IN THE MATTER	of The New Zealand Registered Architects Act 2005 ("Act")
BETWEEN	**The New Zealand Registered Architects Board**
AND	**Registered Architect A**
AND	**Registered Architect B**
DATES OF HEARINGS:	9 – 11 November 2020 and 17 June 2021
VENUES:	Cordis Hotel Auckland (November 2020); NZRAB offices and via Zoom (June 2021)

BOARD MEMBERS PRESENT FOR THE DISCIPLINARY HEARING

- Gina Jones (Chair)
- Louise Wright
- Murali Bhaskar
- 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 ARCHITECTS: Duncan McGill, Kristal Rowe and Kiri Petrie

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)
- Theressa Murray, Stenographer (9 – 11 November 2020); Jacqui Kennedy (17 June 2021)
- Complainant A
- Complainant B
- Witness A
- Witness B

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

RELEVANT RULES FROM THE REGISTERED ARCHITECTS RULES 2006:
Rules 49 and 72 – 78

DETERMINATION OF THE BOARD

THE COMPLAINT

1. The Architects were both originally charged by the New Zealand Registered Architects Board (the **Board**) under s 25(1)(b) and (c) of the Registered Architects Act 2005 (the **Act**) with:

   (a) a breach of the Code of Ethics contained in Rule 49 of the Code of Minimum Standards of Ethical Conduct for Registered Architects 2006 (being a failure to perform their professional work with due care and diligence; and/or

   (b) practising as a registered architect in a manner that was negligent or incompetent.

2. At a hearing of the Board which commenced on 9 November 2020 and was set down for three days, the Architects denied the charges and the Board received and considered evidence and submissions over the following two days.

3. On the morning of 11 November 2020, the hearing was adjourned part-heard to enable counsel to consider some potentially relevant documents the Architects' legal counsel had become aware of during the hearing.

4. At a directions conference held on 26 May 2021 the prosecution sought and was granted leave to amend the notices of charges by withdrawing the charge of practising as a registered architect in a manner that was negligent or incompetent, and by withdrawing some and amending other particulars supporting the charge of breaching the Code of Ethics.

5. At the same directions conference, the Architects sought and were granted leave to change their pleas and they pleaded guilty to the amended charges.

BACKGROUND FACTS

6. The Board agreed to register Architect B on 28 November 2013 and he was placed on the register on 1 January 2014. Architect A was initially registered 4 December 2008.

7. The following background facts are taken from the Agreed Summary of Facts signed by counsel for the Board and the Architects dated 8 June 2021.

8. The residential building consists of five similar, but not identical, duplexes. Each duplex is individually owned. There is no body corporate.

9. The duplexes were 'leaky buildings' and, in 2014, the homeowners as a group were taking steps to address weathertightness issues affecting their properties including:

    (a) seeking settlement regarding the remedial costs with their original builder; and

    (b) obtaining fee proposals from various architects to design and document the remedial work for the duplexes, incorporating:

        (i) 10 homeowners in five duplexes acting as one group in order to utilise economies of scale to reduce overall planning and construction costs (but contracting individually);

        (ii) one Master Design and overall re-cladding solution;

        (iii) 10 Financial Assistance Package (**FAP**) applications for 50% of the remedial costs;

        (iv) 10 building consents;

        (v) one contractor with building contracts with each of the 10 homeowners; and

        (vi) five construction periods (assuming that the work on a duplex (two homes) would be carried out together).

10. At all material times Architect A was a Registered Architect and an owner and principal of the Architectural firm. Architect B was a Registered Architect and senior employee of the Architectural firm.

11. In November 2014, the Architectural firm presented their Project Scope and Fee for the remedial works at Provence Esplanade. The firm's brief was to create a cohesive design that would add value and look like the duplexes had not been re-clad.

12. The Architectural firm's proposal was based on a template design for a duplex unit that could be replicated with various changes (including the individual differences between the duplexes) with a series of customisable options and design elements. These customisable options were provided to ensure that there was a sense of cohesion and the value of the duplexes would increase, whilst also allowing some individuality. The homeowners could carry out additional remedial or betterment work (at an additional cost), in consultation with their duplex neighbour where necessary.

13. At all material times, Complainants B were the owners of Unit 40 Provence Esplanade and Complainants A were the owners of Unit 42 (the **Owners**). (Units 40 and 42 were in different duplexes).

