

# **DISCIPLINARY COMMITTEE DECISION**

## **COMPLAINT ABOUT ARTHUR BUDVIETAS**

### **CONFIDENTIAL TO THE PARTIES**

#### **In accordance with:**

Chartered Professional Engineers of New Zealand Act 2002

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

Engineering New Zealand Rules 2019

Engineering New Zealand Complaints Resolution and Disciplinary Regulations 2020

Engineering New Zealand Code of Ethical Conduct 2016

#### **Prepared by**

Dr Carron Blom FEngNZ

**Chair of Disciplinary Committee**

Stuart George CPEng

Theo Baker, Barrister

Hamish Wilson, nominated by Consumer New Zealand

**Members of the Disciplinary Committee**

20 February 2025

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# EXECUTIVE SUMMARY

1. In January 2021, the Hastings District Council (**the Complainant**) raised concerns with Engineering New Zealand about Mr Arthur Budvietas (**the Respondent**). The complaint related to two buildings in Hastings for which Mr Budvietas provided professional engineering services to the respective owners. Building A and Building B are both in Hastings.
2. The Council raised multiple concerns in relation to Building A. The Council was concerned that Mr Budvietas assessed the building as having a seismic rating that could not be substantiated. From this, Mr Budvietas then provided a structural strengthening design that may not meet the performance outcome implied. The Council also alleged that Mr Budvietas advised the property owner he could apply for an exemption or building consent for work that had already been done, and then Mr Budvietas continued to carry out an inspection in these circumstances.
3. In relation to Building B the Council was concerned that Mr Budvietas provided a structural strengthening design that may not have met the performance outcome implied.

## Decision

4. Having considered the information available to us, we have found in the matter of:
  - a. Building A:
    - i. Assessing the building as having a seismic rating that cannot be substantiated: the complaint is upheld.
    - ii. Providing a structural strengthening design which may not have achieved the performance outcome implied: the complaint is upheld.
    - iii. Advising the property owner it could apply for an exemption or a building consent for strengthening work that had already been done on the building: the complaint is dismissed.
    - iv. Carrying out an inspection of the building work when he was aware the work had not been done in accordance with the Building Act 2004: the complaint is dismissed.
  - b. Building B:
    - i. Providing a structural strengthening design for the building which may not have achieved the performance outcome implied: the complaint is dismissed.

# BACKGROUND

2. The Hastings District Council (the **Council**) raised concerns about Mr Arthur Budvietas (the **Respondent**) with Engineering New Zealand in January 2021. The complaint (**complaint**) was laid by Council building consents officer John Tait on behalf of the Council (the **Complainant**).
3. Mr Arthur Budvietas CPEng CMEngNZ is, and was, a Chartered Professional Engineer and Chartered Member of Engineering New Zealand at the time he performed the engineering services complained of, being from 2018 until 2020. At the relevant time, Mr Budvietas was a senior structural engineer at Structural Concepts Limited (**SCL**) based in Hawke's Bay.
4. The complaint related to two buildings in Hastings for which Mr Budvietas provided professional engineering services to the respective owners. These two buildings, Building A and B are located in Hastings.
5. Specifically, the Council was concerned the advice provided by Mr Budvietas was in breach of the Code of Ethics contained in the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 and provided in a negligent and/or incompetent manner.

## The Complaint

6. The Council raised multiple concerns in relation to Building A. The Council was concerned that Mr Budvietas assessed the building as having a seismic rating that could not be substantiated. From this, Mr Budvietas then provided a structural strengthening design that may not meet the performance outcome implied. The Council also alleged that Mr Budvietas advised the property owner he could apply for an exemption or building consent for work that had already been done, and then Mr Budvietas continued to carry out an inspection in these circumstances.
7. In relation to Building B the Council was concerned that Mr Budvietas provided a structural strengthening design that may not have met the performance outcome implied.

## Initial Investigation

8. The concerns were put to Mr Budvietas by Engineering New Zealand in March 2021. He responded in writing on 21 April 2021.
9. On 21 April 2021 the Council advised Engineering New Zealand that Mr Budvietas' response had not resolved its concerns. Accordingly, the matter was referred to an adjudicator to determine if the complaint should be referred to an investigating committee.
10. On 12 October 2022, Chair of Investigating Committees Dr Wayne Stewart FEngNZ CPEng, acting in the role of Adjudicator, issued a decision following an initial investigation of the complaint. Having considered all the evidence available at the time, Dr Stewart considered there were no grounds to dismiss the complaint in relation to the Hastings properties. The complaint was referred to an investigating committee for a formal investigation.
11. Dr Stewart dismissed an aspect of the complaint relating to a building in Masterton. This was dismissed as the Council did not have sufficient personal interest in a building in Masterton.

## Investigating Committee

12. An investigating committee was appointed to investigate the complaint. The Investigating Committee members were:
  - Garry MacDonald DistFEngNZ CMEngNZ (Chair)
  - Rachel Wright CPEng CMEngNZ IntPE(NZ)
  - Ian Watson CPEng CMEngNZ IntPE(NZ)
13. The Investigating Committee considered the suitability of alternative dispute resolution (ADR) and was of the view it would not be appropriate in this instance.
14. Having reviewed the evidence provided, the Investigating Committee decided there were no grounds to dismiss the complaint and determined it should be referred to a disciplinary committee in accordance with Rule 60(a) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 and clause 34.1 of the Engineering New Zealand Complaints Resolution and Disciplinary Regulations 2020.
15. In its decision of 3 October 2023, the Investigating Committee referred the complaint to a disciplinary committee.

## DISCIPLINARY COMMITTEE

16. On 8 February 2024, a disciplinary committee was appointed to determine the complaint. The members of the Disciplinary Committee are:
  - Dr Carron Blom FEngNZ (Chair)
  - Stuart George CPEng
  - Theo Baker Barrister
  - Hamish Wilson Consumer New Zealand Representative
17. Prior to the hearing we obtained consent from the parties to hold the hearing 'on the papers'. On 17 July 2024 we circulated the disciplinary hearing procedure to the parties. Amongst other things, the parties were invited to make written submissions and/or submit any further material for the Committee's consideration.
18. A hearing was held on the papers on 21 August 2024.

## Role of the Disciplinary Committee

19. 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 accepted professional standards.<sup>1</sup>

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<sup>1</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC).

20. Our role is to hear the complaint and decide whether there are grounds for disciplining Mr Budvietas; and if so, whether to order any penalty. If we decide there are no grounds to discipline Mr Budvietas, we must dismiss the complaint. If we decide there are grounds to discipline Mr Budvietas, we must decide whether and how to exercise our powers under 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**), and the Engineering New Zealand Rules 2019, Engineering New Zealand Disciplinary Regulations 2020 (the **Regulations**), and the Code of Ethical Conduct 2016.
21. While the Disciplinary Committee includes a member with structural engineering expertise, and this has been brought to bear in our deliberations, it is not our role to undertake a peer review of Mr Budvietas' work.

## ISSUES TO DETERMINE

### *Issues*

22. In relation to Building A, we must determine if Mr Budvietas was in breach of the code of ethics contained in the Rules and/or performed engineering services in a negligent or incompetent manner by:<sup>2</sup>
  - a. Assessing the building as having a seismic rating that cannot be substantiated;
  - b. Providing a structural strengthening design which may not have achieved the performance outcome implied;
  - c. Advising the property owner it could apply for an exemption or a building consent for strengthening work that had already been done on the building; and
  - d. Carrying out an inspection of the building work when he was aware the work had not been done in accordance with the Building Act 2004.
23. In relation to Building B, we must determine if Mr Budvietas was in breach of the code of ethics contained in the Rules and/or performed engineering services in a negligent or incompetent manner by:
  - e. Providing a structural strengthening design for the building which may not have achieved the performance outcome implied.

### *Legal and membership standards relevant to the Issues*

24. The applicable parts of the code of ethics contained in the Rules are:

*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.*

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<sup>2</sup> Chartered Professional Engineers of New Zealand Rules (No 2) 2002 at r 42.

