

**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**

Appeal 03/07

C N  
**Appellant**

**And**

Mr B  
**Respondent**

**And Between**

Appeal 02/07

C N  
**Appellant**

**And**

Mr T  
**Respondent**

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Decision of the Chartered Professional Engineers Council dated 22 May 2008

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**The Legislation**

1. These are two appeals to the Chartered Professional Engineers Council under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”) from two decisions of an investigating committee dated 29 August 2007 in which complaints by the appellant against both appellants were dismissed.
2. The Council granted a waiver to C N to lodge his appeals out of time since he had been overseas when the decisions were delivered to his address for service.

3. The appeals arise from the same factual matrix. It is sensible to deal with both matters together.
4. On 6 December the parties were informed of the appointment of an Appeal Panel to hear the appeals consisting of Andrew Hazelton as Principal, Viv Kloosterman, Helen Walch, Steve Gentry and Stephen Reindler.
5. The appeal lodged by C N against the decision to dismiss the complaint against Mr T is dated 23 October 2007; that against the decision to dismiss the complaint against Mr B is dated 24 October 2007.
6. As is the practice with appeals to this Council the Registration Authority provided a complete copy of its file in relation to the complaints to the Council. A copy of the files were sent to all parties. Similarly all submissions and correspondence received on the matter were copied to all parties and comment invited prior to this determination.
7. C N lodged his complaint against both Chartered Professional Engineers by letter of 9 July 2007. In that letter C N summarised his complaint as follows:

*“Please examine my report and determine the most appropriate action to be taken over my concerns about the behaviour of structural engineering services by Mr T and Mr B.*

*These are:*

- *Exceptionally high fees to be charged by Mr T - which is likely to include substantial time for junior engineer training*
  - *Purposeful actions by Mr T to unethically collude with a competitor - commonly known as ‘price fixing’*
  - *Unreasonable withdrawal by Mr B from a signed agreement to undertaken proposed work that placed no reliance whatsoever on Mr T’s previous work.”*
8. Both Mr T and Mr B responded to the original complaint with letters explaining that in their view the complaint concerned commercial matters being in essence a dispute over fees.

9. From the complaint and the responses thereto it is apparent that in summary:
- (a) C N engaged Mr T to undertake engineering services at an hourly rate;
  - (b) Mr T charged for those services;
  - (c) C N did not anticipate the size of the invoices he received;
  - (d) C N then chose to engage the services of Mr B;
  - (e) Mr T informed Mr B of his outstanding invoices;
  - (f) Mr B then declined to work further for C N.
10. The Complaints Research Officer for the Registration Authority wrote a report on the correspondence for the Investigating Committee. It recommended that the complaint be dismissed in accordance with Rule 57(a) as there was no applicable ground of discipline under section 21(1)(a) to (d) of the Act.
11. The Investigating Committee found that both complaints were commercial disputes over fees and that there was no applicable ground of discipline under section 21(1)(a) to (d) of the Act. The complaints were therefore dismissed without being referred to a Disciplinary Committee.
12. C N's appeal against the decision to dismiss the complaint against Mr T is as follows:

*It is necessary to summarise the background commercial dispute in order to demonstrate the unethical issues that are the focus of my complaint and this appeal:*

*1. The commercial background to my complaint is summarised in five parts:*

*a) Three months after commencement of the assignment, Mr T produced a letter of engagement and urgently sought my agreement. I signed immediately based on my trust in him for his inclusion of familiar terms of engagement similar to his previous assignments successfully completed for me.*

Unfortunately, he betrayed my trust by omitting any fee cap as I had come to expect.

b) The initial commercial dispute between me and Mr T does not directly involve any other party, nor should it have been any business of another, competing consultant. In dispute are Mr T's high fees invoiced for work part completed. Further concern arose from his estimate of significant additional fees to complete the overall assignment. Prior to that time I had already received technical drawings that indicated the assignment was substantially completed.

c) I instructed Mr T to stop work while attempting to resolve the fees issue with him. I then terminated the assignment and informed him I had abandoned all his delivered outputs (e.g. drawings and information) from further use, irrespective of fees already paid and outcome from the dispute.

d) I sought an alternative quotation for an identically scoped assignment. This reassured me about the substantial inflation of Mr T's fees in relation to the nature and scope of work required of him.

e) To avoid undue delay to my project, I engaged the second consultant with a signed letter of engagement. At that time the second consultant had no knowledge of, nor proposed reliance on Mr T's partly finished work, and was completely unaware of my commercial dispute with the latter.