14. In February 2015, the Owners (along with the other eight owners of the duplexes) individually engaged the Architectural firm to design and document the remedial and additional works to the duplexes. The scope and terms of the agreement were contained in a Project Scope and Fee Proposal document, agreed on 23 February 2015, incorporating the NZIA Short Form Conditions of Contract (the **Design Contract**).

15. Under the Design Contract, the Architectural firm agreed to provide architectural services to the remediation project, which included six stages:

    (a) Stage 1: Develop and agree a design concept and develop a repair plan and resource consent;

    (b) Stage 2: Detailed plans and specifications to obtain building consent;

    (c) Stage 3: Tendering and contract negotiations;

    (d) Stage 4: Contract administration;

    (e) Stage 5: Construction observation;

    (f) Stage 6: FAP coordination.

16. Architect B was assigned the role of 'Project Architect' and Architect A supervised his work.

17. Between February 2015 and November 2015, the Architectural firm undertook the work necessary to produce a concept design for the duplexes and a more detailed set of drawings to obtain building consent, and carry out the tender and construction contract negotiations. Building consent was obtained in April 2016.

Construction of Unit 40

18. In May 2016, Complainants B agreed an NZIA Standard Construction Contract (the **Unit 40 Contract**) with B Building company to undertake the construction work. B Building company was also engaged by seven other homeowners (Complainants A and their duplex neighbour engaged a different builder). The Architectural firm assumed the role of the Architect under the Unit 40 Contract.

19. Construction on Unit 40 was the last to start and commenced in October 2016. It was largely complete when Complainants B retook possession in September 2017.

20. The Architects failed to administer the Unit 40 Contract adequately or with sufficient rigour in the respects described below.

    (a) Variations to the Unit 40 Contract were not assessed and/or approved in accordance with the contractual framework.

        Changes to the scope of work for the Unit 40 Contract were categorised as variations only when they had time or cost consequences (rather than in accordance with clause 9.1.1 of the contract). Further, B Building firm carried out variations before being provided with, or in the absence of, a written Architect's Direction. Timeframes within which the Contractor must nominate the value of a variation were not enforced. Accordingly, the process for approving, claiming and valuing variations under clause 9 of the Unit 40 Contract was not always followed. In that respect the role of Architect under the contract was not adequately discharged.

    (b) B Building firm was not required to submit claims for extensions of time in accordance with the contractual framework.

        Clause 11.5.2 of the Unit 40 Contract required B Building firm to apply for extensions of time *"within 5 working days, or as soon as practicable, after the delay begins"*. Without the consent of the Principal, the Architects agreed that B Building firm could submit a consolidated claim for extension of time for Unit 40 at the end of the construction phase so that they could be

clearly separated from extension of time claims for the other seven units that B Building firm was working on. Whilst that was the most workable approach for B Building firm, it was not consistent with the contractual requirements nor was the approval of the Principal sought.

(c) Variations, and the basis for issuing a Certificate of Practical Completion, were not properly documented.

Written communications from the Architect to B Building firm which constituted variations under clause 9 of the Unit 40 Contract were not, in all cases, readily identifiable as such.

Practical Completion was certified by the Architect as achieved under clause 12.1.1 on 1 September 2017, by which the Architect and Contractor can agree to defer certain works (in this case one of the storm water drainage connections). However, the agreement to defer this work and the reasons for doing so were not properly documented.

Construction of Unit 42

21. In June 2016, Complainants A agreed an NZIA Standard Construction Contract (the **Unit 42 Contract**) with A Building firm to undertake the construction work. Complainants A's duplex neighbour also engaged A Building firm. The Architectural firm assumed the role of Architect under the Unit 42 Contract.

22. The Architectural firm's proposal was based on a rolling construction over five construction periods. That is, construction would start on one of the duplexes, then when most of the carpentry work was complete, the builders would move to the next. Since there were two different builders, it meant there was more overlap and pressure on the Architectural firm's resources.

23. Prior to Complainants A agreeing to engage A Building firm, Complainant A advised that he wanted to "help" A Building firm with the remedial work and the complainants wanted to live in their campervan adjacent to Unit 42. The Architectural firm advised Complainant A:

(a) that A Building firm's draft Unit 42 Contract did not include any allowance for any time that he may spend on site assisting A Building firm; and

(b) he (the Complainant) should record any of his labour time for work on the remediation of his house.

