

IN THE MATTER OF	The Chartered Professional Engineers of New Zealand Act 2002 (“the Act”)
AND	The Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”)
IN THE MATTER OF	An inquiry by the Institution of Professional Engineers New Zealand (IPENZ) as Registration Authority (“the Complainant”) on its own motion pursuant to Rule 55(1)
AGAINST	Dr Alan Reay, Chartered Professional Engineer (“the Respondent”)

DECISION OF DISCIPLINARY COMMITTEE

1. INTRODUCTION

- 1.1 This Disciplinary Committee (DC) has been established under the Chartered Professional Engineers of New Zealand (CPEng) Act 2002 (the Act) and members appointed in accordance with Rule 85 of the Chartered Professional Engineers Rules (No 2) 2002 (the Rules) to inquire into a complaint from the Institution of Professional Engineers New Zealand (IPENZ) dated 11 December 2012, in its capacity as Registration Authority under the Act pursuant to Rule 55(1).
- 1.2 The grounds for the complaint are that the Respondent, as a Chartered Professional Engineer (CPEng), –
- (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 or misleading in a material particular;*¹
- 1.3 The particulars of the complaint are that the Respondent applied for registration as a CPEng after 22 February 2011 (being the date of a large seismic event in Christchurch) and did not disclose either in his application or interview with assessors his involvement in the design and construction of the Canterbury Television Building (CTV building) which was destroyed in the event with loss of life of 115 persons.
- 1.4 The complaint was referred to an Investigating Committee (IC) in accordance with Rule 59(b). The IC decided in its report of 9 April 2014 that the complaint should be referred to a DC in accordance with Rule 60.

¹ Refer to section 21(1)(d)(i) of the CPEng Act.

- 1.5 The inquiry that led to the complaint was initiated by Dr Andrew Cleland, then the Chief Executive of IPENZ which is the Registration Authority under the CPEng Act.
- 1.6 On 11 April 2011, Dr Reay applied for registration as a CPEng under the Act and CPEng Rules. His application was dealt with under a so-called “fast-track process” established following the 22 February 2011 Canterbury earthquake (February earthquake) to process applications for registration as CPEngs so that such persons could carry out building assessments and conduct business in the Christchurch central business district (referred to as “the Red Zone”).
- 1.7 While Dr Reay had previously obtained registration as a Registered Engineer in 1970 under the then-applicable Engineers Registration Act 1924, such recognition lapsed following the coming into force of the CPEng Act in 2002.
- 1.8 Dr Reay had not subsequently sought registration under the new CPEng Act evidently because he did not consider it essential to his work. This changed after the February earthquake and the introduction of a requirement that professional engineers seeking to enter the Red Zone for work purposes must be currently registered as CPEng and hold full authorities for work and certification.
- 1.9 Dr Reay’s application for registration as a CPEng, dated 13 April 2011 with its requisite series of forms and accompanying descriptions and reports, was received for consideration under the ‘fast-track process’. The Competency Assessment Board (CAB) had established this process to expeditiously respond to the large number of applications from structural engineers seeking to access the Red Zone. The fast-track process was able to be utilised by candidates who were Washington Accord qualified.²
- 1.10 The assessment panel assigned to consider Dr Reay’s application consisted of Mr Basil Wakelin MNZM DistFIPENZ CPEng IntPE(NZ) and Mr Tim Armitage MIPENZ CPEng IntPE(NZ).
- 1.11 The two referees nominated by Dr Reay in his application were Mr Arthur Tyndall CPEng IntPE(NZ) and Dr David Whittaker CPEng MIPENZ IntPE(NZ).
- 1.12 The Complainant asserts that it does not appear from any of the written material relating to the application or assessment as held in the IPENZ National Office at the time of the initiation of the inquiry, that Dr Reay at any point either in his application or his interview made any reference to or mentioned his professional association or involvement with the design of the CTV building.
- 1.13 The Complainant has asserted that the assessment of Dr Reay’s application undertaken by the panel involved review and consideration of the application forms and accompanying descriptions and reports as prepared and submitted by Dr Reay, together with a face-to-face interactive interview held at the Château on the Park Hotel in Christchurch on 19 April 2011.

² This is an international agreement involving a number of national professional engineering institutions providing for mutual recognition of academic qualifications as the prerequisite for professional assessment such as CPEng.

