

Appeal Number: 03/10

BEFORE THE CHARTERED PROFESSIONAL ENGINEERS COUNCIL

NO 136

UNDER Chartered Professional Engineers of New Zealand Act 2002
 In the matter of an Appeal against the decision of the Registration Authority
 Between Mr Y
 Appellant
 AND Mr T
 Respondent

Decision

1. This is an appeal to the Chartered Professional Engineers Council from a decision of the Registration Authority. The decision arose from a complaint by Mr Y, a Building Consultant and Project Manager about Mr T CPEng.
2. Under Rule 58 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 and Amendment Rules 2004 ("the Rules") a Chair of Investigating Committees can either refer a complaint to an Investigating Committee or dismiss a complaint without referring it to an Investigating Committee, if the Chairperson of Investigating Committees decides that:
 - *There is no applicable ground of discipline under section 21(1)(a) -(d) of the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"); or*
 - *The subject matter of the complaint is trivial; or*
 - *The alleged misconduct is insufficiently grave to warrant further investigation; or*
 - *The complaint is frivolous or vexatious or is not made in good faith; or*
 - *The person alleged to be aggrieved does not wish action to be taken or continued; or*
 - *The complainant does not have sufficient personal interest in the subject matter of the complaint; or*
 - *An investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*
3. In his decision dated 9 April 2010, the Chairman considered the applicable grounds of discipline under section 21(a)-(d) of the Act as well as the grounds set out in Rule 57. He concluded that no grounds exist for referring the complaint to an Investigating Committee. In particular he made reference to section 21(1) (c) of the Act and considered that Mr T had not performed engineering services in a negligent or incompetent manner. Hence he decided that the complaint should be dismissed under clause 58(d) of the Rules.

The Chairman's Decision not to refer the matter to an Investigating Committee

4. As stated above, this appeal concerns the decision of the Chair not to refer the matter to an Investigating Committee. The Council has considered whether the Investigating Chair complied

with the statutory requirements, and gave appropriate weight to the information in his possession.

5. The Council notes that the Complaints Review Officer had recorded that he believed that there were several aspects requiring further consideration.
6. It is clear the legislation envisages that the role of the Chair is not to usurp the powers of the Investigating and Disciplinary Committees, but to rule out complaints without merit. The Council has determined that the Chair failed to give appropriate weight to the role of the Investigating and Disciplinary Committees.

The Council decision

7. Under section 37(5) (c) the Council can make any decision that could have been made by the decision authority. The decision authority is defined in section 4 as the Registration Authority or Council. The relevant functions of the Registration Authority are set out in section 39(d) which include: receive, investigate and hear complaints about, inquire into the conduct of, and discipline, chartered professional engineers in accordance with part 2. Section 26 enables the decision authority to regulate its own procedure for making decisions, except as otherwise provided by the Act.

Investigation of complaint

8. The Council considered the matter and found that there is an applicable ground of discipline under Rule 57 (a) to be investigated. The applicable ground is contained in section 21(c), which is whether Mr T performed engineering services in a negligent or incompetent manner.
9. The Council finds that the Chair did not provide the parties with material for comment prior to making his final decision.
10. **The Council finds that the Chair should have referred the matter to an Investigating Committee.**

The Right of Appeal

11. Section 35 of the Act allows for a right of appeal against a decision of the Registration Authority to the Chartered Professional Engineers Council ("the Council"). The appeal of a decision must be made by written notice to the Council within 28 days after the person receives notice of the decision from the Registration Authority or any further time that the Council allows on application made to it before the expiry of the 28 day period.
12. The first issue is whether the matter was appealed in writing to the Council in the required time period, or any further time period allowed. The Decision is dated 9 April 2010. The Registration Authority wrote to Mr Y in a letter dated 12 April 2010. The letter advised Mr Y

that the Chair of the Investigating Committee has decided under Rule 57 that there were no grounds for referring the complaint to an Investigating Committee and there was no applicable ground of discipline under section 21(1)(a)-(d) of the Act, therefore the complaint was dismissed. The letter advised that the Chair had considered the documentation that has been submitted by both parties and formed the view that there was no identifiable aspect of Mr T's conduct that gave rise to any concern as to his compliance with the Rules. The letter advised Mr Y that he had 28 days to lodge an appeal in accordance with clause (sic) 35 to 38 of the Act. It gave the contact address for CPEng Council. It indicated that there were enclosures which included the Act and the Decision.

