BEFORE THE NEW ZEALAND REGISTERED ARCHITECTS BOARD (NZRAB)

IN THE MATTER	of the New Zealand Registered Architects Act 2005 ("Act")
BETWEEN	The New Zealand Registered Architects Board
AND	Michael Farrant
DATE OF HEARING:	3 December 2019
VENUE:	Heritage Hotel, Auckland

BOARD MEMBERS PRESENT FOR THE DISCIPLINARY HEARING:

- Gina Jones (Chair)
- Marc Woodbury
- Rob Hall
- Murali Bhaskar

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:	Duncan McGill
LEGAL ASSESSOR TO DISCIPLINARY HEARING:	Terry Sissons

OTHER PERSONS PRESENT:

- Andrew Symonds (Clerk of the Hearing and Executive Officer New Zealand Registered Architects Board)
- Helen Hoffman (Stenographer)
- Michelle van der Veer (Complainant)
- Doug Cowan (Complainant's Barrister)
- Ms Rowe (Assistant Architect's Counsel)

RELEVANT SECTIONS OF THE REGISTERED ARCHITECTS ACT 2005:
Sections 24 - 26

RELEVANT RULES OF THE REGISTERED ARCHITECTS RULES 2006:
Rules 49 and 72 - 78

DETERMINATION OF THE BOARD

THE COMPLAINT

1. At a hearing of the Board conducted on 3 December 2019 Mr Farrant of Michael Farrant Architects (MFA) 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 (the **Code**).

2. The notice of complaint alleged that during the period April 2015 - October 2016, Mr Farrant provided architectural services to Ton and Michelle van der Veer (the **Clients**) relating to alterations and additions to their property at 62 Garnet Road, Westmere, Auckland, in breach of Rule 49 of the Code in that:

   (i) Mr Farrant was engaged by the Clients under a contract to provide services for the Project including a preliminary design for a modified deck and conservatory, together with the more developed designs necessary to support an application for resource and building consent.

   (ii) More particularly, it was part of Mr Farrant's brief to design a new waterproof deck which would *"comply with maximum coverage rules"*.

   (iii) The Clients informed Mr Farrant that, insofar as consents were concerned, it was his responsibility to identify matters that may affect the "allowable footprint" of the property.

   (iv) At all material times, Mr Farrant was made aware 62 Garnet Road was on a cross-lease title and situated adjacent to a joint private driveway providing access to other cross-lease properties.

   (v) The cross-lease required the consent of all owners in the event of any alteration, addition or extension to any existing building on the land.

   (vi) In July 2015, Mr Farrant obtained and reviewed the property file held by Auckland Council relating to 62 Garnet Road.

   (vii) In August 2015, Mr Farrant obtained the Certificate of Title for 62 Garnet Road, but did not order a copy of the cross-lease document referred to.

(viii) Later in August 2015, Mr Farrant submitted an application to Auckland Council on behalf of the Clients for resource consent. That application required the consent of one south side neighbour. The documentation necessary to obtain that consent was prepared by Mr Farrant.

(ix) In October 2015, Mr Farrant submitted an application to Auckland Council on behalf of the Clients for building consent.

(x) Mr Farrant attended the site on several occasions during the construction phase of the Project, to clarify aspects of the design, prior to completion of the construction works in September 2016.

(xi) No neighbour consent was obtained in relation to the cross-lease, making the Clients' title to their property non-compliant with the terms of that lease. This derailed plans to sell the property and, later, required the deck to be modified to address neighbour concerns.

(xii) At no time did Mr Farrant:

(a) adequately advise the Clients and/or advise them in writing that neighbour consent may be required under a cross-lease title before alterations or additions could be undertaken; and/or

(b) advise the Clients they should seek legal advice regarding the cross-lease to confirm potential limitations it may impose upon the Project; and/or

(c) obtain the cross-lease to identify, in general terms, any covenants that may impact the Project.

