

APPEAL NUMBER : 01/12

**In the Matter of the Chartered Professional  
Engineers of New Zealand Act 2002**

**AND**

**In the matter of an appeal to the Chartered  
Professional Engineers Council pursuant to  
Section 35**

**Between**

Mr C

**Appellant**

**And**

Mr. OH

**Respondent**

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Decision of the Chartered Professional Engineers Council dated 24 August 2012

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### Chartered Professional Engineers Council

1. This is an appeal to the Chartered Professional Engineers Council ("the Council") under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"). The appeal is of a decision by the Chair of an Investigating Committees of the Registration Authority dated 20 December 2011, in which complaints by Mr C (Appellant), against a Chartered Professional Engineer, O.H. (Respondent), were dismissed without being referred to a full Investigating Committee. The complaint was dismissed under Rule 58 (d) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ("the Rules"), on the basis of Rule 57 (a) of the Rules that there was no applicable ground of discipline under S21(1)(a) – (d) of the Act.
2. Mr C's notice of appeal dated 4 January 2012 was received by the Council on 11 January 2012. Due to the lack of availability of legal advice over the holiday period, Mr C requested a further 28 days to submit his appeal documentation. The Chair of the Council, in his email dated 13 January 2012, agreed for Mr C to have until 14 February 2012 to submit his appeal. This being 28 days from the date that the notice of appeal was received by the Council. The Appeal Panel has determined that the appeal cannot be dismissed under S 35 (3) (b) for being received out of time.
3. The parties were informed by letter dated 27 February 2012 of the receipt of the appeal and subsequently by letter dated 7 March 2012 of the appointment of an appeal panel consisting of Jon Williams as Principal, Mr Arthur O'Leary, Ms Jane Nees and Ms Sharyn Westlake as members. The parties were informed of the timings required for submission of additional information and responses.
4. Mr O.H. confirmed on 5 March 2012 that he was to be represented by Robertsons, Barristers and Solicitors of Auckland. All subsequent correspondence was copied to them.
5. The 7 March 2011 letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. All parties were offered the opportunity for a hearing to be held in person if required.
6. Mr C requested an extension to the time frames. The new dates were issued to all parties in a letter dated 19 March 2012.
7. Mr C provided an additional submission detailing the grounds of his appeal on 4 April 2012. Robertsons responded on Mr O.H.'s behalf on 11 April 2012.
8. In an email dated 17 April 2012 Mr C requested an extension of the time from 27 April 2012 to 4 May 2012 to reply to Mr O.H.'s response. In emails of 3, 4 and 23 May 2012 Mr C requested additional extensions of time. The response from Mr C was received on 31 May 2012.

9. Via email on 28 May 2012 the Panel requested confirmation from all parties that they were happy for the matter to be considered on the papers. Confirmation was received on 29 and 31 May 2012. The Panel met in Wellington on 25 June 2012 to consider the appeal.
10. Mr. C's original complaint to the Registration Authority, dated 10 February 2010, was in respect of structural advice provided by Mr OH which related to works undertaken on the property owned by Mr C and Ms G, at G Rd, Wellington. In his complaint Mr C alleges that Mr OH:
- Failed to exercise due care in his work, uphold reasonable professional standards and has been negligent in the advice provided; and
  - Failed to uphold the ethics and adhere to, the moral standards set by the profession
11. In his appeal Mr C specifically alleges Mr OH of the following:
- Breaches of Rule 21 (1) (b) and (c) of the Act, namely breaches of the code of ethics and performance of engineering services in a negligent or incompetent manner.
  - That the Chairperson of the Investigating Committee erred in dismissing the complaint under rule 57(a) of the Rules.
12. The background to the complaint is.
- In the context of this complaint/appeal, the project at G Rd commenced with geotechnical ground testing and design of retaining walls on the road reserve above the existing dwelling. The scope was then extended to include lower retaining walls and foundations for part of the dwelling. Finally the existing dwelling was removed and foundation design was required for the new dwelling.
  - Mr OH provided a structural design for lower retaining walls and foundations for the dwelling. The structural design was based on geotechnical information provided by another party (subject to a separate complaint/appeal).
  - As the work progressed and the existing dwelling was removed from site, the ground conditions under the dwelling were seen to not match those indicated in the geotechnical report that the structural design was based on. There was man-made fill found to be present that had not been expected.
  - This necessitated further geotechnical ground investigation and structural redesign of the foundations. The redesign resulted in both additional design fees and additional capital costs.
  - As Mr C has not paid for the additional design work, Mr OH's company have refused to issue compliance documentation (PS4's) required by Wellington City Council for the issuance of a Code Compliance Certificate.
  - Mr C alleges that Mr OH was negligent in failing to design the original retaining/roundations adequately for the ground conditions that existed and that his withholding of the PS4 is unethical.
13. Rule 56 of the Rules requires the Registration Authority to carry out an initial investigation of the complaint in accordance with Rule 58 and either refer it to an Investigating Committee or dismiss on a ground in Rule 57.