13. On 16 April 2010 Mr Y advised the Registration Authority that he would be appealing the decision and requested a copy of the decision which he said was not enclosed with the letter dated 12 April 2010 and requested a copy of the Act. He concluded the letter with the statement that this letter is confirmation that the decision "has to be appealed". He also asked for a copy of Mr T's response to his complaint to IPENZ ("the Registration Authority").
14. A hand written note indicates that the decision was sent on 19 April 2010 but that Mr T's response would be withheld. The hand written note is on the bottom of the letter written by Mr Y. It says: " Rang Mr Y 19.4.10 to say we could not send T's response but the rest has been sent. He was grateful". Alongside this note is a note from "C" which says: " I have resent the letter and included documents*. G ¹could you please check if we are empowered to send Mr T's response and if so send it, if not phone Mr Y and explain".
15. Mr Y wrote a fuller letter to the Registration Authority dated 11 May 2010 raising the grounds for the appeal. He asked again for Mr T's response. One copy of the letter dated 11 May has a hand written note saying "G, please advise, C". Mr Y in a hand written note states that he did not receive a reply to the 11 May letter so he hand delivered it to the Registration Authority on the 24th May.
16. In addition to this written correspondence Mr Y was in telephone contact with the Registration Authority. An internal email indicates that Mr Y rang in on or around 10 May asking for an extension of time for filing his appeal. According to his letter of 11 May the Registration Authority did ring Mr Y and appeared to have "confirmed a one week extension of time regarding our appeal..."
17. Mr Y wrote to the Secretary of the Council on 24 May 2010. He gave an explanation of reasons for delay in filing the appeal. They can be summarised as follows:
 - The decision was not enclosed with the letter dated 12 April 2010
 - The decision was received on 19 April 2010
 - He sought an extension of time within the 28 days.

¹ G is the Complaints Review Officer of the Registration Authority. C is the Director Engineering of the Registration Authority.

Did Mr Y file in time?

18. There are a number of errors in process, but there is no doubt that Mr Y attempted to file an appeal in time. He made an error in sending his notice to the Registration Authority, and for some period of time engaged in correspondence with the Registration Authority. It does not appear that the Registration Authority forwarded the correspondence to the Council upon receipt. Had it done so, there would have been no doubt that Mr Y was attempting to file an appeal. The Registration Authority compounded the confusion by assuming a power it does not have. It has no authority to confirm or otherwise provide an extension of time for filing an appeal.
19. It also seems that the decision was not sent by the Registration Authority in its original correspondence. Therefore Mr Y was not in a position to comply with the Appeal Practice Note which requires him to affix the decision to his notification until on or around 19 April.
20. Mr Y took steps to file an appeal and seek an extension of time. He lodged an appeal at the latest date on or around 24 May, but given the shortcomings in the process it seems reasonable to accept the notice of appeal.

There are shortcomings in the appeal processes; nevertheless the Council will hear the matter.

Does Mr Y have a personal interest in the matter?

21. The Council determined that Mr Y does have an interest in the matter. He was acting for the owners of the property and the disclosure of the report about the property, to the City Council, drew attention to the state of the property.

Procedure and preliminary matters

22. The Council considered its powers under the Act, in particular section 37(5) whereby the Council can make any decision that could have been made by the decision authority.
23. We have considered whether we should refer this matter back to the Registration Authority so that it can be passed on to an Investigating Committee. The Council had regard to Regulation 13 under the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002, wherein the Council must conduct hearings with as little formality as it considers is consistent with a fair and efficient process and a just and quick determination of the Appeal. We are conscious that appeals are normally by way of rehearing, but section 37(3) of the Act does allow the Council to grant leave to parties to call further evidence on appeal.
24. The Council determined that it could proceed to a Disciplinary hearing and that its procedure would be determined by Rules 66-70. In the circumstances of this case the Council considered that Regulation 13 was best satisfied by providing the parties with the opportunity to call further evidence and then making a decision on the merits, being a decision that ultimately the

Registration Authority could have made. The alternative would have been to have sent the matter back to the Registration Authority which would have meant further delays and possibly further opportunities for appeal, which the Council did not consider would provide a "fair and efficient process".

