

DISCIPLINARY COMMITTEE DECISION

REGARDING THE OWN MOTION INQUIRY BY
IPENZ ABOUT STEPHEN JAMES BORLASE
CPENG MIPENZ INTPE(NZ)

In accordance with:

Chartered Professional Engineers of New Zealand Act 2002

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

Institution of Professional Engineers Rules

Institution of Professional Engineers Disciplinary Regulations

Institution of Professional Engineers Regulations for Competence Registers

Issued by

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23 November 2017



engineering
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Institute of Engineering Professionals

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EXECUTIVE SUMMARY

On 9 December 2016, Chartered Professional Engineer and IPENZ¹ Member Stephen Borlase was convicted in the Auckland High Court on eight charges relating to corruption and bribery of an official about roading contracts.

On 19 December 2016, IPENZ initiated an own motion inquiry in respect of Mr Borlase.

The purpose of this own motion inquiry was to determine whether there are grounds for disciplining Mr Borlase based on his conviction.

An Investigating Committee was formed to consider the matter. On 22 June 2017, having made their inquiries and considered the complaint, the Investigating Committee referred the matter to a Disciplinary Committee for consideration.

The Disciplinary Committee conducted a hearing on 26 September 2017. At the conclusion of that hearing, the Disciplinary Committee issued an oral decision, with written reasons to follow. The Disciplinary Committee found that:

- a. Both elements of the test in S21(1)(a) of the Chartered Professional Engineers Act 2002 had been met.
- b. Mr Borlase had breached rule 4.4 of the Institution of Professional Engineers New Zealand Rules (IPENZ Rules).
- c. Mr Borlase had breached clause 55 of the Institution of Professional Engineers New Zealand Regulations for Competence Registers (IPENZ Regulations for Competence Registers).

This decision sets out the background to, and reasoning for, that decision.

S21(1)(a) of the Chartered Professional Engineers Act 2002 is a two-element test. The first element requires a finding that Mr Borlase had been convicted of an offence punishable by imprisonment for a term of six months or more. The second element is that IPENZ considers this reflects adversely on Mr Borlase's fitness to practise engineering.

The first element is satisfied by court records.

Having regard to the type, duration, and context of the offending, we are satisfied that Mr Borlase's convictions in the circumstances reflect adversely on his fitness to practise engineering. We have also applied this rationale to our consideration of rule 4.4 of the IPENZ Rules, and clause 55 of the IPENZ Regulations for Competence Registers. We have concluded that Mr Borlase has breached his good character obligation under rule 4.4, and that he has satisfied the test in clause 55, in that he has acted in a manner that makes him unfit to practise engineering.

¹ IPENZ is the Registration Authority for Chartered Professional Engineers and New Zealand's professional body for engineers. On 1 October 2017, IPENZ changed its trading name to Engineering New Zealand. For the sake of clarity, both the Registration Authority and Engineering New Zealand will be referred to as IPENZ throughout this document.

BACKGROUND

OWN MOTION INQUIRY

1. On 9 December 2016, Chartered Professional Engineer and IPENZ Member Stephen Borlase was convicted in the Auckland High Court on eight charges relating to corruption and bribery of an official about roading contracts.
2. On 19 December 2016, IPENZ commenced an own motion inquiry² in respect of Mr Borlase.
3. The purpose of the own motion inquiry was to determine whether there are grounds for disciplining Mr Borlase on the basis of his conviction. It did not investigate the circumstances surrounding the allegations of corruption and bribery themselves, as those have already been considered and determined by the High Court.
4. Specifically, the own motion inquiry sought to determine whether or not:
 - Both elements of the test in S21(1)(a)³ of the Chartered Professional Engineers Act 2002 had been met.
 - Mr Borlase had breached rule 4.4⁴ of the IPENZ Rules.
 - Mr Borlase had breached clause 55⁵ of the IPENZ Regulations for Competence Registers.

INVESTIGATING COMMITTEE

5. Following an initial investigation, the matter was referred to an Investigating Committee for formal investigation.
6. On 22 June 2017, having inquired into and considered the matter, the Investigating Committee referred the matter to the Disciplinary Committee for consideration.