24. However, the complainant and A Building firm did not make any formal arrangements regarding how the Complainants' time would be accounted for and there was no formal agreement that the Architectural firm would deduct the Complainant's labour time from A Building firm's invoices. The Architectural firm did not follow up the matter and left it to A Building firm and the Complainant to resolve.

25. Construction on Unit 42 commenced July 2016 and was largely complete when Complainants A retook possession in March 2017. Complainant A did not make final payments to A Building firm (because he considered the work he had done himself was not properly taken into account) and the Architectural firm (because he considered the service to be lacking).

26. The Architects failed to administer the Unit 42 Contract adequately or with sufficient rigour in the respects described below.

(a) Variations to the Unit 42 Contract were not assessed and/or approved in accordance with the contractual framework.

Changes to the scope of work for the Unit 42 Contract were categorised as variations only if they had time or cost consequences, rather than in accordance with Section 9.1.1 of the contract. Further, A Building firm carried out variations before being provided with, or in the absence of, a written Architect's Direction. In some instances, this was due to Complainant A giving A Building firm verbal directions onsite without the Architectural firms' knowledge. Accordingly, the process for approving, claiming and valuing variations under clause 9 of the Unit 42 Contract was not followed. In that respect the role of Architect to the Contract was not adequately discharged.

(b) Payment claims were not processed in accordance with the contractual framework.

Section 14 of the Unit 42 Contract prescribes how contractor's payment claims should be processed. However, Complainants A and A Building firm agreed an amendment to their contract that included a payment plan that was based on milestones, rather than periodic payments. In some instances, payment schedules were issued outside the timeframes specified in the contract and did not correctly describe the Principal's right to deduct in accordance with clause 14.5 of the contract.

(c) Variations, payment claims, and architect's directions were not documented in accordance with the contract.

The documentation recording some variations, payment claims, and architect's directions was incomplete and/or inadequate. For example, some of the written communications which were said to constitute a variation, or an architect's direction, were not readily identifiable as such. Variations were not numerically numbered for ease of reference. The form used for payment schedules were incorrect regarding its provisional status and payment due date calculation.

(d) No communications framework was implemented to manage Complainant A's dual roles on the project (Principal under the Unit 42 Contract and a subcontracted labour resource to A Building firm).

Complainant A's dual role was a risk identified by the Architects before Complainants A contracted with A Building firm. A key issue was communication: ensuring any instructions issued to A Building firm by Complainant A on site (whilst performing the role of labourer or subcontractor or principal) were properly identified and addressed in accordance with the Unit 42 Contract. The Architects did not establish a written communication framework or protocol that would ensure any such instructions were properly identified, documented and, where appropriate, implemented as contemplated by the Unit 42 Contract.

27. Further, as a principal of the Architectural firm, Architect A failed to adequately review and/or supervise the work Architect B performed under the Unit 42 Contract.

ALLEGATIONS OF FAILURE TO ACT WITH DUE SKILL CARE AND DILIGENCE AS AMENDED

28. The Board alleges that, in relation to Unit 42, the Services were not provided with the skill, care and diligence required of a Registered Architect. In particular, the Architects failed to administer the Construction Contract adequately or with sufficient rigour, in that they did not:

(a) assess and/or approve variations in accordance with the contractual framework;

(b) process payment claims in accordance with the contractual framework;

(c) properly document variations, payment claims and architect's directions in accordance with the contract;

(d) implement a communications framework to manage Complainant A's dual roles on the Project (Principal under the Construction Contract and a subcontracted labour resource to the Contractor);

29. The Board also alleges that Architect A failed to adequately review and/or supervise the work of Architect B in relation to Unit 42.

30. The Board alleges that, in relation to Unit 40, the Services were not provided with the skill, care and diligence required of a Registered Architect. In particular, the Architects failed to administer the Construction Contract adequately or with sufficient rigour, in that they did not:

(a) assess and/or approve variations in accordance with the contractual framework;

(b) require the Contractor's extensions of time claims to be submitted in accordance with the contractual framework;

(c) properly document variations and the basis for issuing a Certificate of Practical Completion.

31. The Board also alleges that Architect A failed to adequately review and/or supervise the work of Architect B in relation to Unit 40.