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.*

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 courtesy and respect.*

25. The Engineering New Zealand Code of Ethical Conduct 2016 applies to members of Engineering New Zealand and contains provisions identical to these. Clause 1 contains the obligation in relation to health and safety, the obligation to act competently is outlined at clause 4, and the obligation to behave appropriately is contained at clause 5.
26. The “*standard against to measure the performance of a Chartered Professional Engineer*” for alleged breaches of the code of ethics is set out in *Robinson v Registration Authority* 2015 where the Chartered Professional Engineers Council said:<sup>3</sup>

*... whether there has been a serious lack of care judged by the standards reasonably expected of a Chartered Professional Engineer. That standard may be informed by whether reasonable members of the public would consider such act or omission, if acceptable to the profession, were to lower the standards of that profession in the eyes of the public.*

27. The thresholds for negligent and incompetent behaviour were established by the Chartered Professional Engineers Council in *R v K*:<sup>4</sup>

*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.*

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<sup>3</sup> *Robinson v IPENZ as the Registration Authority* 10 July 2015, Appeal Ruling #29 Chartered Professional Engineers Council at [40(b)].

<sup>4</sup> *R v K* Appeal Ruling 11/14 Chartered Professional Engineers Council at [36] and [38].

28. Expanding on the quoted passage in *Robinson* (para. 26, above) the Council also stated what constitutes performing engineering services in a negligent and/or incompetent manner (emphasis added):<sup>5</sup>

*Whether engineering services have been performed in a **negligent manner** is a question of whether there has been a serious lack of care judged by the standards reasonably expected of a Chartered Professional Engineer. That standard may be informed by **whether reasonable members of the public would consider such act or omission, if acceptable to the profession, were to lower the standards of that profession in the eyes of the public.***

*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 in Rule 6** [of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002].*

29. If the evidence is that Mr Budvietas acted in accordance with accepted standards for a CPEng and/or members of Engineering New Zealand, then we will dismiss the complaint. If the evidence is that Mr Budvietas did not act in accordance with these 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.<sup>6</sup>

## INFORMATION CONSIDERED

30. The Disciplinary Committee has read and considered the bundle of documents, including all information gathered up to and including the Investigating Committee stage.
31. We have considered further material obtained since the Investigating Committee stage:
- Responses to Requests for Information (**RFIs**) from the Disciplinary Committee to the parties;
  - Information gathered from the Hastings District Council online portal;
  - the Ministry of Business, Innovation and Employment’s Seismic Assessment of Existing Buildings Guidance Part A July 2017;
  - Weine (as trustees of Ruth Weine Family Trust) v Tadd Management* [2024] NZCA 323; and
  - Written briefs of evidence from John Tait on behalf of the Council and Jonathan Devine of Spencer Holmes, and written submissions from the Complainant.
32. This information was provided to both parties for their comment.
33. Beyond responding to the RFIs we sent (reproduced below), Mr Budvietas did not submit any further material or make any further submissions to the Committee.

### The Council’s Position

34. We received briefs of evidence from John Tait on behalf the Council and Jonathan Devine from Spencer Holmes, along with written submissions from the Council. We also considered all information provided from the Council until the Investigating Committee stage.

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<sup>5</sup> *Robinson v IPENZ as the Registration Authority* at [40(b - c)].

<sup>6</sup> *Robinson v IPENZ as the Registration Authority* at [40(e)].

## Building A

35. The Council's written complaint and submissions outline its position and the rationale for its concerns.
36. On 15 May 2019 the Council received an application for a building consent discretionary exemption prepared and lodged by Mr Budvietas as agent for the building owner. The exemption related to the carrying out of structural strengthening works.
37. The next day the Council advised SCL that the exemption would not be granted and a building consent would be required.
38. SCL responded to the Council's RFI, providing a PS2 from Design Phase Limited assessing the seismic rating as 70%NBS and a construction inspection record confirming Mr Budvietas inspected and photographed the steel work on 22 May 2019.
39. In relation to this construction inspection record, the Council said "*Concerningly, this inspection, undertaken by Mr Budvietas, was after the Council advised that a building consent exemption was not an option for the owner*".
40. On 5 June 2019 the Council became aware that the building work subject to the exemption had already been undertaken, meaning that an application for a certificate of acceptance (COA) would be required.
41. The Council received a COA application from SCL that stated "*the owner was unaware a consent was required for internal strengthening works*". The application also included a structural strengthening design and PS1 from Mr Budvietas who had assessed the building having a seismic rating of 70%NBS.<sup>7</sup>
42. A Council building officer inspected the building and "*could not be satisfied on reasonable grounds that the building work complied with the New Zealand Building Code*". Accordingly, the Council put the application on hold and requested further information from Mr Budvietas.
43. The Council then engaged Spencer Holmes, a larger consulting engineering practice with experience in the field of seismic strengthening, to assess the appropriate %NBS level via a detailed seismic assessment. Spencer Holmes determined the concrete frame to the street elevation had a capacity of 40%NBS which governed the capacity of the building. Several other parts of the building had capacities less than 70%NBS. The Council provided SCL with a copy of Spencer Holmes' assessment.
44. In May 2020 the Council contacted SCL recommending that the engineers meet to resolve the differences in their %NBS findings. SCL advised the Council it would contact Spencer Holmes. The differences were not resolved and Spencer Holmes maintained its position.
45. By October 2020 the Council had refused the COA application on the basis the NBS issue was outstanding, meaning the Council still could not be satisfied that the building complied with the Building Code. A notice to fix requiring compliance by 10 December 2020 was issued to the building owner and SCL.

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<sup>7</sup> Percentage of the 'New Building Standard' from building.govt.nz. This means "*the degree to which the building, or part, meets the seismic performance requirements of the Building Code that relate to how a building is likely to perform in an earthquake, and that would be used to design a new building on the same site as at 1 July 2017 – the date the new system came into force.*"

46. Although the COA application had been declined, the Council claim it received an extension of time application in relation to the COA from Esther Smith of SCL on 8 December 2020. Then, on 10 December 2020, an extension of time to comply with the notice to fix application was received from Mr Rex Harrison of Rex Design.

#### *Building B*

47. On 9 October 2018 the Council received an application for building consent from the building owner to carry out structural strengthening of the existing building to achieve a proposed >67%NBS.
48. The strengthening design proposal and accompanying PS1 had been completed by Mr Budvietas of SCL.
49. On 8 November 2018 the Council issued the building consent. The work did not start, and an extension of time was granted until 6 November 2021.
50. As the Council was concerned about other strengthening design projects, it engaged Calibre Consulting Limited to conduct a high-level review of the proposed design. The Calibre Consulting review raised issues with the documents provided including those provided as part of the engineering aspect of the building consent application.
51. The Council considers it is not likely these issues would have been identified but for Calibre Consulting's review.

#### *Council Response to RFI*

52. On 11 July 2024 we sent an RFI to the Council as follows:

*Were Spencer Holmes in receipt of extra or new information, beyond that which Mr Budvietas had, when they completed their assessment? With reference to the documents recently obtained by the Disciplinary Committee (and contained in the updated bundle of 13 June 2024) it seems this may have been the case.*

*If they were in receipt of extra or new information, what was it and how did the information affect their assessment?*

53. In response to the above questions from the Committee, Mr Devine stated that in his opinion, Spencer Holmes was not in receipt of further information that was not available to Mr Budvietas.