DISCIPLINARY COMMITTEE

7. The Disciplinary Committee was appointed on 16 August 2017.
8. The Disciplinary Committee consisted of:
 - Peter McCombs CPEng DistFEngNZ IntPE(NZ)
 - Sulo Shanmuganathan CPEng FEngNZ
 - Hamish Wilson BSc, nominated by Consumer New Zealand.

² Under rule 55(1) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (the Rules), IPENZ may inquire into any matter on its own motion if it has reason to suspect that a Chartered Professional Engineer or former Chartered Professional Engineer may come within any of the grounds for discipline in section 21 of the Act. The complaint was commenced pursuant to rule 55(1) of the Rules, clause 4(1) of the IPENZ Disciplinary Regulations, and clause 58(1) of the IPENZ Competence Register Regulations.

³ S21(1)(a) provides that IPENZ may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a Chartered Professional Engineer has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of six months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering.

⁴ Rule 4.4 imposes an ethical obligation on Members, that they must conduct themselves at all times in a manner consistent with being a fit and proper person to be a Member of the Institution (the "good character" obligation).

⁵ Clause 55(a) provides that IPENZ may (in relation to a matter raised by a complaint or by its own enquiries) make an order if it is satisfied that a registered person has acted in a manner that in the view of the Institution makes the person unfit to practise engineering.

INFORMATION GATHERED

9. On 9 December 2016, Mr Borlase was found guilty in the High Court of Auckland on eight charges of bribery and corruption of an official under section 105(2) of the Crimes Act 1961.⁶
10. The charges span a seven year period, from 2006 to 2013, and were in relation to Mr Borlase's business relationships with two public officials.
11. Mr Borlase is a former director of Projenz Limited, which undertook roading project consultation contract work for Rodney District Council and Auckland Transport. The offending related to:
 - Payment by Projenz of monthly invoices from former Director of Transportation at the Rodney District Council (and later an Auckland Transport employee) Murray Noone, that were said to be for consulting services. In her consideration of the matter, Fitzgerald J found that these payments were made in connection with Mr Noone's official roles at Rodney District Council and Auckland Transport and with an intent to influence him in that regard.
 - The provision of benefits to Mr Noone, such as travel and accommodation. Justice Fitzgerald stated: "I have no doubt that these benefits were provided in connection with Mr Noone's roles at Rodney District Council and Auckland Transport and with an intent to influence him in that regard."⁷
 - The provision of benefits to Auckland Transport Maintenance Contracts Manager Barrie George, such as travel, accommodation and other benefits.
12. On 22 February 2017 in the High Court in Auckland, Fitzgerald J sentenced Mr Borlase to five years and six months' imprisonment.

SUBMISSIONS

Mr Borlase's response to the own motion inquiry

13. Mr Ian Brookie, Mr Borlase's lawyer, provided a brief letter⁸ of response to the own motion inquiry. Mr Brookie noted that the convictions focussed on Mr Borlase's business relationships. He asked IPENZ to keep in mind the following:

"At no time during the trial was the quality of the engineering services provided by Projenz/Mr Borlase to [Rodney District Council/Auckland Transport] brought into question, and the High Court's findings are consistent with the evidence given at trial – which was to the effect that Projenz's performance was of the highest quality."

IPENZ's submissions

14. On 8 September 2017, IPENZ filed written submissions with the Disciplinary Committee.

⁶ Section 105(2) provides: "Everyone is liable to imprisonment for a term not exceeding seven years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him or her in his or her official capacity."

⁷ R v Borlase and Noone [2016] NZHC 2971 at 18.

⁸ Bundle of documents (BOD) page 6.

15. IPENZ noted⁹ that there is no definition for “fit and proper person” in the IPENZ Rules or Disciplinary Regulations.
16. IPENZ’s written submission to the Disciplinary Committee noted¹⁰ the following reasons that it considered Mr Borlase’s convictions make him unfit to practise engineering:
 - the offending took place in the context of Mr Borlase’s business;
 - the offending was serious;
 - the offending occurred over a prolonged period of time, and involved two officials;
 - the offending was a dishonesty offence, where Mr Borlase was in a position of authority and power as a director; and
 - the public expects engineers to act with honesty and integrity.

