly derived from the authorities:

First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element.' Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

58. In the recent decision of *Attorney-General v Institution of Professional Engineers New Zealand Incorporated and Reay*¹⁵ the High Court set out the standard the public expects when an engineer is a member of Engineering New Zealand:

[M]embership of a professional body, such as the Institution, can confer a status that signals trustworthiness to the public. This status reflects the value that society places upon the training and skill acquired by members and upon the Institution's ability to maintain the standards of its members through ongoing education, training and disciplinary processes.

59. The Court also went on to set out the public expectation of Engineering New Zealand's role in maintaining the standard of the profession:¹⁶

There is, however, a counterbalance to the public trust that is reposed in members of professional bodies such as the Institution. That counterbalance is the public expectation that the Institution will tightly regulate admission into its ranks and ensure members maintain high professional standards. The public expects that if a person is to be afforded the status of membership of the Institution, then those individuals will maintain professional standards and that those standards will be enforced by the Institution through, if necessary, disciplinary proceedings. If a professional body, such as the Institution, wishes to maintain that public trust, and the value associated with membership status, then it must act in accordance with this expectation.

60. The complainant submitted that the respondent be suspended from the register of Chartered Professional Engineers for a period of 12 months because the Investigating Committee noted that the respondent:

- failed to comply with standards, which is a serious matter;
- signed the PS1 despite not being able to confirm whether they checked the original design; and
- should have recognised the complexity of the building and the associated load paths.

¹⁴ *A v Professional Conduct Committee* [2008] NZHC 1387 at [81].

¹⁵ [2018] NZHC 3211 at [52] and [55].

¹⁶ *Ibid* at [56].

61. The complainant further submitted that the respondent continued to stand by this design, despite advice from other engineers; that they incurred significant cost in having the design reviewed; and, but for the review, the design would have resulted in life-safety issues. Further, that the respondent is a senior engineer and should be held to a higher standard.
62. The respondent submitted that the suspension as sought by the complainant would not be appropriate, as the Disciplinary Committee did not find any wide-ranging competency concerns nor identified that the respondent needed to undertake further professional development. Further, that suspension would be disproportionate and unfair to the respondent and their staff. The respondent also submitted that the complaint was historic, and significant work had been undertaken in company A to ensure that this did not happen again.
63. After considering the principles set out by the High Court in *Roberts* (set out in paragraph 39 above) we are not convinced that this case warrants the removal or suspension of the respondent's registration as a Chartered Professional Engineer or Chartered Member of Engineering New Zealand. The primary purpose of cancelling or suspending registration is protection of the public. Although we have upheld this complaint, we do not consider that the respondent's practice poses a risk to the public such that we would need to remove or suspend them. The respondent has accepted their failings in this case and has signaled the lessons they and company A have undertaken to prevent this happening again.
64. Although we accept that the respondent's actions may have caused the complainant significant costs in having the design reviewed, professional discipline exists to ensure professional standards are maintained and to protect clients, the profession and the community. Not to punish the engineer nor appease the complainant.
65. We have upheld the complaint, and we are therefore minded to make an order to make it clear that the profession does not condone the respondent's actions or behaviour. But taking the above into account, and, as we have not identified that the respondent's actions or behaviour raise any wide-ranging competency issues, we consider censure to be the most proportionate penalty in the circumstances.

Fine

66. The Chartered Professional Engineers of New Zealand Act 2002 and the IPENZ Disciplinary Regulations state that the Disciplinary Committee may order that an engineer pay a fine up to a maximum of \$5,000.
67. We do not consider it necessary to consider a fine under both the Act and the IPENZ Disciplinary Regulations and the Chartered Professional Engineers of New Zealand Act 2002.
68. The complainant has submitted that the respondent's conduct is of higher gravity than the IPENZ Disciplinary Committee decision of *Roberts* from 2015,¹⁷ where a fine of \$1,500 was imposed. The complainant also referred to an Engineering New Zealand Disciplinary Committee decision *Joyce*,¹⁸

¹⁷ Disciplinary Committee decision *Complaint about Steven Roberts* 27 May 2015; Summary available at:

https://www.engineeringnz.org/documents/245/DC_decision_regarding_inadequate_building_design.pdf

¹⁸ Disciplinary Committee decision *Complaint about Richard Joyce* 19 September 2018; Available at:

https://www.engineeringnz.org/documents/434/Disciplinary_Committee_Decision_on_complaint_about_Richard_Joyce.pdf

from 2019, where the Disciplinary Committee ordered a fine of \$3,500, and stated that the bar needed to be raised to condemn “this type of behaviour.”¹⁹

