IN THE MATTER OF THE REGISTERED ARCHITECTS ACT 2005

BETWEEN THE NEW ZEALAND REGISTERED ARCHITECTS' BOARD

AND

Registered Architect of

Registration No.

Date of Hearing: 25 January 2013

Counsel: Mr Matthew McClelland for NZRAB

Mr Grant Collecutt for

In attendance: Mr B A Corkill QC – Legal Assessor

Date of Decision: 12 April 2013

DECISION OF DISCIPLINARY COMMITTEE

Result: *Pursuant to rules 72 and 75 and the complaint made in this matter the disciplinary committee unanimously decides and recommends to NZRAB that it decides that there are grounds for disciplining the person complained about, namely the architect mentioned in the intituling to this decision, under section 25 of the Registered Architects Act 2005 in that:*

(a) **the registered architect has breached Rule 50 of the Code of Ethics contained in the Registered Architects' Rules 2006 both generally and in relation to particulars (a)-(c) and (e)-(l) set out in the complaint; and**

(b) **that if, pursuant to Rule 76, the Board of the NZRAB decides to confirm the said recommendations of the disciplinary committee in this matter, it directs the disciplinary committee to make a timetable for submissions on**

penalty, costs and possible name suppression so as to lead to a recommendation to the board about the penalty to be imposed by the board under section 26 of the Act.

Complaint

[1] This is the decision of a disciplinary committee of the New Zealand Registered Architects' Board ("NZRAB" or the "Board") in relation to a complaint under the Registered Architects Act 2005 ("the Act") against , Registered Architect, registration number ("the Architect").

[2] The NZRAB complaint alleges that during the period 2007-10 the Architect provided architectural services to two clients for the design of a new house in in breach of rule 50 of the Code of minimum standards for ethical conduct by registered architects in that "he undertook professional work without having agreed with the clients the terms of the appointment".

[3] The claimed breach of rule 50 was expanded by saying that "prior to undertaking professional work for the clients and at any time during the period that he provided professional work to the clients [the Architect] failed to agree with the clients one or more of the following, terms of appointment", an assertion which was followed by 12 particulars. The particulars were:

(a) the scope of the project; and/or

(b) the scope of the services to be provided; and/or

(c) the stages for the provision of services and the timelines for the provision of those services; and/or

(d) a budget for the project; and/or

(e) the scope of fees and costs including an estimate of the total cost of the services to be provided; and/or

(f) an estimate of the total cost of each stage of the agreed services; and/or

(g) the scope of fees and costs for consultant services; and/or

(h) the timing for the invoicing of the professional work whether it be done monthly, or at the completion of a service stage or at such other intervals as agreed with the clients; and/or

(i) the mutual responsibilities of the architect and client; and/or

(j) the basis and extent of the architect's liability; and/or

(k) requirements for and details of the architect's liability; and/or

(l) details relevant to the administration of the contract including issues as to:

Confidentiality

- Intellectual property rights
- Promotional credit
- Changes in client/architect relationships
- Resolving disputes
- Ending the contract.

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[4] NZRAB alleges that the conduct in the complaint and the particulars "either separately or cumulatively amount to a breach of rule 50 of the Code and/or negligence or incompetent practice pursuant to s.25(1)(b) and/or (c)" of the Act.

Procedural

[5] The Act and the Registered Architects Rules 2006 ("the Rules") have each been in force for a number of years but because this is the first occasion when a complaint against a registered architect has reached a disciplinary hearing, it is convenient to set out the procedural steps required by the Act and the Rules in rather more detail than might ordinarily be appropriate.

[6] The Act gives NZRAB exclusive jurisdiction in respect of the registration (and re-registration) of architects and only those who have been registered by NZRAB are entitled to call themselves "registered architects"[1].

[7] Anybody may complain to NZRAB about the conduct of registered architects[2] and NZRAB is obliged to investigate complaints and determine whether or not to proceed with them as soon as practicable after their receipt[3]. On receiving a complaint NZRAB is required to carry out an initial investigation:[4]this is undertaken by a complaints officer under R63(b). The officer recommends to the chair of the investigating committee either that the complaint be dismissed on a R62 ground or that it be investigated. After considering the recommendation the chair of the investigating committee then also decides either that the complaint be dismissed on a ground enumerated in R.62 or that the complaint should be referred to an investigating committee. If the chair opts for the latter, an investigating committee must then be appointed and it is required to look into the complaint as soon as practicable and make a recommendation to NZRAB either to refer the complaint to a disciplinary committee or dismiss it on any of the grounds listed in R.62[5]. If the investigating committee's recommendation to NZRAB to refer the matter to a disciplinary committee is adopted by the Board, NZRAB must comply with the procedure set out in rules 69-71 and, if its decision is to refer the matter to a disciplinary committee, appoint such a committee under rule 71.

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[1] Sections 6 & 7 Rule 4 & 5
[2] Section 24(1) & R59
[3] Section 24(2)
[4] Utilising the procedure in R.63 and R.64
[5] R.65

[8] A disciplinary committee must hear a complaint as soon as practicable after receiving it and decide if there are grounds for disciplining the "person complained about"[6] under s 25 and, if so, what penalty it recommends the Board impose[7]. Rule 76 requires NZRAB after considering the disciplinary committee's recommendations either to confirm or vary them. Rules 73-75 and rules 77 and 78 mandate the procedure disciplinary committees and the Board must follow in adjudicating on complaints and recommendations.

[9] It is plain from that description of the procedures required by the Act and Rules that the Board of the NZRAB is required to play a number of roles in the disciplinary process against registered architects and is required to exercise both procedural and discretionary judgment at various stages relating to a complaint which ultimately results in a penalty being imposed.

[10] Amongst those, the Board plainly has discretions whether to accept an investigating committee's recommendation, whether to refer a complaint to an investigating committee; whether to accept an investigating committee's recommendation, whether to refer a complaint to a disciplinary committee; and finally, whether to accept or modify a disciplinary committee's recommendations, including as to penalty.