32. The Architects have admitted the allegations set out in the immediately preceding paragraphs. In addition, they have admitted that:

(a) the contract administration services provided by the Architectural firm in relation to the Unit 40 Contract and the Unit 42 Contract lacked the skill, care and diligence required of a Registered Architect; and

(b) in providing construction administration services in the manner described at paragraphs 20 and 26 above, the Architects breached Rule 49 of the Code of Minimum Standards of Ethical Conduct for Registered Architects 2006;

(c) as a principal at the Architectural firm, Architect A failed to adequately review and/or supervise the work Architect B performed under the Unit 40 Contract and the Unit 42 Contract.

33. While the Architects' guilty pleas and admissions are relevant and significant, the Board must still be satisfied that there are grounds for discipline in that the admitted conduct amounts to a breach of the Code sufficient to justify a disciplinary sanction.

THE LEGAL FRAMEWORK

Onus of proof

34. The onus is on the prosecution to prove the matters alleged in each Notice of Complaint to the civil standard (on the balance of probabilities). Accordingly, the Board must be satisfied it is more probable than not that the allegations made in the Notices of Complaint are true.

35. As the registered architects have admitted the facts this onus has been discharged.

Purpose of disciplinary proceedings

36. The majority of the Supreme Court in *Z* v *Dental Complaints Assessment Committee* observed that the purpose of disciplinary proceedings is:

> *"… to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future*." [1]

37. It is apparent from the rationale in *Z* that the disciplinary process is not engaged simply to prosecute and penalise; it is to hold accountable the members of a profession who fall below professional standards and thereby maintain those standards.

38. There is a strong public interest to such proceedings and the approach taken should not be unduly technical. In *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, Cooke P observed that professional discipline is:

> *... a field where the spirit of justice is more important than the letter.*[2]

The Registered Architects Act 2005 and the 2006 Rules

39. Section 25(1) of the Registered Architects Act 2005 (the **Act**) provides:

> *The Board may (in relation to a matter raised by a complaint or by its own inquiries) take any of the actions referred to in section 26 if it is satisfied that –*

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1 [2008] NZSC 55, at [128].

2 Page 548, L14.

(b) A registered architect has breached the Code of Ethics contained in the Rules ... or

40. Clause 49 of the Registered Architects Rules 2006 applicable at the time provides:

> *A registered architect must perform his or her professional work with due care and diligence.*

41. While the phrase "*due care and diligence*" appears in various pieces of legislation and Codes of Conduct for various professions, it has not been judicially defined. Whether a person has exercised due care and diligence is usually evident from the factual circumstances of the case. The test is an objective one and conduct is to be judged at the time the work was done, and not with the benefit of hindsight.

42. Perhaps the classic formulation remains that of Windeyer J in *Voli* v *Inglewood Shire Council*:

> *An Architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual amongst Architects practising their profession and he must use due care.* [3]

43. In the UK Court of Appeal decision in *HMRC* v *Kearney* where Arden, LJ explained the test for "due care and diligence" in the following terms:

> *"… lack of care means lack of concern, whereas diligence means a failure to apply oneself to the issue … it is not possible to define all the circumstances that will meet the second condition* [being the requirement to exercise due care and diligence]*. In part what is due care and diligence in any set of circumstances will depend on the obligations of the person being considered".*[4]

44. The proper approach 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.* [5]

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3 [1963] ALR 657.
4 [2010] S.T.C. 1137, at [27].
5 [1998] 3 NZLR 528 at 537.

ARE THERE GROUNDS FOR DISCIPLINE?

45. The Board's Prosecutor submitted that there are grounds for discipline for the following reasons:

    (a) Contract administration was a key component of the services to be provided and, in the context of this complex project, one that required particular care.

    (b) The departures from professional standards are not merely technical.

    (c) The cumulative effect of the allegations that have been admitted should be taken into account when assessing liability.

    (d) The Practitioners accept their work fell below the standard reasonably expected by the profession and the public and they admit a breach of Rule 49 of the Code.

46. The Architects agreed that contract administration for any project should be performed at a high standard and that their performance had shortcomings that are reflected in their guilty pleas.

47. The Board is satisfied there are grounds for discipline, and the Board accordingly makes a finding of guilty under s 25(1)(c) of the Act.

PENALTY

Legal principles

48. The factors identified by the High Court in *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354 apply to the determination of penalty by professional disciplinary bodies such as the Board. The Court held that the penalty that should be imposed is one that:

    (a) most appropriately protects the public and deters others;

    (b) facilitates the Board's role in setting and maintaining professional standards;

    (c) reflects the seriousness of the misconduct;

    (d) punishes the practitioner (although subsequent Court decisions have taken the view that punishment is more a by-product of the other factors);

    (e) allows for the rehabilitation of the practitioner;

(f) promotes consistency with penalties in similar cases;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is fair, reasonable and proportionate in the circumstances.

