

**In the Matter of The Chartered
Professional Engineers Act**

**And In the Matter of an Appeal pursuant
to section 35**

Appeal Number: 01/06

Between

**Mr G
Appellant (Complainant)**

And

**Mr M
Respondent**

Decision of the Council on Appeal

1. This is the first appeal to come before the Chartered Professional Engineers Council (CPEC) under the Chartered Professional Engineers Act 2002.

Background

2. On 19 April 2006 the Appellant wrote to the Registration Authority referring a complaint against *T Limited* to the “ethics committee”.
3. The complaint concerned two reports, one written by Mr M, and one by Mr L. Both individuals are Chartered Professional Engineers.
4. On 15 May 2006 a Complaints Research Officer with the Registration Authority wrote to Mr M and sought his views on the complaint. He indicated in that letter that the complaint would be dealt with under

the “Charter [sic] Professional Engineers of New Zealand Rules (no2) 2002”.

5. No such letter was sent to Mr L.
6. Mr M responded with his views in a letter dated 17 May 2006.
7. On 18 July 2006 the Complaints Research Office completed an initial investigation report into the matter and recommended that the complaint be dismissed.
8. That report was passed to the Chairperson of Investigating Committees for a decision. The Chairperson’s report stated:

“The complaint is that T Limited (Mr M) have not “acted with honesty, objectivity and integrity”. [underlining added]

9. The complaint was dismissed under grounds “ba and e of Clause 57 of the CPEng Rules”.
10. Notification of the decision was made to the Appellant and Respondent on 25 July 2006.
11. On 30 July 2006 the Appellant responded to the notification of the decision. His letter commenced:

“Re: T Limited

Thank you for your letter dated 25 July 2006 wherein you refer to complaint against Mr M.

Firstly I clarify that complaint related to the practice of T Limited. The submission did not put forward Mr M as the party of complaint.” [underlining added]

12. The letter went on to detail complaints against T Limited. It also appears as though the Appellant did not grasp that the complaint had been dealt with as a complaint under the Chartered Professional Engineers Act 2002 since his letter refers on a number of occasions to the “IPENZ Charter”.
13. On 8 August 2006 the Chief Executive of IPENZ, the Registration Authority, wrote to the Appellant. His letter stated:

“Thank you for your letter dated 30 July 2006. It appears that we have not provided a clear explanation of both the limits of what we can do and the processes we can use.

IPENZ has jurisdiction over only individual engineers who are Members of IPENZ or Chartered Professional Engineers under the Chartered Professional Engineers Act 2002, and does not have jurisdiction over companies.

When I received your letter of complaint, dated 19 April 2006, my staff were unable to investigate a complaint against T Limited. Consequentially they commenced the investigation of the complaint against Mr M, Managing Director and author of one of the reports, who is a Member of IPENZ and a Chartered Professional Engineer (CPEng). As IPENZ is the Registration Authority, under the Chartered Professional Engineers of New Zealand Act 2002, the investigation proceeded in accordance with the Chartered Professional Engineers of New Zealand Rules (No2) 2002.”

14. The letter went on to state that an appeal could be lodged with this Council, and the Appellant elected to take this course of action, filing an appeal by letter of 22 August 2006.

Jurisdiction

15. On receipt of the appeal the Council was concerned to ensure that it had jurisdiction to deal with the matter. The Principal of the Appeal Panel for this appeal wrote to the Appellant, with copies to the Respondent and the Registration Authority in the following terms:

“Prior to proceeding further with this appeal I am concerned to ensure that the Appeal Panel has appropriate jurisdiction to hear the matter.

In his letter to you of 8 August 2006 Mr Andrew Cleland, Chief Executive of IPENZ, pointed out that IPENZ (in its capacity as the Registration Authority of Chartered Professional Engineers) only has jurisdiction to over individual engineers who are Chartered Professional Engineers.

The same is true for this Council when it sits as an appellate body.

The Chartered Professional Engineers of New Zealand Act deals with the registration and discipline of individuals. This does not extend to companies, which cannot be registered as Chartered Professional Engineers.