[11] In addition, the Board has power to inquire into any matter on its own motion if it has reasonable grounds to suspect a registered architect has breached s.25[8].

[12] What is reasonably clear from the terms of the Act and Rules, however, is that complaints are made to, and adjudicated on by, the Board of the NZRAB. Even though the rules require members of investigating and disciplinary committees to avoid conflicts of

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[6] The relevant sections of the Rules speak of "the person complained about" rather than the "registered architect" to cover the possibility that the "person complained about" is in voluntary suspension in which case they are not a "registered architect" for the period of the suspension: s.17.
[7] R. 72
[8] R.60

interest[9] a specified number of members of such committees must be Board members so that, although the Act and Rules set out procedures resulting in a certain measure of independence of the investigating and disciplinary committees from the Board itself, they are committees of the Board and the investigation and determination of complaints to NZRAB is a function of the Board itself.

[13] In the case of this disciplinary hearing NZRAB, not the clients, filed the complaint and did so in its name and it retained counsel, Mr McClelland, to prosecute at the hearing. That would appear to have been the appropriate procedure.

[14] In this matter the complaint was filed with NZRAB on 9 March 2011, with further particulars being provided on 18 March 2011. The Architect's response to the complaint was received on 18 April 2011.

[15] On 3 May 2011 the complaints officer recommended to the Chair of the investigating committee that the complaint be investigated by an investigating committee. The Chair of the investigating committee decided under R.63(d) on 25 October 2011 that the complaint should be investigated. The investigating committee recommended in February 2012 to NZRAB that the latter refer the complaint to a disciplinary committee and NZRAB on 7 March 2012 accepted the investigating committee's recommendation and appointed a disciplinary committee to hear the complaint[10].The architect responded on 12 April 2012 to advice of the Board's 7 March decision but the Board, after considering the response, on 19 May 2012 confirmed its earlier decision. (In this case Assoc. Prof Tony van Raat was appointed Chair, Mr John Bannatyne, a registered architect on the NZRAB's rule 88 list was

[9] R.90(3), 91(5)

[10] Rule 91 mandates that disciplinary committees must consist of a Chairperson, a registered architect with particular knowledge set out in Rule 88, a non-registered architect representing consumer interests, and a member nominated by the Building Practitioners Board. Two others being one from the Rule 88 list and one who is not a registered architect may also be appointed. Two of the members must be members of the NZRAB.

appointed and Mr Alan Bickers was nominated by the Building Practitioners Board. Hon Sir Hugh Williams QC is not a registered architect but was appointed to represent consumer interests. Both Assoc. Prof van Raat and Sir Hugh Williams are members of the NZRAB Board.)

[16] The hearing of the disciplinary complaint took place in Auckland on 25 January 2013. Both NZRAB and the Architect were represented by counsel, Messrs McClelland and Collecutt respectively, and Mr B A Corkill QC acted as legal assessor to the committee.

Legal

[17] The grounds for disciplining registered architects by NZRAB are set out in s25 which reads:

> **25 Grounds for discipline of registered architects**
> (1) 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 –
> (a) both of the following matters apply:
> (i) a registered architect has been convicted, whether before or after he or she is registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more; and
> (ii) the commission of the offence reflects adversely on the person's fitness to carry out the work of a registered architect; or
> (b) a registered architect has breached the code of ethics contained in the rules; or
> (c) a registered architect has practised as a registered architect in a negligent or incompetent manner; or
> (d) a registered architect has, for the purpose of obtaining registration (either for himself or herself or for any other person),-
> (i) either orally or in writing, made any declaration or representation knowing it to be false, or misleading in a material particular; or
> (ii) produced to the Board or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or
> (iii) produced to the Board or made use of any document knowing that it was not genuine.
> (2) The Board may take the action whether or not the person is still a registered architect.

[18] Unsurprisingly, most complaints to NZRAB are under s.25(1)(b) or (c).

[19] (Section 26 provides a range of disciplinary penalties and is not presently relevant.)

[20] Part 3 of the rules contains the "Code of minimum standards of ethical conduct for registered architects". As far as the public is concerned, registered architects may not represent or promote themselves or their businesses in a misleading or deceptive manner and are obliged to comply with the codes of ethics and conduct and laws in force in the countries where they provide professional services[11]. As far as the architectural profession and other registered architects are concerned, registered architects must act honestly and fairly, acknowledge other registered architects' intellectual property and ideas, not maliciously or unfairly criticise each other and notify a currently-engaged registered architect when asked to take over professional work or give an opinion on another's work[12]. As far as clients are concerned, registered architects are required to exercise unprejudiced and unbiased judgment, perform their professional work with due care and diligence, be remunerated solely by the fees and benefits in their appointment agreement, not offer inducements to procure an appointment, observe the confidentiality of clients' affairs and avoid conflicts of interest[13].

[21] Apart from the allegation of negligence or incompetence against the Architect under s.25(1)(c), this complaint centres around R.50 which reads:

> **50 Terms of appointment**
> A registered architect must not undertake professional work unless the registered architect and the client have agreed the terms of the appointment, which may include but need not be limited to,-
> (a) scope of work;
> (b) allocation of responsibilities;
> (c) any limitation or responsibilities;
> (d) fee, or method of calculating it, and terms of trade;
> (e) any provision for termination;
> (f) provision for professional indemnity insurance.

[11] Rules 46, 47
[12] R.54-58
[13] R.48-49, 51-53

[22] This being the first complaint under the Act and Rules to reach a disciplinary hearing, there was, obviously, no direct precedent available to guide the disciplinary committee but counsel's submissions relied on decisions relating to other professional disciplinary bodies which they suggested were helpful.