2. Unprofessional conduct by Mr T is demonstrated by the following two actions:

a) His belated and urgent request for completion of the letter of engagement, almost at completion of his work and about three month after having started it (refer initial complaint report dated July 9, 2007) was unprofessional in respect to

(i) the lack of protection provided to both parties on expectations and conduct for the assignment, prior to its signing.

(ii) his omission of a fee cap when clearly aware of the escalating time spent in part by inexperienced staff.

b) Mr T's supplied poor quality work within drawings received, such as poor detailing and over-specification that would have inflated subsequent construction costs. The poor quality demonstrates his reliance on junior staff without adequate quality control over delivered services. It also indicates the basis for excessive chargeable time claimed.

3. Unethical behaviour by Mr T is set out as follows:

a) His motivation for searching out and interfering with my alternative consultant was to protect his own commercial interests that were in dispute. There were no engineering, technical, information hand-over or other issues involved that justify his actions under protection of the appropriate Code of Practice.

b) He is guilty of unlawful market place interference by his collusion and/or coercion with a competitor consultant:

(i) to frustrate my attempts to bypass the delay created by the commercial dispute, in order to minimise my accumulating losses from the delay to my project, and/or

(ii) to 'price-fix' in order to protect and/or substantiate his high fee claim.

*In summary, such unprofessional and unlawful behaviour by an experienced professional engineering consultant must be of significant concern to CPEC as it comprises unethical behaviour undertaken by a member of your profession.*

*I therefore seek your reappraisal of your previous decision that my complaint "... is primarily a commercial dispute, over fees for an engineer's services, rather than an issue of ethics."*

*This is clearly not so.*

13. C N's appeal against the decision to dismiss the complaint against Mr B is as follows:

*It is necessary to summarise the background commercial dispute in order to demonstrate the unethical issues that are the focus of my complaint and this appeal:*

*1. The commercial background to my complaint is summarised as follows:*

*a) I engaged an engineer, independent of Mr B, to provide professional engineering services. A protracted commercial dispute has resulted over his high fees (part invoiced and part projected). This commercial dispute did not, and does not, directly involve any other party.*

*b) I sought an alternative quotation from Mr B for an identically scoped assignment to reassure me about typical fees for such services.*

*c) After further failed negotiations I terminated the assignment with the initial engineer and informed him I had abandoned all his delivered outputs (e.g. drawings and information) from further use, irrespective of fees already paid and outcome from the dispute.*

*d) To avoid undue delay to my project, I engaged Mr B with his signed letter of engagement. At that time he had no knowledge of, nor proposed reliance on the initial engineer's partly finished work, and was completely unaware of my commercial dispute with the latter.*

*e) In the course of unsuccessful fee negotiations I showed an anonymous copy of Mr B's quotation to the initial engineer. I did not divulge the source of this quotation in spite of his persistent questioning for this information.*

*f) The initial engineer subsequently identified Mr B as the source of this alternative quotation with resultant interference with the commercial agreement between me and Mr B. (This breach of ethics by the initial engineer is subject to a separate complaint and appeal lodged with CPEC.)*

*2. Unethical behaviour by Mr B is as follows:*

*a) Within 24 hours of the initial engineer sighting the anonymous quotation (refer item (e) above) Mr B decided to terminate his contract with me. His*

*motivation for this was based on what he had been told by the initial engineer. He declined several times to discuss with me (his Client) his concerns, his financial or other interests that were likely to affect his judgement in the proposed work, and his basis for his decision. His reluctance to seek a balanced view of the facts demonstrates unethical behaviour when terminating an engagement contract in such circumstances, without proper process.*

*b) Furthermore, depending upon exactly what he was told by the initial engineer, Mr B may be guilty of unlawful market place interference by his apparent collusion and/or coercion with his competitor consultant engineer in order to:*

*(i) to frustrate my attempts to minimise the project delay and associated costs created by the initial commercial dispute, and/or*