49. The task for the Board is to determine the penalty that will most appropriately balance the *Roberts* factors in this case.

Prosecution submissions

50. The prosecution submitted:

(a) the admitted breaches are 'mid-range' in seriousness and significant given:

(i) contract administration is core business for many registered architects and should be performed to a high standard;

(ii) the contract administration required for this project was logistically complex – the Practitioners should have been alert to the need for care;

(iii) the deficiencies were not isolated (having occurred in several respects across two units on the project); and

(iv) particular project risks in relation to Complaints A were identified by the Practitioners, but then ignored.

(b) Architect A perhaps had a greater responsibility to supervise the overall standard of work performed by the Architectural firm and address the question of Complaint A's role on site (and therefore elevated culpability);

(c) the Board can readily infer genuine disruption and inconvenience to the Clients as a result of the Practitioners' conduct;

(d) the conduct is not so egregious as to require the protection of the public in a direct sense (through cancellation or suspension of registration);

(e) a censure would denounce the conduct, is proportionate and would be broadly consistent with prior cases;[6] and

[6] See prior cases of 3 December 2019, 11 June 2020 and 3 November 2020 - https://www.nzrab.nz/c/Disciplinary-Decisions

(f) bringing forward a competence review (and having it face-to-face) will assist the rehabilitation of the Practitioners and the more general protection of the public.

51. In terms of mitigation, the Practitioners have pleaded guilty (albeit at a late stage), co-operated with the disciplinary investigation and have unblemished disciplinary records. However, the extent to which the Practitioners have developed any insight into their behaviour (and its consequences) remains unclear.

52. For those reasons the prosecution sought the following orders by way of penalty:

(a) The Architects each be censured under s 26(1)(c) of the Act;

(b) The Architects each undertake a competence review, face-to-face, within the next 12 months and that the Evaluation Panel be provided with a copy of the Board's decision, under s 26(1)(d) of the Act;

(c) Architect A pay a fine of $4,000.00 under s 26(1)(f) of the Act; and

(d) the penalty be included on the Register in relation to each individual and the decision (without reference to name and location) be published on the NZRAB website under s 26(5)(b) of the Act.

Registered architects' submissions

53. The Practitioners legal counsel agreed that a censure and the other orders sought are appropriate, apart from the imposition of a fine.

54. He submitted that:

(a) the project was logistically complex;

(b) the Practitioners shortcomings in contact administration were at the low end of the spectrum, as can be inferred from the prosecution's request for a censure;

(c) the deficiencies were limited to 2 out of 10 contracts on the project and were not systemic;

(d) no other projects of either Architect have come before the Board suggesting that there is any systemic difficulty in their practice;

(e) there was no evidence that the deficiencies had any impact on the complainants in terms of time or money;

(f) the full extent of the risks posed by Complaint A's involvement with the builder's work was not apparent until the project was well underway;

(g) no previous case has found that a principal of an architecture firm had a higher degree of culpability because they were under an obligation as a registered architect to supervise another experienced registered architect;

(h) in the absence of evidence, it is not open to the board to infer disruption and inconvenience to the clients as a result of the practitioner's conduct;

(i) The Architects have unblemished records and have cooperated with the Board's investigation throughout;

(j) their insight is evident from their guilty pleas and the Board can be confident that they will not appear before it again in relation to similar allegations;

(k) there is no evidential basis for ordering that Architect A pay a fine but if the board were minded to order that he pay a fine then one no more than $3,000.00 would be appropriate.

PENALTY – BOARD'S DETERMINATION

Discussion

55. The Board acknowledges that the project was somewhat complex, but notes that Rule 7 of the Registered Architects Rules 2006 - Minimum standard for registration as registered architect (2)(d) requires that, to be able to practise competently to the standard of a registered architect, the person needs to *"demonstrate an ability to realise a complex architectural project based on knowledge and appropriate professional experience".*

56. The Board does not accept that the imposition of a censure implies that the shortcomings in this case were at the low end of the spectrum. The New Zealand Lawyers and Conveyancers Disciplinary Tribunal recently noted in *Auckland Standards Committee 2 v Halse* that:

> *A censure is a permanent mark on a practitioner's record. It is a significant penalty component, not something to be treated as a mere matter of course*.