69. The respondent has submitted that the comparison to the IPENZ Disciplinary Committee decision of *Roberts* decision was unfounded and should be distinguished as Mr Roberts defended the complaint, only accepted his calculation errors and design mistake a week prior to the hearing and at the hearing said he would not do anything differently now.
70. The respondent says that they acted professionally, co-operated fully in the complaint process, apologised directly to the complainant at a meeting of the wider project team and the complainant’s solicitors, accepted the Investigating Committee’s decision that their actions constitute a ground of discipline and has reflected on the complaint and reviewed company A processes.
71. In respect of the *Joyce* decision, the respondent submits that when the Disciplinary Committee stated that “this type of behaviour” should be condemned it was referring to Mr Joyce’s behaviour. The respondent notes that the Disciplinary Committee commented unfavourably on Mr Joyce’s lack of professionalism, including that: either Mr Joyce’s record keeping and referencing was of a poor standard or there had been a deliberate effort to conceal his lack of engineering consideration; he had failed to comply with deadlines set by the Disciplinary Committee; and failed to engage in the hearing process.
72. As stated above, the respondent’s behaviour fell below the standard expected of a professional engineer, and it is important that Engineering New Zealand condemns this behaviour and that this condemnation is reflected in the fine ordered. We have considered precedent in this matter, including *Joyce* and other recent decisions that are yet to be published.
73. We have taken careful account of the cases that the parties referred to in their submissions. Reviewing other cases is helpful but each must be considered on its own merits and no two complaints are the same. Furthermore, we are not bound by precedent.
74. We consider that a fine of \$2,500 is appropriate.

Costs

75. The Disciplinary Committee can order that the engineer pay costs and expenses of, and incidental to, the inquiry by Engineering New Zealand and Registration Authority.²⁰ We note the ordering of payment of costs is not in the nature of penalty.
76. When ordering costs, it is generally accepted that the normal approach is to start with a 50% contribution.²¹ That, however, is a starting point and other factors may be considered to reduce or mitigate that portion. Those factors include whether the hearing was able to proceed on an agreed statement of facts, any co-operation from or attendance at the hearing by the engineer, and consistency with the level of costs in previous decisions. The balance of costs after the orders must be met by the profession itself.²²

¹⁹ *Ibid*, at [160].

²⁰ Chartered Professional Engineers of New Zealand Act 2002, s 22(4) and IPENZ Disciplinary Regulations, reg 17(3)(g) respectively.

²¹ Including *Cooray v Preliminary Proceedings Committee HC* Wellington AP 23/94, 14 September 1995 per Doogue J.

²² *PCC v Van Der Meer* 1019/Nur18/422P.

77. In respect of the medical profession, the Court in *Vatsyayann v PCC* said:²³

[P]rofessional 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 [themselves] 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.

78. Further, in *O'Connor v Preliminary Proceedings Committee* the High Court stated:²⁴

It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found.

79. The complainant made submissions that the respondent should be ordered to pay a contribution towards their costs of raising the complaint of \$5,000, on the basis that the Act does not prevent an award of costs to a complainant.

80. The respondent made submissions that they should be ordered to pay costs of Engineering New Zealand to the sum of \$4,000. The respondent submits that the mitigating factors in this matter are that they have fully cooperated in the complaint process in an effort to minimise the costs incurred by Engineering New Zealand, including accepting the Investigating Committee's decision, which obviated the need for an in-person hearing. Further, that a significant number of the complaints have not been upheld.

81. In response to the complainant's submission that the Disciplinary Committee should make an order to contribute to their own costs, the respondent provided a copy of a letter sent to Engineering New Zealand by counsel for the complainant dated 3 July 2018 that stated:

In addition to making a complaint to Engineering New Zealand, the complainant filed a civil claim in the High Court at Christchurch against company A, arising out of the same factual matrix. That matter has been resolved on a confidential basis ... [and] it was agreed as part of that settlement that the complainant will not pursue any compensatory orders in [the] complaint [to Engineering New Zealand].

82. We are not convinced by the complainant's submission that the Act can be interpreted in such a way that the Disciplinary Committee could make an order for costs to a complainant where a complaint was upheld. This interpretation would not be in line with the purpose of the Act, to establish the title of Chartered Professional Engineer as a mark of quality, or in line with the purpose of professional discipline generally. This interpretation is also not supported by case law, as set out in *O'Connor*. Even

²³ [2012] NZHC 1138 at [34].

²⁴ *O'Connor v Preliminary Proceedings Committee HC Wellington AP 280/89*, 23 August 1990 at [13] per Jeffries J.

if the Act was able to be interpreted this way, we would be reluctant to interfere with conditions of settlement in the High Court proceedings between the parties.