It seems from the documentation that the Registration Authority has provided to me as though your complaint is against the practice of T Limited. The Registration Authority decided to interpret your complaint as being one against Mr M, the Managing Director of that company.

However, it is clear from your letter of appeal that, insofar as your complaint concerns individuals, it certainly includes Mr L, an employee of T Limited. Both Mr M and Mr L are Chartered Professional Engineers.

The Appeals Board, and the Registration Authority, has an obligation to follow the rules of natural justice in relation to the hearing of any matter. That means

that all parties must be given an appropriate opportunity to be heard and the respondent(s) to any complaint must know that a complaint has been made against them and the substance of it so that they have an opportunity to respond.

It is apparent that Mr L was not asked for his views at the original hearing before the Registration Authority, neither was any complaint lodged against him personally.

The Registration Authority treated the complaint against T Limited as a complaint against Mr M and asked Mr M for his comments, but it does not appear from the documentation that I have seen as though Mr M was informed that this was a complaint against him personally.

Mr M provided comments to the Registration Authority in a letter dated 17 May 2006, but it appears from the content of his letter that he did so in his capacity as Managing Director of T Limited, rather than in his own personal capacity.

Therefore, it appears to me as though the Appeal Panel may not have jurisdiction to hear this matter. The Appeal Panel only has jurisdiction to hear appeals on disciplinary matters that have been determined against individual Chartered Professional Engineers by the Registration Authority.

The Appeal Panel does not wish to make a decision on its jurisdiction without giving both you, and Mr M (on the basis that he has responded previously to the Registration Authority in this matter) the opportunity to comment.

However, the Appeal Panel is charged with ensuring that there is a just and quick determination of the appeal. If it transpires that there is no jurisdiction to consider this matter then it is preferable that this be identified sooner rather than later so that the time and associated cost of proceeding is saved by everyone.

I wish to assure you that the Appeal Panel is in no way predetermining this or the substance of your complaint, but you will appreciate that if due process is not observed then the outcome may well be flawed which would not be beneficial to any party to the proceedings.

I therefore direct, pursuant to rule 4.6 of the Appeal Practice Note that each party to this appeal provide to me any submission it may wish to make as to the Appeal Panel's jurisdiction to proceed with an appeal against Mr M in his personal capacity. The submission is to reach me by Monday 11th September 2006. A copy of this letter is also being sent to the Registration Authority which may make a submission if it wishes within the same timeframe.

After this time the Appeal Panel will convene to determine the preliminary matter as to whether it has jurisdiction to proceed with the appeal lodged.

16. Responses to this letter were received from Mr M, the Appellant Mr G and the Registration Authority.
17. We need only refer to the response of the Appellant to demonstrate that we are without jurisdiction in this matter. In that letter Mr G states:

“...

*My complaint involves the November 2005 report prepared by Mr L of T Limited.
...”*

And also:

“Mr M is not the subject party of this complaint”.

18. The letter goes on in some detail about the content of a report prepared by Mr L as opposed to the content of an earlier report prepared by Mr M.
19. From this it is clear to us that:
 - (a) The Appellant lodged a complaint with IPENZ. He did so not appreciating that IPENZ was the Registration Authority for Chartered Professional Engineers under The Chartered Professional Engineers Act 2002.
 - (b) IPENZ pointed out to the Appellant that the appeal would be dealt with under the “Charter [sic] Professional Engineers of New Zealand Rules (no2) 2002”. However, it did not clearly distinguish itself as being the Registration Authority under those rules and also that a complaint under those rules can only be laid against an individual. The Appellant indicated that he wanted to complain about T Limited.
 - (c) Unfortunately, and no doubt in an effort to assist, the Registration Authority treated the complaint as being one against Mr M. That was an error. It has meant that Mr L has never had an opportunity to defend any claims made against him.
 - (d) What the Registration Authority should have done was to write in terms of the Chief Executive’s letter of 8 August 2006 from the outset. Thus, the Appellant would have been informed that the Registration Authority could not consider a complaint against a company and should have advised that the Appellant could choose to lay a complaint against either or both of Mr M or Mr L in their capacity of Chartered Professional Engineers.