#### *Council Submissions*

54. The Council's written submissions also set out its concerns. The Council is particularly concerned that Mr Budvietas' structural strengthening design cannot be substantiated and may not reach the performance outcome specified, giving rise to health and safety concerns. The Council raised issues with SCL on multiple occasions to no avail, meaning the issues were never resolved. Council considers the works may represent a "*higher risk to the health and safety of public in the event of an earthquake*" and:

*By failing to take reasonable steps to safeguard the health and safety of people, Mr Budvietas put the public, or those using the building, at a potentially high risk. A high level of trust is placed in engineers in reliance on special areas of knowledge. There is an expectation to keep people safe.*

55. In terms of the building consent process, the Council submitted Mr Budvietas had inadequate knowledge of the building consent processes resulting in the following:

*In relation to [Building A], Mr Budvietas undertook construction monitoring of building work on 22 May 2019 in his capacity as engineer when the building work was being undertaken without the requisite building consent, and with knowledge that an application for a building consent discretionary exemption had been refused by the Council on 16 May 2019. In the Council's submission, an inspection should not have occurred when he was aware the work had been done in other than accordance with the Building Act,*

56. In concluding, the Council stated:

*Engineers play an integral role in the construction of building work in New Zealand. Among other things, they are routinely responsible for providing construction monitoring, carrying out inspections, providing advice and directions to builders, and issuing producer statements to consenting authorities, which confirm compliance with the building code and relevant building consent. Mr Budvietas' conduct falls well below the accepted standard of a Chartered Professional Engineer and a reasonable Chartered Member of Engineering New Zealand.*

## **Mr Budvietas' Position**

57. Mr Budvietas wrote to Engineering New Zealand on 21 April 2021 responding to the Complaint. For Building A, Mr Budvietas said:

*When I became aware that the owner had undertaken construction work without obtaining the proper consent from Hastings District Council (HDC) (this occurred when I arrived on site for a structural steel inspection, but found that there were no consent documents available) We arranged for a member of staff to contact the owner and discuss the issue. There had been a misunderstanding from the owner, and he had incorrectly assumed that Structural Concepts Ltd would obtain an exemption from HDC for the works. It was our understanding that the owner would undertake this themselves.*

*We worked with the owner and advised that documentation would have to be lodged with HDC for the project. We suggested that it might be possible to get an exemption from the council for these works, and suggested this route be tried, not with the intent to conceal or mislead and informed HDC that the works were complete as part of this application. HDC rejected this application and advised that a Certificate of Acceptance was required, which was duly applied for.*

*During processing a number of comments were made by HDC and HDC requested a peer review which was duly obtained, from an independent firm.*

*I understand that the independent firm have not been approached by Spencer Holmes to discuss the building and would be happy to be part of a meeting between all engineers to discuss the concerns.*

*This project has formed a part of a recurring problem we have found with a variety of clients, who undertake works without following the requirements of the Building Act. Since late 2020 Structural Concepts Ltd now include a letter with every short form agreement for design works that advises the client that we will not conduct construction monitoring on their behalf if a Building consent or other exemption document has not been obtained from the local Territorial Authority.*

58. For Building B, Mr Budvietas said:

*This complaint was made shortly after a peer review was obtained from Calibre Consulting Ltd at approximately the same time as Structural Concepts Ltd were informed of the Calibre report. I had not yet had a chance to discuss the content of the report with Calibre Consulting with regard to the design of the strengthening.*

*I note that many of the issues raised in this report are relatively minor and could be easily resolved with a discussion, which we would be happy to have with Calibre Consulting.*

*As with any design there will be items of disagreement between engineers as to approach or interpretation of the design, and I have undertaken additional training in seismic assessment since 2018 when this design was originally undertaken as would likely change my approach to the design if it were being undertaken today.*

59. Mr Budvietas also said:

*I note in HDC's complaint that they suggest that my design may not meet the design intent for the strengthening and I would [sic] more time to work with both HDC and the relevant reviewers to establish if this is indeed the case, and I expect that if any changes are necessary these will be relatively minor in nature.*

60. Mr Budvietas was subsequently requested to provide a copy of the contract, engagement agreement or short form agreement between SCL and the building owner which outlines the scope of SCL's engagement and scope of work.<sup>8</sup> The purpose of this request was to seek clarification regarding Mr Budvietas' role in relation to the application for building consent. The short form agreement provided by Mr Budvietas did not mention applying for a building consent on behalf of the owner nor any comment that this was assumed to have been received by his client.
61. Mr Budvietas also provided a Detailed Seismic Assessment (**DSA**) for Building A. He also confirmed "*there was no DSA done for [Building A], just a condition report by Strata Engineering. The owner and my GM wanted to move straight to a strengthening design*".
62. The Disciplinary Committee wrote to Mr Budvietas on 26 March 2024 asking further questions. Mr Budvietas responded on 16 April 2024. These questions and his response are reproduced below:

*General Questions*

*These questions relate to the role of yourself and others at Structural Concepts Limited (SCL) and are not specific to either of the relevant properties.*

*What was your role at SCL?*

*AB: I ( Arthur Budvietas) am a senior Engineer at SCL, at the time I was one of 3 Chartered Engineers at the firm. I [undertook various]<sup>9</sup> designs for the firm, reviewed others work and participated in various design projects.*

*What was Esther Smith's role at SCL?*

*AB: Esther Smith was the Operations Manager for the fir[m]. This included allocated and following up projects with Engineers, [liaising] with clients and Territorial Authorities, managing workload and in preparing consent applications when necessary.*

*What was Gary Newton's role at SCL?*

*AB: At the time Garry Newton was both the Managing Director for the company as well as undertaking and reviewing designs for the firm.*

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<sup>8</sup> RFI Investigating Committee to Arthur Budvietas 21 February 2023 BOD 571.

<sup>9</sup> We have made corrections to Mr Budvietas' spelling only, denoted by "[ ]". Otherwise, Mr Budvietas' responses are unedited.

*What internal review or quality control was carried out internally within SCL?*

*AB: Before issues a senior engineer other than the designer is to perform at least a high level review of the final drawings and Calculations as well as periodic check ins throughout the design process to check if the design is proceeding appropriately.*

*Building A*

*These questions are specific to Building A. We understand there may be some overlap with earlier questions.*

*What was your role? What responsibilities did you have?*

*AB: I was the design engineer for the project.*

*Who was the Project Manager and what were their responsibilities?*

*AB: In terms of the design there was no "project manager" per se. Esther Smith worked with the client and I was the technical person on the project.*

*What was Esther Smith's role? What responsibilities did she have?*

*AB: Esther Smith was our operations manager, she dealt with the client worked through pricing and contact issues and oversaw deliverables.*

*What was Gary Newton's role? What responsibilities did he have?*

*AB: Garry Newton was the technical reviewer for the project. He also signed the contract with the client as the clients representative*

*What was your role in relation to the building consent and exemption? What were the roles of others in relation to the building consent and exemption?*

*AB: Other than providing the [calculations] and signing a PS1 I had little to do with the consent application.*

*What prompted you to inspect the building?*

*AB: The client asked us to inspect the works once he had had them completed. While there I asked about the building consent and found there was none. This is when SCL became involved in looking for a solution to obtain permission for the construction. As all works were exposed and visible it was thought that applying for an exemption was the best path forward then a BC then a COA.*

*What was your involvement, if any, in relation to the Design Phase PS2?*

*AB: I was made aware that design Phase was being engaged to do a PS2, and was available for any queries.*

*The Investigating Committee decision states:*

*In May 2020, the Council recommended SCL and Spencer Holmes engineers meet to resolve their differences in %NBS findings. SCL's project manager advised that SCL would contact Spencer Holmes to resolve their differences. This did not occur and in October 2020, the Council refused the COA. On 8 December 2020, SCL requested an extension of time to resolve issues with the COA, even though the application had already been refused.*

*What is your perspective here? In particular, have you met with Spencer Holmes to resolve the differences? If so, did anything change as a result of this? If you did not meet with Spencer Holmes, why not?*

*AB: I have not met with Spenser Holmes, but agree with their comments that a mu of 1.0 was more appropriate for the analysis of the front wall ( which in particular reduces the %NBS possible for the building to 40%*

#### *Building B*

*These questions are specific to Building B. We understand there may be some overlap with earlier questions.*

*The Investigating Committee decision states:*

*Calibre Consulting summarised its concerns with Mr Budvietas' analysis and design over four and a half pages. The concerns were numerous. Mr Budvietas suggested at the time of the complaint he had not had a chance to review its findings. Engineering New Zealand has not received any update from Mr Budvietas to suggest that he has engaged in that process.*

*What is your perspective here? Have you reviewed Calibre Consulting's findings? If so, what was the outcome?*

*AB: I have reviewed Calibres finding, and as the client has put the project on hold have not proceeded with anything further.*

63. We wrote to Mr Budvietas on multiple occasions inviting him to make further submissions. However, the response to our RFI, as reproduced at paragraph 62 above, was all we received from Mr Budvietas.

## **Building A**

64. In considering all the information received in relation to Building A, we understand the key facts to be as set out in chronological order below.
65. In November 2018 the owner of Building A engaged SCL via contract to undertake a detailed seismic assessment (**DSA**) for the building.<sup>10</sup> Garry Newton signed the contract on behalf of SCL.
66. Mr Budvietas completed the DSA and it was provided to the building owner on 31 January 2019.<sup>11</sup>
67. By mid-February the building owner had enquired with Esther Smith Operations Manager at SCL about obtaining a structural strengthening design from SCL. On 28 February 2019 Ms Smith advised the building owner "*depending on the scale of the works, their [sic] could be an option to apply to council for a building exemption.*"<sup>12</sup>

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<sup>10</sup> Short Form Agreement for Consultant Engagement between the owner and Structural Concepts Ltd November 2018 BOD 572 – 573.