[23] While the statutory schemes set out in the Act and Rules differ in a number of details from that required of disciplinary committees relating to other professions, the committee accepts that the basic underlying principles affecting all such disciplinary hearings are similar if not identical and that decisions relating to other professional bodies, whilst not binding, are a useful guide.

[24] Counsel for the parties and the legal assessor agreed that the onus of proof is on NZRAB to prove the substance of the complaint factually and to demonstrate that those facts amount to a breach of s.25(1)(b), s.25(1)(c) or both.

[25] Counsel and the legal assessor also agreed that the standard of proof was the civil standard of proof on the balance of probabilities "applied flexibly according to the seriousness of matters to be proved and the consequences of proving them"[14].

[26] Messrs McClelland and Corkill both submitted that the Committee was required to consider each of the 12 particulars, first independently and, secondly, cumulatively in the context of the overall charge, make findings on each of the 12 and then consider them, separately and cumulatively, to decide whether a breach of R.50 or negligence or incompetent practice, or both, had been demonstrated to the required standard[15].

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[14] *Z v. Dental Complaints Assessment Committee* [2009] 1NZLR 1 at [100] – [103]
[15] *Duncan v. Medical Practitioners Disciplinary Committee* [1986] 1NZLR 513

[27] Noting that neither negligence nor incompetence is defined by the Act or Rules, Messrs McClelland and Corkill submitted that guidance could be derived from cases under the Nurses Act 1977 and the Building Act 2004 both of which use similar phraseology.

[28] In *Collie v. Nursing Council of New Zealand* [2000] NZAR 74 the question on appeal was whether a nurse who accepted money from patients had properly been found guilty of "professional misconduct" as defined in the Nurses Act 1977. Unlike this case,that definition of "professional misconduct" included "malpractice or negligence" or actions likely to bring discredit on the nursing profession. Because of the widely differing facts and statutory context, *Collie* is only authority bearing on the s.25(1)(c) allegation in the present case but counsel pointed to the following observations of Gendall, J[16]:

> "[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, or oversight or for that matter carelessness. That sort of test must still apply to the malpractice/negligence definition in s.2(a) of the Act.
> [22] Whilst the views of the members of the profession may assist a tribunal in reaching a decision as to whether the behaviour falls into a category deserving of disciplinary sanction are relevant, in the end the tribunal must itself act in a representative capacity and endeavour to formulate the standards which are themselves representative. As was said by Gallen, J in *Farris v Medical Practitioners Disciplinary Committee* [1993] 1 NZLR 609 at pp 71-72:
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> > ... the disciplinary committee is to be regarded as a representative body. It would be impracticable and undesirable to endeavour to set standards by some kind of referendum. Those standards must be fixed by the members of a representative capacity and must endeavour to formulate standards which are themselves seen as representative, rather than expression of their own personal views. The standards are professional in nature and need to be seen in that light. No doubt there are certain difficulties theoretically in arriving at and expressing such standards. However, this is the way in which professional bodies have always acted and in practical terms I think there would be little difficulty in determining those standards in an acceptable way. That view is in accordance with the comments of [sic] *Ongley v. Medical Council of New Zealand* (1984) 4 NZLR 69."

[16] At p82 para [21] and [22]

[29] Counsel also referred to the recent decision in *Beattie v. Far North District Council* (DC Whangarei CIV-2011-088-313 14 November 2012 Judge McElrea). The case revolved around s.317 of the Building Act 2004 which provides as one of the grounds for discipline of a Licensed Building Practitioner that they have carried out building or inspection work in a "negligent or incompetent manner". The Building Practitioners Board, acting on a complaint by the Far North District Council, found incompetence against Mr Beattie but dismissed a complaint of negligence. Mr Beattie appealed[17] against the finding of incompetence and the Council cross-appealed against dismissal of the complaint of negligence. A large number of grounds of appeal which have no relevance to this matter were raised and discussed by the Judge and the appeal was allowed in part but, in relation to the cross-appeal, Judge McElrea, held[18]:

> "There are no previous cases relating to s.317 of the Act but in a case ... decided under a similar provision of the Health Practitioners Competence Assurance act 2003,[19] it was held that the common law concept of negligence is not applicable:
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> > It is highly unlikely the drafters of s100(1)(a) HPCA Act envisaged those prosecuting health practitioners would need to prove all criteria required by the common law to establish negligence on the part of a health practitioner. In the Tribunal's view, the term "negligence" as used in s100(1)(a) of the HPCA Act ["amounts to malpractice or negligence"] focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes negligence in s100(1)(a) of the HPCA Act requires, as a first step in the analysis, a determination of whether or not, in the Tribunal's judgment, the practitioner's acts or omissions fall below the standards reasonably expected of a health practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against the standards of a responsible body of the practitioner's peers."

[30] Noting that negligence and incompetence were mentioned disjunctively in s.317 – as they are in s.25(1)(c) – so could not be synonymous, Judge McElrea went on to observe:[20]

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[17] Though without appearing personally or by counsel

[18] p16 para [41]

[19] Footnote "32 New Zealand Health Practitioners Disciplinary Tribunal, Dr DB Collins QC (as he then was) Chairperson, decision 8/Med04/03P, 18 April 2005, at para 62"

[20] p16-18 paras [43], [44], [46] and [47]

> "The difference between "negligent" and "incompetent" is difficult to state. Because words take their meaning from their context, both terms – "negligent" and "incompetent" – have to be considered in the context of that whole phrase – one in which the adjective describes a *manner* of carrying out work, as distinct from the skills of the worker. Thus while in ordinary speech "incompetent" generally refers to someone lacking in the basic skills required for the job, an incompetent *manner* of working would be one that suggested or exhibited incompetence.
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> [44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficit in the required skills) judged by the four areas of design competence in Schedule 1 of the Licensed Building Practitioner Rules 2007."
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> ...
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> [46 The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus –*negligence* referring to a manner of working that shows a lack of reasonably expected care, and *incompetence* referring to a demonstrated lack of the reasonably expected ability or skill level"

[31] Finally in relation to legal matters, and with specific reference to R.50, Mr Collecutt, submitted that the phrase, "terms of the appointment", in R.50 only required agreement before work is commenced with that agreement not being required to be in any particular form and not necessarily in writing.