*(ii) to 'price-fix' in order to protect and/or substantiate his competitors high fee claim.*

*In summary, such unprofessional, unlawful behaviour by an experienced professional engineering consultant must be of significant concern to CPEC as it comprises unethical behaviour undertaken by a member of your profession.*

*I therefore seek your reappraisal of your previous decision on my complaint.*

14. The right of appeal to this Council from the decisions of the Investigating Committee exists by virtue of section 37 of the Act.
15. Under section 26 of the Act the Council may regulate its own procedure in determining an appeal. The Council must of course observe natural justice.
16. The Registration Authority and this Council are statutory bodies which obtain their powers from the Act and the Rules. In all cases there must be jurisdiction to actually deal with an appeal. If there are no grounds set out in the Act or the Rules under which a complaint can proceed then it follows that the Registration Authority and this Council can have no jurisdiction to hear the matter.
17. In this case the Council considered it appropriate to deal with the jurisdictional issue as a preliminary matter since if it is determinative of the appeals then they do not need to proceed further.
18. On 6 December 2007 the parties in appeal 03/07 were sent a letter by the Principal of the Appeal Panel containing the following passage:

*This appeal raises the important issue of whether there is an appropriate ground of discipline set out in the Act covering factual situations of the type complained of. The disciplinary committee found that the complaint was primarily a commercial one.*

*For this appeal to proceed C N will have to convince us that there is an appropriate ground of discipline in the Act or the Rules under which he intends to pursue his complaint.*

*I consider it appropriate to deal with this as a preliminary issue in this hearing, and also in another appeal filed at the same time and referenced as 02/07.*

*In the circumstances, pursuant to clause 4.4 of the Appeals Practice Note, the Council requires the Registration Authority to file with the Council, with a copy to C N and the respondent, submissions as to why it considers that there is no applicable ground of discipline under section 21(1)(a)-(d) as the decision contains no detailed reasoning on this.*

*Given the holiday season, and C N's absence, I direct that this be served on the Council, C N and the Respondent by 31 January 2008 after which C N and Mr B shall have until close of business on 15 February 2007 to file a response if they so chose.*

*Thereafter the Council will consider the position and advise the parties thereafter of any further directions.*

19. An identical letter with appropriate modifications to take into account the different parties was sent to the parties in appeal 02/07.
20. Mr W for the Registration Authority lodged submissions with the Council and the parties on 22 January 2008. These submissions largely recounted the factual background of the matter with associated comment. However, it is clear from these submissions that the Registration Authority considered that the standard by which Chartered Professional Engineers are to be judged does not include commercial matters which should be the province of the company for which the Chartered Professional Engineer works.
21. For C N Ms Charlotte Walker Counsel of Morrison Kent made submissions dated 14 February 2008. Ms Walker stated that the complaint by C N had been misconstrued, that while there was a commercial dispute about fees, there was also a complaint about poor quality work. Ms Walker says that C N is more than happy to provide the details of the poor quality work, but that he has never been invited to. She also said

that while the allegation of poor work “may not have been stated expressly in C N’s original correspondence, it was certainly implied”.

22. With the submissions Ms Walker included a “Summary of defects in the work produced by Mr T”. In summary these included:

- (a) That a retaining wall that Mr T designed was too large;
- (b) That a wall had been drawn in the wrong place;
- (c) That Mr T’s plan contained provision for rock anchors which were not necessary;
- (d) Mr T’s plans include a stair void when there are no stairs;
- (e) That joists are located in the wrong place;
- (f) Lintels are not dimensioned.

23. Ms Walker considered that the appropriate rule under which a complaint should proceed would be Rule 45. This states:

***“45 Act with honesty, objectivity, and integrity***

*A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.”*

24. Ms Walker considers that the fact that Mr T had done work before for C N and on previous occasions had offered a fee cap for his services is relevant. On the facts of this matter Mr T did not do this on this occasion but rather requested C N to sign a contract after work had commenced which did not contain a fee cap. C N complains that this took advantage of his trust in Mr T.