25. The Council established a panel of three.

26. Timetabling and events leading up to the hearing:

- a. The Council set down a timetable in September 2010 with a hearing date of 13th October 2010.
- b. The Council sought a response to the grounds of appeal from the parties.
- c. A bundle of documents was provided to the parties but Mr Y advised he did not receive them, so a fresh bundle was hand delivered on 4 October 2010.
- d. The appellant advised that the timeframe was untenable, so an extension of time was given.
- e. The Council advised the parties of the revised timetable on 11 January 2011.
- f. On 9th March 2011 Mr Y wrote to say he was scheduled to enter hospital on 14 March 2011 for surgery. Mr Y was asked to provide a medical certificate; otherwise the hearing would proceed on 18 March 2010.
- g. No medical certificate was received from Mr Y.
- h. The hearing proceeded on 18 March 2010. Mr T and his counsel attended.

27. In correspondence with Mr Y it was confirmed that the Council had given leave to Mr T to further file submissions on:

- whether the appeal was filed out of time, and
- whether the Chair of Investigating Committees had failed to observe the principles of natural justice by not providing the parties with material for comment prior to making his decision.

28. Mr Y was provided with the further evidence adduced at the hearing and a timetable for submissions. Mr Y was provided with Mr T's submissions.

29. The Council has provided an opportunity for Mr Y to be heard in person and to file submissions. It has taken the step of asking for a medical certificate to verify Mr Y's incapacity, this has not been provided. Therefore the Council has proceeded to consider the evidence before it. The Council does not consider that Mr Y has taken reasonable steps to progress the appeal.

The complaint:

30. The Council sought to clarify the matters. The complaint raised by Mr Y concerns whether Mr T:

- entered property without permission

- distributed an "erroneous" report
- made insufficient efforts to approach or attempt to approach the property owner prior to distribution of the report.
- relied upon an incorrect boundary position
- was working outside his area of expertise e.g. assessing the boundary position without the benefit of a survey
- made adverse comment on the structural adequacy of buildings which were erroneous

Further the Council accepted submissions on:

- whether in making his decision not to refer the matter to an investigating committee, the Investigating Chair adhered to the principles of natural justice and fairness including, but not limited to:
 - whether the Chair gave appropriate weight to the information in his possession;
 - whether he put all relevant information that he relied upon in coming to his decision, to the parties and provided the parties with an opportunity to comment on that information;
 - whether he provided the parties with an opportunity to comment on his findings and reasoning, before making his report final.

Entering property without prior permission

31. Mr T CPEng was engaged by Mr P, to report on the property adjacent to Mr P's home The adjacent property is owned by persons who live overseas. The property is tenanted.
32. Mr Y is a Building Consultant and Project Manager. Mr Y was engaged by the adjacent property owners to effect repairs on their property.
33. Mr T, in order to photograph the adjacent property, to assist him completing his report, entered the adjacent property without prior permission either on 24 April 2009 or on 7 May 2009 (or on both days). Mr T says he knocked on the tenant's door but no one was home. Mr T says he contacted A² (the engineers engaged by Mr Y) but the details of this contact are hazy, and he tried to contact Mr Y. Nevertheless these steps were unsuccessful and Mr T acknowledges that he entered the property without prior consent of the owners or their agents. Neither did he leave any note advising the tenants that he had entered the property and his purpose in doing so.

² Mr T seems to have contacted A in May 2009. The contact with A does not appear to have occurred prior to Mr T entering the property. He may have contacted A on or around the time he was writing the report only to find they were no longer involved.

34. Mr T could have taken further steps to have let the tenants and the property owners know of his intentions, such as delivering a letter to the property seeking permission to enter the property to take photographs. He could have requested that his client obtained permission on his behalf. Mr T advised the Council that he did not have this discussion with Mr P prior to entering the adjacent property. If obtaining proper permission was impossible then Mr T ought to have taken photographs from Mr P's property. The state of the building was not a reason to enter the property to take photographs.

35. **The Council concluded that Mr T ought to have obtained consent prior to entering the adjacent property in order to take photographs, failing that he ought not to have entered the property to take photographs. We do find that he entered the adjacent property without permission.**

Provision of the T Report to the City Council

36. On 15 May 2009, Mr T wrote to his client including a structural report about the adjacent property. Amongst other points he asserted that *"there are several part (sic) of the building and of the structural members that are likely to fall onto your property....There is a risk that people could be injured by falling debris as well as damage to your property. The risk to people using the deck is very significant.....The existing building does not comply with the current District Plan..."*. He concluded that this structure is likely to continue to undergo partial collapse on to the ground below as pieces fall off. A significant part is likely to fall within the next year. A complete collapse would occur in a moderate earthquake.....He suggested that the City Council be given a copy of the report. The report contained photos and drawings.