[32] Mr Collecutt is correct that R.50 does not expressly require a particular form of agreement, nor one in writing, but the number of issues customarily covered in the terms of appointment between clients and architects makes clear that prudence and the dictates of best practice strongly indicate that agreements under R.50 should be in writing in order to prevent the type of disagreement which arose in this case. The 23 page NZIA Agreement for Architect Services provides a useful template. Indeed, it might even be arguable that architects' failure to agree with their clients on all the terms of their appointment and put

them in writing might conceivably amount to a breach of the obligation for architects to perform their professional work with due care and diligence[21].

[33] Mr Collecutt argued that R.50 should be interpreted in the context of the previous Code of Practice applying to architects and the regulations applying to real estate agents. He noted that R.3.2 of the repealed Code of Practice for architects was mandatory in requiring architects to use the conditions of engagement and scale of charges recognised by the former Architects Education and Registration Board under the Architects Act 1963. Similar provisions currently apply to real estate agents[22].

[34] Mr Collecutt stressed the contrast between the strict obligation – "must" – in relation to agreements on terms of appointment - and the discretionary – "may" – requirements of the balance of R.50 including the six aspects described in R.50(a)-(f). He submitted a more flexible approach was mandated not just by the change in wording from that which formerly applied but also because of the principles of freedom of contract, competition law and what he submitted was common sense. As to the latter, Mr Collecutt drew attention to a number of factual possibilities arising out of the spectrum of architect-client relationships. In light of that, Mr Collecutt submitted the minimum requirements under R.50 for terms of appointment were no more than agreement as to the parties, the nature of the brief and identification of the price for architect's services or a method of its calculation.

[35] In construing R.50, the mandatory requirement of the initial portion of the rule is noteworthy: registered architects "must" not undertake professional work until they and their clients have agreed the terms of appointment. As the phrase "professional work" is not defined, it must include all work of whatever nature which registered architects undertake professionally for their clients. True, architects and their clients may decide to include in, or

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[21] R.49

[22] Real-estate agents (duties of licensee) regulations 2009 covered by R.4

exclude from, their agreements particular aspects of professional work or may vary previous agreements, but whatever the "professional work" may be that registered architects undertake for clients, it is mandatory that it be preceded by agreement between them on the terms of the registered architect's appointment. It was common ground in this case that, apart from agreement on an hourly rate (plus GST), there was, at no time, any agreement, written or oral, signed or unsigned, between the Architect and the clients on any other terms of the Architect's appointment, whether those in the NZIA form or any others.

[36] It is correct that inclusion in any agreement on the terms of appointment of one or more of the six elements of "professional work" itemised in the latter portion of R.50 is optional. But it is plain that inclusion of the matters listed in the rule is illustrative. Not all six may be relevant to the "professional work" which the parties have contracted will be done by the registered architect in the particular instance. The parties may decide, flexibly, that, in relation to the professional work contracted for that, say, the registered architect's professional indemnity insurance will not be engaged or will be specifically increased for that particular project or that, in a long project, fee rates can be revised. The categories are merely indicative of aspects of registered architects' "professional work" to which clients and architects should turn their minds when agreeing on the scope of the work being contracted for, but are not definitive, still less mandatory.

[37] Put shortly, the obligation for registered architects and their clients to agree on the terms of the registered architect's appointment prior to any "professional work" being undertaken is obligatory: the terms to be included in their agreement for the registered architect's appointment for that professional work are discretionary. The list in R 50 is indicative only. The topics listed are prompts, leaving maximum contractual flexibility to registered architects and clients.

[38] To summarise to this point:

- The onus of proving the complaint is on NZRAB.
- The standard of proof is the balance of probabilities as discussed in Z.
- NZRAB must prove that the registered architect is in breach of rule 50, either generally or by reference to one or more of the particulars outlined in the complaint; **or**
- that the proved particulars, either alone or cumulatively, amount to practice in a negligent or incompetent manner as a registered architect
- **or both.**
- If the complaint is proved, the disciplinary committee makes recommendations to NZRAB as to that fact and, if the Board accepts those recommendations, it later makes recommendations as to the appropriate penalty.

Facts

[39] The clients became clients of the Architect in 2001 having chosen the practice from its website. Initially the clients retained the Architect to prepare plans for the renovation of their house in , but two efforts in that direction were unable to proceed for varying reasons and, as a result, in 2007, the Architect advised the clients that the best course was for them to demolish their existing house and erect a new house on the site. The two proposed renovations were referred to at the hearing as Projects 1 and 2 and the new house proposal as Project 3.

[40] From the clients' initial retention of the Architect in 2001 through Projects 1, 2 and 3, it was common ground that the parties agreed the Architect's practice would be remunerated at $65.00 per hour plus GST, a rate said by the Architect to be discounted by about a third from the practice's usual charge-out rate. It was also common ground that there was no

agreement as to the budget available, no agreement concerning revision of the hourly rate throughout the period of the Architect's employment by the clients, no agreement as to the number of hours to be worked or any estimate thereof, no agreement as to termination or dispute resolution, no agreement as to any of the other factors listed in rule 50 and no agreement on any of the other topics covered by the NZIA contract.

[41] The Architect asserted that his usual practice, both before 2001 and since, was to get his other clients to sign the NZIA agreement or a signed letter for services. He said:

> "In this case I did not use either of these documents due to the long-standing relationship with the client, and the agreement to only charge for services at the reduced hourly rate. I accept that I did not follow best practice."

