

UNDER The New Zealand Registered Architects Act 2005 ("Act") and
the New Zealand Registered Architects Rules 2006 ("Rules")

IN THE MATTER of a complaint by (the Clients)
against

BETWEEN THE NEW ZEALAND REGISTERED ARCHITECTS BOARD

AND Registered Architect

DATE OF HEARING: 23 February 2016

VENUE:

DISCIPLINARY COMMITTEE MEMBERS

- Euan Mac Kellar (Chair and NZRAB Board member)
- Warwick Bell (Alt Chair and NZRAB Board member)
- Penny Mudford Lay Person and arbitrator/mediator)
- Chris Preston (Lay person and Licensed Building Practitioners Board member)

The committee is appointed in accordance with Registered Architects Rule 91 (1).

COUNSEL FOR NZRAB: Matthew McClelland QC

COUNSEL FOR THE ARCHITECT: Peter Hunt and Geraldine Wishart

LEGAL ASSESSOR TO DC: Terry Sissons

OTHER PERSONS PRESENT:

- Andrew Symonds, Clerk of the Hearing
- Theresa Murray Stenographer

RELEVANT SECTIONS OF THE REGISTERED ARCHITECTS ACT 2005

Sections 24 - 26

RELEVANT RULES FROM THE REGISTERED ARCHITECTS RULES 2006

Rules 72 – 78

RECOMMENDATIONS OF THE DISCIPLINARY COMMITTEE

The Charge

1 | is charged with a breach of Rule 49 of the Registered Architects Rules 2006 in that:

During the period February 2013 – February 2014 | registered architect, provided architectural services to the clients for the design of a new house on a rear section at | ("the site"), in breach of Rule 49 of the Code of Minimum Standards of Ethical Conduct for Registered Architects 2006 ("the Code").

Particulars

2 | agreed to undertake professional work for the design of a new house on the site, that agreement comprising a letter establishing fees and services and a General Conditions of Contract (collectively known as "the Agreement").

3 | It was a term of the Agreement that "*Resource Consent, if needed, will be applied for by a separate consultant*".

4 | In December 2013 applications for building and resource consent were lodged with the Auckland City Council and tenders were called for.

5 | No separate consultant had been engaged when application for resource consent was lodged with the | City Council.

6 | The design and documentation lodged in support of the applications for building and resource consents contained significant errors and in particular being a rear site, the building was required to be set back from all boundaries by 3m whereas the documentation showed that the proposed building was set in approximately 1.2m from the northern boundary and 1.8m from the southern boundary ("the errors").

7 | As a result of the errors written approval from four neighbours was required or the plans were required to be amended to comply with the Yard Control provisions or limited notification of the Resource Consent was required.

The Evidence Produced in relation to the Complaint

8 The following information was produced and presented at the Hearing:

- i. Notice of Complaint as prepared by Mr McClelland. -this document was taken as read and [redacted] admitted the charge.
- ii. Summary of Facts as prepared by Mr McClelland. – this was accompanied by a set of documents as referred to in the summary of facts (MMFK2).
- iii. Opening Submission on Behalf of New Zealand Registered Architects Board (the Board).
- iv. Penalty Submission on Behalf of New Zealand Registered Architects Board ("The Board") as prepared by Mr McClelland.
- v. Personal Statement of [redacted] – this included an annexure from the Auckland District Plan 2002 on the rules definitions covering yards.
- vi. Submission on Behalf of [redacted] regarding Liability and Penalty as prepared by Peter Hunt/Geraldine Wishart – this included an annexure of financial information showing turnover for [redacted] companies and his Income before tax (2012 – 2015).

Submissions as to grounds for discipline

9 In Mr McClelland's opening submission he highlighted that, despite [redacted] admitting the particulars and signing the Summary of Facts, the Disciplinary Committee needed to satisfy itself that [redacted] conduct amounted to a Breach of Rule 49. Specifically that he failed to engage a separate consultant for lodgement of the Resource Consent application and that he should have reasonably been able to identify the errors he made with regard to the yard requirements, and that in doing so [redacted] conduct fell below the standard expected of a registered architect.

10 [redacted] counsel chose not to be heard on the question of liability as [redacted] has admitted the facts.

Deliberations and decision of the committee as to grounds for discipline

11 On the matter of whether [redacted] should have engaged a separate consultant to lodge the Resource Consent application, the Committee found that the Architects Services letter (paragraph 2) Developed Design clearly stated that if a Resource Consent was needed the application would be made by a separate

consultant. Not doing so resulted in significant errors to the design that left the client with a set of Building Consent and Resource Consent documents that did not comply with the Council's requirements.

- 12 On the matter of whether the errors should have reasonably been identified before the applications for Building Consent and Resource Consent were made the Committee found that, as an architect with significant residential project experience, [redacted] should have understood the planning rules relating to the required yard setbacks for the project and that if the rules were not clear to him he should have sought advice from an independent expert or sought clarity from the Council. He should also have checked the work of his staff member. It is common practice to hold pre-application meetings with Council staff to identify and clarify potential issues relating to planning or building consent matters. In this instance [redacted] elected to submit Planning and Building Consents concurrently. The Committee's view was that this is not a recommended practice as identifying planning issues on completion of documentation carries risk as the proposed design may not meet the Council's planning requirements. If [redacted] had identified the potential ambiguity in how his office was interpreting the rules then he should have sought clarification. This could have been achieved through a specific and proper pre-application meeting with the Council planning team at an early stage of design or by consulting with an expert planning consultant. However, [redacted] chose not to consult with or engage a separate planning consultant.