- 1.14 In a CA07 form³ prepared from that interview summarising their findings and their recommendations, the assessors recorded that Dr Reay's "*Christchurch buildings evidently performed well in the recent earthquakes*". However, and as is now known, Dr Reay's previous firm of Alan M Reay Consulting Engineer (ARCE) was the engineering consultancy that had been retained to design and observe the construction of the CTV building.
- 1.15 Dr Reay stated that while he was the sole principal of ARCE at the time that the CTV was designed and constructed he had not had any material personal involvement in the design and construction of the CTV building.
- 1.16 On 11 December 2012, Dr Cleland, initiated an inquiry under Rule 55 of the CPEng Rules into whether Dr Reay "*was in possible breach [of S 21(1)(d) of the CPEng Act] in that he did not disclose his role in the CTV building*" for the purposes of his application.
- 1.17 Dr Cleland later clarified in a 13 March 2013 email that his "*reason for initiating the inquiry was my concern, arising from this statement in the CA07, as to whether there had been sufficient disclosure or misleading representation to the assessment panel in regard to how buildings with which he was involved had performed.*"

2. INITIAL INVESTIGATION

- 2.1 IPENZ Complaints Research Officer (CRO) Charles Willmot FIPENZ CPEng IntPE(NZ) undertook and completed an initial investigation and recorded his findings in a report dated 12 April 2013. These are summarised below.
- 2.2 The overall view of the CRO was that there was no clear ground for dismissing the complaint and that in the circumstances it was inappropriate to dismiss it.
- 2.3 The CRO acknowledged that there was some uncertainty about the grounds for discipline. In itself the statement (presumably of the assessors) in the CA07 form that, "*his Christchurch buildings evidently performed well*" did not lead to the inevitable conclusion that Dr Reay misled his assessors in any material way. The CRO considered it was also uncertain that Dr Reay was under an obligation to disclose his role, whatever that may have been, in the design and construction of the CTV building for the purposes of what was essentially an assessment of his (current) competence some 25 years later.
- 2.4 The CRO could not, however, exclude the possibility of an applicable ground of discipline. Dr Reay's disclosure obligations, if any, about his professional association and involvement with the CTV building depended to a significant extent on the nature of the conversation and specific representations made during the assessment interview which were the subject of conflicting accounts.
- 2.5 In the CRO's view, it was premature to dismiss the complaint on the basis that there was no applicable ground for discipline without having this factual background carefully investigated by an Investigating Committee (IC). In this regard, the CRO considered an IC would be in a better position to resolve these

³ Competence Assessment Report.

factual issues and consider what professional disclosure obligations arose within the factual context and whether or not Dr Reay fulfilled those obligations.

- 2.6 The CRO considered that the matter clearly was not trivial, frivolous or vexatious. If the alleged misconduct was found to be with intent to hide the matter of the CTV building collapse from the knowledge of the assessors that would be very serious and it could not be recommended that the matter was insufficiently grave not to warrant further inquiry. The Registration Authority's interest was in the integrity of the assessment process that Dr Cleland was ultimately responsible for and it had a particular interest in ensuring that the assessment process was not compromised.
- 2.7 For these reasons the CRO recommended that the inquiry into whether or not Dr Reay failed to disclose his involvement in the design of the CTV building during his competence reassessment process and was, consequently, in breach of S. 21(1) (d) of the CPEng Act should be referred to an IC in accordance with Rule 59(b).
- 2.8 The Adjudicator was in agreement with the CRO. He particularly noted, given the nature of this complaint and having regard to the findings of the Canterbury Earthquakes Royal Commission (Royal Commission) report⁴ that referring this complaint to conciliation, mediation or any other dispute resolution process would not be appropriate.
- 2.9 His decision was that the complaint be referred to an Investigating Committee.

3. INVESTIGATING COMMITTEE

- 3.1 Appointments to committees formed during the disciplinary process are normally delegated to the Vice-President of IPENZ. On this occasion, the Vice-President declared a conflict of interest and so on 3 May 2013 the IPENZ Board delegated authority to the President of the Registration Authority Board Derrick Adams FIPENZ to appoint the members of the IC. Mr Adams appointed a committee on the same day.
- 3.2 In light of concerns raised by Dr Reay in a letter dated 26 June 2013, one of the appointees to the IC later resigned. A replacement was appointed by a similar process and the IC was reconstituted on 2 August 2013. The IC for this complaint comprised:
- Ir Peter McCombs FIPENZ CPEng IntPE(NZ) (Chair)
 - Mr Mike Cathie FIPENZ CPEng IntPE(NZ) (Member)
 - Mr Adam Thornton DistFIPENZ CPEng IntPE(NZ) (Member)
- 3.3 The business of the IC was conducted through email and face-to-face meetings.
- 3.4 The IC met with Dr Reay on Wednesday 14 August 2013 at the IPENZ offices in Wellington. This meeting was also attended by Mr Willie Palmer and Mr Olly Peers (counsel for Dr Reay) together with Mrs Barbara Reay (spouse of Dr

⁴ Report of the Canterbury Earthquakes Royal Commission, (29 November 2012); "*Canterbury Television Building (CTV) – Volume 6*".

Reay); and Mr Doug Latham [a present employee of Alan Reay Consultants Ltd (ARCL)].

3.5 The IC finalised its decision to refer the complaint to a Disciplinary Committee (DC) pursuant to Rule 60(a) on 9 April 2014.