[42] The clients paid the Architect at the agreed rate for the architectural services provided on Projects 1 and 2 and, following the receipt of instructions in 2007 to design the new house as Project 3, also paid invoices dated 25 September 2008 ($5,284.12 being partly for preliminary design of the new home) and 16 April 2009 ($8,104.95 for developed design and the resource consent application) also at $65.00 per hour plus GST. The complaint arose in the circumstances later outlined when, on 23 March 2010, the Architect rendered an account for $37,023.58 for the work done over the previous 11 months including work on the working drawings, all charged at $65.00 per hour plus GST. The clients paid $10,000 on each of 8 May and 21 June 2010 on account of this invoice, that being their calculation of what was fair to remunerate the Architect for what they understood would have been the time involved.

[43] Mr Orgias, a highly experienced architect called by NZRAB as an expert witness, had reviewed the main documents relating to this complaint and expressed the opinion from his registration experience that:

> "7.9 ..... I have never once come across a candidate who (in a registration context) has submitted details of a verbal agreement reached with the client, as evidence of their involvement in a term of appointment to demonstrate their compliance with Rule

50. Nor have I ever reviewed an application in which the terms of appointment only deals with an agreement to pay the architect by the hour at a particular rate. All candidates submit evidence of a completed NZAI standard short or long form agreement (or written equivalent that addresses the same suite of relevant matters).

7.25 The second part of ... Rule [50] in my opinion allows some flexibility as to the terms which the agreement must cover, but does not limit agreement to these specified terms. There are many types of architectural services provided by registered architects and the details of these agreements as to terms will differ considerably depending on the size and complexity of the project or the services to be provided. This part of the Rule recognizes that the terms of appointment are going to be very different for designing and constructing a large commercial project compared to minor renovations on a residential dwelling. An agreement engaging the services of a large architectural firm which employs a whole team working on a project is going to look very different to a one man band.

7.43 As illustrated by the NZIA 2007 agreement (or equivalent) the terms of appointment should clearly define the expectations, responsibilities and obligations of both architect and client in a transparent manner to ensure that both parties are aware of the terms of the agreement before commencing the relationship and undertaking work on a project. This document provides protection to both parties to the agreement in the event that the project experiences difficulties or the relationship deteriorates and provides a clear way which these difficulties are to be resolved."

[44] Following which Mr Orgias concluded:

"7.32 From the evidence I have reviewed it is clear to me that ... [the Architect] undertook professional work without submitting and agreeing the terms of appointment with his clients. In addition it would seem that many of the matters which should have been included in a standard terms of appointment were never even discussed with the client.

7.33 In my opinion obtaining an initial verbal agreement for charging on a time charge basis and agreed hourly rate without clearly addressing any other matter including failure to define the scope, range of services and even the various rates for the different personnel in the office is grossly deficient and falls well below what is recognized and expected as standard practice and minimum professional standards in New Zealand."

[45] The Architect's admissions cited above coupled with Mr Orgias' opinion – which the committee accepts - make it unnecessary to review the facts in great detail, but an outline is necessary as background to the committee's discussion.

[46] As earlier noted, when Project 3 began, it must have been agreed the Architect would design a new house for the clients, but, apart from that and possible confirmation of the hourly rate agreed in 2001, there were never any discussions between the Architect and the clients about any other terms of the engagement, including details of the professional work he would undertake for the clients and the timing, pricing and terms of engagement of third party consultants. The evidence suggested the Architect never even raised those topics for discussion with the clients.

[47] However, financial matters must have been discussed between them to some extent at least because it is agreed that the clients did not tell the Architect the amount of their budget for Project 3 – they had in mind the project would cost no more than $1M – because they did not want the Architect to design a house up to their budgetary limit. It is agreed, however, that the parties discussed a price for the project in the region of $2-2,500m^2.

[48] At the clients' instructions, in late 2007 or early 2008, the Architect obtained three estimates from contractors. They were in the range of $8-880,000.00 but it seems there were significant omissions from that phase of the project such as double glazing and a pool.

[49] Despite that, in about July 2009 the clients instructed the Architect to obtain three tenders. They were aghast when these resulted in prices between $1.2-1.8M. These included the items formerly omitted and followed the engagement and reporting of other consultants. The tenderers did not include two who had furnished estimates, and the third tender was about $650,000 higher

[50] After discussion with builders who had put in estimates or tenders for the work to try to reduce construction costs, the clients concluded they could not afford to proceed with Project 3.

[51] A number of ancillary matters were raised in evidence but, again in view of the expert's opinion and the Architect's admissions, brief mention of a selection of these items is all that is required:

(a) The prime matter amongst these ancillary topics is that, in evidence at the hearing, the Architect endeavoured to suggest, contrary to his brief of evidence, that a number of the topics listed in rule 50 were discussed with, and agreed to by, the clients after the inception of Project 3.. Not only were these matters not mentioned in the Architect's brief, they were not put to the clients in evidence and were not mentioned in any of the documents in the case. For those reasons, the committee accepts that the only matter agreed between the Architect and the clients was for the former to design the new house at $65.00 per hour plus GST.

(b) The clients learned, part way through Project 3, that most of the architectural work was being undertaken not by the architectural principal but by a registered architect employed by the practice. There was some disagreement in evidence at the hearing as to whether, when working drawings were about to be embarked on, they were told the employee's work had or would last either "four weeks" or "four more weeks". The committee finds it unnecessary to resolve that difference since the hours claimed to be utilised on Project 3 – and 240 hours (in the documents it was 140 hours) which the Architect claimed he had spent on Project 3 but not charged for – were itemised in the account of 23 March 2010 and the committee prefers to rely on that document.

(c) The clients were critical of the Architect for failing to take notes at meetings which, they asserted, led to misunderstandings. The committee notes that matter, but puts it to one side as being of insufficient weight to impact on its overall decision.

(d) The clients were also critical of the Architect for billing them erratically and demanding payment in peremptory terms when accounts were sent. Again, the committee finds it necessary to do no more than note that complaint.

