

APPEAL NUMBER 5/14

**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 H S MEng, BEng AIFireE

Appellant

And

Mr T CPEng IntPE(NZ) MIPENZ

Respondent

Decision of the Chartered Professional Engineers Council dated 29 September 2014

Chartered Professional Engineers Council

The Appeal

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 of the Chair of the Investigating Committee (CIC) dated 23 February 2014.
2. The CIC dismissed the complaint on the basis that a confidential mediation agreement had been reached. A mediation agreement dated 19 February 2014 was signed by both parties.
3. Mr S’s Notice of Appeal and appeal documents dated 28 February 2104 were received by the Council. The Appeal Panel has determined that the appeal cannot be dismissed under s 35 (3) of the Act for being received out of time.
4. The parties were informed by letter dated 9 June 2014 of the receipt of the appeal and of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Anthony Wilson and Ms Jane Nees as members.
5. The 9 June 2014 letter 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. Both parties were offered the opportunity for a hearing to be held in person if required. Both parties agreed to the matter being considered on the papers.
6. Mr. S elected to make no further submission. The RA made their submission on 14 August 2014, Mr T made his on 15 August 2014. Mr S made a Submission in Reply dated 24 August 2014.
7. The Panel met via phone conference on 26 September 2014 to consider the appeal.

Background

8. The Appeal relates to a Fire Safety Report submitted by Airey Consultants Ltd dated 15 March 2013. The report was signed by Mr T.
9. Mr S received the report in his role as a Fire Engineer with the Design Review Unit (DRU) of the New Zealand Fire Service (NZFS). As a part of the Building Consent process the DRU provided a NZFS Building Memorandum (dated 1 May 2013). In this memorandum the NZFA raise a number of concerns over the technical basis for the design proposed by Airey Consultants.
10. The memorandum was provided to the Building Consent Authority (BCA). The BCA then worked with the designer (Airey Consultants) and the BCA’s peer reviewer (no details of the peer reviewer have been provided in the complaint/appeal

documentation) to finalise the building's fire design. It is understood that this process included resolving the concerns raised in the NZFS Building Memorandum. It is noted that there is no implication that an unsafe building has been constructed.

11. Mr S considered the quality of the design within the Airey Fire Safety Report contained errors, lacked robustness and was of standard worthy of a complaint (submitted 27 May 2013).
12. Mr T responded to the complaint on 7 June 2013.
13. The Complaints Review Officer (CRO) and the CIC issued reports dated 12 June 2013 and 2 July 2013 respectively. The reports concluded:
 - a. That Mr S's technical comments go beyond the scope that the DRU is commissioned to undertake in the Building Consent process.
 - b. That Mr S/NZFS should have communicated their concerns directly to the designer rather than utilising the complaints process.
 - c. That the technical differences between the two parties are unlikely to be resolved by further discussions.
 - d. That in accordance with Rule 58 (d) the process of alternative dispute resolution should be followed. This was discussed and agreed by both parties and an Adjudicator was appointed.
14. The CIC also noted (paragraph 8.7) That should Mr S frustrate a meaningful attempt at achieving reconciliation, then that the CIC would need to be convinced that the complaint was not a part of a "wider agenda" of the NZFS. If this was shown to be the case then the CIC would consider dismissal under Rule 57 (c) that the complaint had not been made in good faith.
15. The mediation ran from 12 August 2013 and was concluded on 19 February 2014. Whilst the mediation concluded, there were still 3 items disputed:
 - a. That there is still a disagreement as to what was the process acceptable to demonstrate the compliance of the design at the time it was made, peer reviewed and consented.
 - b. That there is still a disagreement as to the design methodology, its inputs and outputs to demonstrate adequate life safety of the building's occupants.
 - c. That there is still disagreement about the level of competence demonstrated by the respondent in the selection of the design methodology originally adopted.
16. The CIC reissued his report on 23 February 2014. The report notes that the parties have reached and signed a confidential mediation agreement and that complaint was dismissed.

Notice of Appeal

17. Mr S's Notice of Appeal states that whilst the mediation was concluded, the matters were not resolved (as is clear from the above).