4. DISCIPLINARY COMMITTEE'S PROCEEDINGS

4.1 A DC was appointed by the Registration Authority on 14 August 2014 pursuant to Rule 85(1) comprising the following:

- Mr Alan Bickers JP DistFIPENZ CPEng IntPE(NZ) (Chair)
- Dr Peter Lipscombe FIPENZ CPEng IntPE(NZ)
- Dr Alan Collier FIEAust CPEng(Aust) MIPENZ
- Hon Rodney Hansen CNZM QC
- Hamish Wilson (nominated by Consumer NZ Inc)

4.2 After consultation with the parties a Disciplinary Hearing Procedure was established on 14 November 2014. The DC also issued orders concerning public attendance and reporting by the news media on 24 February 2015.

4.3 The DC met in the Christian Cullen Lounge, Addington Raceway in Christchurch on 23rd and 24th March 2015 to inquire into the complaint. All members of the DC were present.

4.4 Messrs Pheroze Jagose and Jeremy Upson appeared as counsel for the Complainant.

4.5 Dr Alan Reay, the respondent, was present and represented by Counsel Mr Hugh Rennie, QC and Ms Kelly Paterson. Dr Reay's solicitor, Mr Willie Palmer, was also in attendance.

4.6 Mr Charles Willmot FIPENZ CPEng IntPE(NZ), IPENZ Manager Investigations and Discipline, represented the Complainant.

4.7 Ms Becca Barrow of IPENZ was in attendance and provided administrative support.

5. THE HEARING

Complainant's case

5.1 The DC received written legal submissions from counsel for the Complainant, the Registration Authority (IPENZ), which were taken as read.

5.2 Jeffery Wastney MIPENZ, the Registrar, gave evidence concerning the registration process for Chartered Professional Engineers under the Act.

5.2.1 He described the 'fast track process' established in early 2011 in response to the sudden demand for CPEngs in Christchurch resulting from the regulatory requirement that only CPEngs could enter the 'Red Zone' for engineering work purposes. The fast track process consisted of –

- a. Applicants submitting application form (CA01) by 15 April 2011;

- b. Applicants attending a one day workshop on 19 or 20 April 2011 to assist them to prepare their competence self-review form (CA03) and supporting portfolios of evidence;
 - c. Consideration of these and referees' reports by an assessment panel comprising two assessors (staff and practice), interactive assessment with the applicant, and preparation of a competence assessment report (CA07);
 - d. Consideration and, if appropriate, approval of the application by the Competency Assessment Board (CAB).
- 5.2.2 Mr Wastney said that following a discussion with the appointed assessors (Messrs Wakelin and Armitage) on 19 April 2011 he decided that a 'truncated fast track process' could be used for three IPENZ Fellows who had applied because it was expected that they "*would be able to more readily establish their competence*".⁵
- 5.2.3 Mr Wastney advised that he appointed Basil Wakelin as staff assessor and Tim Armitage as practice assessor to carry out assessments of the three Fellows using the truncated fast track process.
- 5.2.4 Mr Wastney described the process for assessment of the respondent's application:
- a. Dr Reay applied for registration on 13 April 2011 with his CA01 form completed, his CV, copies of his qualifications, other supporting information, his CA03 self-review form and a CA05 form setting out continuing professional development.
 - b. Because he was one of the three Fellows seeking a fast track assessment, Dr Reay was invited by telephone to attend an interactive assessment at short notice on 19 April 2011 without having attended the workshop.
 - c. Dr Reay was assessed by Messrs Wakelin and Armitage who were satisfied that he was "*clearly competent*"⁶ and submitted their report on 2 May 2011 to CAB who approved Dr Reay's registration as CPEng on 11 May 2011.
- 5.2.5 In response to questions from counsel and members of the DC, Mr Wastney said (inter alia):
- a. The approval of the truncated fast track process was made by himself and Mr Wakelin (a member of CAB) and Mr Armitage under Rule 11(2);
 - b. Dr Reay did not seek any modification of the fast track process;
 - c. The CAB's vote was by majority using email under Rule 79(5) on 11 May 2011 and reconfirmed on 6 July 2011;
 - d. The CAB had not reconsidered Dr Reay's registration after the complaint was lodged by Dr Cleland and had not raised any concerns with the Registration Authority about Dr Reay's registration;
 - e. The forms in the assessment process were focussed on assessing 'current competence' and referred to 'recent engineering work' although this was not specifically defined by a particular time period.

⁵ Wastney, paragraph 28.

⁶ Ibid, paragraph 38.