57. The risk involved in having a client on site is well known and dealing with this situation is part of an architects' training.

58. While there have been no cases which hold that a principal of an architecture firm has a higher degree of culpability because they were under an obligation as a registered architect to supervise another experienced registered architect, Architect A's shortcomings in supervision were significant.

59. The Board shares the prosecution's concern about the Architects insight. If they had developed insight into the shortcomings in their contract administration and in Architect A's case his supervision of staff, we would have expected them to provide some indication or evidence of changes made to their construction administration and supervision practices in the intervening years.

60. Having carefully considered the facts set out in the Agreed Summary of Facts, the practitioners' admissions, and counsel's submissions together with penalties imposed in other cases the Board finds that the admitted breaches were sufficiently serious to justify a penalty, in that:

    (a) The Architects:

        (i) failed to perform contract administration competently to the standard expected of a registered architect;

        (ii) provided no evidence that the deficiencies were not isolated (having occurred in several respects across two units on the project);

        (iii) failed to sufficiently manage the particular project risks, which they identified, in relation to Complainant A's role; and

        (iv) have provided no indication or evidence of changes made to their construction administration practices in the intervening years; and

    (b) Architect A failed to adequately review and or supervise the work of Architect B.

61. 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; and

(d) ensuring that the improvements to Architect's practice are implemented and followed.

62. Having considered all the circumstances the Board considers that censure is a fair, reasonable and proportionate penalty in conjunction with a structured competence review under section 26(1)(c) as a condition of the Architects' practice as registered Architects.

COSTS

63. Section 26(4) of the Act provides that in a case such as this *"… the Board may order that the person must pay costs and expenses of, and incidental to, the inquiry by the Board."*

64. The amount of costs and expenses which may be payable by the practitioner in any given case is at the discretion of the Board. That discretion must be exercised on a principled basis and result in an imposition of costs which is fair and reasonable.

Prosecution submissions

65. The prosecution sought an order that the Architects make a significant contribution to the costs of, and incidental to, the inquiry by the Board under s 26(4) of the Act (such contribution to be divided equally between them). He submitted that 50%, being the usual starting point, would be a reasonable contribution, with perhaps an uplift to take into account the costs associated with the adjournment of the original hearing.

66. Counsel submitted that the present case concerns two distinct complaints against two individual practitioners, albeit arising from the same project.

67. The hearing was initially contested and then adjourned part heard so the Practitioners could make further discovery of documents to the prosecution. That added to the overall costs and could justify a figure higher than 50% of the costs incurred. The complainants were required to attend and be cross examined.

68. The Practitioners may argue some reduction in costs is justified due to the allegations withdrawn. But those allegations affected only one complaint and, ultimately, were not the subject of any determination by the Board. The main focus of the expert

evidence was the adequacy of the contract administration across both construction contracts.

69. There is a basis for increasing the costs payable above 50% of the total. Any final costs figure can be divided equally between the Practitioners.

Practitioners' submissions

70. Counsel submitted that 50% of costs is an appropriate starting point and that a reduction to 25% could be justified.

71. The complaints against the Architects have been significantly refined during the investigating committee stage and following the part hearing of the charges; resulting at the first stage in several aspects of the original complaint being dismissed and, at the second stage in the withdrawal of one charge and some particulars and in the amendment of others.

72. The Architects were entitled to defend the charges and should not be penalised for that. The Summary of Facts does not do justice to the circumstances which led to the adjournment of the first hearing and there is no basis for increasing costs above 50% as a starting point on account of the adjournment.

73. The Architects pleaded guilty to the charges which "had prospects of success" at the appropriate time and, when the series of events is accurately considered, there is justification for reducing any costs from a starting point of 50% to say 25% so is to give credit for the guilty pleas and the consequent saving in time and cost.

Discussion

74. In February 2020 the Board changed its policy in relation to the costs incurred in the disciplinary process to use a starting point of 100% of actual costs. Prior to the change of the policy a starting point of 50% of the actual costs has in most cases been adopted.

75. The Board accepts 50% is a reasonable starting point in this case, in line with cases brought prior to January 2020. The Architects could reasonably expect this starting basis based on prior cases.

76. The Board is conscious that to the extent the costs are not recoverable from Architects A and B, the costs fall upon Architects as a whole.