Submissions in person

17. The Disciplinary Committee hearing was held in Wellington on 26 September 2017. IPENZ General Counsel Ms Helen Davidson, appeared on behalf of IPENZ. Although formal notice had been given, there was no appearance by or on behalf of Mr Borlase.
18. In its submissions, IPENZ emphasised that the own motion inquiry was limited to Mr Borlase’s conviction, and how that reflects on his standing as a Member of IPENZ, a Chartered Professional Engineer, and on the International Register.
19. IPENZ reiterated its view that Mr Borlase’s conviction and the type of offence committed reflect poorly on the profession, and its view that the tests in s21(1)(a) of the Act, rule 4.4 of the IPENZ Rules, and clause 55 of IPENZ Regulations for Competence Registers had been met.
20. IPENZ drew the Disciplinary Committee’s attention to the five points outlined (above at 16) in its written submissions regarding the second element of the test in s21(1)(a).
21. It also indicated that a number of members of IPENZ had contacted IPENZ expressing concern about Mr Borlase retaining his membership.
22. IPENZ was able to provide some useful background regarding rule 4.4, which was inserted into the IPENZ Rules in November 2004 following the vote of members at a Special General Meeting. It reflected an intention to incorporate all membership obligations into one set of Rules.
23. For IPENZ, Ms Davidson concluded that the Disciplinary Committee should be satisfied that the elements set out at 16 above reflect adversely on Mr Borlase’s fitness to practise engineering.

DECISION

DISCUSSION

24. In coming to our decision, we appreciated the rationale the Investigating Committee helpfully set out in its decision. We accept that the quality of Mr Borlase’s engineering is not at issue. We have focussed our considerations on Mr Borlase’s fitness to practise engineering in respect of S21(1)(a), rule 4.4 of the IPENZ Rules and clause 55 of the IPENZ Regulations for Competence Registers.

⁹ At paragraph 5.7 of its submissions.

¹⁰ At paragraph 5.5b

S21(1)(a) of the Chartered Professional Engineers Act 2002

25. We note that the test for discipline in s21(1)(a) of the Act has two elements, both of which must be satisfied for discipline. It requires that:

- i. A Chartered Professional Engineer has been convicted by any court in New Zealand or elsewhere of any offence punishable for a term of six months or more; and
- ii. the nature and commission of the offence reflects adversely on the person's fitness to practise engineering.

The fact of conviction

26. On 9 December 2016, Mr Borlase was convicted of eight charges of corruption and bribery of an official.¹¹ Conviction under this section carries a possible penalty of not more than seven years' imprisonment.

27. We have been provided with copies of both the short "Verdicts and Summary of Reasons for Verdicts" of Fitzgerald J and the full reasoning and decision. We are satisfied that the first part of the test in S21(1)(a) has been met.

Fitness to practise engineering

28. The second element of the test requires an exercise of judgement.

29. In considering whether Mr Borlase's convictions reflect adversely on his fitness to practise engineering, we are mindful of the following:

- Mr Borlase's convictions relate to offending that spanned a seven-year period. This was not a one-off mistake, but rather it was calculated, continued conduct over a period of years.
- The conviction is for dishonesty offences.
- The offending was serious, as indicated by the term of Mr Borlase's sentence.¹²
- The conviction relates to behaviour undertaken by Mr Borlase in the course of his profession.

30. We agree with IPENZ's assertion that these factors together raise serious questions about Mr Borlase's ethics and professionalism and that his actions, if condoned, would lower the standing of the profession in the eyes of the public. We conclude that the second element of the test in s21(1)(a) has also been met.

31. We note Fitzgerald J's comments that Mr Borlase's offending was not victimless. In the Court's decision, her honour helpfully set out the impact of Mr Borlase's offending, including the tarnishing of reputations and the adverse effects on the wider public perception of engineers. In particular, we note her Honour's comments at paragraph 39, that:

"...offending of this nature has a wide effect, tarnishing New Zealand's current reputation as a place where public corruption is virtually non-existent".

32. And at paragraph 41:

¹¹ S 105(2) of the Crimes Act 1961.

¹² Mr Borlase was sentenced to five years' imprisonment on 22 February 2017. **R v Borlase [2017] NZHC 236 (22 February 2017)**

“...Put simply, the public’s trust in the manner in which officials carry out their duties is seriously undermined.”

