

IN THE MATTER of The New Zealand Registered Architects Act 2005 (“Act”)

BETWEEN **The New Zealand Registered Architects Board**

AND **Registered Architect**

DATE OF HEARING: 3 November 2020

VENUE: Zoom Video Hearing

BOARD MEMBERS PRESENT FOR THE DISCIPLINARY HEARING

- Gina Jones (Chair)
- Louise Wright
- Marc Woodbury
- Rob Hall

The Board members above form a quorum in accordance with section 29 of the schedule to the Registered Architects Act 2005.

COUNSEL FOR THE BOARD: Richard Moon

COUNSEL FOR THE ARCHITECT: Don MacRae

LEGAL ASSESSOR TO THE DISCIPLINARY HEARING: Terry Sissons

OTHER PERSONS PRESENT:

- Andrew Symonds, Clerk of the Hearing & Executive Officer, Public Protection, New Zealand Registered Architects Board (NZRAB)
- Theresa Murray, Stenographer
- R B (Complainant)

RELEVANT SECTIONS OF THE REGISTERED ARCHITECTS ACT 2005:

Sections 24 – 26

RELEVANT RULES FROM THE REGISTERED ARCHITECTS RULES 2006:

Rules 46 and 72 – 78

DETERMINATION OF THE BOARD

THE COMPLAINT

1. At a hearing of the Board conducted on 3 November 2020, the Architect admitted a charge that he failed to perform his professional work with due care and diligence, in breach of Rule 49 of the Code of Minimum Standards of Ethical Conduct for Registered Architects.

BACKGROUND

2. There is no dispute about the facts. The parties have produced an agreed summary which records the following.
3. The **Complainants** were, at all material times, the owners of a coastal section at 58-60 L Crescent, (the **Property**).
4. In 2017, the Complainants decided to progress their plans to build a house on the Property (the **Project**).
5. In October 2017, the Complainants engaged Architect of A Architects under a standard NZIA short form agreement (the **Agreement**). It was agreed A Architects would complete the following phases of work for the Project, for a total price of \$109,100:
 - B.1 Pre-Design
 - B.2 Concept Design
 - B.3 Preliminary Design
 - B.4 Developed Design
 - B.5 Detailed Design and Documentation
 - B.6 Contractor Procurement (the **Services**).
6. The Agreement also stated the *“project budget estimate is based on \$4,500+gst per sqm for 300-350 sqm. Budget range \$1.35 - 1.575+gst”*.
7. In early February 2018, A Architects provided an initial design for the Project showing a house with a floor area of 410 square metres at a cost of \$6,500 per square metre (requiring a total budget of \$2.46 million).

8. On 23 February 2018, the Complainants confirmed, in writing, their budget for the Project was restricted to \$1.65 million plus GST and asked A Architects to revise the design accordingly.
9. On 2 March 2018, Architect provided further designs showing a floor area of 310 square metres with some elements of the Project moved to a “stage 2”. No cost per square metre was indicated.
10. A quantity surveyor was engaged to provide a preliminary costing of the revised design. On 6 April 2018, the quantity surveyor provided a report costing the Project at \$1.936 million plus GST.
11. The preliminary costing was based on a standard foundation arrangement that did not allow for engineering work associated with bored concrete piles, or bridging of the public stormwater line, both of which were identified through engineering reports as needing to be addressed to deal with known issues with the site.
12. On 14 March 2018, the Complainants met with Architect to discuss the quantity surveyor’s preliminary costing. In response to queries raised by the Complainants Architect told them that the costing was conservative and that the competitive tendering process would lower the cost of the Project.
13. Architect proceeded on the assumption the Complainants had revised their budget to an amount equivalent to the quantity surveyor’s preliminary costing. However, Architect failed to confirm with the Complainants, orally or in writing, that any such revision had been made. Nor did he alert them to the risk that their preferred design may be unachievable within the stated budget. At no time did the Complainants revise their budget from \$1.65 million plus GST.
14. In June 2018, the Complainants met with Architect to discuss finishes, internal requirements, and the engineering design work.
15. In October 2018, an application for building consent was lodged by A Architects on behalf of the Complainants. Later that month the Project was put out to tender.
16. On 26 November 2018, the quantity surveyor provided an updated costing for the tender process based on the building consent plans. The costing for what had become “stage 1” of the project (which excluded the interior fit out) was \$2.567 million plus GST.

