

**IN THE MATTER**

**BETWEEN**                                 **THE NEW ZEALAND REGISTERED ARCHITECTS BOARD**

**AND**   **(Deleted)**  
Registered Architect of (deleted)  
RA (deleted)

**DATE OF HEARING**                 **29 January 2015**

**COUNSEL**                                 Matthew McClelland QC for NZRAB  
Don MacRae for (deleted)

**LEGAL ADVISOR ASSESSOR**             Terry Sissons

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**DELIBERATIONS OF THE DISCIPLINARY COMMITTEE**

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**1 Introduction**

- 1.1 (Deleted) (*the complainant*) lodged a complaint with the New Zealand Registered Architects Board (*the Board*) on 16 December 2013 in respect of (deleted), Registered Architect (*the Architect*).
- 1.2 An Investigating Committee duly appointed by the Board pursuant to Rule 90 of the Registered Architects Rules 2006 (*the Rules*) made a recommendation to the Board under Rule 68, that the Board refer the complaint to the Board's Disciplinary Committee on the grounds that (deleted)'s conduct appeared to provide sufficient grounds for referring the matter to a disciplinary hearing.
- 1.3 The Board confirmed on 18 September 2014 its Rule 69 proposal to refer the complaint against the Architect to a Disciplinary Committee and appointed a Disciplinary Committee under Rule to hear the complaint against the Architect.
- 1.4 A disciplinary hearing in the above matter was held in Auckland on 29 January 2015.
- 1.5 The Disciplinary Committee hearing the matter was :
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|-------------------------|--------------------------------------|
| Callum McKenzie (Chair) | NZRAB Board Member                   |
| Euan Mac Kellar         | NZRAB Board Member                   |
| Sharron Cole            | Representative of consumer interests |
| Dianne Johnson          | Building Practitioners Board nominee |

1.6 No Committee Members declared any conflicts of interest in relation to the matters under consideration.

1.7 The following other persons were present during the course of the hearing

(Deleted)	The Architect
Matthew McClelland QC	Counsel for NZRAB
Don MacRae	Counsel for (deleted)
Terry Sissons	Legal Assessor to the Disciplinary Committee
Andrew Symonds	Clerk of the Hearing
Jackie Kennedy	Stenographer
(Deleted)	(Deleted) and support person

Members of the public were not present.

1.8 The Committee's deliberations were held in private with no other persons present.

## 2 Background taken from the Agreed Summary of Facts

- 2.1 (Deleted), as a registered architect and a Director of (deleted) was commissioned by (deleted) in 2007 to prepare a concept design for a new house at their recently purchased property at (deleted).
- 2.2 At the time (deleted) arranged for initial surveying work to be undertaken on the site.
- 2.3 On 18 January 2010 the (deleted) entered into an Agreement for Architects Services (AAS SF 2008) for a new two storeyed dwelling, commencing with revisions to the original concept designs, and to provide full architectural services.
- 2.4 From late January to early November 2010 (deleted) proposed various design options. The original proposal was for a two storey, two bedroom dwelling. However affected neighbours would not give their consent so the (deleted) elected to proceed with a single storeyed, one bedroom dwelling.
- 2.5 The resulting proposal exceeded the (deleted) City Council District Plan's permitted activity standards for site coverage and encroached on the permitted height in relation to boundary envelope, requiring a Resource Consent. (Deleted) noted on the drawings submitted that the "Corner of the lounge eave wall 740mm above the projected angle" and in her written Assessment of Environmental Effects, "Height in relation to Boundary, minor infringement on northern face of living and bedroom. Will not impact on adjoining properties".
- 2.6 In about September/October 2010 adjoining owners provided their neighbours consent to an application for Resource Consent which was approved by the (deleted) Council on 15 December 2010 and Building Consent was issued in March or April 2011.
- 2.7 A replacement Agreement for Architects Services was entered into on 11 November 2010 to cover the remaining work on the single storeyed dwelling. This was followed by a decision by

the (deleted) to extend the front of the dwelling by 1.3 metres which despite a lowered roof pitch increased the height in relation to boundary encroachment to 1.835m as set out in the (deleted) drawings.