37. Mr P followed Mr T's recommendation and sent the report to the City Council. This Report had not been disclosed to the owners of the adjacent property or Mr Y prior to its dispatch to the City Council.

38. **We find that Mr T made no effort to approach or attempt to approach the adjoining property owner or his agent prior to distribution of the report to his client. We do not consider that he had an obligation to approach the adjoining property owner or his agent.**

Was the report erroneous?

39. The Council has identified two issues: Mr T's reliance on inferred boundaries and his description of the condition of the building.

40. Upon receipt of the report, the City Council contacted the owners of the adjacent property in June 2009 copying in Mr Y. The City Council advised them that Mr T's report identified a systemic structural failure could occur at any time within the year, and if this failure occurs it will endanger both properties and the occupants within them. It also notes that the engineers report says that the existing structure encroaches over the common boundary and into Mr P's property. The City Council gave the owner until 16 June 2009 to engage an engineer to inspect the building and report how to mitigate the danger, and by 31 July 2009 he is required to have

completed building work to mitigate all danger. Failure to comply would result in further action.

41. On 15 August 2009, the owners agreed to undertake the repair work authorising Mr Y to act for them.

Relied upon an incorrect boundary position: the inferred boundary

42. Mr T assessed the boundary location by inference (see page 3 of his report): "We infer these dimensions from the survey pegs.....this could be confirmed by a registered land surveyor." Despite his caveat it appears Mr T has drawn conclusions from these inferred boundaries.
43. The Council notes that the City Council relied on Mr T's report and did not read into it that the boundaries had been inferred. Mr Y did have to take steps to correct this misapprehension on the part of the City Council. Nevertheless, the key issue was the state of the structure rather than the exact boundary. It would have been prudent for Mr T to highlight the inference he was making about the exact location of the boundary.
44. Therefore any conclusions drawn by persons who relied on Mr T's "inferred boundaries" may have been incorrect. In his explanation to the Registration Authority on 18 October 2009, Mr T says the exact location of the boundary has no relevance to his report. He believes that it is reasonable to refer to an inferred boundary in a report. Had he avoided referring to a boundary at all then his report would have been "significantly reduced in meaning and usefulness". Nevertheless, in evidence Mr T says in retrospect he would have made the boundary issue clearer.
45. By letter to the City Council on 11 June 2009, Mr Y confirms that the adjacent property does not encroach on Mr P's property. The Council assumes that either Mr Y or the adjacent property owner would have incurred costs related to this matter.
46. **The Council does not find that Mr T was working outside his area of expertise e.g. assessing the boundary position without the benefit of a survey. However, Mr T has been unwise to have relied on an "inferred boundary" given that the reference to the boundary was in his own words "significant", and added to meaning and usefulness of his Report. In the context of the report the "inferred boundary" is not significant and does not make the report erroneous, but reliance on the "inferred boundary" has plausibly led to a cost on the owners of the adjacent property to verify the exact boundary.**

The structure and risk of collapse

47. The Council notes that Mr T's report identified a property in a poor state, which in his view posed a health and safety risk.
48. Under clause 43 of the Rules, a Chartered Professional Engineer must in the course of his or her engineering activities take reasonable steps to safeguard the health and safety of people.

49. The City Council placed weight on Mr T's report and the risk of collapse. By letter to Mr Y on 30 October 2009, the City Council explained that they had informed the owners of the adjacent property of the contents of Mr T's Report. The City Council requested that Mr T's findings should be confirmed and remedial work undertaken. If this is not done the City Council would engage its own engineer and pass the cost on to the owners, alternately the engineers for the two adjoining properties could provide the council with a single report. The City Council asked for an engineer's joint confirmation by 1 December 2009.
50. On 24 September 2009, G from A on behalf of Mr Y and the owner of the adjacent property wrote to the City Council saying that (in essence) structural collapse was unlikely.
51. On 22 March 2010 (some 10 months after the T Report had been provided to Mr P) the City Council Building Inspector and Mr G CPEng visited the adjacent property. Mr G believed the structure would likely be affected by a significant earthquake or wind from NE to SE quarters, but is not in immediate danger of collapse under the general current conditions. He recommended that it be strengthened to at least original code within the next 12 months (March 2011) and reassessed if the work is incomplete by that time.
52. Mr Y states in his letter of 24 May 2010, that the dwelling has not been well maintained and needs repairs but has been proven to not be in danger of collapse.
53. The Council considered that it was plausible that debris had fallen and could fall from the adjacent property onto Mr P's property. The heights and proximity of the properties are relevant. The report properly identified a property in a poor state and in Mr T's view it was a health and safety risk. This view is supported to some extent by Mr G's report.
54. **We do find that Mr T made adverse comment on the structural adequacy of buildings. There was agreement that the buildings were in poor repair, any difference between the engineers was a matter of degree. Mr T said it was the worst case he had seen; his report reflects his honest view. The report is not erroneous.**