17. Between December 2018 and March 2019, three tenders were received and negotiated at length. Ultimately, all tenders received were considerably above the complainant's budget of \$1.65 million plus GST (the lowest being \$2.14 million plus GST and the highest \$4.1 million plus GST).
18. On 18 April 2019, the Complainants terminated the engagement with A Architects. They ultimately sold the property without undertaking the Project.

ARE THERE GROUNDS FOR DISCIPLINE?

19. For the Board Mr Moon submitted that:
 - (a) the facts outlined above establish that there are grounds for disciplining Architect.
 - (b) in particular, there were indications that the March design, which had already revised and reduced an initial project design, was unlikely to be built within the budget specified.
 - (c) a preliminary costing by the quantity surveyor in April was materially higher than the Clients' budget.
 - (d) engineering reports confirmed several aspects of the work were more involved than the initial assumptions had allowed for.
 - (e) Architect's response to this changing dynamic was to assume the budget had been revised upwards. However, he did not confirm that assumption with the Clients or alert them to the risk the design could not be built within the budget specified;
 - (f) it was incumbent upon him to take one or both of those steps; and
 - (g) Architect accepts that, by failing to do so, he breached Rule 49 of the Code and fell below the standard reasonably expected by his profession and the public.
20. Mr MacRae informed the Board that:
 - (a) Architect accepts that he should not have assumed that the Complainants had revised their budget to reflect the quantity surveyor's costing issued in April 2018;

- (b) instead, he should have ensured that the Complainants understood that if they wanted to proceed with the design they would need to either increase the budget or if they did not want to or could not do that, they would need to “scale back” their design; and
 - (c) Architect accepts a liability finding against under section 25(1)(b) of the Act.
21. As required by Rule 72 the Board has considered the Investigating Committee’s report, the agreed statement of facts, Architect’s admission of the charge and counsels’ submissions and has determined that the Services were not provided with the skill, care and/or diligence required of a Registered Architect in that Architect failed to:
- (a) produce a design that was reasonably capable of being built within the budget specified by his clients; and/or
 - (b) alert his clients to the likelihood that their preferred design was unachievable within the budget specified.
22. Accordingly, the Board finds that there are grounds for discipline.

PENALTY – LEGAL PRINCIPLES

23. The disciplinary penalties that may be imposed for a breach of the Code are set out in section 26 of the Act. They are:

“26 Disciplinary penalties

(1) *In any case to which section 25 applies, the Board may—*

(a) *do both of the following things:*

(i) *cancel the person's registration and remove the person's name from the register; and*

(ii) *order that the person may not apply to be re-registered before the expiry of a specified period:*

(b) *suspend the person's registration for a period of no more than 12 months or until the person meets specified conditions relating to the registration (but, in any case, not for a period of more than 12 months) and record the suspension in the register:*

(c) *order that the person be censured:*

- (d) *order that the person may, for a period not exceeding 3 years, practise only subject to any conditions as to employment, supervision, or otherwise that the Board may specify in the order:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person must pay a fine not exceeding \$10,000.*
- (2) *The Board may take only 1 type of action in subsection (1) in relation to a case, except that—*
- (a) *it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (c) or (e); or*
 - (b) *it may order that a person be censured in addition to taking the action under subsection (1)(d) or (e) or (f).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 25 applies, the Board may order that the person must pay costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to notifying the action taken by the Board in the register, the Board—*
- (a) *must notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the action and the reasons for it; and*
 - (b) *may publicly notify the action in any other way that it thinks fit.”*

24. The principles that normally apply in considering what penalty or penalties are appropriate are set out in the decision of the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*¹ as follows:

“(a) *The Tribunal’s first consideration requires it to assess what penalty most appropriately protects the public. Part of the function of protecting the*

¹ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

public involves the Tribunal setting penalties that will deter other health professionals from offending in a similar way.