- 2.8 Again the neighbours consent was sought and gained and an application for an amendment to the existing resource consent was made on 28 September 2011 and granted in October 2011. A Building Consent for the revisions was granted in September 2011.
- 2.9 On 1 November 2011 the Agreement for Architects services was varied at the (deleted)'s request so that (deleted) would no longer provide contract administration services, but the (deleted) would engage (deleted) as necessary on a time and cost basis, to which (deleted) agreed.
- 2.10 Work commenced on the site in November 2011, and surveyors were engaged to set out the works. On reviewing the documentation they identified that the heights in relation to boundary were shown incorrectly. The (deleted) contacted (deleted) on at least two occasions to be told that "In our opinion as long as the building complies with the issued Resource Consent (and Building Consent) no issue exists"
- 2.11 The surveyors determined that the encroachment was approx. 3.0m, as opposed to the 1.8 m shown on the drawings. The (deleted) engaged two further surveyors to review the documentation. They identified that the methodology used by (deleted) to calculate these encroachments was not in accordance with that required by the District Plan. (Deleted) had determined HIRTB compliance by taking measurements perpendicular to the faces of the building rather than perpendicular to the boundary, as required and in some cases at the corner of the wall to roof junction rather than at the eave corner junction.
- 2.12 The (deleted) sought to communicate these findings to (deleted), who did not accept that there was an issue, and then commissioned another architect to amend the documentation and to seek new Resource and Building consents. They had sought to gain the adjoining neighbours consent to the increased encroachment, but this was not given.
- 2.13 In both the Agreements for Architects services entered into cl E2 Insurance states that:
- (a) the Architect shall use best endeavours to hold and maintain professional indemnity insurance for the duration of the Agreed Services and for a period of 6 years beyond completion of the Services for the indemnity amount of \$100,000.*
- (d) Should such insurance not become obtainable or if any material changes to the terms and conditions of cover occur, the Architect will accordingly advise the client in writing;*
- 2.14 When (deleted) entered into the two Agreements and over the time covered by them, (deleted) did not at any time hold and/or maintain professional indemnity insurance, nor did they use best endeavours to hold and maintain such insurance. At no time throughout that period did (deleted) advise the (deleted) that (deleted) did not have such insurance.

### **3 The Charge**

- 3.1 The Charge as set out in the Notice of Complaint was read to the hearing.

3.2 Counsel for the NZRAB noted that that an Agreed Summary of Facts had been drawn up between the parties and that this amended the charge to being a breach of Rule 49 only and therefore sought leave to delete reference to the Rule 50 and 54 breaches.

3.3 The Agreed Summary of Facts was tabled at the hearing.

#### **4 Submissions as to Grounds for Discipline**

4.1 Mr McClelland, Counsel for the NZRAB made opening submissions, noting that the burden of proof is on the Board and that it is for the Board to establish the complaint against (deleted) and to provide the evidence that proves the facts on which the complaint is based.

4.2 He further noted that in professional disciplinary cases the appropriate standard of proof, is the proof to the satisfaction of the tribunal on the balance of probabilities; and that; "The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal".

4.3 Mr McClelland discussed Rule 49:

##### **49 Care and diligence**

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

And noting that neither the Act nor the Code set out possible definitions for "due care and diligence"; and proposed that in this case the legislation, the Rules, the Code, and agreements for services would help to define what was expected of an architect in (deleted)'s position.

4.4 He noted that there is an Agreed Summary of Facts in place, in which (deleted) agrees to the facts and admits that her conduct as particularised in the Notice of Complaint amounts to a breach of Rule 49 of the Code is conduct deserving of a disciplinary sanction.