25. Lastly Ms Walker says that Mr T has breached Rule 50 since he told Mr B that he had not been paid. Rule 50 states:

***“50 Not to disclose confidential information***

*(1) A chartered professional engineer must not disclose confidential information of an employer or client without the agreement of the employer or client.”*

26. Ms Walker says that the matter is not simply a commercial dispute, but no allegations about quality of work are levelled against Mr B, and that further investigation should be required of a conversation between Mr B and Mr T in the light of rules 45 and 50.
27. Taking each of these arguments in turn:
28. The Council does not consider that the Investigating Committee misconstrued the complaint against both Mr T and Mr B. It was clearly a complaint that was focused on fees and the basis of their calculation. The complaints incorporated associated allegations relating to “collusion” between Mr T and Mr B in relation to their commercial arrangements with C N. It is stretching matters far too far to say that the original complaints were about the quality of Mr T’s work, and there are no complaints at all that the Council can identify about the quality of Mr B’s work. It is of course the original complaints with which the Council is concerned on this appeal. The Council cannot consider new matters not raised before the Investigating Committee and the alleged defects set out by Ms Walker were not raised.
29. The Council does not consider that a dispute about fees, or even about the integrity of commercial arrangements, could be founded on any of the Rules. The nearest that one might get to finding such a rule is Rule 45 requiring Chartered Professional Engineers to act with “honesty, objectivity and integrity”. However this Rule is qualified by the words “*in the course of his or her engineering activities*”. The Council considers that the commercial arrangements of Chartered Professional Engineers are not within the course of engineering activities. It gains support from this view from the fact that the Code of Ethical Conduct under which this rule is headed is about “General Obligations to Society”. The other rules in this part of the Act are about safeguarding health and safety and having regard to effects on the environment. The overall tenor of this part of the Act is about how a Chartered Professional Engineer’s work might impact on society. To attempt to import a commercial overtone into this rule we consider is a step too

far, particularly when clients, employers and Chartered Professional Engineers themselves have recourse to the usual tribunals and Courts to pursue civil matters.

30. It should also be pointed out that Chartered Professional Engineer status is only available to individuals. Therefore a complaint based on commercial matters would not proceed against a Chartered Professional Engineer in a large consulting firm because its contractual arrangements were with the consulting firm and not the Chartered Professional Engineer directly. Consequently, it would be inconsistent to allow a complaint based on commercial matters to proceed against a Chartered Professional Engineer who was a sole practitioner, simply because that sole practitioner had a direct contract with a client.
31. We consider that if commercial disputes were considered to have been appropriate for the complaints regime under the Rules then a specific rule would have been included to have allowed for this - and it was not.
32. We do not consider it relevant that Mr T has done work previously for C N. C N is obviously an intelligent man and he chose to sign a contract which he was presented with. That was his choice, and it is not something that the Council considers can form the basis of a complaint.
33. Lastly, with respect to Mr T, we do not consider the fact that C N had not paid his fee was “confidential information”. No specific confidentiality agreement is in place that we are aware of. If a client does not pay a fee then there is a commercial dispute. The parties to a contract may chose to pursue their arguments in public Courts and the fact that one party considers that a debt is due is not of itself confidential information. Whether information is confidential or not can only be considered on a case by case basis, but in the absence of specific agreement, we do not think that all client information can be considered confidential.

34. In the circumstances we do not consider that the complaint against Mr T could proceed under Rule 45 or Rule 50.
35. As regards the case against Mr B there is simply no evidence that could be brought under Rule 45 or Rule 50 against him. Again, that being the case the Investigating Committee had no jurisdiction to refer the matter to a Disciplinary Committee and was correct to dismiss the complaint.
36. In the circumstances both appeals are dismissed.
37. The Council has discretion to award costs. This is an important decision, being the first time that the Council has been able to issue a decision clarifying the extent to which commercial matters may be the subject of a complaint to the Registration Authority. In due course the Council will request that its Executive Officer summarise this decision (taking care not to identify the parties) and shall ask the Registration Authority to publish that summary so that it is available for future reference.
38. The appeal has therefore been a valuable one and so the Council considers that no cost awards should be made. If commercial matters are appealed in the future to the Council then it is possible that costs will be awarded against such appellants.

Dated this 22 day of May 2008

Andrew Hazelton  
Principal

Viv Kloosterman

Helen Walch

Stephen Reindler

Steve Gentry