33. Having reviewed and assessed these aspects of the matter, we consider Mr Borlase’s convictions reflect adversely on his fitness to practise engineering.

Rule 4.4

34. Rule 4.4 from the IPENZ Rules 2015¹³ requires that:

“Members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a Member of the Institution (the “good character” obligation).”

35. IPENZ submitted that Mr Borlase’s conviction, as well as the type of offending, give reason to suspect that Mr Borlase has breached his obligation under rule 4.4.

36. In this regard, we note that the courts have examined the definition of ‘fit and proper’ in the legal context. In *New Zealand Law Society v Mitchell*, the Court found that a person is ‘fit and proper’ where they are “of unquestionable integrity, probity or trustworthiness”. In *R v Landon*, the Court found that a person was ‘fit and proper’ where they were “of such integrity and moral rectitude [that he or she may] be safely accredited by the Court to the public to be entrusted with their business and private affairs”.

37. Given the facts of this matter, we consider Mr Borlase has breached his obligation under rule 4.4.

Clause 55

38. Clause 55(a) establishes a ground for discipline where an engineer has breached the Code of Ethical Conduct set out in clauses 44 to 54.

39. Clause 46 requires that a registered person must act honestly and with objectivity and integrity in the course of his or her engineering activities.

40. It is clear to us that bribery of an official, a dishonesty offence, is contrary to the obligations of honesty, objectivity and integrity. Bribery is, by its very nature, dishonest. The bribery occurred in Mr Borlase’s capacity as an engineer.

41. We are satisfied that there is a ground for discipline under clause 55 of the Regulations for Competence Registers, in that Mr Borlase breached his obligation under clause 46.

DECISION

42. In reaching our decision we have been mindful of:

- the fact of conviction,
- the type of offending (convictions for eight charges of dishonesty offending); and
- the circumstances of the offending (that it lasted over a period of seven years and was in the course of Mr Borlase’s engineering activities).

43. We find that:

- a. both elements of the test in S21(1)(a) of the Chartered Professional Engineers Act 2002 have been met.

¹³ As discussed above, this Rule was inserted in 2004. It has therefore been in place since before the beginning of the period of Mr Borlase’s offending.

- b. Mr Borlase breached rule 4.4 of the IPENZ Rules.
 - c. Mr Borlase breached clause 55 of the IPENZ Regulations for Competence Registers.
44. We find that there are grounds for disciplining Mr Borlase under the Act, the IPENZ Rules and the IPENZ Regulations.

DISCIPLINARY ACTIONS

45. Having decided that there are grounds for disciplining Mr Borlase, we need to determine what orders, if any, should be made against him.
46. In this regard, there are a range of disciplinary actions available under section 22(1) of the Act.¹⁴ In addition, under rule 11 of the IPENZ Rules, a range of sanctions in respect of Mr Borlase's membership of IPENZ are available.
47. On 31 October 2017 our reserved determination was sent to the parties and they were invited to make submissions as to penalties.
48. On 8 November 2017, we received a submission on penalty from IPENZ. In summary, IPENZ submitted that an appropriate penalty would be:
- a. The removal of Mr Borlase's registration as a Chartered Professional Engineer be removed under section 22(1)(a) of the Act for a period of 3 years, after which he may reapply.
 - b. Mr Borlase be expelled from membership of IPENZ (now Engineering New Zealand) under rule 11.5(a) of the IPENZ Rules.
 - c. Mr Borlase pay 50% of the costs incurred inquiring into his conduct, that amounting to \$2979.04.
 - d. Publication of Mr Borlase's name with a full copy of the Determination be made available on IPENZ's (now Engineering New Zealand's) and the Registration Authority's website.
49. In its submission, IPENZ noted the following considerations.
50. In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*¹⁵ the High Court outlined a number of principles to be applied by (in that case) the Health Practitioners Disciplinary Tribunal (Tribunal) in determining the appropriate penalty to impose in disciplinary proceedings against a health practitioner. The High Court determined that a disciplinary penalty must:
- a. protect the public (including through deterrence of other practitioners from engaging in similar conduct);
 - b. set and maintain professional standards;
 - c. where appropriate, rehabilitate the practitioner back into the profession;
 - d. be comparable with penalties imposed on practitioners in similar circumstances;
 - e. reflect the seriousness of the practitioner's conduct, in the light of the range of penalties available;
 - f. be the least restrictive penalty that can reasonably be imposed in the circumstances; and
 - g. be fair, reasonable; and proportionate in the circumstances.