4.5 He noted, however, that it is for the Disciplinary Committee to decide whether or not (deleted)'s actions do indeed amount to a breach of Rule 49 and whether such conduct is deserving of a disciplinary sanction.

4.6 Mr MacRae, Counsel for (deleted) chose not to make opening submissions other than to say that (deleted) has admitted to the particulars of the Notice of Complaint as amended, and does not take any issue with the opening statements of Mr McClelland.

4.7 The Committee's Legal Advisor Mr Sissons then gave directions to the Committee.

#### **5 Decision that Disciplinary Penalty is Required**

5.1 The Committee retired to consider the opening statements and reached a decision that "(Deleted)'s actions do indeed amount to a breach of Rule 49 and that such conduct is deserving of a disciplinary penalty, under s 26 of the Act".

## 6. Submissions as to Penalty

6.1 Mr McClelland made general submissions to the Committee setting out the range of penalties available to be considered, and the options with respect to publication.

6.2 With respect to costs Mr McClelland noted in *Cooray v Preliminary Proceedings Committee*, Doogue J concluded;

*"It would appear from the cases before the Court that the Council on other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made".*

6.3 Mr McClelland noted that in this case the time between the charge being brought and the hearing, plus the Christmas break intervening, required that it was necessary to brief witnesses and take statements so that if agreement could not be reached a defended hearing could proceed. The evidence of five witnesses was briefed and five draft Statements of Evidence were prepared, and these formed the basis of the Agreed Summary of Facts. This had an impact on the costs for the preparation for the hearing.

6.4 He also noted that the Committee should take into account that (deleted) has admitted to the charge.

6.5 (Deleted) was sworn and provided her Statement of Evidence to the hearing. She noted her admission to the particulars of the complaint and accepted that her conduct deserves sanctioning. She then provided evidence explaining the factors surrounding the particulars of the complaint.

6.6 With respect to Professional Indemnity Insurance she accepts that at no time during period that services were undertaken for the (deleted) did (deleted) carry professional indemnity insurance, but asserted that in entering into the two agreements for service she mistakenly believed that cover was in place. She proposed that this was because they were in financial difficulties, that the cover lapsed because of the non-payment of premiums, and that she does not recall receiving notice from the insurer that the cover had lapsed and was not renewed.

6.7 She however accepts that "I ought to have known that the insurance had lapsed, or at least I ought to have ensured that it did not lapse."

6.8 With respect to the error in relation to HIRTB encroachment (deleted) noted that she now understands the error she made. The error meant that the encroachment was 2.8m not the 1.8m she noted on the plans, to which the neighbours gave their consent and which received resource consent.

6.9 She accepted that when the (deleted) and their surveyor contacted her in relation to the error she "could not understand what the error was or why there was an error because the council had granted both the resource and building consents."

- 6.10 She noted that "in hindsight I realise I should have been more proactive after receiving advice ... that there was an issue. I appreciate now that the position I took at the time was defensive because I could not understand what the issue was."
- 6.11 Finally she noted that "I am no longer a sole practitioner but am working as an employed architect. I have no desire to return to work as a sole practitioner."
- 6.12 Both Mr MacRae and the Committee asked a number of questions of (deleted) in relation to her statement.
- 6.13 Mr MacRae tabled a Declaration made by (deleted) as to her financial means.
- 6.14 Mr MacRae made submissions as to penalty. He submitted that (deleted)'s conduct falls at the low end of the scale of seriousness. He submitted that the "offence was simply not sufficiently serious to warrant" cancelling or suspending (deleted)'s registration or censuring her. He suggested that under s 26(1)(d) that it would be appropriate to order that (deleted) continue architectural work as an employee for a period and suggested six months. He further submitted that the imposition of a fine is not warranted for the same reasons, and that it would be appropriate for a no costs order to be made against (deleted). However, he did submit that "if the committee is minded to order that (deleted) contribute towards costs, the Committee is asked to take into account (deleted) financial circumstances as set out in her declaration".
- 6.15 The Legal Assessor Mr Sissons gave the Committee directions as to penalty. Specifically he identified that "Disciplinary proceedings in a professional context serve a variety of purposes, including enforcing a high standard of professional conduct, and protection of the public by ensuring that the conduct of members conforms to the standards generally expected of them." And further that "While protection of the public is a very important consideration the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed. Penalties such as censure and fines are designed in part to deter both the offender and others in the profession from offending in a like manner in the future".
- 6.16 He then identified each of the penalties available to the Committee, indicating their proportionality and any particular considerations required of each. He identified that the Committee must detail its decision in a recommendation to the Board under Rule 75(c).

