

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

Appeal 01/10

AND

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

Between

**S
Appellant**

And

Registration Authority

**Decision of the Chartered Professional Engineers Council
dated 11 February 2011**

The Legislation

1. This is an appeal to the Chartered Professional Engineers Council under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”) from a decision of a Chair of an Investigating Committee dated 30 June 2010 in which complaints by the complainant against a chartered professional engineer, G, were dismissed without being referred to a full Investigating Committee on the basis of Rule 57(a). Rule 57 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.*
2. S did not agree and hence we have to deal with this appeal.
3. The parties were informed by letter of the appointment of an Appeal Panel consisting of Andrew Hazelton as Principal, Mr Andrew Read and Mr Roly Frost as members. The letter went on to propose that the Appeal be dealt with on the papers which was agreed to by the parties. Consequently this decision is based upon the papers.
4. S's complaint was made on 8 February 2010. It was contained in a detailed submission. S owns land in the North Island which S wished to subdivide. S instructed consultants to prepare a subdivision application which was lodged with the local council. The subdivision included the creation of a right of way.
5. G was instructed by the Council to provide a report on traffic effects for the subdivision and did so. G's report, was alleged by S in summary to be defective in the following respects:
- (a) It incorrectly assessed the right of way to exceed the maximum length permitted under the District Plan. In fact, S states that this is not the case and states that evidence from S prepared by S's traffic consultants confirms this to be the case.

- (b) It made an incorrect assessment of the intervisibility between waiting areas. Again S states that this is not the case and states that evidence from S prepared by S's traffic consultants confirms this to be the case.
 - (c) That in considering the gradient of the right of way G focused on service, maintenance, and emergency vehicles and driver skill rather than assessing the design put forward by S's traffic consultant.
 - (d) That there were incorrect assumptions made about the availability of a fire hydrant to service emergency fire vehicles.
 - (e) That G dismissed the possible use of an alternative access without due inquiry.
 - (f) That site access assessments were done by G using Google streetmaps and without the benefit of a site visit.
6. In general the complaint raised matters of bias, and stated that the report prepared by G fell short of an appropriate professional standard.
7. Receipt of S's complaint was acknowledged by the Registration Authority on 8 February 2010 and pointing out internet links to copies of relevant forms and copies of the Act and Rules.
8. On 9 February 2010 S set out the jurisdictional basis of complaint as follows:

I have examined the legislation and believe that [G] has not met the requirements of the legislation as follows:

*Under the Act 2002 Part 2 s22
Clause 21(c) has performed engineering services in a negligent or incompetent manner*

*Under the Rules (No2) 2002
Part 3 Code of Ethical Conduct
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.*

53 Not review other engineers' work without taking reasonable steps to inform them and investigate

(1) A chartered professional engineer who reviews another professional engineer's work for the purpose of commenting on that work must take reasonable steps to-

*(a) inform that engineer of the proposed review before starting it; and
(b) investigate the matters concerned before commenting.*

Not displayed the minimum standards required under clause 6 and 7.

9. G responded to the complaint in a detailed fashion denying the allegations. G pointed out that:
- (a) G had not been provided with a detailed layout of the subdivision and had not context such as contours or cross sections.
 - (b) G's instructions came from the Council, and it was they that supplied G with the information he obtained.
 - (c) The Council had not refused consent and were awaiting further information from S.
 - (d) In G's professional opinion meeting standards alone did not necessarily produce an acceptable result.
 - (e) That even though the majority of the individual components of the drive might meet minimum criteria the access was still long, steep and windy, and would prove problematic in the future.
 - (f) Use of internet resources was to illustrate issues but that it was clearly stated that on site verification would be necessary.
 - (g) *"Judgement is inherent in the engineering advice provided"*.
10. A complaints research officer was assigned to the matter and produced a report dated 19 April 2010 which concluded that there was no clear ground available to dismiss the matter so it should proceed to be referred to an Investigating Committee.
11. The Chair of the Investigating Committee considered the complaints research officers report under Rule 58(d) and took a different view, as

he was entitled to and dismissed the complaint under Rule 57(a) which we have set out above.

12. This appeal is from that decision. Appeals 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. We think it relevant that this was a preliminary decision made “on the papers”. Since if it is correct the substance of the matters in issue will not be tested by an Investigating Committee we consider that the threshold to be crossed by a complainant in these circumstances is set relatively low, but not so low as to render the criteria listed in Rule 57 nugatory.
13. The dismissal of a complaint without testing the evidence is equivalent to a strike out procedure in the District or High Courts. In such cases the hearing will proceed on the basis that the allegation pleaded is true. Against that test one can measure if a prima facie case is established which should then be tested by the hearing of the evidence. We are mindful however, that Rule 57 does not contain any criteria equating to a “strike out” application - ie a ground that would allow a complaint to be dismissed on the basis that it could not possibly succeed at law. We consider that we are entitled to have regard to the evidence placed before the Chair of the Investigating Committee to see if the complaint should proceed further or be dismissed under Rule 57(a) as happened here, or for any other the other reasons listed in Rule 57 which is a decision that would have been open to the Chair of the Investigating Committee. However, as we have said, once the threshold set by Rule 57 is crossed any further assessment of the evidence should await a full Investigating Committee report.