In considering the Summary of Facts, [redacted]'s admission of the charge and Counsel's submissions the Committee decided that there were grounds for disciplining [redacted] under Section 25 (1) (b) of The Registered Architects Act 2005 in that he breached rule 49 of the Registered Architects Rules 2006 by failing to perform his professional duty with due care and diligence as set out in the Notice of Complaint.

Submission on penalty, costs and publication from the Prosecutor

- 13 Mr McClelland submitted that the principles for sentencing in a disciplinary case of this nature should include the following:
- i. The protection of the public – to ensure that registered architects are competent and fit to practise their profession;

- ii. Maintenance of professional standards – *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720.
- iii. To punish the professional – *Dentice*.
- iv. Where appropriate to rehabilitate the professional.

14 Mr McClelland concluded that "The Committee should take into account the fact that [redacted] has admitted the charges as set out in the notice of complaint and thereby avoided a defended hearing and all the costs associated with that. However despite indicating quite early on that he would admit the charges made against him, considerable time and effort was expended by the Board in getting to the position where [redacted]'s admission was confirmed. This resulted in there being a number of telephone conferences with the Committee Chair and various delays associated with concurrent civil proceedings. All this added to the Board's costs so that they exceed the costs which would ordinarily be associated with a straightforward admission."

Submission on penalty, costs and publication from the Architect
The personal Statement of [redacted]
Side and rear yard interpretation

15 [redacted] acknowledged his sincere regret that [redacted] were not able to use the plans that [redacted] prepared. He accepted responsibility for failing to identify the planning error. [redacted] claimed that the error was an issue that involved different interpretations of yards and as to whether a cross lease property should be treated as a single site with two buildings on it or as separate sites within a cross lease. After the error in his interpretation had been identified by the Council [redacted] consulted with an expert planning consultant who believed that it may be possible to challenge the Council's interpretation through a hearing process.

Agreement to apply for Resource Consent by a separate consultant

16 While acknowledging the wording of Clause 2 of the Architects Service Agreement [redacted] explained that he only used separate consultants for planning applications where clients sought and planned non complying features such as height or building coverage infringements. He noted that he has since changed the

wording of Clause 2 to reflect his intent and provide clarity that a separate consultant may be used as opposed to will be used.

Submission on Penalty from [redacted] Counsel

17 Mr Hunt submitted that, in addition to [redacted] admitting to facts as set out in the agreement summary of facts and that he did not dispute the breach of rule 49 of failing to perform his professional work with due care and diligence, the following should also be taken into account when considering penalty:

- i. There is no ongoing risk to the public as a result of the error;
- ii. The error was a one off and arose from a reasonably difficult interpretation;
- iii. [redacted] is a competent Architect who has run his practice for over 30 years without any previous disciplinary complaints;
- iv. [redacted] dealt with attempting to remedy the error, promptly and responsibly and without additional cost to [redacted];
- v. On this basis Mr Hunt submitted that censure was an appropriate penalty.

18 Mr Hunt also submitted information on [redacted] income and suggested that based on his earnings that if any cost were to be awarded that a sum of up to 30% would be appropriate.

Deliberation and decision of the Committee in regard to penalty, costs and publication

19 Based on the evidence presented to the Committee, and in particular the extract from the District Plan presented as an annexure to [redacted] Personal Statement, the Committee accepted that the property was a rear site and given that [redacted] has significant residential project experience he should have been able to identify the property as a rear site. The Committee's view was that if [redacted] had any doubt, and if he had he acted with an appropriate level of due diligence, he would have sought clarification from an independent planning consultant, the planning desk or had a specific pre-application meeting for Resource Consent with the Council. The evidence showed that the Pre-application meeting he had with the Council was immediately prior to Building Consent lodgement and that it was with Building Consent officers only. [redacted] clarified that he expected a planning officer to be at that meeting and that he did meet with the duty planning officer after the meeting.

- 20 The disciplinary penalties available to the Committee are set out in section 26 of the Act and include:
- i. cancellation of registration
 - ii. suspension
 - iii. censure
 - iv. the imposition of conditions
 - v. a requirement that the registered architect undertake training
 - vi. a fine not exceeding \$10,000
- 21 While the committee considers the matter as serious it took into account the mitigating factors presented by [redacted] s, his Counsel and Counsel for the Board.
- 22 The Committee found the seriousness of the matter was not such that [redacted] posed an ongoing risk to the public. The Committee accepted that [redacted] had learnt from the errors and had already actioned changes to his terms of service and work practice, therefore he was unlikely to repeat these mistakes. Cancellation of registration, suspension, additional training or the imposition of conditions was not considered appropriate in this case. Given the circumstances the Committee found that censure was a sufficient penalty.
- 23 With respect to costs, the Committee did not accept that [redacted] financial circumstances warranted leniency and considered that awarding 50% of costs against [redacted] was appropriate.
- 24 With respect to publication, the Committee agreed the circumstances of [redacted] errors did not warrant publication of his name.

Recommendations to the Board of NZRAB under Registered Architects Rules 72 and 75 (c)

- 25 That the Board of NZRAB consider the following recommendations of the appointed Discipline Committee with regards to penalty, costs and publication.
- i. **Recommendation to the Board as to penalty**
That the Board of NZRAB censure [redacted] under section 26(c) of the Registered Architects Act 2005.
 - ii. **Recommendation to the Board as to costs**

That the Board of NZRAB award costs and expenses of, and incidental to, the hearing and inquiry by the Board of 50% against _____ under section 26(4) of the Registered Architects Act 2005 and that as required under section 27 of the Act that the amount be paid within 60 days of notice.

iii. Recommendation the Board as to publication

That the Board of NZRAB does not publish _____ name.

DATED at this twenty third day of March 2016

Euan Mac Kellar



Disciplinary Committee Chairperson