<sup>11</sup> Letter Esther Smith to Council 8 October 2019 BOD 214

<sup>12</sup> Email Esther Smith to the owner 28 February 2019

68. On 1 March 2019 the owner engaged SCL to provide structural engineering design for strengthening the building to 70%NBS.<sup>13</sup> Once again, Garry Newton signed the contract on behalf of SCL. On 23 March 2019 this design, undertaken by Mr Budvietas and approved by Mr Newton, was issued to the owner. The accompanying technical specification was prepared by Ms Esther Smith.<sup>14</sup>
69. On 29 March 2019, Esther Smith wrote to Council advising SCL had been commissioned “to conduct inspections” at the subject property, that SCL would issue a PS4-Construction Review “on completion of the building works”.<sup>15</sup> Ms Smith noted SCL would need to inspect structural steel elements “plus any aspects required by Council as per the Building Consent Conditions, of which **you need to provide us with a copy**” (emphasis added). The letter provided contact details for the Council to arrange these inspections, including a requirement for advance notice. It is not clear from the information provided by either party as to whether the Council replied to SCL to signal that a building consent had not yet been granted or an application received.
70. Subsequently, on 8 May 2019, Linda Harris emailed the property owner stating “I believe that [you] are wanting an inspection at the above property” being Building A. This was then organised between Linda Harris and the building owner.<sup>16</sup> In a letter to Tony Manunui at the Council, Ms Smith stated:<sup>17</sup>
- On the 8<sup>th</sup> of May 2019 SCL received a call from the building owner indicating he required a construction monitoring visit for the strengthening, at no time prior to that date, was SCL aware that any strengthening work had taken place or was in the process of taking place [sic].*
71. On 15 May 2019 Esther Smith emailed the owner confirming that SCL was about to lodge an application for exemption on behalf of the owner.<sup>18</sup> The email also stated: “Council could turn down the exemption application and request a full building consent be applied for.” The building owner emailed Esther Smith back on the same day instructing:<sup>19</sup>
- Yes go ahead with the application, I will pay the fees... I would still like your engineer to look at the steel as the steel company wants paying and I cant pay them until say its all good [sic].*
72. On 15 May 2019, the Council received a building consent exemption application sent by administrator Linda Harris for structural strengthening at the building.<sup>20</sup> The application was signed by Esther Smith of SCL as agent on behalf of the owner.<sup>21</sup>
73. The next day the Council advised SCL and the property owner a building consent would be required.<sup>22</sup>

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<sup>13</sup> Short Form Agreement for Consultant Engagement between the owner and Structural Concepts Ltd March 2019 BOD 575 – 576.

<sup>14</sup> Structural Concepts Ltd Specification. The owner: Building A. 29 March 2019 BOD 56 – 74.

<sup>15</sup> Letter Esther Smith to Council 29 March 2019 BOD 84.

<sup>16</sup> Email Linda Harris to the owner 8 May 2020 BOD 225.

<sup>17</sup> Letter from Esther Smith to Council 8 October 2019 BOD 214.

<sup>18</sup> Email Esther Smith to the owner 15 May 2019 BOD 221.

<sup>19</sup> Email from the owner to Esther Smith 15 May 2019 BOD 222.

<sup>20</sup> Email from Linda Harris to Council 15 May 2019 BOD 15.

<sup>21</sup> Application for Exemption under Schedule 1, Part 1, s.2 15 May 2019 BOD 17 – 20.

<sup>22</sup> Email from Internal Email from Council to Council 16 May 2019 BOD 15

74. A construction inspection record included in the RFI documents confirmed Mr Budvietas inspected the work on 22 May 2019.<sup>23</sup> The only comment on the record was “*all steel looks correct, bulked well*”.
75. On 5 June 2019, the Council became aware the building work had already been done.<sup>24</sup> The Council advised the owner a Certificate of Acceptance (**COA**) would be required.<sup>25</sup>
76. On 14 June 2019, Esther Smith of SCL applied for a COA for structural strengthening.<sup>26</sup> The application included a structural design and Producer Statement 1 Design (**PS1**)<sup>27</sup> from Mr Budvietas which assessed the building as having a seismic rating of 70%NBS.<sup>28</sup> The COA noted the owner did not know consent was required for internal strengthening works.
77. On 2 July 2019, a Council building officer inspected the work. The Council was not satisfied the building work complied with the Building Code and placed the COA on hold.<sup>29</sup> Amongst other things, the Council emailed Esther Smith and the building owner on 12 July 2019 requesting the following information within 30 days:<sup>30</sup>
- a. the construction monitoring reports to CM2 relating to the PS1;
  - b. an independent structural engineer’s review of the existing building and structural strengthening Producer Statement 2 Design Review (PS2);<sup>31</sup>
  - c. a new PS1 not referencing Form 2 or application for building consent.
78. In December 2019, the Council engaged Spencer Holmes Limited (**Spencer Holmes**) to undertake a detailed seismic assessment (**DSA**)<sup>32</sup> to confirm the %NBS for the building. Spencer Holmes’ DSA assessed the building at 40%NBS after the strengthening work had been completed<sup>33</sup>. The Spencer Holmes DSA concluded:<sup>34</sup>

*The assessment undertaken on the building is higher than the 33%NBS threshold for an earthquake prone building but lower than the 67%NBS threshold for an earthquake risk building, meaning that the building would not be classified as being either earthquake prone but would be classified as earthquake risk.*

*With reference to the NZSEE building classification and based on our assessment, **there is no legal requirement to strengthen the building.***

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<sup>23</sup> Construction Inspection Record 22 May 2019 BOD 147.

<sup>24</sup> Building A – Background Timeline BOD 5

<sup>25</sup> A COA is issued retroactively by building consent authorities for non-consented building work.

<sup>26</sup> Application for Certificate of Acceptance 13 June 2019 BOD 75 – 77.

<sup>27</sup> A PS1 is a statement from a design engineer stating they believe their design complies with the Building Code.

<sup>28</sup> The NBS is an assessment of the earthquake rating a building is expected to have when built to the Building Code.

<sup>29</sup> Letter from Council to Structural Concepts 30 March 2020 BOD 120.

<sup>30</sup> Ibid.

<sup>31</sup> A PS2 is a design review of a PS1 and related documents confirming the design complies with the Building Code.

<sup>32</sup> A DSA is a comprehensive assessment of the structural load paths of a building, the capacity of each structural element, the likely inelastic mechanisms, the buildings’ response in earthquake shaking, and the impact of secondary structural and critical non-structural building elements.

<sup>33</sup> Letter HDC to Structural Concepts Limited 30 March 2020 BOD 123.

<sup>34</sup> BOD 139

79. In his brief of evidence Mr Devine of Spencer Holmes said the 40%NBS was a result of:<sup>35</sup>

*Out of plane strength of the parapet to the street elevation of the building; and*

*The strength of the reinforced concrete frame to the street elevation of the building.*

80. Mr Devine also stated “in my opinion, the strengthening design undertaken by Mr Budvietas was therefore inadequate to achieve the 70%NBS claimed”.<sup>36</sup>

81. The Council wrote a letter to Ms Smith and the building owner on 30 March 2020.<sup>37</sup> The letter reiterated the RFI of 2 July 2019, noting the Council had not received this information. It also enclosed a copy of the DSA from Spencer Holmes. Esther Smith of SCL responded on the same day.<sup>38</sup> Her response included a PS2 from Design Phase Limited assessing the building’s seismic rating as 70%NBS.<sup>39</sup>

82. In May 2020, the Council wrote again to Ms Smith and the building owner recommending the engineers meet to resolve their differences in %NBS findings saying:<sup>40</sup>

*Council are [sic] concerned at the large discrepancy between your engineer’s and Councils engineer (Spencer Holmes) findings of the structural performance outcome achieved following the strengthening works. This needs to be resolved and Council have therefore sought further advice from its consulting engineers Spencer Holmes.*

*To resolve the engineering differences it would be useful if the engineers could communicate with each other directly on the structural matters as deemed necessary. Please confirm if you agree and Council will inform Spencer Holmes.*

83. The Council again contacted Ms Smith and the building owner on 23 July 2020 saying:<sup>41</sup>

*Councils engineer Spencer Holmes has considered the discrepancy again. However based on the available information is of the view that both Structural Concepts calculations and the peer reviewer Design Phase have not taken into account the unreinforced masonry elements. For that reason, the position in the Spencer Holmes report that the building has been assessed as 40% NBS is unchanged by the applicant providing a PS2 from Design Phase.*

*Previously Council requested you confirm agreement for the engineers to communicate directly with each other in an attempt to resolve the discrepancy.*

*As no response has been received from you Council must consider what further legislative action is required. To this end, and in a final attempt to assist resolve the matters, Council consider it is necessary to provide a definitive timeframe.*

*If the engineering discrepancy and other matters have not been resolved by 24 August 2020 Council will proceed to take action based on the current information.*

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<sup>35</sup> Brief of Evidence of Jonathan Walker Devine 1 August 2024 at [3.5].