In conclusion:

1. **The Council concludes that Mr T ought to have obtained consent prior to entering the property in order to take photographs, failing that he ought not to have entered the property to take photographs. We do find that he entered the adjacent property without permission.**
2. **We do find that Mr T made no effort to approach or attempt to approach the adjacent property owner prior to distribution of the report. However we do not consider that he had an obligation to approach the adjacent property owner or his agent.**
3. **The Council does not find that Mr T was working outside his area of expertise e.g. assessing the boundary position without the benefit of a survey. However, Mr T has been unwise to have relied on an "inferred boundary" given that the reference to the boundary was in his own words "significant", and added to meaning and usefulness of his Report. In**

the context of the Report the "inferred boundary" is not significant and does not make the Report erroneous, but reliance on the "inferred boundary" has plausibly led to a cost on the owners of the adjacent property to verify the exact boundary.

4. We do find that Mr T made adverse comment on the structural adequacy of buildings. There was agreement that the buildings were in bad shape, any difference between the engineers was a matter of degree. Mr T said it was the worst case he had seen; his report reflects his honest view. The report is not erroneous.

55. Was Mr T negligent or incompetent?

Section 21(1) (c) is the relevant subsection. This subsection requires a consideration of whether Mr T has been negligent or incompetent.

56. The test that the Council has applied in relation to negligence is drawn from *Complaints Committee of the Canterbury District Law Society v W* (2009) 1 NZLR 514. The Council put its mind to whether Mr T's conduct was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public.
57. Rule 6 sets out the minimum standards for registration as a chartered professional engineer. Of relevance are:
- (a) *Comprehend and apply his or her knowledge of accepted principles underpinning-*
 - (i) *widely applied good practice for professional engineering; and*
 - (ii) *good practice for professional engineering that is specific to New Zealand; and.....*
 - (d) *Exercise sound professional engineering judgement; and.....*
 - (g) *Identify, assess, and manage engineering risk; and*
 - (h) *Conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct; and*
 - (j) *communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities.....*
58. Rule 45 requires the Chartered Professional Engineer to act honestly and with objectivity in the course of his engineering activities.
59. The underpinnings for a minimum standard under the Rules should be read and considered in relation to any judgement of competence and negligence under the Act.
60. The actions complained of and the Council's findings on those actions are set out in paragraph 52 above.
61. **In relation to section 21(1) (c) the Council finds as follows:**
- (a) Mr T made a mistake in not obtaining consent to enter the adjacent property. It should not have occurred and does not show good judgement as a professional.
 - (b) Mr T was working for his client and had no obligation to show the report to the owners of the adjacent property prior to his client sending it on to the City Council.

- (c) Mr T did not appear to communicate with the engineers at A prior to commencing writing his Report, but contact appears to have been made before the Report was disclosed to his client and he found that they were no longer involved at that property.
- (d) Mr T should have been clearer about the "inferred boundary" reference in his Report.
- (e) Mr T made a judgement on the soundness of the structure and it was not a judgement that was either negligent or incompetent. He perceived a health and safety risk, and this was his honest opinion. There is no doubt that the structure was in need of repairs. None of the subsequent engineers believed that Mr T's Report was out of line, they differed on degree.

60. The Council notes areas for improvement, but it does not find that Mr T was negligent or incompetent.

Outcome

The Council finds that there are no grounds for disciplining the person complained about under section 21 of the Act.

No order for costs against either party is made.

Dated this 9th day of June 2011

Hazel Armstrong, Principal

Graham Shaw

Roly Frost