(e) There were also differences between versions of documents later supplied to NZRAB, but this, too, does not impact on the final result.

(f) The committee also notes that, in the Architect's response to the clients' challenge to the 23 March 2010 account, he said, of the time charged for preparation of the working drawings that "it was my fault not to inform you fully of the level of work required for this stage and for that I am sorry".

(g) The Architect agreed that he provided the clients with no analysis of the respective merits and demerits of either the estimates or the tenders and, when challenged as to his failure to advise the clients of the process to be followed by an Architect in carrying out such work, produced a "building consent – construction process flow chart" which he had sent to the clients. However, in cross-examination, he acknowledged this to be no more than a generic document not specifically relating to Project 3.

Discussion and Decision

[52] It is appropriate first to consider the rule 50 charge generally without reference to the specified particulars because, as earlier noted, the first section of the rule is mandatory with the listed topics which follow being optional. They are merely instances which NZRAB alleges were topics which should have been covered in the terms of appointment agreed between the clients and the Architect before the Architect undertook any professional work on their behalf on this project. In any event, they largely reproduce the categories in the NZIA contract rather than being tailored to the factual circumstances of this case.

[53] As earlier noted, any general consideration of whether the charge under rule 50 has been proved is eased by the Architect's acknowledgement that, apart from agreement on the hourly rate to be charged, there was never any agreement between the Architect and the clients on any other aspect of the professional work undertaken on their behalf whether on Project 1, Project 2 or Project 3.

[54] Further, the Architect acknowledged in the passage from the evidence earlier cited, that the arrangement between the Architect and the clients in this case was not best practice. That acknowledgement carries NZRAB a certain distance towards proof of the rule 50 charge, but acceptance of failure to apply best practice does not, of itself, amount to proof to the required standard of the charge itself.

[55] The gap is, however, in the committee's opinion, bridged by Mr Orgias' opinion earlier cited – particularly paragraph 7.33 – coupled with the facts of the matter.

[56] The committee has already indicated its agreement with Mr Orgias' views and when he concluded - having seen more material than the parties chose to put in evidence – that what occurred in this case was "grossly deficient" and "well below .. standard practice and minimum professional standards in New Zealand", the committee accepts Mr Orgias' view.

[57] Further, the Architect in this complaint was and is a registered Architect and accordingly must be taken to have been aware of the terms of rule 50. Mr Orgias said that was part of the registration procedure. The Architect must therefore have been aware that the codes of minimum ethical conduct required him not to undertake professional work for a client unless all the terms of the appointment to effect that professional work had been previously agreed. Though the parties chose not to put the architectural drawings and other architectural material relating to Project 3 before the Committee, it was common ground that a considerable amount of professional work was undertaken by the Architect for the clients

but that the terms on which that work was undertaken were, apart from the hourly rate, never discussed, let alone agreed.

[58] The committee therefore takes the view that no conclusion is open other than that NZRAB has proved to the required standard that the Architect was in breach of rule 50 in undertaking professional work for the clients on Project 3 without the parties previously agreeing on any of the terms of the Architect's appointment, other than the charge-out rate which would be utilised by the practice. Accepted professional architectural standards require agreed terms of appointment comprising much more than oral agreement on an hourly charge-out rate. Such terms will usually include at least some of the matters listed in rule 50, but will commonly also include other matters as well.

[59] Seen from a general viewpoint, therefore, the rule 50 charge is made out.

[60] Messrs Corkill and McClelland submitted the committee was obliged to consider each of the 12 particulars singly and together in order to decide whether the rule 50 charge had been proved. While there is room for an alternative view as to those submissions, the committee turns to each of the pleaded particulars. It must be said, however, that the committee's deliberations were hampered by the complaint's repetitive use of the conjunction "and/or". Its use has been deprecated in judicial circles and is to be deprecated in a document such as a disciplinary complaint. The multitude of permutations and combinations which necessarily arise from its use fails to give persons complained about (and disciplinary committees) proper notice of what, precisely, is alleged by the case against them. However, Mr Collecut made no objection to the way the complaint was worded.

(a) **The scope of the project**

[61] It was not in contest that the Architect and the clients in this matter never agreed on the scope of Project 3, other than in the most general terms, namely that the Architect would design a new house for the clients which was hoped to cost in the region of $2-2,500 m^2. Given the multitude of matters requiring discussion and agreement in any sizeable domestic project such as this, the committee's view is that such a broad agreement is wholly inadequate for a project of this nature.

[62] The committee finds particular (a) proved.

(b) **The scope of the services to be provided**

[63] Similarly, beyond broad agreement that the Architect would design a house for the clients for their site, there was no agreement in this case on the scope of the architectural services to be provided. This, too, is a critical aspect of any engagement of a registered architect in light of the many variables possible. The most basic of these is whether the Architect will provide full services, ie including supervision during construction, or only partial services. Important, too, is the degree of the Architect's involvement in such matters as employment of third party consultants or whether they are employed direct by the client, and the extent of the Architect's involvement in obtaining the various consents required for such a project to proceed.

[64] There being no agreement between the Architect and the clients in this case on anything other than the broad object to be achieved, the committee finds particular (b) proved.

(c) **Stages for the provision of services and the timelines for the provision of those services**

[65] Necessarily, a project of the nature involved in this case involves a number of stages for the provision of architectural services when particular stages of the project were underway or achieved. None of that was discussed by the Architect and the clients in this case.

[66] If NZRAB intended by the use of the word "timelines" that any agreement between the architect and the clients should incorporate some form of fixed timetable, such an allegation is unrealistic having regard to the variables intrinsic in a project such as Project 3.