<sup>36</sup> Detailed Seismic Assessment Spencer Holmes February 2020 Ibid at [3.10].

<sup>37</sup> Letter HDC to Structural Concepts Limited 30 March 2020 BOD 122 and Detailed Seismic Assessment Spencer Holmes BOD 129 - 139.

<sup>38</sup> Letter From Esther Smith to Council 30 March 2020 BOD 145.

<sup>39</sup> PS2 BOD 153.

<sup>40</sup> Letter from Council to SCL and the owner 8 May 2020 BOD 201 – 202.

<sup>41</sup> Letter Council to Structural Concepts 23 July 2020 BOD 204.

84. An independent project manager, Dave Morrison, was then engaged by the owner to “assist with getting [Building A] building works completed”.<sup>42</sup> Mr Morrison agreed with Mr Budvietas that Mr Budvietas would contact Spencer Holmes “to discuss and agree on the steps required to resolve the outstanding matters this week”.

85. This did not occur and in October 2020, the Council refused the COA.<sup>43</sup>

*Further, there remains a significant unresolved discrepancy between the owner’s engineer (Structural Concepts Limited) and the Council’s engineer (Spencer Holmes Limited) in relation to the structural performance outcome achieved following the strengthening works (70%NBS vs 40%NBS).*

*Despite repeated requests from the Council, Structural Concepts has not submitted any amendment to the structural performance outcome of the Certificate of Acceptance, and there has been no attempt by Structural Concepts Limited to communicate with Council’s engineer to resolve the discrepancy.*

86. Alongside this refusal the Council issued a Notice to Fix (NTF) to the owner also.<sup>44</sup> The NTF stated:

*Contrary to section 40 of the Act, earthquake strengthening work (involving the installation of eight structural steel portal frames) has been carried out except in accordance with a building consent.*

87. The owner then engaged Rex Henderson of Rex Design to provide what was necessary to comply with the NTF and to secure a building consent.<sup>45</sup>

88. On 8 December 2020, Council claim that SCL requested an extension of time to resolve issues with the COA, even though the application had already been refused. However, despite the Council stating this in their complaint, we could not find evidence in the material provided.

89. We obtained further documentation about Building A via the Hastings District Council online portal. The property owner engaged Alan Thompson, an engineer at LHT Design to:<sup>46</sup>

*get involved to try to resolve the current lack of progress. It doesn’t make sense for me, as the 4<sup>th</sup> engineer, to get involved at a design/review level and I hope that instead I can facilitate a path forward that will help get the work completed and appropriately signed off.*

*Structural Concepts have agreed to complete their calcs, taking into account the new info. Design phase have agreed to update their PS2 accordingly [sic].*

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<sup>42</sup> Letter from Dave Morrison Project Manager of Roberts Industrial Electrical to Craig Van Der Zwet at the Council 30 July 2020 BOD 206.

<sup>43</sup> Letter from Council to Structural Concepts and the owner 27 October 2020 BOD 208 – 209.

<sup>44</sup> A NTF is a statutory requirement to fix building work found by a building consent authority to be non-complaint with the Building Act 2004. Notice to Fix 27 October 2020 BOD 210 - 212.

<sup>45</sup> Building A – Background Timeline BOD 4.

<sup>46</sup> Email from Alan Thompson to Gerard van Veen at Council 2 November 2021 BOD 627.

90. Emails between Mr Thompson, the Council and Mr Budvietas indicate a plan had been devised between these parties around how to move forward. In relation to Mr Budvietas' role, an email from Mr Thompson states:<sup>47</sup>

*Hi Arthur/Kelvin*

*I have recently spoken to you both about a plan to get building owner's building [Building A] back into operation again. This afternoon I met with John and Gerard at the Council and got agreement from them to follow the proposed plan...*

*So, the plan is ....*

*1. Arthur revises the strengthening design taking account of the following.*

*a. Discoveries after the building was opened up (eg brick walls, wall openings, etc)*

*b. The points raised by Spencer Holmes ie parapets, front wall transverse strength, etc*

*c. Mike has stated that he would like the strengthening to address the current weak points if this does not result in major cost. I therefore suggest Arthur provides preliminary comment on this (including approx cost estimates, etc) so that Mike can make a definitive call.*

*2. Arthur provides revised calcs*

*3. Arthur provides any additional strengthening details; this to be shown separately so can be included with current consent application*

*4. Arthur updates PS1 (might be necessary to issue in two parts – one for COA, 1 for consent) [sic].*

91. By mid-January 2022 Mr Thompson had written a letter to the Council stating “*unfortunately, we have not been able to get Arthur at Structural Concepts to provide the additional information requested*”.<sup>48</sup>
92. LHT and Silvester Clarke were engaged by the building owner to resolve the outstanding structural compliance matters at the property.<sup>49</sup> An agreed way forward was documented by Council in an email of 28 February 2022, and resulted in:
- d. A design change to include a new portal frame to replace a rear wall; and
  - e. The addition of some plates and bolts added to one portal frame (as shown on details 5/110 and 4b/120 on drawing S120), and relate to an existing opening in the side wall.
93. This culminated in the issuing of a PS4 and code compliance certificate for the building in March 2024.<sup>50</sup> We note that the front wall that Spencer Holmes rated at 40%NBS was reassessed by LHT as being >66%NBS.<sup>51</sup>
94. It appears that Mr Budvietas and/or SCL had no involvement in the work undertaken by LHT and Silvester Clarke.

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<sup>47</sup> Email from Alan Thompson to Arthur Budvietas and others 4 November 2021 BOD 628.

<sup>48</sup> Letter from LHT Design to Council 19 January 2022 BOD 631.

<sup>49</sup> Documents obtained from Council online portal BOD mid 2022 – March 2024 BOD 639 – 734.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

## Building B

95. In considering the information provided we consider the key information in relation to Building B to be set out in chronological order below.
96. Mr Budvietas provided a structural strengthening design for Building B.
97. In October 2018, the Council received an application for building consent to carry out structural strengthening of the building. This application included a strengthening design proposal and signed PS1 by Mr Budvietas. The application and design suggested the work would result in a greater than 67%NBS rating.<sup>52</sup> On 8 November 2018, the Council issued the building consent. The work did not start and on 14 August 2020 a request for an extension of time was granted until 6 November 2021.<sup>53</sup>
98. After becoming concerned about other strengthening design projects carried out by Mr Budvietas, the Council engaged Calibre Consulting Limited (**Calibre Consulting**) to conduct a high-level review of the proposed design.<sup>54</sup> Calibre Consulting produced this review on 10 December 2020 where it concluded:<sup>55</sup>

*Calibre has been engaged HDC to carry out a High-Level Peer Review of the consented documents on the Seismic Strengthening Design of the property at [address] carried out by Structural Concepts Ltd in 2018 and targeted a minimum rating of 67%NBS(IL2).*

*We trust we have interpreted your requirements correctly in this letter by outlining our concerns regarding the design process followed by Structural Concepts Ltd that does not reflect the Seismic Strengthening Scheme proposed in the corresponding set of Structural Drawings provided to Calibre.*

*Hence, based on the Calculations package provided by HDC, we are unable to comment on the %NBS(IL2) that the Seismic Strengthening Scheme proposed in the corresponding set of Structural Drawings is likely to achieve.*

*Our recommendation is to appropriately assess the performance of the existing structure accounting for the designated Seismic Strengthening Scheme indicated in the Structural Drawings that supported the Building Consent application with HDC to confirm that the targeted 67%NBS(IL2) is met or note otherwise.*

99. On 1 October 2020, the building was issued an earthquake-prone classification. The notice states:<sup>56</sup>

*Hastings District Council has not determined if the building is earthquake prone (because the owner has not provided an engineering assessment), but is proceeding as if it had determined the building to be earthquake prone.*

100. The building is a priority for the Council and is required to be remediated by 1 April 2028.<sup>57</sup>

101. The Council instructed the property owner that it will need to engage a suitably qualified person to carry out the assessment as recommended by Calibre, at the building owner's cost.<sup>58</sup>

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<sup>52</sup> Building B – Background Timeline BOD 7.