77. This case concerns two distinct complaints against two individual architects, albeit arising from the same project, which could have resulted in four independent hearings. The Board decided to hear these complaints jointly to minimise costs.

78. The refinement of the complaints at the Investigating Committee stage is relevant but had little impact on costs overall as the costs and expenses of the two Investigating Committees', totalling $18,759.26, represent a modest proportion of the total costs incurred.

79. On the morning of the 3rd day of the November 2020 hearing, counsel sought an adjournment for the following reasons:

> "*We went through a process of identifying which documents we thought remained relevant to the charges as they then were framed. What we failed to do, and this is no criticism intended of anyone in particular, but it falls across both my firm and my clients, what we failed to do was recognise that there was possibly further documentation of their position that was relevant to these issues".*

80. At the time of the adjournment, the hearing was at day three and most of the costs in relation to the hearing had been expended.

81. At a directions conference held on 26 May 2021, the Architects were granted leave to change their pleas and they pleaded guilty to the amended charges. This was very late into the proceedings. In previous recent cases where the architects pleaded guilty to the charge, this was upon receipt of the Investigation Committee's report, through to a few weeks prior to the hearings commencing.

    (i) Given the late stage at which an adjournment was sought, we consider it is fair for the Architects to bear the costs incurred as a result of the adjournment and amendments to the charges and pleas.

82. The Board considers it appropriate that the architects pay 100% of these costs and 50% of the remaining costs and expenses, leaving 50% of the remaining costs to be borne the by the profession.

PUBLICATION

83. Whilst no order for publication is sought under s 26(5)(b) of the Act, the censure will be public and appear on the Register.

84. The parties and the Board agree this an appropriate case to make available to other Architects through an anonymised summary on the NZRAB website.

DECISION

85. The Board orders that:

(a) The Architects each be censured under s 26 (1)(c) of the Act;

(b) The Architects each undertake a face-to-face competence review within the next 12 months. As part of such a review the Evaluation Panel is to be provided with a copy of this decision. At their face-to-face competence review the Architects will each need to provide evidence of the processes they have in place for construction administration and evidence of these being used. In addition, Architect A will need to provide evidence of how he supervises and adequately reviews his staff work.

(c) The Architects pay for the costs of the adjourned hearing, plus a sum equivalent to 50% of the remaining costs and expenses incurred by the Board in investigating the complaints, conducting the hearing, and issuing this decision, such sums to be paid equally by the Architects.

(d) the Penalty be included on the Register in relation to each individual and the anonymised decision be published on the NZRAB website under s 26(5)(b) of the Act.

DATED at Wellington this 28th day of July 2021

……..
Gina Jones, Chairperson
New Zealand Registered Architects Board

Attachment 1

NEW ZEALAND
Registered Architects Board
Te Poari Kaihoahoa Ngaio Rēhita o Aotearoa

Board Minutes

Date: 17 June 2021

Venue: Zoom meeting

Board members: Gina Jones (Chair), Murali Bhaskar, Louise Wright, Rob Hall

In attendance: Andrew Symonds (EOPP)

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 architects and that therefore a disciplinary hearing was required.

The hearing was duly conducted. Richard Moon acted as prosecutor and Terry Sissons acted as legal assessor. The Architects attended and were represented by their counsel Duncan McGill, Kristal Rowe and Kiri Petrie

Following the admission of the charge and consideration of the Investigating Committee's report, the agreed statement of facts, and counsel's submissions 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 A and Architect B under section 25(1)(b) of the Registered Architects Act 2005.

2. That the Board makes the following orders:
   (a) The Architects each be censured under s 26(1)(c) of the Act; and
   (b) The Architects each undertake a face-to-face competence review within the next 12 months. As part of such a review the Evaluation Panel is to be provided with a copy of this decision. At their face-to-face competence review the Architects each need to provide evidence of the processes they have in place for construction administration and evidence of these being used. In addition, Architect A will need to provide evidence of how he supervises and adequately reviews his staff work.
   (c) The Architects pay for the costs of the adjourned hearing, plus a sum equivalent to 50% of the remaining costs and expenses incurred by the Board in investigating the complaints, conducting the hearing, and issuing this decision, such sums to be paid equally by the Architect A and Architect B.
   (d) the Penalty be included on the Register in relation to each individual and the anonymised decision be published on the NZRAB website under s 26(5)(b) of the Act.

Carried

…… Date: 29June 2021
Gina Jones
CHAIR