THE EVIDENCE

3. The agreed summary of evidence produced at the hearing records that the van der Veers purchased the property at 62 Garnet Road in February 2006. It is a substantial concrete heritage villa located in central Auckland. It spans three levels, comprising five bedrooms, three living rooms, 2.5 bathrooms with a separate office, large basement and double off-street parking.

4. The Property is on a cross-lease title and is situated adjacent to a joint private driveway providing access to other cross-lease properties. There are four cross-lease neighbours (five cross-lease houses in total).

5. The van der Veers decided in early 2015 to extend the existing first floor deck and replace the existing carport underneath it (the **Project**).

6. The van der Veers sought advice from their lawyer, Gavin Garrett of Whaley Garrett, in early 2015. He advised them to engage an architect to deal with consenting issues.

7. The van der Veers approached MFA for assistance with the Project in April 2015. Mr Farrant attended an initial meeting at the Property with the van der Veers to discuss their plans on 30 April 2015. The issue of the cross-lease title and the possibility that the consent of the cross-lease neighbours would be required was raised, but the parties do not agree who raised it. Whether, and to what extent, Mr Farrant gave any guidance on the subject of neighbour consent under the cross-lease remains in dispute. However, Mr Farrant accepts he did not communicate adequately any obligation on the van der Veers to address that issue themselves.

8. Although the parties were not aware of it, the cross-lease required the consent of all owners in the event of any alteration, addition or extension to any existing building on the land. If alterations changed the footprint of a house on the cross-lease, then the title would also need to be updated in order to ensure the flat plans reflect those changes. The title and flat plans cannot be updated without all cross-lease owners' consent.

9. On 1 May 2015, Mr Farrant emailed an initial brief and fee proposal for the Project to the van der Veers.

10. Although the initial correspondence referred to the NZIA Standard Agreement for Architects Services, no formal contract of that kind was executed.

11. Shortly afterwards, Mr Farrant was engaged to provide services to the Project including a preliminary design for the modified deck (and conservatory), together with the more developed designs necessary to support applications for resource and building consent.

12. In July 2015, MFA provided some preliminary designs. The van der Veers enquired, in writing, whether that design had "*stayed within the allowable footprint so no need to get neighbour approval".*

13. At a meeting at the Property on 28 July 2015, the parties again discussed the Project including potential consenting issues. Again, the parties cannot agree on what was said. However, Mr Farrant accepts he was not clear in communicating what was required of the van der Veers in relation to neighbour consent under the cross-lease.

14. In August 2015, Mr Farrant obtained the Certificate of Title for the Property, but did not obtain a copy of any of the 10 supporting documents, including the cross-lease He did not communicate further with the van der Veers on the subject of the title, the cross-leases or its potential implications for the Project.

15. Mr Farrant prepared more developed designs for the resource consent application and sent them to the van der Veers.

16. In late August 2015, Mr Farrant submitted the application for resource consent. That application required the consent of one south side neighbour because the soffit design extended slightly beyond the height to boundary envelope. The documentation necessary to obtain that consent was prepared by Mr Farrant and the van der Veers obtained that neighbour's consent.

17. In October 2015, Mr Farrant submitted an application to Auckland Council on behalf of the van der Veers for building consent.

18. Mr Farrant attended the site several times during the construction phase of the Project at the' request of the builder, to clarify aspects of the design, prior to completion of the construction works in September 2016.

19. Despite the issue being raised at the initial client meetings, at no time did Mr Farrant adequately inform the van der Veers that the Project would, or was likely to, need the consent of cross-lease neighbours.

20. Mr Farrant accepts that any oral communication with the van der Veers relating to neighbour consent under the cross-lease should have been considerably clearer and should have been confirmed by him in writing.

21. At no time did Mr Farrant identify to the van der Veers that it would be prudent to discuss the implications of the cross-lease title with their lawyer (so as to asses any potential limitations it might impose on the Project).

22. Mr Farrant accepts that, in the circumstances, he should have been clearer in his discussions with the van der Veers about seeking legal advice in relation to the implications of the cross-lease.