- (b) When assessing what penalty to impose the Tribunal must be mindful of the fact that it plays an important role in setting professional standards.*
- (c) Penalties imposed by the Tribunal may have a punitive function.*
- (d) Where it is appropriate, the Tribunal must give consideration to rehabilitating the practitioner recognising that health professionals and society as a whole make considerable investments in the training and development of health practitioners.*
- (e) The Tribunal should strive to ensure that any penalty it imposes is comparable to other penalties imposed upon health professionals in similar circumstances*
- (f) It is important for the Tribunal to assess the practitioner's behaviour against the spectrum of sentencing options that are available. In doing so the Tribunal must try to ensure that the maximum penalties are reserved for the worst offenders.*
- (g) The Tribunal should endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.*
- (h) Finally, it is important for the Tribunal to assess whether the penalty it is proposing to impose is fair, reasonable and proportionate in the circumstances presented to the Tribunal. Imposing a penalty involves issues of finely balanced judgement. It is not a formulaic exercise."*

PENALTY – COUNSEL'S SUBMISSIONS

- 25. Both parties have submitted that a censure is the appropriate penalty.
- 26. Mr Moon submitted that, where the parties are aligned on the appropriate penalty, the main task for the Board is to determine whether the aligned penalty is within the appropriate range. The prosecution submits it is, because:
 - (a) the breach of the Code in this case, whilst not at the most serious end of the spectrum, is still a marked departure from professional standards;

- (b) denouncing the conduct through a censure will support the maintenance of those standards and uphold the reputation of the profession;
- (c) imposition of a censure is broadly consistent with prior cases;²
- (d) the breach had real and significant consequences for the Clients, who having paid a fee in excess of \$100,000, were left with a design that was of no use to them;
- (e) Architect has recently come to the view that he could, and should, have served the Clients better;
- (f) he is entitled to credit for that insight and his unblemished prior disciplinary record. The parties' alignment on penalty has regard to those matters also.

27. Mr McRae submitted that:

- (a) Architect's offending is at the low end of the spectrum. It was not done out of any dishonesty or intention to mislead the Complainants, and the scope of Architect offending is very limited.
- (b) Architect believed that the quantity surveyor's estimate had become the Complainant's new budget (which was not an unreasonable assumption), but he was remiss in not confirming this assumption with the Complainants and/or alerting them to the risk the design could not be built within \$1.65m.
- (c) Architect was remiss in that regard, but his failure did not relate to any systemic deficiencies.
- (d) After receiving information and having given consideration to the matter, Architect has accepted his offending and he has fully cooperated with the Board.
- (e) Architect has taken proactive steps to introduce practices and checks to ensure the situation that arose in this case does not arise again.
- (f) Architect has an exemplary disciplinary record over many years and has had no prior complainants against him.

² See prior cases of 29 June 2016 and January 2015 - <https://www.nzrab.nz/c/Disciplinary-Decisions>

- (g) There is no need to protect the public from Architect; and for these reasons the agreed penalty of censure is appropriate.

28. In his statement to the Board Architect said:

“A Architects standard project protocols now includes:

- (a) An improved client-briefing worksheet. This worksheet now itemises each area of expenditure and is generally clearer than before. It is intended to supplement the client’s written brief and it can be adjusted and updated during the project;*
- (b) Advising clients on the potential for unforeseeable additional costs, such as unexpected foundation or groundwork costs, which may impact on their budget;*
- (c) Reviewing the budget and confirming it in writing each time we proceed to a new stage of the project. Previously we did not include a budget review when obtaining written approval to move to the next stage;*
- (d) Implementing an interiors budget checklist (I have noticed that the interiors budget is particularly prone to increases as the clients become more involved with the project). This checklist helps us to ensure the interior costs stay within budget;*
- (e) Requiring clients to instruct a quantity surveyor for all residential projects. As a condition to our engagement we now require the client to agree to obtain a quantity surveyor estimate for the following stages of the project: completion of the concept design, completion of the preliminary design (prior to applying for resource consent) and completion of 50% of the detailed design documents;*
- (f) In the event the quantity surveyor's costing differs from the budgeted amount and/or new information indicates an increase in costs, explaining options available to the client (for example scaling down or amending the design); and*
- (g) Following which, obtaining written confirmation of how the client wishes to proceed, including any variation of the budget.*

I take my obligations as an architect seriously. I have practiced as an architect for thirteen years, and I have never had a complaint against me. I pride myself on having a very good relationship with clients and working hard to achieve an outcome the clients wish to achieve.”