[67] However, by this particular NZRAB must be taken to be alleging that there should have been agreement between the Architect and the clients in this case for the architectural services for a project of the size and complexity of a new house to be provided in stages with at least indicative time periods allocated for completion of each. Stages commonly encountered range from preliminary through developed and detailed design and through contact documentation to contract procurement and administration The committee agrees that stages such as those and time estimates for their completion should have been agreed in this case. Nothing like that was agreed.

[68] The committee accordingly finds particular (c) proved.

(d) **Budget for the project**

[69] It is common ground that, apart from a hoped-for cost per square metre, the clients, fearful of the result, were not prepared to advise the Architect of their budget for the project. Obviously, financial matters were skimpily discussed between the parties and had the clients been more forthcoming on what they could afford to outlay the Architect may have been able to design them a house they could afford. But, as far as this particular is concerned, any agreement for the Architect's professional services could not have not

included an agreed budget for the project because of the clients' reluctance to impart this information.

[70] There could, therefore, have been no agreement on the budget and the committee consequentially finds particular (d) unproved.

(e) **The scope of fees and costs including an estimate of the total cost of the services to be provided**

[71] What NZRAB meant by the phrase "the scope of fees and costs" is unclear – fees and costs are different matters - but, given the absence of any agreement as to the number of hours to be expended at the agreed hourly rate or a cap on the hours or a means of terminating the agreement or revising the question of fees, that aspect of particular (e) must be regarded as proved. The total cost of the service – including both the fees to be charged and the cost of providing the service - and variations such as those just discussed are of sufficient importance that they should have been the subject of an agreement between the Architect and the clients before the professional work was undertaken. There was no agreement on any of those issues.

[72] The committee finds particular (e) proved

(f) **Estimate of the total cost of each stage of the agreed services**

[73] For the same reasons, the same conclusion must apply to particular (f) as applies to particulars (c) and (e) and the committee accordingly regards particular (f) as proved.

(g) **The scope of fees and costs for consultant services**

[74] In the limited material the parties chose to put before the committee the consultants, for the most part, set out their fees as part of providing their services. Whether that modus

operandi was agreed between the clients and the Architect was not extensively covered in evidence but in any event would not satisfy rule 50's requirement that professional work, even though it may proceed in stages, must not commence before an agreement is reached.

[75] The committee accordingly regards particular (g) as proved.

(h) **The timing for the invoicing of the professional work whether it be done monthly, or at the completion of a service stage or at such other intervals as agreed with the clients**

[76] There was, as mentioned, complaint about the irregularity of the Architect's accounts to the clients, but it seems there was no agreement as to at what intervals or at what stages the Architect would render an account for fees.

[77] This is a matter that should have been covered by agreement between the Architect and the clients and accordingly the committee regards particular (h) as proved.

(i) **The mutual responsibilities of the architect and client**

[78] The mutual responsibilities of registered architects and their clients are important matters which should be covered by agreement involving, as they do, the extent to which each is to contribute to the project and its cost. Agreements should also cover any departures from the incidence of ordinary contractual liability, in particular whether the Architect is to be exempt from liability for any aspect of the work. This includes the ambit of the Architect's professional indemnity cover, discussed later. This is an area covered in significant detail in the NZIA agreement for architect services, as are a number of the other aspects of the particulars alleged against the Architect here, and is clearly one that should have been discussed and agreed between the Architect and the clients in this case. That was particularly the case as these clients were not well-versed in knowing the types of issues customarily

covered in agreements for architectural services, so it was the responsibility of the Architect to raise for their consideration all the matters needing discussion and agreement before any professional work began.

[79] The committee accordingly finds particular (i) proved.

(j) **Basis and extent of the Architect's liability**

[80] This, again, is an aspect covered by the relevant section of the NZIA contract relating to mutual responsibilities and the committee's finding is accordingly that this particular is proved for the same reasons as relating to particular (i). The clients were entitled to have the extent and basis of the Architect's liability raised with them, discussed and agreed so each party was aware of their rights and obligations.

(k) **Requirements for and details of the Architect's professional indemnity insurance**

[81] This, too, is covered in the same section of the NZIA contract as those relating to mutual responsibilities and liabilities. Professional indemnity insurance and its extent is a vitally important aspect of the rights and obligations of architects and their clients, particularly in the era of "leaky buildings". It is also an important aspect vis-à-vis Architects and their insurers where a failure to agree on this aspect of the matter with clients may affect the currency of the Architect's PI cover.

[82] The Architect advised the committee, but only during the hearing, of the extent of the practice's PI insurance but, given the importance of the matter to relations between clients and architects, it was a matter that should have been raised, discussed and agreed at the inception of Project 3.Nothing was said about it.

[83] The committee accordingly finds particular (k) proved.

(l) **Details relevant to the administration of the contract**

[84] While, perhaps, of lesser moment in relation to the issues at the heart of this complaint, the committee's view is that such matters as confidentiality, intellectual property rights, promotional credit, changes in client/architect relationships, resolving disputes and ending the contract are issues which should be discussed, and, agreed – even if the agreement is no more than that they do not arise in relation to the particular project - before any professional work is undertaken. Although, of this list, only termination appears among the optional topics in rule 50, the NZIA agreement has at least two pages discussing the issues raised by NZRAB in this complaint. The ownership of intellectual property rights, particular in drawings or specifications, is not uncommonly a course of friction in the architectural profession, both as between registered architects and their clients, and between architects when one takes over a project from another. This was another topic which should have been, but was never, raised by the Architect. Had there been an agreement between the Architect and the clients in this case dealt which dealt with changes in the relationships between them and included dispute resolution and termination provisions, it is at least possible that this dispute would never have reached a hearing before a disciplinary committee.

[85] More broadly, matters of administration of the contract between architects and their clients should be covered in agreements reached prior to the professional work being undertaken and such agreements should be preceded by discussions and, if appropriate, agreement on issues of confidentiality, intellectual property, changes in the relationships, dispute resolution and termination.

[86] Nothing like that occurred here and the committee accordingly finds particular (l) proved.