14. When considering the dismissal of an appeal we are bound by Rule 57 which as a whole provides:

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

- (a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or
  - (b) the subject matter of the complaint is trivial; or
  - (ba) the alleged misconduct is insufficiently grave to warrant further investigation; or
  - (c) the complaint is frivolous or vexatious or is not made in good faith; or
  - (d) the person alleged to be aggrieved does not wish action to be taken or continued; or
  - (e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or
  - (f) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.
15. We do consider that Rule 57(a) has a purpose and two examples illustrate this. If a complaint was made that a Chartered Professional Engineer had libelled a complainant we cannot see that there would be an applicable ground of discipline under which such a complaint could proceed. Similarly, if there was an employment dispute between a staff member and a Chartered Professional Engineer there would most likely not be an applicable ground of discipline. (Though we stress that each complaint must obviously be assessed on its own facts).
16. The Chair of the Investigating Committee dismissed the complaint for failing to meet the requirements of Rule 57 (a).
17. The Panel considers that whilst there may be no "substantiated evidence" of a breach of S21 of the Act, the nature of the complaint is such that it falls within S21 (b) and (c) of the Act. The Panel considers that there was sufficient evidence available to the Chair of the Investigating Committee that there were "applicable grounds" to consider that there may have been a breach. As such the Panel considers that the Chair of the Investigating Committee was wrong in dismissing the complaint under Rule 57(a). The complaint should have been referred to an Investigating Committee.
18. In considering this Appeal the Panel has considered both the information available to the Chair of the Investigating Committee and subsequent information provided by all parties
19. Appeals to the Council are by way of rehearing (section 37(2)). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee, but the appellant carries the burden of satisfying us that we should do so.

20. Having come to the conclusion that the complaint should not have been dismissed under Rule 57(a), we are bound to consider whether the complaint should be dismissed for any other reasons set out in Rule 57.
- a. We immediately discount subparagraphs (d), (e) and (f) as being grounds for dismissal as it is clear that Mr C wishes to proceed with the action, has personal interest in the result and it is practicable to investigate the complaint.
  - b. We dismiss subparagraph (b). We do not consider that the subject matter of the complaint is trivial. That implies something of very little importance or value, something insignificant. We do not think that the complaint falls into that category.
  - c. We dismiss subparagraph (ba). We do not consider that alleged misconduct is insufficiently grave to warrant further investigation. If the alleged breaches of the Act and Rules were proved to be true then they would represent a serious failing on the part of the Engineer that could bring the profession into disrepute.
  - d. We dismiss subparagraph (c). We do not consider that the complaint is frivolous or vexatious. Frivolous is a reference to a proceeding that is not a serious and proper use of the complaint process (see for example *Fitzherbert v Acheson* [1921] NZLR 265). Vexatious is a reference to impropriety such as a second attempt to complain about a matter already dealt with (see for example *Registered Securities Ltd (in liq) v Yates* (1991) 5 PRNZ 68). It is clear from the papers filed by Mr C that there is strong feeling that Mr OH should have produced a design suitable for all ground conditions.