- 5.2.6 Arising from these question some areas of concern were identified to the DC as follows:
- a. Was Mr Armitage appropriately qualified and experienced in structural engineering to act as a practice assessor for Dr Reay's application? (Rule 75(2)(b) refers);
 - b. Was there delegated authority for the approval of the truncated fast track process by Messrs Wastney, Wakelin and Armitage? (Rule 11(2) allows the assessment panel to *"take steps in a different order, repeat or combine steps, or take additional steps."* It does not refer to amending a process approved by the CAB);
 - c. Was the CAB's vote on 11 May 2011 valid? (Rule 79(5) requires *"all voting members"* to consent and this did not occur).
- 5.3 Basil Wakelin, a member of Dr Reay's assessment panel and the CAB, gave evidence concerning the handling of Dr Reay's application.
- 5.3.1 He noted that the purpose of the training days on 19 and 20 April 2011 was to *"help applicants for CPEng under the fast track process to prepare their applications and supporting evidence"*.⁷ He suggested to Mr Wastney that the process could be truncated for Fellows who *"could be expected to have the right sort of track record and experience. We could do the interactive assessments there (ie at the training venue) and then without much preparation"*.⁸
- 5.3.2 Mr Wakelin described the interactive assessment with Dr Reay: *"he turned up with very good evidence ... there was no doubt that he was technically competent"*. He noted that the assessors had discussed with Dr Reay two of the examples of his work, viz. the IRD building and Christchurch International Airport parking building and terminal that had *"performed well"* in the earthquake on 22 February 2011.⁹
- 5.3.3 Mr Wakelin referred to his handwritten note of the assessment stating *"CTV discussed"*.¹⁰ He recalled a discussion about the reported observations of another person about the failure mechanism of the CTV building. He stated that Dr Reay did not say anything about his (then) firm's involvement with the design of the building. Had he done so this would have led to a series of consequential questions about the extent of his involvement. He learnt of Dr Reay's involvement some time later and was surprised by this news.
- 5.3.4 Mr Wakelin said that he spoke by telephone to Dr David Whittaker, one of Dr Reay's referees, on 28 April 2011 while on holiday in the Marlborough Sounds and recorded on the CA06 form¹¹ the following comment:
- "Consistently competent in all elements, specifically queried ethics and judgement and both very satisfactory."*¹²

⁷ Wakelin, paragraph 11.

⁸ Ibid, paragraph 13.

⁹ Ibid, paragraph 18. These buildings were part of Dr Reay's CA03 form as "two recent examples of engineering work".

¹⁰ Ibid, paragraph 20. Also 'Agreed Bundle of Documents' (ABD) p292.

¹¹ Referee Declaration and Evaluation form. This was no completed seen or signed by Dr Whittaker.

¹² ABD p281.

His handwritten notes of the interview recorded that Dr Reay's registration would be "well deserved".¹³

5.3.5 Ultimately, he completed the Competence Assessment Report (CA07), which was reviewed by Mr Armitage and submitted to IPENZ on 2 May 2011. This Report included the following comment:

*"His Christchurch buildings evidently performed well in recent earthquakes".*¹⁴

5.3.6 In response to questions Mr Wakelin said that work carried out by persons other than the applicant or work carried out 25 years ago are not normally relevant considerations in a competence assessment. He agreed that all engineers make mistakes and that it was part of a learning process but he opined that *"the boss of a firm must take some responsibility for actions of his employees"*.

5.3.7 Mr Wakelin did not recollect Dr Reay disclosing his firm's involvement with the CTV building and said that, had he known this fact he would have recorded it and reported it to CAB. Nevertheless he would still have probably considered Dr Reay was competent and recommended his registration to the CAB.

5.4 Mr Tim Armitage, the practice assessor on Dr Reay's assessment panel, gave evidence.

5.4.1 He described his recollection on Dr Reay's assessment interview on 19 April 2011. He could not recall if the panel directly questioned Dr Reay about the CTV building. He was *"positive, however, that Alan Reay did not mention his or his firm's involvement in the design of the CTV building's design"*.¹⁵

5.4.2 He supported his recollection of this with the following reasons:

- a. A personal friend had died in the collapse of the building. Had Mr Reay disclosed his involvement, Mr Armitage was certain he would have reviewed his involvement with the panel;
- b. Had Dr Reay disclosed his connection there would have been a series of consequential questions;
- c. Had Dr Reay referred to his former employee, David Harding, as the designer in the CTV building it would have been relevant to Mr Armitage who had previously worked with Mr Harding.

5.4.3 Mr Armitage also interviewed another of Dr Reay's referees, Arthur Tyndall, on 20 April 2011 who had no concerns about Dr Reay's competence.

5.4.4 Mr Armitage advised he has destroyed his notes of the interactive assessment.

5.4.5 In response to questions, Mr Armitage confirmed the sequence of events on 19 April 2011:

- a. He attended the training workshop to provide advice to engineers on how to complete their documentation for assessment under the fast track process;

¹³ ABD p293.

¹⁴ ABD p324.

¹⁵ Armitage, paragraph 17.