18. Mr S considers the Adjudicator's (CIC) decision to dismiss the complaint without fully investigating it was flawed.
19. Mr S seeks the following relief:
 - a. That IPENZ revisit the decision to dismiss the complaint and provide independent adjudication on the matters raised as per the original complaint.

Process

20. 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.
21. In hearing the Appeal the Panel has considered whether the CIC's decision to dismiss the complaint was correct. As the final decision of the CIC provided no specific grounds for dismissal, (although infers it was dismissed under rule 57(d)), all items under Rule 57 will be considered. i.e

57 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.

Commentary

22. The Appeal Panel considers that the role of the DRU in the consenting process is not relevant to this complaint. Mr S as an individual is entitled to complain about the performance of a Chartered Professional Engineer.
23. For the building in question, the process of NZFS Building Memorandum and independent peer review managed by the BCA appears to have resulted in a Fire Design that all parties consider adequate. The final resulting design does not appear to be in dispute.

24. With the exception of a typographical error in the report (output fires incorrectly labeled), Mr T stands behind the original design.
25. Mr S continues to dispute the interpretations and assumptions contained in Mr T's design.
26. The mediation process was not an independent technical review. Mr Arnaud Deutsch (the mediator appointed), is a Chartered Professional Engineer with Civil and Management listed as his practice fields.
27. The Appeal Panel notes that the fire design/building consent process has been amended since this complaint was made. The new process is likely to bring closer alignment between the designers and NZFS by the production of a Fire Engineering Brief (FEB) earlier in the design process.
28. That the process has subsequently changed does impact on this complaint. The Appeal Panel needs to consider the actions of the Chartered Professional Engineer in the context of the rules and process that existed at the time of the incident being complained about.
29. The Appeal Panel has reviewed the information provided by all parties. Whilst the Appeal Panel could make technical determinations, in this case it does not believe it is qualified so to do and believes that this should be the role of an Investigating Committee.

Findings of the Appeal Panel.

30. Both the CRO and CIC imply that the actions of Mr S may be motivated by a wider agenda. They both note that if the alternative dispute resolution process is not successful, then the complaint should be dismissed under Rule 58(c) for not being made in good faith.
31. The Appeal Panel can find no evidence that has been presented to support this implication. In addition, the signed mediation agreement dated 19/2/2014 includes the statement that "Both parties have taken part into (sic) the mediation in good faith and have genuinely attempted to resolve the complaint."
32. The CIC in 10.2 of his decision states that the parties have reached and signed a confidential mediation agreement that brings this matter to an end. On this basis he dismissed the complaint.
33. The Appeal Panel does not consider that the mediation "brought this matter to an end". The Mediator, in his cover email to the RA states "The parties have not resolved all their disagreements..." "Nevertheless, the parties have wished to record an agreement summarizing their current positions".
34. The Appeal Panel considers that the three "Remaining Disagreement" items cover the majority of the scope of the original complaint.
35. The Appeal Panel finds that the CIC was wrong to dismiss the complaint on the basis that the parties had reached a mediation agreement. The Appeal panel also

notes that there is no evidence provided that would allow the CIC to dismiss the complaint on the basis of it having not being made in good faith.

36. The Appeal Panel notes that the complaint has not been investigated by an appropriately qualified independent person. Neither the CIC, nor the CRO nor the Adjudicator has any qualifications in Fire Engineering.

Outcomes

1. The Appeal Panel finds the CIC was wrong to dismiss the complaint.
2. The complaint, these findings, and all documentation provided to the Appeal Panel will be sent to the Registration Authority who will be instructed to form an Investigating Committee. This committee should include an appropriately qualified and experienced, independent fire engineer.
3. In the interests of time and costs to all concerned, the Investigation Committee is instructed to hear the complaint on the papers based on the submissions that have been provided to date.

Costs

4. The costs incurred by all parties to this appeal will remain where they lie.

Dated this 29th September 2014

Mr Jon Williams
Principal



.....

Mr Anthony Wilson



.....

Ms Jane Nees



.....