23. Although Mr Farrant obtained the Certificate of Title to the Property in August 2015, he did not communicate further with the van der Veers on any issues arising from the title or the cross-leases it referred to. Mr Farrant did not obtain any of the cross-lease documents to determine if, on their face, they could impact or otherwise limit the nature of the Project.

24. Mr Farrant accepts he should have more carefully considered the implications of the cross-lease title and obtained a copy of the relevant document(s) to determine whether, in general terms, they contained any restrictions or covenants the van der Veers should have been alerted to.

25. No neighbour consent was obtained during the Project, making the Clients' title to their property non-compliant with the terms of the cross-lease (in the sense that the flat plans could not be updated).

26. By the time the Project had been completed (without the necessary consents) the van der Veers had put the Property on the market and made an offer on a new property.

27. Neighbour consent was not forthcoming in several instances. The van der Veers were required to engage in the time consuming and expensive exercise of negotiating such consents as were provided through their solicitors and, ultimately, modifying the deck to address the concerns of other cross-lease neighbours.

28. The van der Veers consider Mr Farrant's failings have had a significant detrimental impact on their financial circumstances and well-being and put them under considerable stress and, as a result, their health and that of their children has suffered.

29. Mr Farrant has acknowledged he could, and should, have performed his role with more diligence and focus. He accepts that his failure to do so was a breach of Rule 49 of the Code in the respects alleged at paragraphs 12 (a)-(c) and 13 of the Notice of Complaint.

LEGAL PRINCIPLES - LIABILITY

30. The test for determining whether a registered architect has performed his or her professional work with due care and diligence is an objective one and judged at the time the work was done (and not with the benefit of hindsight).

31. The proper approach for professional advisers was captured by the Court of Appeal in *Gilbert v Shanahan* in the context of solicitors' duties:

> *Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.*

THE BOARD'S DETERMINATION - LIABILITY

32. While the terms of engagement in the present case did not expressly require Mr Farrant to:

> Adequately advise the Clients and/or advise them in writing that neighbour consent may be required under a cross-lease title before alterations or additions could be undertaken; and/or
>
> advise the Clients they should seek legal advice regarding the cross-lease to confirm potential limitations it may impose upon the Project; and/or
>
> obtain the cross-lease to identify, in general terms, any covenants that may impact the Project

we are satisfied that the need to do those things fairly and reasonably arose in the course of carrying out his instructions and therefore came within the scope of his engagement.

33. Having considered Mr Farrant's admission of the charge and of the particulars, the Investigating Committee's report and the agreed summary of evidence, the Board is satisfied that Mr Farrant has breached Rule 49 of the Code by failing to perform his professional work with due care and diligence.

PENALTY – LEGAL PRINCIPLES AND COUNSEL'S SUBMISSIONS

34. 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."

35. 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 public*

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

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.*

36. In this case the parties have agreed that the following penalties should be imposed:

(a) Mr Farrant be censured under s 26(1)(c) of the Act;

(b) Mr Farrant undertake his next five yearly competence review (in 2020) via a face-to face review and that the Evaluation Panel be provided with a copy of the Board's decision and the Investigating Committee's report on the complaint No. 75, under s 26(1)(d) of the Act;

(c) Mr Farrant contribute to the costs of, and incidental to, the inquiry by the Board under s 26(4) of the Act; and

(d) the decision should be published on the NZRAB website with mention of Mr Farrant's name and location under s 26(5)(b) of the Act.

37. In *Commerce Commission v New Zealand Milk Corporation Limited*[2] the full High Court held that, where the parties have reached a consensus on penalty, the Court is likely to provide its approval if it accepts that the agreed penalty is proportionate to the evidence available, and the defendant's conduct. The approach has since been applied in disciplinary proceedings against medical practitioners, accountants and vets.

38. In *Commerce Commission v PGG Wrightson Limited*[3] the Court noted the decision maker must perform their own assessment, noting at [32].