- b. He, Mr Wakelin and Mr Wastney discussed and agreed on a truncated fast track process for three Fellows;
 - c. Mr Wastney appointed Mr Wakelin and himself as the assessors for the three Fellows seeking CPEng;
 - d. He telephoned Dr Reay mid/late morning and asked him to attend at 1.00pm telling him to bring his documentation despite being told by Dr Reay that it was incomplete;
 - e. He had little time to review Dr Reay's CA03 and record and examples of recent engineering work before the interview.
- 5.4.6 Mr Armitage said that had Dr Reay disclosed his firm's connection with the CTV building the assessment of his current competence was unlikely to have changed depending on his answers to supplementary questions that would have arisen concerning the lessons he had learnt from the collapse (although Mr Armitage may have withdrawn from the panel).
- 5.5 Mr Peter McCombs, Chair of the Investigating Committee (IC), tabled the IC's report dated 9 April 2014. He said that the IC was inconclusive on the matter of Dr Reay's disclosure to the assessment panel but had determined that there were no grounds for dismissal. The IC considered that the DC would be better placed to investigate and determine the complaint.

Respondent's case

- 5.6 The DC received legal submissions from counsel for the Respondent, Dr Reay, which were taken as read.
- 5.7 The respondent, Dr Alan Reay, gave evidence to the hearing in which he rejected the allegation that he had provided misleading information to IPENZ in order to gain registration as CPEng.
- 5.7.1 He described the contractual relationships and responsibilities for the design and construction of the CTV building in 1986. He said that the design had been carried out by David Harding, Senior Registered Engineer, who was an Associate of the practice. Dr Reay said that he did not review Harding's drawings, calculations or specifications and that timesheets showed he devoted 3.5 hours to the project. The DC assumes from Dr Reay's explanation that this time related to finalising the contractual arrangements with the client, Williams Construction Ltd, and discussions with Mr Harding over the location of a shear wall.¹⁶
- 5.7.2 On 18 August 1988 Alan Reay Consultants Limited (ARCL) was incorporated to succeed the practice of ARCE. Dr Reay was a Director at ARCL.
- 5.7.3 In 1990/91 ARCL had further input into the CTV building as a result of a pre-purchase inspection report carried out by Holmes Consulting Group Ltd. A design error was identified in the detailing in the connections of the northern shear wall to the floor diaphragms. ARCL designed a remedial solution which

¹⁶ Reay, paragraphs 21-52 (there are no paragraphs 31-49).

was installed in 1991. This work was performed by another Director of ARCL, Geoff Banks, and Dr Reay had “*little direct involvement*”.¹⁷

5.7.4 Dr Reay described the sequence of events leading to his assessment for CPEng and interview on 19 April 2011. This was not inconsistent with the evidence of Messer’s Wastney, Wakelin and Armitage.¹⁸

5.7.5 He said that the involvement of ARCE, his former practice, with the design of the CTV building was not a matter he was trying to keep quiet. He had discussed it with Dr David Hopkins of the Critical Buildings Assessment Group of the (then) Department of Building and Housing and other professional colleagues.¹⁹

5.7.6 Dr Reay explained that his reason for seeking CPEng at that time through the fast track process was the restriction had been placed on entry to the cordon in the central city referred to as the ‘Red Zone’. Entry to the Red Zone was restricted to persons currently registered as CPEng.²⁰ He was seeking entry in order to carry out work for his clients in the Red Zone.

5.7.7 In relation to the assessment interview with Messer’s Wakelin and Armitage, Dr Reay stated that there was discussion about the IRD building and Christchurch International Airport terminal and parking building. There was also discussion about the Dean’s stand at the AMI Stadium. In response to a question from Mr Armitage about failures in the earthquake Dr Reay states that he said:

*“... My former firm, ARCE, had designed the CTV building. I said I was not directly involved in the design and that it had been a project of a senior employee of ARCE”.*²¹

He stated that the assessors said the CTV building was not relevant to the assessment of (his) current competence.²²

5.8 A statement of evidence from Mrs Barbara Reay, the wife of the respondent and a director and senior manager at ARCL, was received and taken as read.

5.8.1 It described how she was assisting Dr Reay with his documentation for CPEng assessment on 19 April 2011, that he received a phone call for him to attend an interview at short notice and how she later delivered a document to Dr Reay during the interview which he had left behind.

5.8.2 She said that after the collapse of the CTV building, Dr Reay was “*fixated with the catastrophe*”, had acknowledged ARCE’s involvement with the design and intended to disclose this to the assessors.

5.8.3 Mrs Reay said that after Dr Reay had returned from the interview he told her that the assessors had discussed the IRD building, the airport terminal and the AMI stadium. He said he had disclosed ARCE’s connection with the CTV building.

¹⁷ Ibid, paragraphs 53-61.

¹⁸ Ibid, paragraphs 64-73.

¹⁹ Ibid, paragraph 75.

²⁰ Ibid, paragraphs 64-68.

²¹ Reay, paragraph 65.

²² Ibid, paragraph 89.