14. We have come to the conclusion that the complaint should not have been dismissed under Rule 57(a). Our reasons are as follows:
15. The applicable grounds of discipline referred to in Rule 57(a) are those set out in section 21(a) to (d) of the Act which provide:
- (1) *The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer—*
- (a) *has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering; or*
 - (b) *has breached the code of ethics contained in the rules; or*
 - (c) *has performed engineering services in a negligent or incompetent manner; or*
 - (d) *has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person),—*
 - (i) *either orally or in writing, made any declaration or representation knowing it to be false or misleading in a material particular; or*
 - (ii) *produced to the Authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or*
 - (iii) *produced to the Authority or made use of any document knowing that it was not genuine.*
16. In this case sub-paragraphs (a) and (d) are clearly not relevant.
17. However, there has been a complaint under paragraphs (b) and (c). That complaint, at its simplest, is that there has been negligent or incompetent work undertaken, along with a breach of the code of ethics. There is clearly an applicable ground of discipline under which such a complaint can heard.
18. Once we have reached that conclusion we do not think we need to take the matter further under Rule 57(a).

19. We do consider that 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).
20. Having come to this conclusion we are bound to consider whether the complaint should be dismissed for any other reasons set out in Rule 57.
21. We immediately dismiss subparagraphs (d) and (f) as not being relevant in this case.
22. 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. The subject matter was clearly of some moment to S and of relevance [though in itself not necessarily decisive] to the subdivision application.
23. 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 S that there is strong feeling that G was incorrect in the report provided. Words like “bias” are used. But that does not mean something is brought in bad faith. For something to be brought in bad faith we would expect to see material, perhaps from a respondent to a complaint that the complainant was motivated by an element of ulterior motive that was somehow malicious. For example if one Chartered Professional Engineer

complained against another purely to obtain a business advantage. There is no such evidence here.

24. As to subparagraph (e) we consider that S had an interest in the subject matter of the report. It was commissioned by the Council in response to the subdivision application. It touched upon and concerned the application that S was making.
25. That brings us to subparagraph (ba):

(ba) the alleged misconduct is insufficiently grave to warrant further investigation;
26. We consider that this ground requires us to consider the facts and to consider whether the low threshold that we discussed earlier in this decision has been met so as to allow the matter to move on to an Investigating Committee.
27. We have undertaken this exercise and have come to the conclusion that the complaint should be dismissed on this ground for the following reasons:
28. The ground on which the complaint can be dismissed is that the *misconduct* is insufficiently grave to warrant further investigation. That requires consideration of the alleged misconduct for seriousness. How grave is it? We have to say that when viewed in context we do not think it is very grave at all and does not cross the low threshold.
29. There is a difference of opinion between two experienced traffic engineers. One was engaged by the applicant to provide material in support of an application for subdivision consent. One was engaged by the Council to provide a report on that application. Although there is a difference of opinion between the two traffic engineers this complaint is not brought by one of those engineers, but by the client, S.
30. We agree with G that “engineering judgment” must be exercised where necessary in order for an engineer to responsibly fulfil his or her duties.

Standards are not always absolute. G owed primary obligations not to S, but to G's client, the Council.

31. S alleges that G's report cost him \$20,000 in consultants fees and \$4,000 in Council fees. However, we note that G's report concludes:

I suggest that [the Council] does not grant resource consent to this application until the geometric deficiencies in the shared driveway are resolved. Any consent conditions should include improvements to sight distance at [the road].

32. That is not a recommendation to decline consent. It clearly invites the applicant for consent to volunteer improvements or offer conditions on what has been proposed. In any event we do not think that the monetary outcome in this case is as a result of the *misconduct* alleged, but rather is caused by S determining not to proceed with the application and to test his expert evidence against that of G in a hearing forum. That is what normally happens in such situations. If, for example, the matter was as simple as assessing whether the length of the driveway complies with the District Plan or not, then one would expect any Commissioner under the Resource Management Act to be able to discern that.

33. We can see that there could be cases where a Chartered Professional Engineer could provide advice in a section 42A report that was incorrect and was inadequate so that the consequences were grave. For example, if on an application for even a modest rural dam a Chartered Professional Engineer were to report incorrectly on the adequacy of the structural integrity or construction methodology for that dam, this could lead to a consent being granted which put people and property in danger. However, we do not believe that this is one of those cases. The *misconduct*, if that is what it was, was insufficiently grave to warrant further investigation.

34. We also think that there is some policy support for our decision. We think it would be most unfortunate if a Chartered Professional Engineer were to feel constrained in providing advice by way of a section 42A report under the Resource Management Act to a Council client on the

basis that an applicant for a resource consent might lodge a complaint of professional misconduct if he or she (rather than the other engineer they had engaged) decided that they did not agree with that advice.

35. In summary we do not agree that this complaint should have been dismissed under Rule 57(a). However, we are entitled to come to a different conclusion to the Chair of the Investigating Committee so long as it was a decision that was available to the Chair. We decide in this case that the complaint should be dismissed under Rule 57(ba) and so order.

Outcome

36. The appeal is declined. The complaint is dismissed under Rule 57(ba).
37. This decision which does not identify the parties may be published by the Registration Authority.

Dated this day of February 2011

Andrew Hazelton
Principal

Andrew Read

Roly Frost