<sup>53</sup> Letters Council To owners 17 December 2020 and 14 August 2020 BOD 386 and 388.

<sup>54</sup> Calibre Consulting Report 10 December 2020 BOD 229.

<sup>55</sup> Calibre Consulting Report 10 December 2020 BOD 235.

<sup>56</sup> Earthquake Prone Building Notice 1 October 2020 BOD 518

<sup>57</sup> Earthquake Prone Building Notice 1 October 2020 BOD 518.

<sup>58</sup> Letter Council To the owner 17 December 2020 BOD 386.

102. The building owner was also told an amendment to the building consent may be required or, alternatively, the Council may apply to the Ministry of Business, Innovation and Employment for a determination to have the decision to grant the consent reversed.
103. When the Council raised its concerns with the Registration Authority in January 2021, Mr Budvietas had not yet had the opportunity to consider the Calibre Consulting report (refer to paragraph 58, above). However, he subsequently advised no further action had been taken by himself as the project was put on hold (refer to paragraph 62). The Council further advised “*the property has since been sold and the new owner has submitted an application for a building consent for alterations to the building which includes structural strengthening design by a different company.*”<sup>59</sup>

## DISCUSSION

*Issue a: in relation to Building A did Mr Budvietas assess the building as having a seismic rating that cannot be substantiated?*

104. Undertaking a seismic assessment of an existing building is a complex task, and invariably appropriately qualified engineers do form different views and offer differing assessments. We refer to the Ministry of Business Innovation and Employment’s *The Seismic Assessment of Existing Buildings: Technical Guidance for Engineering Assessments* (July 2017) where it states:<sup>60</sup>

*Due to the nature of the seismic assessment process, it should not come as a surprise that, in some circumstances, assessments of the same building by two or more experienced engineers may differ – sometimes significantly.*

105. That LHT made a yet different assessment again underlines this point (as noted at paragraphs 93-94).

106. The guidance also acknowledges that an engineer’s experience and their ability to exercise their own judgement when undertaking a seismic assessment is crucial, i.e. it is a sophisticated task and cannot be undertaken by rote following a prescribed approach:<sup>61</sup>

*All seismic assessments are expected to be undertaken by experienced engineers with considerable knowledge of how buildings respond to earthquakes, as well as an ability to exercise judgement regarding key attributes and their effects on building seismic behaviour.*

107. In considering the actual NBS% Mr Budvietas calculated, we have read the brief of evidence from Mr Devine of Spencer Holmes, information submitted by Mr Budvietas, and the Investigating Committee’s report.

108. The Investigating Committee said:<sup>62</sup>

*... engineers at Spencer Holmes, carried out a seismic check and the building had no lateral support system for the front elevation. A parapet to the front elevation was not considered in the other direction. These two elements reduced the %NBS to 40%. We believe this should not have been missed by Mr Budvietas.*

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<sup>59</sup> Letter Council to Engineering New Zealand Disciplinary Committee – Response to request for further information for Hastings District Council v Budvietas (616) 16 April 2024.

<sup>60</sup> At A9-1 and A1-4.

<sup>61</sup> Ibid.

<sup>62</sup> Investigating Committee Decision 03 October 2023 BOD 624.

109. Mr Devine explained these two factors had a major impact on reducing the NBS to 40% in Spencer Holmes' assessment.

110. We have considered the responses from Mr Budvietas in relation to this issue and note that in his comments to us on 16 April 2024 he acknowledged:

*I have not met with Spenser [sic] Holmes, but agree with their comments that a mu of 1.0 was more appropriate for the analysis of the front wall ( which in particular reduces the %NBS possible for the building to 40%*

111. Further, while the NBS rating an engineer reaches is important, communication with other parties, including other engineers and the client, is also crucial for engineers undertaking structural assessments. This position is consistent with the aforementioned Guidance from the Ministry of Business, Innovation and Employment. While the Guidance accepts the notion that significantly different assessments are likely, it also states that the experienced engineers who have produced these different assessments must work together to find a "consensus position".<sup>63</sup>

*However, it is expected that experienced engineers will be able to identify the critical issues that are expected to affect seismic behaviour and that, through discussion, a consensus position should be able to be agreed...*

112. If this is not possible the guidance goes on to state: "If the disagreements occur at the DSA level and cannot be readily resolved, the differences in opinion should be acknowledged and recorded."

113. So, while the Guidance acknowledges the complexity involved in undertaking these assessments, it also indicates there is an expectation on the engineering industry that engineers work through their differences with a view to resolution.

114. On this matter, we note Mr Budvietas' lack of engagement with this issue of the different DSAs for the property. As far back as May 2020 Mr Budvietas understood Spencer Holmes had been engaged by the Council and produced a rating of 40%NBS.<sup>64</sup> On multiple occasions the Council unsuccessfully requested Mr Budvietas engage with Spencer Holmes.

115. Eventually, an independent project manager was engaged by the building owner, and Mr Budvietas agreed to make contact with Spencer Holmes to resolve matters. Likewise, when LHT engineers became involved, it appears Mr Budvietas again agreed to resolve matters with Spencer Holmes, but did not. Consequently, LHT and Silvester Clarke were engaged to remediate the work.

116. Then, in 2021, Mr Budvietas informed Engineering New Zealand he would like more time to resolve matters with the Complainant.

117. Despite the above stream of requests and assurances, we have seen no evidence that Mr Budvietas attempted to resolve matters in relation to the differing assessments with either the Council, Spencer Holmes or LHT.

118. If Mr Budvietas had engaged when the matter was initially raised by the Council, it may be that the shortcomings in his work would have been able to have been completely resolved at this time. The months and years that followed contained similar opportunities for him to engage with the Council and the other engineers involved.

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<sup>63</sup> Ibid.

<sup>64</sup> Building A – Background Timeline BOD 4.

119. Mr Budvietas had a professional obligation to act competently by undertaking engineering activities in a careful and competent manner. The Ministry of Business, Innovation and Employment's Guidance provides insight into what careful and competent engineering looks like here. Firstly, a CPEng engineer must carefully calculate the DSA using their knowledge and judgment and, secondly, where there are differences in professional opinion, the parties must engage to work through these.
120. Mr Budvietas also had an obligation to take reasonable steps to safeguard health and safety. In this instance, reasonable steps include calculating the DSA in a competent manner, *and* actively communicating with other parties, including other engineers, where there are different views. This is particularly important where those differences in opinion relate to matters affecting risk and/or effects in relation to health, safety, and the environment.
121. By undertaking the assessment in the manner discussed above and failing to engage further with others, we find that Mr Budvietas has fallen short of the standard reasonably expected of a chartered professional engineer, specifically 42B in relation to health and safety, and 42E(a)(ii) to undertake engineering activities in a careful and competent manner. We also consider that by failing to adequately engage with the issues as raised, and to adequately communicate with other parties, that Mr Budvietas meets the higher threshold of negligence for this aspect of his conduct.
122. As such, we find that Mr Budvietas assessed the building as having a seismic rating that cannot be substantiated, in breach of his obligations as a chartered professional engineer and member of Engineering New Zealand.
123. For completeness, we note quality assurance processes inside the firm were not evident, which is a mitigating factor. While the calculations were approved by Garry Newton, we otherwise saw no evidence Structural Concepts had an internal peer review process.<sup>65</sup>

*Issue b: In relation to Building A, did Mr Budvietas provide a structural strengthening design which may not have achieved the performance outcome implied.*

124. We note the extent to which issues a and b are interrelated here. Given Mr Budvietas assessed the building as having a seismic rating that cannot be substantiated, it is difficult to imagine how he would then have provided a structural strengthening design that did meet the performance outcome implied.
125. So, having found Mr Budvietas to be wanting in the first matter, it follows that Mr Budvietas has also fallen short in respect of issue b by providing a structural strengthening design which may not have achieved the performance outcome implied.