83. We have considered the respondent's submissions and the factors as they relate to the respondent's level of co-operation with the investigation, along with the respondent's acceptance of the Investigating Committee's decision, which led to dispensing with the in-person hearing, along with maintaining consistency with other Disciplinary Committee's orders for costs. We note that the costs incurred by Engineering New Zealand are already at the lower end of the scale because no in-person hearing was held.
84. In terms of mitigating factors, we are cognisant of the length of time that it has taken for Engineering New Zealand to hear this matter. We are also cognisant of the respondent's cooperation with the investigation to date, along with the dismissal of two aspects of the complaint.
85. Taking all factors into account, it is the decision of the Disciplinary Committee that the respondent pay 40% of costs incurred by Engineering New Zealand.

Naming

86. In addition to notifying any orders made against an 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.²⁵
87. In respect of membership with Engineering New Zealand, the Disciplinary Committee may order that the member be named, the order against the member be stated and the nature of the breach described in the official journal of the Institution or publicised in any other manner as may be prescribed by the Committee.²⁶
88. The Act does not prescribe factors the Disciplinary Committee should consider when deciding whether to name an engineer. While we are mindful of the specific legislative test of "desirability" set out in the Health Practitioners Competence Assurance Act 2003, we are guided by the public interest factors considered by the medical profession when deciding whether to name a practitioner.²⁷ 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; and that where an 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.²⁸
89. 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*²⁹ the Court of Appeal

²⁵ Chartered Professional Engineers of New Zealand Act 2002, s 22(5).

²⁶ IPENZ Disciplinary Regulations, reg 17(5)(h).

²⁷ The presumption in the Health Practitioners Competence Assurance Act 2003 is that hearing shall be in public, but gives the Tribunal discretion to grant name suppression. The test is whether it is "desirable" to prohibit publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both the interests of any person and the public interest.

²⁸ *Professional Conduct Committee of the Pharmacy Council of New Zealand v El-Fadil Kardaman* 100/Phar18/424P at [113] – [114].

²⁹ [2016] NZCA 474.

explored the principles that should guide the suppression of the names of parties, witnesses, or particulars in the civil context. The starting point is the principle of open justice.³⁰

90. The question is then, do the circumstances justify an exception to the principle of open justice. In a professional disciplinary context, a practitioner is “likely to find it difficult to advance anything that displaces the presumption in favour of disclosure”.³¹ 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.³²
91. Consistent with these precedents, the starting point is that naming of engineers subject to a disciplinary order is the normal expectation. This is because public protection is at the heart of disciplinary processes, and naming supports openness, transparency, and accountability.
92. The complainant made submissions that there are no reasons why public naming of the respondent would be inappropriate, that open justice should encourage public naming, and current and intending clients should be aware of the respondent’s conduct.
93. The respondent made submissions that there were compelling reasons to justify an exception to the starting point and supporting the suppression of the respondent’s name and identifying details; those reasons being that publication would amount to undue public shaming and have a punitive effect on themselves and their staff. The respondent further submitted that they do not present a risk to public safety, and it is not necessary to publish their name to demonstrate accountability. the respondent also relied upon *Ang v Professional Conduct Committee*,³³ specifically that:

[W]here ... there is no striking off or suspension but rather, as here, a decision that practice may continue, there is much to be said for the view that publication of the defendant’s name is contrary to the spirit of the decision and counterproductive.

94. In response to the complainant’s submission that the respondent’s clients should be aware of this conduct, the respondent submitted that there was no basis for that assumption given their considerable experience and unblemished history, there being no suggestion of wider competency concerns and the steps that the respondent and company A had taken to review its processes in light of the complaint.
95. We agree with the respondent’s submissions. While the threshold to displace the principle of open justice is high, we agree the findings of the investigation do not suggest that there are wider competency concerns regarding the respondent’s practice, they have accepted accountability and, in these circumstances, publicly naming them would be a disproportionate response.
96. After considering the above factors, we consider there are reasons to justify the departure from the fundamental principle of naming. We agree that this would be disproportionate and punitive in this case.

³⁰ Ibid at [25].

³¹ Ibid at [32].

³² Ibid.

³³ *Ang v a Professional Conduct Committee* [2016] NZHC 2949 at [49] citing *B v B* HC Auckland HC4/92, 6 April 1993 at [99].

SUMMARY OF ORDERS

97. In exercising our delegated powers, we order that:

- a. the respondent is censured;
- b. the respondent is fined \$2,500; and
- c. the respondent is to pay \$7,305.10 plus GST towards the costs incurred by the Registration Authority in inquiring into the respondent's conduct (approximately 40% of Engineering New Zealand's total costs).

98. In addition, the Registration Authority will:

- 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 an anonymised version of the Investigating Committee's and Disciplinary Committee's final decisions on this complaint on its website, in a public press release and in any other communication it considers appropriate.

99. The respondent's name suppression is to be made permanent.

A handwritten signature in black ink on a light green background. The signature is stylized and appears to read 'Jeff Jones'.

Jeff Jones FEngNZ (Chair)

On behalf of the Disciplinary Committee