

APPEAL NUMBER 1/13

**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 & Mrs E

Appellant

And

Mr H and Mr S

Respondents

Decision of the Chartered Professional Engineers Council dated 30 April 2013

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 from a decision of a Chair of an Investigating Committee of the Registration Authority dated 4 December 2012, in which complaints by Mr and Mrs E (Appellants), against two Chartered Professional Engineers, Mr H and Mr S (Respondents), 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 and Mrs E's Notice of Appeal and appeal documents were received by the Council on 16 January 2013. 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 29 January 2013 of the receipt of the appeal of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Roly Frost and Mr Graham Shaw as members.
4. A subsequent letter dated 15 February 2013 outlined the timing and process to be followed. This 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.
5. Confirmation was received on 5 April 2013 that the Appeal could be heard on the papers. The Panel met via phone conference on 12 April 2013 to consider the appeal.
6. Mr and Mrs E's original complaint to the Registration Authority, dated 24 October 2012 was in respect of the following:
 - a. The compliance with the New Zealand Building Code of the Fire Engineering design of an apartment development in Mt Maunganui.
 - b. The contents of the affidavit provided by Mr S to the High Court of New Zealand relating to a judgement provided on the obligations of Mr and Mrs E with respect to the purchase of an apartment in the Mt Maunganui development.
 - c. The level of engagement that Mr H and Mr S had during the construction of the apartment project.

The complaint includes references, links and attachments to a considerable volume of additional information. The above points are the key subjects of the complaint that relate to Mr. H and Mr. S.

7. In their Notice of Appeal Mr and Mrs E cover a wide range of issues. Some of these go beyond the scope of the original complaint. However the Panel considers that the key aspects remain those noted in item 6 above.
8. The background to the complaint is.
 - a. Mr. H and Mr. S (via the company they work for) were engaged as Fire Engineers by the developer of the project.
 - b. The Fire Engineering design was completed on the basis of a mix of Acceptable Solution and Alternative Solution designs to the New Zealand Building Code. The design was granted consent by the Tauranga City Council. In the construction of the design a number of layout changes were made. It is unclear from the documentation available to what extent Mr. H and Mr. S were consulted on the impact of each change. Towards the conclusion of the project Mr. H and Mr. S visited the site and provided advice on how to make the changed design compliant with the consented design intent. A Producer Statement Observation (PS4) was issued by Mr. H and Tauranga City Council issued a Code Compliance Certificate deeming the project to be compliant with the Building Code.
 - c. Mr. and Mrs. E consider that the Fire Engineering design of the development has been compromised by the changes made during construction. They allege that Mr. H and Mr. S have acted in a negligent way in discharging their duties as Chartered Professional Engineers.
 - d. The relief sought by Mr and Mrs E includes:
 - i. A complete review by the Panel of all documentation associated with the project including visits to site.
 - ii. Confirmation that the building complies 100% with the New Zealand Building Act.
 - iii. A complete independent Fire Engineering evaluation of the buildings
9. Some further context relating to the complaint, the process followed and the jurisdiction that panel has is as follows..
 - a. Mr. and Mrs. E engaged an independent Fire Engineering company (Prendos) to review the Fire Engineering design and the Fire Safety aspects of the completed development. Their (Prendos') conclusion was that some additional "justifications and calculations" could have been provided, however both the original design and the final development comply with the requirements of Building Code. The installation of curbs and thresholds along the secondary escape path is noted as potentially non-compliant. This could be debated as it is a secondary means of escape and has been signed off by Tauranga City Council.
 - b. Mr. H and Mr. S were engaged by the developer, not Mr. and Mrs. E. The details of their contractual engagement and scope of their services has not been provided. How well Mr. H and Mr. S have complied with the requirements of their contract is not in question in this complaint.

- c. Fire Engineers are required to specify means of compliance and required services. The design and documentation for the implementation of their requirement is by other members of the design team (Architect, Structural Engineer, Building Services Engineer).
 - d. The Panel has no jurisdiction over the actions of the Territorial Authority unless they relate to the actions of a specific Chartered Professional Engineer working for the Authority.
 - e. The Panel can only review the actions of Chartered professional engineers. It cannot engage in the processes requested in the relief sought by Mr and Mrs E in item 8(d) above.
10. 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.
11. 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.
12. The Chair of the Investigating Committee dismissed the complaint for failing to meet the requirements of Rule 57 (a), i.e. That there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act.
13. 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.
14. Appeals to the Council are by way of rehearing (section 37(2) of the Act). 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.

15. Before reviewing if 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. and Mrs E wish to proceed with the action, have 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 Engineers 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 and Mrs E that there is strong feeling that Mr H and Mr S should have taken a far more proactive role during the construction of the project.

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

16. 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.

17. Were Mr H and Mr S negligent or incompetent?
- a. The Panel has considered the information provided all parties. It has considered the industry accepted role of the Fire Engineer in the fire design of buildings.. It has considered the consenting and review process outlined for this project and what is considered the norm in the industry.
 - 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 Mr H [redacted] and Mr S [redacted] were incompetent. The Fire Engineering design and construction observation services met the requirements of the Territorial Authority. They also met the expectations of the independent Fire Engineer engaged by Mr and Mrs E [redacted]. These actions are in line with expectations for someone in the profession and are not the acts of incompetent engineers.
- 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 H [redacted] or Mr S [redacted] have performed in a manner that indicates that they are not fit to practice as Engineers or would tend to bring the profession into disrepute. Therefore we consider that Mr H [redacted] and Mr S [redacted] have not been negligent.

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

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

- a. There is no evidence that Mr H [redacted] and Mr S [redacted] have not taken reasonable steps to safeguard health and safety (Rule 43). Their design and subsequent changes recommended during construction are focussed on the safety of the building occupants. The use of "Alternative Solutions" (as opposed to following the "Acceptable Solutions") is accepted in the New Zealand Building Code and is a normal industry practice. The implementation of the on-going management plan for the development is not the responsibility of the Fire Engineers.
- b. There is no evidence that indicates that Mr H [redacted] and Mr S [redacted] have acted in a way that will compromise the environment (Rule 44).
- c. There is no evidence that Mr H [redacted] and Mr S [redacted] acted without honesty, objectivity or integrity (Rule 45).
- d. Mr H [redacted] and Mr S [redacted] have produced design documents and undertaken site reviews for the Fire Engineering related systems. They have not misrepresented their competence as a Fire Engineers (Rule 46).
- e. The remaining Rules of Part 3 are not relevant to this complaint.

We see no evidence that Mr H [redacted] and Mr S [redacted] have 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.

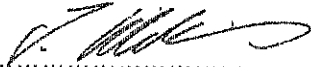
19. In summary, there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act and we agree that this complaint should have been dismissed by the Chair of the Investigating Committee under Rule 57(a). We are entitled under Section 37 (5) of the Act to make any decision that could 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

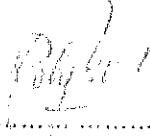
20. The appeal is declined. The complaint is dismissed under Rule 60(b).
21. A copy of this decision which does not identify the parties may be published by the Registration Authority.

Dated this 30 April 2013


Mr Jon Williams
Principal


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Mr Roly Frost,;


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Mr Graham Shaw


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