20. Both this Council and the Registration Authority are required to observe the rules of natural justice in proceeding with complaints hearings.
21. This Council conducts appeals by way of rehearing. Unfortunately, there was no hearing in relation to this matter insofar as a complaint against Mr L was concerned, and we have reservations as to whether Mr M was ever properly informed (in a formal sense) as to the fact that a complaint was being laid against him personally. The evidence seems to indicate that there was a misapprehension that the complaint was against T Limited. We have no jurisdiction to hear a complaint against a party who is not a Chartered Professional Engineer and, of course, a company cannot be chartered.
22. In these circumstances, our view is that there is no proper appeal in place for us to determine. Unfortunately all parties seem to have been at cross-purposes as to who was the subject of the complaint, such that we are of the view that if we were to proceed there would clearly be a breach of natural justice.
23. In such circumstances we believe that the best way to proceed is not to decline jurisdiction altogether, but to refer this matter back to the Registration Authority under rule 37(5)(b) for it to seek clarification from the Appellant as against whom he wishes this complaint to proceed and for the Registration Authority to then determine that specific complaint if necessary by reference to further information from the Appellant and any Respondent.
24. It is unfortunate that we have to deal with the matter in this way, however, the processes in place need to be robust to ensure that any outcome is not flawed or is reached in breach of natural justice.
25. We are also conscious that the Appeals Regulations (2002) contemplate that a hearing date must be set by the Council to determine an appeal (Regulation 10). However, we are in no doubt that:
 - (a) Such a hearing would not change our view on the matters set out in this decision; and

- (b) Such a hearing would add significantly and unnecessarily to the time and expense incurred on this matter;

and accordingly under Regulation 12(1)(d) we waive the requirement to hold a formal hearing and choose instead to deal with this matter on the papers. We are confident that there is no breach of natural justice in us taking this course of action because the complaint is being returned to the Registration Authority for further consideration.

- 26. We have no doubt that the Registration Authority was attempting to assist the complainant in taking the course of action it did in deciding to pursue with the complaint against Mr M personally. The Registration Authority is required to lend such assistance under rule 54(3). Unfortunately, that assistance was not as detailed as it should have been.
- 27. In future, we recommend that the Registration Authority clearly set out to all complainants the following information:
 - (a) That IPENZ has two roles. One as a professional body representing its members, and one as the Registration Authority dealing with matters arising under The Chartered Professional Engineers Act 2002.
 - (b) That if a complaint is made against an engineer who is a member of IPENZ and a Chartered Professional Engineer a complaint can be laid with either or both of IPENZ as an Institute or IPENZ as the Registration Authority. The distinction between the two should be clearly set out so that there is no confusion in the mind of a complainant as to the capacity in which IPENZ is acting. We think it would be helpful in this context if complainants were informed that a complaint to the Registration Authority was the statutorily backed complaints regime.
 - (c) That a complaint cannot be laid against a company.

- (d) If it is not clear from the complaint then the complainant should be requested to confirm the identity of the Chartered Professional Engineer complained against. It would also be helpful to inform complainants from the outset of the grounds for discipline set out in section 21 of the Act to assist complainants in framing their complaint.
- (e) Finally when any decision on a complaint is delivered to any party it would be helpful if they could be directed to the Appeals Practice Note issued by the Council in the event that an appeal is to be lodged.

28. Since we have referred this matter back to the Registration Authority we do not consider that there are any cost consequences for any party and costs are to lie where they fall.

29. This decision is publicly available and a copy will be posted on the Council's website.

Dated this day of October 2006

Andrew Hazelton
Principal of Appeal
Panel

Vivian Kloosterman
Member of Appeal
Panel

Helen Walch
Member of Appeal
Panel

Kemp Broughton
Member of Appeal
Panel