> "*… when a court is presented by the parties with a proposed penalty, it is still essential that the court perform its own assessment of the appropriate range of penalties. If the penalty is not within the proper range, the court must intervene and impose what it assesses as the appropriate penalty."*

39. The main task for the Board is therefore to determine whether the aligned penalty is within the appropriate range.

40. The prosecution submitted that it is, for the following reasons:

(a) the breach admitted is significant, albeit not at the most serious end;

(b) the consequences for these Clients were serious and real;

(c) the conduct should be denounced through a censure (which will support the maintenance of proper professional standards);

(d) a penalty of censure is broadly consistent with prior cases; and

(e) requiring a face-to-face competence review will assist the rehabilitation of the practitioner and protection of the public.

41. Mr McGill agreed with the prosecution's submissions in relation to the applicable legal principles and stressed the importance of rehabilitation as a factor. He submitted that this case is at the lower end of the spectrum of offending whereas Mr Moon characterised it as significant but not at the most serious end.

---

[2] *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730
[3] *Commerce Commission v PGG Wrightson Limited* [2015] NZHC 3360

42. Counsel submitted that Mr Farrant has learnt a lot as a result of this experience and will now implement a practice where he will:

(a) Advise all clients that have cross leases or unit titles in writing:

i. That he is not an expert on cross lease/unit titles and therefore cannot and will not provide any advice about the impact (if any) those titles may have on their proposed projects; and

ii. To seek independent legal advice about the impact or potential impact of the cross lease/unit title on the proposed project at the commencement of the engagement.

43. Through counsel Mr Farrant expressed his sorrow to the van der Veers and said he had learned his lesson.

PENALTY – BOARD'S DETERMINATION

44. Having considered all of the facts in this case and the penalties imposed in other cases we are satisfied that the agreed penalty of censure is within the range of appropriate penalties.

45. The Board notes the parties' agreement that an order requiring Mr Farrant to undertake his next five-yearly competence review as a face-to-face review was preferable to the imposition of a fine and that such an order could be made under s 26(1)(d) of the Act. The Board considers that it is appropriate to make the agreed order under s 26(1)(d as a condition of Mr Farrant's practice as a registered architect.

COSTS – COUNSEL'S SUBMISSIONS AND BOARD DETERMINATION

46. Mr Moon submitted that Mr Farrant should be ordered to pay 50% of the costs and expenses incurred in investigating the complaint. Mr McGill submitted that the contribution to costs should be 25% because Mr Farrant admitted guilt and accepted the charge, thereby saving the Board time and cost, and that as a sole practitioner a substantial costs order would impose a significant financial burden on him.

47. A contribution of 50% towards the costs of the investigation of complaints and prosecution of charges has been the usual starting point in this jurisdiction. Without wishing to bind the Board for the future we consider that 50% is a reasonable starting point given the late guilty plea and having regard to the fact that, to the extent that costs are not recovered from the practitioner concerned, they fall upon the profession as a whole.

PUBLIC NOTIFICATION

48. The parties are agreed that the decision be published with mention of Mr Farrant's name and location. Their agreement recognises the principle that

> *The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in Rowley.*[4]

49. The Board agrees that public notification with mention of Mr Farrant's name and location is appropriate in the public interest.

DECISION

50. For the reasons set out above the Board makes the following orders:

(a) Mr Farrant be censured under s 26(1)(c) of the Act;

(b) Mr Farrant undertake his next five yearly competence review in the first quarter of 2020 via a face-to-face review and that the Evaluation Panel be provided with a copy of the Board's decision and the Investigating Committee's report on the complaint (No. 75), under s 26(1) (d) of the Act;

(c) Mr Farrant contribute 50% of the costs of, and incidental to, the inquiry by the Board under s 26(4) of the Act;

(d) The decision be published on the New Zealand Architects Board website with the mention of Mr Farrant's name and location under s 26(5)(b) of the Act.

49 The Board voted on the above findings and this is separately recorded in a Board draft minute as attachment 1.

DATED at Auckland this third day of December 2019

……
Gina Jones, Chairperson
New Zealand Registered Architects Board

[4] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4