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<sup>65</sup> Building A Calculations BOD 31.

126. However, in the event that we are wrong in this presumption, we are of the view that: had Mr Budvietas engaged with the concerns raised by the Council and its peer reviewers per the MBIE guidance, the process would have enabled the assessment of the %NBS rating and design details to iterate and align (so achieving the implied/agreed performance outcome).

127. Additional works were required to the property to address shortcomings in Mr Budvietas' design. Those additional works were not to bring the building up to the 70% as claimed by Mr Budvietas, but (emphasis added):<sup>66</sup>

*The owner was required to engage a further engineering company and complete further structural work under a building consent **to achieve the structural performance outcome of 44%NBS.***

128. We therefore consider that Mr Budvietas has fallen short of the standard reasonably expected of a chartered professional engineer, specifically 42B in relation to health and safety, and 42E(a)(ii) to undertake engineering activities in a careful and competent manner.

129. As such, we find that Mr Budvietas provided a structural strengthening design which may not have achieved the performance outcome implied, in breach of his obligations as a chartered professional engineer and member of Engineering New Zealand.

*Issue c: In relation to Building A, did Mr Budvietas advise the property owner it could apply for an exemption or a building consent for strengthening work that had already been done on the building.*

130. In response to the RFIs sent by the Investigating and Disciplinary Committees, Mr Budvietas maintained that he was unaware such work had taken place without a building consent until he visited the site. This is consistent with the responsibilities assigned to SCL per the contract between SCL and the building owner, i.e. SCL did not agree to apply for the building consent.<sup>67</sup> Further, while Mr Budvietas undertook the structural design, the work itself was undertaken by Hellacious Engineering in April/May 2019.<sup>68</sup>

131. According to Mr Budvietas, when he realised the work did not have a building consent, a "member of staff" at Structural Concepts Limited, i.e. not Mr Budvietas, suggested to the owner that the way forward may be by applying for an exemption. This member of staff also advised the owner this may not be successful and a Certificate of Acceptance may be required.<sup>69</sup> This account is consistent with the emails sent by Esther Smith to the building owner about the matter.

132. Further to Mr Budvietas' account, the contemporaneous evidence shows the exemption was signed and lodged by others at SCL.<sup>70</sup> This is also consistent with the evidence showing this instruction from the client was not sent to Mr Budvietas.<sup>71</sup>

133. We have no evidence that suggests Mr Budvietas had any further involvement in the matter of applying for a building consent/exemption/certificate of acceptance. Mr Budvietas' recollection of events is consistent with the application for exemption and email of instruction.

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<sup>66</sup> Letter Rice Spier to Engineering New Zealand Disciplinary Committee – Response to request for further information for Hastings District Council v Budvietas (616) 16 April 2024

<sup>67</sup> Short Form Agreement between Structural Concepts and the owner BOD 572 – 573.

<sup>68</sup> Building A – Background Timeline BOD 2.

<sup>69</sup> Response from Mr Budvietas to Engineering New Zealand 19 April 2021 BOD 534.

<sup>70</sup> Email from Administrator to the Council 15 May 2019 and Application for Exemption 15 May 2019 BOD 15 and 19.

<sup>71</sup> Letters from Owner to Structural Concepts Administrator 14 May 2019 and 11 June 2019 BOD 20 and 117.

134. Therefore, we do not find that Mr Budvietas advised the property owner it could apply for an exemption or a building consent for strengthening work that had already been done on the building.
135. Accordingly, we dismiss issue c as it is unsubstantiated and therefore there is no applicable ground of discipline.

*Issue d: In relation to Building A, did Mr Budvietas carry out an inspection of the building work when he was aware the work had not been done in accordance with the Building Act 2004?*

136. Further to issue c above, we have seen no evidence suggesting that Mr Budvietas knew the work was being undertaken without building consent until he visited the site on 22 May 2019. We also note correspondence from Ms Smith requesting Council advise SCL of requirements relating to the inspection of the site and as arising from a building consent, a copy of which was requested from Council.<sup>72</sup>
137. Given Mr Budvietas' recollection in relation to issue c above was consistent with the contemporaneous evidence we received, we do not consider we have reason to doubt Mr Budvietas' account of events in relation to issue d.
138. Irrespective of this, we have been unable to fully comprehend the nature of the Council's concern here. We consider that in many situations engineers, including structural engineers, may undertake inspections of building work that has not been done in accordance with the Building Act. We understand that there can be situations where an engineer may, by necessity, inspect work undertaken without consent in order to determine if there is a health and safety or other risk.
139. Accordingly, we dismiss issue d as it is unsubstantiated. We do not see the act of undertaking a requested inspection as an issue, and, accordingly, there is no applicable ground of discipline.

*Issue e: In relation to Building B, did Mr Budvietas provide a structural strengthening design for the building which may not have achieved the performance outcome implied?*

140. We begin by noting there are similarities between this issue and issues a and b. However, we were not provided with a DSA for this property as Mr Budvietas was instructed to move straight to a strengthening design.<sup>73</sup> Likewise, Mr Budvietas did not provide an admission in relation to alleged shortcomings in the assessment and design for Building B.
141. We did receive Calibre Consulting's "high level" review of the seismic strengthening design.
142. Council would have rightly assumed that it could rely on the PS1 when it issued the Building Consent for this property. So, we consider it likely, and understandable that, given the concerns the Council had in relation to the assessment and structural strengthening design undertaken by Mr Budvietas in relation to Building A, the Council then had concerns about Building B.<sup>74</sup>

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<sup>72</sup> Letter Esther Smith to Council 29 March 2019 BOD 84.

<sup>73</sup> Email Mr Budvietas to Engineering New Zealand 15 May 2023 BOD 578.

<sup>74</sup> Building A, Hastings – Background Timeline BOD 8.

143. However, as noted in relation to that property, the seismic assessment rating has a subjective element to it, which can result in engineers arriving at different %NBS ratings. This difference in the rating assessment, whilst cause for concern, is not grounds in itself for discipline. We note that the complaint was lodged without the parties having the opportunity to work through the reported differences and we cannot speculate the extent to which Mr Budvietas might have engaged with that process.
144. Accordingly, we dismiss issue e as it was not factually substantiated and there is no applicable ground of discipline.

## DECISION

145. Having decided that Mr Budvietas' conduct in relation to issues a and b did not meet accepted professional standards for chartered professional engineers, we must decide whether there are grounds to discipline him in accordance with the CPEng Act and the Engineering New Zealand Rules.
146. We find that Mr Budvietas breached the Code of Ethical Conduct applicable to both a chartered professional engineer and member of Engineering New Zealand. The Code requires an engineer to take reasonable steps to safeguard health and safety and undertake engineering activities in a careful and competent manner. We consider that Mr Budvietas did not act in accordance with the standards reasonably expected of a chartered professional engineer.
147. Having considered all the evidence, including responses to RFIs, written submissions, briefs of evidence, we are satisfied that, on the balance of probabilities, there are grounds for discipline under section 21(1)(b) of the CPEng Act and Engineering New Zealand Rules.
148. There is a range of disciplinary actions available to a disciplinary committee as set out in section 22(1) of the CPEng Act. There is also a range of disciplinary actions in relation to Mr Budvietas' membership with Engineering New Zealand under the Engineering New Zealand Complaints and Disciplinary Regulations 2020.

## Penalty

149. We reserved our decision on disciplinary sanctions and invited submissions from both parties on the appropriate penalty. We received brief submissions from both parties.
150. Following receipt of the submissions from the parties, we have considered and determined the penalties to be imposed.

## Relevant Law

### *Penalty*

151. 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. The High Court determined that a disciplinary penalty must:<sup>75</sup>

- protect the public (including through deterrence of other practitioners from engaging in similar conduct);
- set and maintain professional standards;
- where appropriate, rehabilitate the practitioner back to the profession;
- be comparable with penalties imposed on practitioners in similar circumstances;
- reflect the seriousness of the practitioner's conduct, in light of the range of penalties available;
- be the least restrictive penalty that can reasonably be imposed in the circumstances; and
- be fair, reasonable and proportionate in the circumstances.