¹⁴ Section 22 refers to the Authority as having power to make these disciplinary orders. However, the Authority delegates these functions to the Committee under rules 66(a) of the Rules.

¹⁵ [2012] NZHC 3354.

51. 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.
52. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under section 22 of the Act.
53. IPENZ also submitted that 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*.¹⁶ In *Z*, the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:

Ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.
54. IPENZ submitted that this is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.
55. IPENZ further submitted that the Supreme Court in *Z* also states that while professional disciplinary proceedings are not intended to punish practitioners, they may have a punitive effect in practice. This is similar to the principles set out in *Roberts* in that the penalty be the least restrictive penalty and that punishment is not a necessary focus of a disciplinary penalty.
56. We note the IPENZ submission that it is appropriate that disciplinary penalties mark the profession's condemnation of the relevant conduct, noting that to do otherwise would not be consistent with the purpose of the Act to establish the title of Chartered Professional Engineer as a mark of quality.¹⁷
57. We also note IPENZ's submission that the reasoning underlying *Roberts*' focus on practitioner rehabilitation is less relevant to penalties under the Act in light of the fact that the removal or suspension of a Chartered Professional Engineer's registration does not prevent the individual practising as an engineer, but does prevent use of the Chartered Professional Engineer title. Similarly, the removal of an engineer's membership to IPENZ (now Engineering New Zealand) does not prevent the individual practising as an engineer, but prevents the individual from claiming to be a member of IPENZ.
58. Overall, we accept IPENZ's submission and rationale on penalty.
59. In our view, as noted previously, Mr Borlase's convictions raise serious questions as to Mr Borlase's ethics and professionalism and that his actions, if condoned, would undermine the public's trust in the engineering profession and reduce public confidence in the Chartered Professional Engineer label. In our view, Mr Borlase's offending is at the extreme end of offending, and his penalty should reflect this.

Naming

60. Naming of engineers subject to a disciplinary finding supports openness, transparency, and accountability. It is the starting point and will only be inappropriate in certain limited circumstances where the privacy of the individual engineer outweighs the public interest. In this case, given the

¹⁶ [2008] NZSC 55.

¹⁷ Section 3 of the Chartered Professional Engineers of New Zealand Act 2002.

seriousness of Mr Borlase's offending, the fact that he has already been named publicly, and the absence of any submission for Mr Borlase, we consider it appropriate for Mr Borlase to be named.

Costs

61. In relation to costs, we have considered other disciplinary committee orders of costs, as well as Mr Borlase's participation in the disciplinary process. While Mr Borlase's breaches are serious, we consider that our view on this is adequately reflected in the severity of the orders made against him, as noted below. We consider that it reasonable to order Mr Borlase pay 50% of costs incurred by IPENZ, which is consistent with previous disciplinary orders.

SUMMARY OF ORDERS

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

- a. Mr Borlase's registration as a Chartered Professional Engineer be removed under section 22(1)(a) of the Act for a period of 5 years, being until December 2022, after which he may reapply.
- b. Mr Borlase be expelled from Membership of IPENZ (now Engineering New Zealand) under rule 11.5(a) of the IPENZ Rules.
- c. Mr Borlase pay 50% of the costs incurred by IPENZ inquiring into his conduct, that amounting to \$2979.04.
- d. IPENZ publish Mr Borlase's name and a full copy of the Decision be made available on IPENZ's and the Registration Authority's website.
- e. IPENZ publish a case summary in its member magazine and any other channel that it thinks appropriate.

63. In conclusion, we reiterate our condemnation of Mr Borlase's conduct. Mr Borlase's conduct is at the extreme end of offending, and falls significantly below the standards expected of Chartered Professional Engineers and members of IPENZ (now Engineering New Zealand).



Signed

Peter McCombs CPEng DistFEngNZ IntPE(NZ) on behalf of the Disciplinary Committee

23 November 2017

Date