PENALTY – BOARD’S DETERMINATION

29. In this case the Board considers that the most important factors are:
- (a) protection of the public;
 - (b) the maintenance of professional standards;
 - (c) imposing a penalty which is comparable to other cases;
 - (d) ensuring that the improvements to Architect’s practice are implemented and followed.
30. Having considered all of the circumstances the Board considers that censure is a fair, reasonable and proportionate penalty in conjunction with a condition of practice under section 26(1)(d).

COSTS

31. Mr Moon submitted that the starting point in relation to the costs and expenses of and incidental to the inquiry by the board is for the Registered Architect to pay 50% of such costs. Architect’s decision to plead guilty (albeit at a fairly late stage) and agree a summary of facts has reduced the costs of the process. A discount to 33% from that starting point may be appropriate.
32. Mr MacRae submitted that the normal starting contribution towards the Boards costs is 50%. For the reasons set out in paragraph 28 above and following he submitted that a 25% contribution to costs should be adopted in this case. The additional factors relied upon are: Architect accepted a breach of Rule 49 prior to the hearing which reduced the costs; Architect agreed to a common summary of facts in order to save the board time; and also agreed to conduct the hearing by Zoom.
33. A contribution of 50% towards the costs of the investigation of complaints and prosecution of charges has been the starting point in this jurisdiction. We do not think that the factors relied upon by Architect justify a discount from that starting point as the overall quantum of costs will be less as a result of the guilty plea, hearing format and agreement on the summary of facts. The Board is conscious that to the extent that

costs are not recovered from the practitioner concerned, they fall upon the profession as a whole.

PUBLICATION

34. Mr Moon did not seek an order for publication under s 26(5)(b) of the Act, noting that the censure will appear on the Register. He submitted that this would be an appropriate case to make available to other practitioners through an anonymised summary on the NZRAB website.
35. Mr McRae submitted that publication under section 26(5) is not necessary. While the censure should appear on the Board's register the decision which will be published on the Board's website should be anonymised. Given the lower level offending and insight shown by Architect it is not necessary or appropriate to publish his identifying information. This would be consistent with the approach the Board has taken previously, where it did not publish the architect's identifying information where the offending was at the lower end of the spectrum.
36. The Board agrees that publication under section 26(5) is not necessary. The censure will appear on the Register and an anonymised summary on the decision will be placed on the NZRAB website.

DECISION

37. For the reasons set out above the Board makes the following orders:
 - (a) Architect be censured under s 26(1)(c) of the Act;
 - (b) as a condition of practice under section 26(1)(d), for the next three years, Architect will provide annually a report to the Board regarding his practice with respect to budget and cost estimates, being matters included in Rule 58B of the Registered Architects Rules 2006 with the first report being due on 1 November 2021; and
 - (c) Architect contribute 50% of the costs of, and incidental to, the inquiry by the Board under s 26(4) of the Act.
38. The Board voted and this is separately recorded in a Board draft minute as Attachment 1.

DATED at Wellington this 3rd day of November 2020



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Gina Jones, Chairperson
New Zealand Registered Architects Board



Board Minutes

Date: 3 November 2020

Venue: Zoom meeting

Board members: Gina Jones (Chair), Marc Woodbury,
Louise Wright, Rob Hall

In attendance: Andrew Symonds (EOPP), Terry Sissons

This Board meeting was called to conduct a disciplinary hearing as allowed for under Registered Architect Rules 2006 Rules 72 to 78.

This followed an Investigating Committee decision under delegated authority that there was a case to answer against Architect and that therefore a disciplinary hearing was required.

The hearing was duly conducted. Architect attended and was represented by lawyer Don MacRae.

Following the admission of the charge and consideration of the Investigating Committee's report and the agreed statement of facts, the Board determined as in the resolution below:

Resolutions:

1. That the Disciplinary Hearing, constituted as a meeting of the NZRAB Board under Rule 73, determines that there are grounds for disciplining Architect under section 25(1)(b) of the Registered Architects Act 2005.
2. That the Board makes the following orders:
 - (a) Architect be censured under s 26(1)(c) of the Act; and
 - (b) As a condition of practice under section 26(1)(d), for the next three years, Architect will provide annually a report to the Board regarding his practice with respect to budget and cost estimates being matters included in Rule 58B of the Registered Architects Rules 2006 with the first report being due on 1 November 2021; and
 - (c) Architect contribute 50% of the costs of, and incidental to, the inquiry by the Board under s 26(4) of the Act.

Carried

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Gina Jones (Chair)

Date: 3 November 2020