- 5.9 A statement of evidence from Dr David Hopkins FIPENZ CPEng IntPE(NZ) was taken as read. He stated that a few days after the February 2011 earthquake, Dr Reay had visited him at the Critical Buildings Team in Christchurch and advised that ARCE had designed the CTV building.
- 5.10 A statement of evidence from Michael Dunn CPEng MIPENZ was taken as read. He stated that he had worked with Dr Reay on many projects and in his experience Dr Reay “operates with a high level of professional integrity”.
- 5.11 Noel Hanham FIPENZ CPEng IntPE(NZ) gave evidence about his experience with his application for CPEng registration under the fast track process. He described how he, Dr Reay and another Fellow were invited to use a ‘truncated’ process and he was invited to attend an interview before he had fully completed his documentation. He did not recall being instructed to include anything about his role in building failures following the Christchurch earthquakes. He did not recall any questions from the assessors regarding his views concerning the collapse of the CTV building.
- 5.12 A statement of evidence from Richard (Barry) Ramsay, a retired member of IPENZ, was taken as read. In it he stated “*many of the Christchurch buildings I designed have since been demolished consequent on the Christchurch earthquake*”. He said he knew Dr Reay as a professional colleague since the 1970s and has “*great respect for his technical competence as a structural engineer*” and found him to be “*highly ethical*”.
- 5.13 Dr David Whittaker CPEng MIPENZ IntPE(NZ) gave evidence. Dr Whittaker was ordered to give evidence as a result of a witness summons issued by the Chair of the Disciplinary Committee (under delegation) pursuant to Rule 67(i). Dr Whittaker said he had worked with Dr Reay on the Integrated Domestic Air Terminal project at Christchurch. Following the February 2011 earthquake he had been involved in an investigation into the performance of various buildings, including the CTV, for the (then) Department of Building and Housing. He stated that Dr Reay had confirmed to him on 16 March 2011 that his former firm had designed the CTV building but that he, personally, was not the designer. Dr Whittaker confirmed that he was one of Dr Reay’s referees for his application for CPEng registration. He advised that he had been contacted by Mr Wakelin on 28 April 2011. During the telephone conversation he did not refer to Dr Reay’s connection with the CTV building because he assumed that Mr Wakelin would be aware of it.
- 5.14 A statement of evidence from Willie Palmer (Dr Reay’s solicitor) was taken as read. He gave an account of a conversation he had with Mr Armitage on 5 February 2013 concerning the assessors’ interview with Dr Reay for his CPEng application.

Complainant’s submissions

- 5.15 Mr Jagose on behalf of the Complainant presented written and oral closing submissions.
- 5.15.1 He submitted that Dr Reay had not disclosed his connection with the CTV building either in his application documents or his assessment interview. Had he done so the assessors would have noted it. By not doing so, Dr Reay had misled the assessors.

- 5.15.2 He argued that in terms of S. 21(1)(d) of the Act the DC must satisfy itself that –
- Dr Reay had made an oral or written declaration or representation;
 - He had done this for the purposes of obtaining CPEng registration; and
 - He had done so knowing it to be misleading or false in a material particular.
- 5.15.3 Mr Jagose noted the evidence of the assessors, Messer’s Wakelin and Armitage, that even though the “*CTV building (was) discussed*” the connection of Dr Reay with the designer was not disclosed. Had that occurred both assessors had credible reasons for recalling that fact.
- 5.15.4 Mr Jagose said that it was clear from Dr Reay’s evidence that he was seeking CPEng registration. Hence the failure to disclose his CTV building connection was an intentional act on Dr Reay’s part.
- 5.15.5 Mr Jagose argued that the assessors were misled by Dr Reay because the CA07 report stated the Dr Reay’s “*Christchurch buildings had evidently performed well in the recent earthquakes*”. He submitted that that statement would not have been made in the CA07 had the assessors been aware of Dr Reay’s connection to the CTV building.
- 5.15.6 Mr Jagose suggested that Dr Reay’s connection to the CTV building was a relevant consideration. Whether or not it would have had any effect on the outcome of his application was immaterial. By not disclosing his connection he denied the assessors and the CAB the opportunity to consider whether the connection was material to an assessment of Dr Reay’s current competence.
- 5.15.7 Mr Jagose submitted that failure to disclose constituted a misrepresentation. He referred to the Fair Trading Act 1986 and noted that cases under that legislation had held that silence can constitute a representation:
- (a) Where there is a duty to disclose a relevant fact;
 - (b) Where an important fact is omitted; or
 - (c) Where a past representation becomes untrue due to a change in circumstances.
- He argued that the Fair Trading legislation should be considered as a guide in the interpretation of S. 21(1)(d) of the CPEng Act.

Respondent’s submissions

- 5.16 The Respondent, through his counsel Mr Rennie, presented written and oral closing submissions.
- 5.16.1 Mr Rennie outlined the elements of the complaint which the DC must consider as follows:
- Was there an oral or written declaration or representation by Dr Reay?
 - If so, was it false or misleading in a material particular?
 - If so, in making it did Dr Reay know it to be false or misleading in a material particular?
 - If so, did he make it to IPENZ for the purpose of obtaining registration?