152. 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.

153. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under the Act and the Engineering New Zealand Rules and they are the principles we rely on when considering the appropriate penalty orders in this case.

154. 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*.

155. In *Z*, the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:<sup>76</sup>

*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.*

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

157. The Supreme Court in *Z v Dental Complaints Assessment Committee* also stated 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.

158. 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 professional disciplinary processes.

159. Penalties available in the Act are the removal or suspension of Mr Budvietas' CPEng registration, censure and/or issuing a fine of up to \$5,000.<sup>77</sup>

160. Penalties available in relation to membership of Engineering New Zealand are:

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<sup>75</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

<sup>76</sup> *Z v Dental Complaints assessment Committee* SC 22/2007 [2008] NZSC 55.

<sup>77</sup> However, section 22(2) of the Act places limitations on what penalties can and cannot be ordered simultaneously.

45.1 removing their membership;

45.2 suspending their membership for any period;

45.3 suspending their membership until such time as they fulfil requirements for professional development, as specified by the Committee;

45.4 suspending their membership for a period of time if, by a prescribed date, the member does not fulfil requirements for professional development specified by the Committee;

45.5 fining them an amount not exceeding \$10,000;

45.6 censuring them;

### **Name Suppression**

161. We start with the presumption that the respondent's name in a disciplinary matter such as this will be published.<sup>78</sup> 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.

162. In the interests of open justice, we consider it is important that we are transparent about the outcomes of disciplinary processes, which includes publishing the names of engineers found in breach of their duties. We consider naming practitioners assists to assure the public of the robustness of our process, sets the standard for the profession and acts to deter other practitioners from engaging in similar conduct. Strong reasons are required to rebut this presumption.

163. Further, section 18 of the Act mandates "*any order made on a disciplinary matter in the last 3 years*" is included is contained in the Registration Authority's public register of Chartered Professional Engineers. Section 16(2)(iv) states this is to "*enable members of the public to - know which chartered professional engineers have been disciplined within the last 3 years*". Naming engineers who have been disciplined is contemplated by the Act and in accordance with the register's purpose.

### **Costs**

164. Under both the Act and Engineering New Zealand Regulations we are able to make an order in relation to costs. We do not consider costs are in the nature of a penalty, hence we consider them separately.

## **Hastings' District Council Submissions**

165. The Council sought that Mr Budvietas is named and the decision made public. The Council made no comment on either penalty or costs.

## **Mr Budvietas' Submissions**

166. Mr Budvietas made a submission in relation to penalty, costs and name suppression.

167. Mr Budvietas said he has already:

- competed the minimum CPD requirements for the last five years, including ongoing training in seismic assessment, and his CPEng status has been renewed during this same period; and

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<sup>78</sup> *Y v Attorney-General [2016] NZCA 474.*

- participated in an internal review at his firm in relation to clients undertaking work prior to obtaining a building consent. The firm has developed a letter confirming it will no longer inspect projects without proof of consent or an exemption.

168. Mr Budvietas proposed:

- to pay the Registration Authority/Engineering New Zealand's costs for the matter;
- his next CPEng renewal is brought forward by three years; and
- all projects with a capital value over \$100,000 are reviewed by an independent party, with this occurring already in 60% of projects he works on.

169. Given the *“long time since the offence, the laying of the complaint and lengthy investigation process”* Mr Budvietas submitted that name suppression should be maintained.

## Discussion

170. We have considered the relevant case law, including *Roberts* and *Z* and the parties' submissions in reaching our decisions on whether to impose a penalty, name suppression and/or make an order in relation to costs.

171. As expressed in our decision, we consider Mr Budvietas' conduct in relation to issues a and b was a departure from the standards expected of CPEng engineers and members of Engineering New Zealand.

172. We acknowledge Mr Budvietas has completed CPD over the past five years in relation to his practice area, and his CPEng has been renewed. While we are reassured he has completed this CPD, we note completing this is a prerequisite for retaining CPEng status.

173. We also acknowledge the letter created by Mr Budvietas and his firm in relation to undertaking work without a prior building consent. However, we note this does not go to our finding for issues a and b in relation to competency when undertaking structural engineering work.

174. We are unable to make an order in relation to the date on which Mr Budvietas' CPEng is renewed. In any case, we do not consider undergoing an early CPEng continued registration assessment is in the nature of a penalty.

175. We consider Mr Budvietas has an obligation under the code of ethical conduct to take reasonable steps to safeguard health and safety and undertake engineering activities in a careful and competent manner. In some instances, this may require that projects are peer reviewed, and we do not consider this is in the nature of a penalty either.

176. Protection of the public is front of mind for us as we determine the appropriate penalty. We are aware that seismic engineering inherently involves life safety implications and so deterring other practitioners from such conduct is also important, along with setting and maintaining the standards for structural engineers. The decisions engineers make can have wide-reaching effects, including consequences for multiple parties: clients, territorial authorities and the public.

177. We also acknowledge that the conduct giving rise to the upheld issues can have an impact on the profession as a whole, in terms of undermining the public's trust and confidence in the profession.

178. However, we consider the conduct is in the low to mid category, we do not consider it to be at the upper end of the scale. We are also aware of our obligation to impose the least restrictive

penalty given all the circumstances. As such, we consider that removing or suspending Mr Budvietas' CPEng registration would be disproportionate and unreasonable.

179. This leaves us with censure and/or ordering a fine of up to \$5,000. As we consider Mr Budvietas' conduct to be in the low to mid category of the scale, we conclude it is fair, reasonable and proportionate to order a fine of \$2,000. This quantum is in keeping with previous disciplinary committee decisions.
180. In keeping with the object of the Act and the establishment of the title of Chartered Professional Engineer, we also order Mr Budvietas to be censured. This censure acts to mark the profession's condemnation of Mr Budvietas' actions and deters others from similar conduct.
181. In relation to membership of Engineering New Zealand, amongst other things, we are able to suspend Mr Budvietas' membership until he completes specified CPD requirements or suspend his membership if he does not complete CPD we specify.<sup>79</sup> We consider it is important Mr Budvietas completes CPD in relation to professional communication and the seismic assessment of earthquake prone buildings as this goes to the heart of the upheld issues.
182. However, we have decided it would be unduly harsh to suspend his membership until such time as he completes this CPD. Accordingly, we determine that Mr Budvietas must complete 11.5 hours of CPD in relation to professional communication and the seismic assessment of earthquake prone buildings. We also require he writes a brief report with his reflections on the CPD and submits this to us. If he fails to do this, his membership will be suspended until such time as he completes it.
183. The specifics in relation to this will be sent separately to Mr Budvietas, including required courses and timeframes for completion.
184. We do not consider this case warrants a departure from the standard practice of naming the practitioner and accordingly we order that name suppression is lifted.
185. Costs in disciplinary proceedings such as this arise in relation to costs incurred in investigating and hearing the complaint. While the starting point is 50%, factors that aggravate or mitigate this may be taken into account and the figure can be adjusted up or downwards. In this situation, we acknowledge the disciplinary proceedings have been delayed and no fault can be attributed to the Mr Budvietas here. As such, we adjust the starting point downwards and order that Mr Budvietas pays 40% of the costs. We note this order is unusual and highly specific to this case.

## Summary of Orders

186. In exercising our delegated powers in relation to the Chartered Professional Engineers Act and Rules and Engineering New Zealand membership rules, we order that:
  - a. Mr Budvietas is censured;
  - b. Mr Budvietas pays a fine of \$2,000;
  - c. Mr Budvietas completes the required CPD and report in the specified timeframe, otherwise his membership of Engineering New Zealand will be suspended; and

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<sup>79</sup> Engineering New Zealand Complaints and Disciplinary Regulations at regulation 45.3 and 45.4.

- d. Mr Budvietas pays costs amounting to \$7,524 +gst.  
187. Mr Budvietas' interim name suppression is lifted.

A handwritten signature in blue ink, appearing to read 'Carron Blom', with a long horizontal flourish extending to the right.

Dr Carron Blom FEngNZ

**Investigating Committee Chair**