A Breach of Rule 50?

[87] The committee having dismissed particular (d) the next question is whether particulars (a)-(c) and (e)-(l), taken in any combination, together amount to a breach of rule 50.

[88] The committee concludes that the proved particulars do amount to a breach of rule 50. The dispute at the heart of this complaint is an archetype of the variety of dispute between registered architects and their clients which are by no means uncommon but where, if the parties had agreed beforehand on the matters discussed in this section of the judgement, either measures could have been taken to overcome any disagreement or to bring the relationship to an end without the consequence of a complaint to NZRAB, investigation and disciplinary proceedings. This dispute is one which demonstrates how advisable –almost a necessity – it is for both the mandatory and optional aspects of rule 50 to be raised by registered architects with their clients in order that agreement can be reached on those and the multitude of other issues that commonly arise in architectural projects.

[89] In this case, apart from agreement on the hourly rate, and some conjectural discussion on a possible square meterage, the parties agreed on nothing concerning Project 3 because the Architect did not raise with the clients any of the issues normally attendant on the provision of professional architectural services, even though many were necessarily engaged by the project. His failure so to do was not merely a failure to observe best practice but was, in the committee's view, a proved breach of rule 50, whether seen generally or in the light of the proved particulars.

Section 25(1)(c) of the Act: Incompetent practice?

[90] Invoking the distinction in *Beattie*, what NZRAB has to prove is that the Architect in this case lacked the basic skills for the job or exhibited a serious deficit in the required skills.

[91] The committee does not regard the allegation of incompetence against the Architect as proved in this case. Apart from the fact that the tenders for the job as designed significantly exceeded the clients' expectations and budget, there was no complaint about the architectural skills devoted to his professional work. In terms of administration of his other professional work, he claimed he regularly used the NZIA form or a similar contract. He must, therefore, be regarded not as someone who lacked the basic skills for the job or showed a deficit in the exercise of those skills, but as one who knew his obligations but, in his words, did not discuss and agree on a contract for his professional work because he had been working for the clients for a number of years before Project 3 and was working at what he claimed was a reduced hourly rate.

[92] That does not satisfy the test for incompetence and the committee accordingly dismisses the section 25(1)(c) aspect of the complaint.

Section 25(1)(c) of the Act: Negligent Practice?

[93] Again adopting the distinction drawn in *Beattie*, what NZRAB has to prove in relation to the complaint of the Architect practising in a negligent manner is that the facts in this case show a serious lack of care judged by the standards reasonably to be expected of registered architects. In terms of *Collie*, NZRAB must show a serious departure from the standards considered acceptable by the architectural profession rather than mere error, oversight or carelessness.

[94] The committee finds that NZRAB has proved in relation to this complaint that the Architect practiced as a registered architect in a negligent manner. Mr Orgias' opinion and the other issues referred to in this judgment show that the standards employed by the Architect in relation to these clients fell seriously below the standards reasonably to be expected from registered architects. Even if there was little criticism of the Architect's

design work, it was negligent for him to embark on professional work with no agreement with his clients beyond the hourly rate as to how it was to be effected or by whom and no means of curtailing the fees. None of the other issues mentioned in the proved particulars were raised and discussed let alone agreed with the clients. This left them seriously disadvantaged in all the aspects of Project 3 discussed in this judgment.

[95] Though not adverted to by counsel, the committee is, however, concerned that finding charges on a complaint arising out of the same course of conduct proved as a breach both of rule 50 and section 25(1)(c) may not be justifiable on the grounds that it is duplicative: transgression on the one set of facts should, in most cases, expose the transgressor to one adverse finding only.

[96] For this reason alone, the committee prefers to find that, had it dismissed the rule 50 complaint, it would have found the complaint of practicing as a registered architect in a negligent manner proved but that, to avoid the possibility of duplication, the committee does not intend to make a formal finding of the latter.

Result

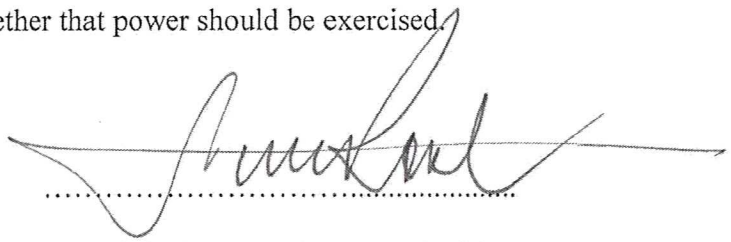
[97] As a result of all the foregoing, pursuant to rules 72 and 75 and the complaint made in this matter the disciplinary committee unanimously decides – and recommends to the Board of NZRAB - that there are grounds for disciplining the person complained about, namely the architect mentioned in the intituling to this decision, under section 25 of the Registered Architects Act 2005 in that:

(c) the registered architect has breached Rule 50 of the Code of Ethics contained in the Registered Architects' Rules 2006 both generally and in relation to particulars (a)-(c) and (e)-(l) set out in the complaint; and

(d) that if pursuant to Rule 76 the Board of the NZRAB decides to confirm the said recommendation of the disciplinary committee in this matter, the committee recommends it directs the disciplinary committee to make a

timetable for submissions on costs, penalty and the possibility of name suppression to lead to a recommendation to the board about the penalty to be imposed by the board under section 26 of the Act.

[98] Although the District Court on appeal from the NZRAB, has express power to make orders concerning the publication of names (section 45), even if appropriate it seems the board of the NZRAB may have only limited power not to publicise the results of any disciplinary action (section 21(1)(a)(iii) but see s 26(5)(b)). That notwithstanding, if the board directs the disciplinary committee to set a timetable leading up to a recommendation as to the penalty to be involved in this case, it may care to include a direction that it call for submissions as to whether there is power to suppress the name of the Architect and, if so, whether that power should be exercised.



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Associate Professor A van Raat - Chair