- 5.16.2 Mr Rennie argued that Dr Reay had not attempted to hide his connection with the design of the CTV building, referring to the evidence of Dr Hopkins and Dr Whittaker.
- 5.16.3 Mr Rennie reiterated that Dr Reay's application documentation was incomplete at the assessment as a result of the "truncated fast track process" for Fellows. He submitted that Dr Reay had not stated that his buildings had performed well in the Christchurch earthquake – that was a conclusion of the assessors because the word 'evidently' was included in the CA07 report. Dr Reay consequently did not misrepresent the performance of his buildings. The evidence was that the CTV building was 'discussed'. The assessors discussed only some of Dr Reay's buildings and concluded he was "*clearly competent*".
- 5.16.4 Mr Rennie referred to the Complainant's argument that failure to disclose amounted to "misrepresentation by silence". He argued that there was no valid comparison of the CPEng Act with the provisions of the Fair Trading Act 1986 as suggested by the Complainant.
- 5.16.5 Mr Rennie submitted that the Complainant could not demonstrate that Dr Reay had made a written declaration or misrepresentation. The Complainant was relying on the evidence of the assessors at the interactive interview. Neither assessor had a clear recollection of the interview until Mr Wakelin's notes had been located sometime after the complaint had been initiated by IPENZ. The Respondent's chronology suggests that Mr Wakelin located his notes on 5 February 2013. Mr Armitage had destroyed his notes. The assessors had differing recollections of what "*CTV discussed*" had involved during the interactive assessment. Mr Armitage could not recall the details and Mr Wakelin said it concerned the hearsay account of an observer to the building's collapse. Mr Rennie submitted that there was a conflict between Dr Reay's evidence that he disclosed his connection with the CTV building and that of the assessors which "*may be prone to confusion or lapse of memory*".
- 5.16.6 Mr Rennie submitted that there was no scope within S. 21(1)(d) of the Act to allege that a declaration or misrepresentation can be made by silence or omission. It is not possible to test a declaration or representation for falsity or misrepresentation unless the words of it actually exist and are known.
- 5.16.7 Mr Rennie submitted that in terms of Rule 66 the DC should decide that there are no grounds for disciplining Dr Reay under S. 21 of the Act.

6. DISCIPLINARY COMMITTEE DELIBERATIONS / DISCUSSION

- 6.1 Having regard to the evidence adduced at the hearing the DC has concluded the following are relevant facts:
- 6.1.1 ARCE designed the CTV building in 1986.²³ Alan Reay was the Principal of ARCE.
- 6.1.2 ARCL designed remedial works to address a 'design error' in the CTV building in 1991.²⁴ Alan Reay was a Director of ARCL.

²³ Reay, paragraphs 21-52 (note that there are no paragraphs 31-49).

²⁴ Ibid, paragraphs 53-61.

- 6.1.3 A significant earthquake occurred on 22 February 2011 and the CTV building collapsed.
- 6.1.4 The regulatory authorities created a cordon in Christchurch central city called the 'Red Zone' and entry to this area required persons to hold a current CPEng registration.²⁵
- 6.1.5 In response to high demand from Christchurch engineers to gain CPEng registration, IPENZ established a 'fast track' process for assessment of applications. This required attendance at a one-day workshop on 19 or 20 April 2011 in Christchurch to help applicants prepare for self-assessments and portfolios of evidence.²⁶
- 6.1.6 Dr Alan Reay was not currently registered as CPEng and submitted an application for CPEng to be assessed under the fast track process on 13 April 2011.²⁷ Dr Reay was a Fellow of IPENZ at that time.²⁸ Dr Reay sought CPEng registration under the fast track process so that he would be able to enter the Red Zone and carry out building assessments for his clients.²⁹
- 6.1.7 On 19 April 2011 at one of the planned workshops, Messrs Wastney and Wakelin agreed on a 'truncated' fast track process for the three Fellows of IPENZ who had applied for CPEng under the fast track process. This truncated process would not require (inter alia) for Fellows to attend a workshop.³⁰
- 6.1.8 Dr Reay was scheduled to attend the workshop on 20 April 2011.³¹ He was telephoned by Mr Armitage mid/late morning on 19 April 2011 and asked to attend an assessment interview at 1.00pm that same day.³² He had not fully completed his documentation for assessment at the time.
- 6.1.9 The assessors for Dr Reay's application were Messrs Armitage and Wakelin. The assessment included discussion of the IRD building, the Christchurch International Airport building, both of which were included as recent examples of Dr Reay's work in his application. There was also discussion about the Dean's stand at the AMI Stadium.³³
- 6.1.10 The CTV building was discussed during the interview.³⁴ It is not agreed by the assessors that Dr Reay disclosed the connection between himself and the designer of the CTV building through ARCE or the designer of the remedial works by ARCL.
- 6.1.11 Subsequent to the interview, the assessors spoke to Dr Reay's nominated referees and being satisfied about his current competence, made a favourable recommendation to the CAB on 2 May 2011. The CAB approved Dr Reay's application for CPEng registration on 11 May 2011.

²⁵ Ibid, paragraph 65.

²⁶ Wastney, paragraphs 26-27.

²⁷ Wastney, paragraphs 30-31.