We therefore cannot dismiss the complaint under Rule 57 and need to consider the breach of S21 of the Act.

21. There are four grounds for disciplining a chartered professional engineer in section 21(1):
- (a) Conviction by any court of any offence punishable by imprisonment for a term of 6 months or more; or
  - (b) Breach of the code of ethics; or
  - (c) Performance of engineering services in a negligent or incompetent manner; or
  - (d) Made or provided false or misleading documentation or representations for the purpose of obtaining registration.

Clearly (a) and (d) are not relevant in this case.

22. Was the appellant negligent or incompetent?
- a. The panel has considered both the information provided Mr C and Mr OH. It has also considered the way in which the project has progressed with varying changes in scope to reach its current state.
  - b. The starting point is to consider what standard sets the benchmark for negligent or incompetent behavior.
  - c. 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.

- d. We do not consider that the Mr OH was incompetent. The design of the structures was consented and constructed. The design was based on the geotechnical information that was provided to him. As the site conditions were revealed, and found to be not in line with expectations, Mr OH brought this to the attention of the project manager (Ms G ). He then produced revised designs based on the updated geotechnical information. These actions are in line with expectations for someone in the profession and are not the acts of an incompetent engineer.
- e. We do not consider that the standard of negligence that a Chartered Professional Engineer is to be judged by is the civil standard as one might expect in a case where a party pursues another for damages. In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 a full bench of the High Court was called upon to consider an appeal from a Law Society Disciplinary Committee. In that case the allegation against the practitioner was framed under section 106(3)(c) of the Law Practitioners Act 1982 and was that the practitioner:
- ... has been guilty of negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect upon his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute...
- We see nothing in the evidence that indicates that Mr OH has performed in a manner that indicates that he is not fit to practice as an Engineer or would tend to bring the profession into disrepute. Therefore we consider that Mr OH has not been negligent.

We therefore conclude that the allegations of incompetence and negligence must be dismissed.

23. In respect of the specific allegations of breaches of ethics we note:

- a. There is no evidence that Mr OH has not taken reasonable steps to safeguard health and safety (Rule 43). In noting the changed ground conditions and acting to get the design changed he acted proactively in the matter.
- b. There is no evidence that indicates that Mr OH has acted in a way that will compromise the environment (Rule 44).
- c. There is no evidence that Mr OH acted without honesty, objectivity or integrity (Rule 45). The linking of issuing compliance documentation to the payment of a fee account is a commercial business decision and not an individual ethical one. The short form contract requires the parties to "attempt in good faith to resolve any dispute by mediation". Either party can start the mediation process. The failure of Mr OH to instigate the process is not a failing of ethics on his part.
- d. As noted above Mr OH has produced designs that have been consented and built. He has not misrepresented his competence as a structural engineer (Rule 46).
- e. The remaining Rules of Part 3 are not relevant to this complaint.

We see no evidence that Mr OH has breached the Code of Ethics defined in Part 3 of the Rules. We therefore conclude that the allegations of breach of ethics must be dismissed.

24. In summary we do not agree that this complaint should have been dismissed by the Chair of the Investigating Committee under Rule 57(a). However, we are entitled under Section 37 (5) of the Act to make any decision that could have been made by the decision authority. We decide in this case that the complaint should be dismissed under Rule 60 (b) as there is no evidence of any grounds for discipline.

**Outcome**

- 25. The appeal is declined. The complaint is dismissed under Rule 60(b).
- 26. A copy of this decision which does not identify the parties may be published by the Registration Authority.

Dated this

Jon Williams  
Principal

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Arthur O'Leary,;

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Jane Nees

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Ms Sharyn Westlake

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