²⁸ Reay, paragraph 64 & 67.

²⁹ Ibid, paragraph 66.

³⁰ Wastney, paragraph 28 & Wakelin, paragraphs 12 & 13.

³¹ Reay, paragraph 73.

³² Ibid, paragraph 78. Confirmed by Wastney, Wakelin and Armitage.

³³ Armitage, paragraph 16; Wakelin paragraph 18 & 19; and Reay, paragraph 84 & 85.

³⁴ Wakelin, paragraph 20 & Reay, paragraph 86 & 87 ff.

- 6.2 The principal matter in contention is whether Dr Reay disclosed his connection with the design of the CTV building. The (incomplete) documentation that he provided to the assessors made no reference to the CTV building.
- 6.3 Dr Reay contends that he disclosed his (former) firm's connection but that is disputed by the assessors Messrs Wakelin and Armitage. The DC prefers the evidence of the assessors for the following reasons:
- a. Had there been disclosure of the connection, Mr Armitage would have considered recusing himself from the assessment because a close friend of his had died in the collapse; and
 - b. Mr Wakelin would have noted the disclosure and pursued a line of questioning about the design of the building because it was a current issue; and
 - c. The competence report would not have said "*his Christchurch buildings evidently performed well in the recent earthquakes*". The assessors would have made some reference to Dr Reay's connection to the CTV building to permit the CAB to exercise a judgement on the relevance of that fact to Dr Reay's current competence.
- 6.4 If Dr Reay made any reference to his role in the design of the CTV Building in the course of interview, it must have been in such vague or obscure terms as to deny the assessors any meaningful opportunity to understand the true position.
- 6.5 Mr Rennie's position is that even if Dr Reay failed to disclose his connection with the design and construction of the CTV Building, it could not be a representation for the purpose of S. 21(1) (d) of the Act. Mr Rennie argued that only a positive representation could constitute a breach of that provision.
- 6.6 For the Complainant Mr Jagose submitted that, by analogy with cases under the Fair Trading Act 1986, silence can constitute a misrepresentation:
- a. Where there is a duty to disclose a relevant fact;
 - b. Where an important fact is omitted; or
 - c. Where a past representation becomes untrue due to a change in circumstances.
- 6.7 We accept that mere silence – the failure to disclose a discrete fact - will not of itself constitute a false or misleading misrepresentation under S. 21(1) (d). We agree with Mr Rennie that the language of the section requires something in the nature of a positive statement, oral or written. However, we consider that an omission to state a material fact may result in a misrepresentation where what is omitted renders a prior statement incomplete to such an extent as to make it false or misleading. The Fair Trading Act cases are not directly analogous as the that Act is directed to unfair conduct which may arise by implication from words or conduct, but they show how a failure to make disclosure can in some circumstances result in a misrepresentation. In our view, however, this is not such a case.
- 6.8 We conclude that there was no duty on Dr Reay to disclose his firm's role in the design of the CTV Building. The interview process was directed to establishing his current competence. He was not and could not be expected to make full and comprehensive disclosure of the buildings he or engineers associated with him

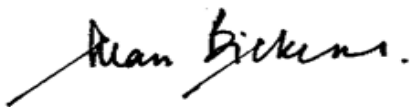
had designed during the course of his career. It was natural that he should focus on his more recent work.

- 6.9 Dr Reay's omission to state that his firm had been involved in the design of the CTV Building did not render false or misleading any other statement he made in the course of the interview process. He did not assert that his buildings had stood up well in the recent earthquakes. That was an inference drawn by the assessors from their discussion with him. It was not a conclusion that Dr Reay had any reason to think would be reached from what was said in the course of the interview. In the circumstances and having regard in particular to the way the discussion developed, we are satisfied that Dr Reay's omission to disclose his role in the design of the CTV Building could not constitute a representation that he knew to be false or misleading.

7. DISCIPLINARY COMMITTEE'S DETERMINATION

- 7.1 The DC has carefully considered the provisions of S. 21(1) (d) of the Act and the submissions on behalf of the Complainant and Respondent on its interpretation. We have concluded that, in this case Dr Reay's failure to disclose his firm's role in the design of the CTV Building did not constitute a false or misleading representation under S.21(1)(d).
- 7.2 Consequently, the DC has determined that the grounds for possible discipline under S. 21(1) (d) of the Act have not been made out on the balance of probabilities.
- 7.3 **The DC has determined that there are not grounds for disciplining Dr Alan Reay under S. 21 of the Act and the complaint is therefore dismissed.**

Signed this 16th day of May 2015.



Alan Bickers MNZM JP DistFIPENZ (Chair)
Chair of the Disciplinary Committee

On behalf of the Disciplinary Committee –

Dr Peter Lipscombe FIPENZ CPEng IntPE(NZ)
Dr Alan Collier FIEAust CPEng(Aust) MIPENZ
Hon Rodney Hansen CNZM, QC
Hamish Wilson (nominated by Consumer NZ Inc)