## **7 Deliberations of the Committee as to Penalty**

- 7.1 The Committee considered the available penalties as set out in s 26 of the Act as follows:
- 7.2 26(1)(a) Cancel registration - the Committee formed the view that the offence was not sufficient to warrant this penalty.
- 7.3 26(1)(b) Suspension of registration - the Committee formed the view that the offence was not sufficient to warrant this penalty.
- 7.4 26(1)(c) Censure - the Committee does not agree that the offence is at the lower end of the scale, taking the view that both transgressions, risked or had serious implications for the Muncaster. The process of calculating HIRTB compliance is a basic procedure, the requirements for which are clearly set out in the District Plan. It would be reasonable to expect every

competent architect to be able to undertake this procedure accurately, or at least to engage specialist advise if they did not believe they were adequately skilled. The Council clearly relied on the Architect to have accurately undertaken this work and as a result of the neighbours consent to her work, as required under the relevant provisions of the resource Management act were required to disregard the effects on that neighbour. The cost implications of this error for the (deleted) would have been significant. (Deleted) made little effort to review her actions, and to understand her error until after the complainant had engaged another Architect to remedy the issues. The Committee is therefore of the view that censure is warranted and should be imposed.

- 7.5 26(1)(d) Impose conditions - the Committee agrees that for the reasons set out above the imposition of employment and practice conditions is appropriate, and recommends that (deleted) be required to remain in employment, under the direct supervision of a registered architect, for a period of two years continuous employment, commencing on the date of the Board's decision on this matter. The two year period recognises that (deleted) has been in such an employment position for approximately the last 15 months.
- 7.6 26(1)(d) Impose conditions - in addition the Committee has formed the view that when (deleted) is next required to undertake her five yearly competence review as required under s 22 of the Rules, that this be undertaken by way of a face to face interview without a fee and that the Evaluation Panel be provided with a copy of this document.
- 7.7 26(1)(e) Training - the Committee is of the view that no additional training is required. It is clear that (deleted) understands the reasons for her errors.
- 7.8 26(1)(f) Fine - the committee is of the view that a no fine should be imposed.

## **8 Deliberations of the Committee as to Costs**

- 8.1 Under s 26(4) the Committee considered the imposition of costs and considered that the determination that there was a case for both disciplinary action and for sanction that the appropriate starting point for the imposition of costs was a 50% contribution by the Architect.
- 8.2 However, the Committee is persuaded that both the admission of a breach of Rule 49 prior to this Hearing thus avoiding the need for a defended hearing, and as a result of (deleted)'s current financial position, that such contribution should be reduced.
- 8.3 The Committee determines that a contribution of 30% of the reasonable costs and expenses of and incidental to this inquiry by the Board, is appropriate.

## **9 Determinations as to Publication**

- 9.1 Under s 26(5)(b) the Committee formed the view that it would not be appropriate to recommend public notification any aspects of this matter that would identify the Architect, other than those requirements to amend the register as set out in s 21.

**10 RECOMMENDATION TO THE BOARD**

This Committee therefore recommends to the Board that;

*Pursuant to s 25(1)(b) of the Registered Architects Act 2005 (deleted) has breached the Code of Ethics contained in the Rules; and that therefore there are grounds for discipline.*

**Penalty**

*Pursuant to s 26(1)(c) of the Act (deleted) be censured*

*Pursuant to s 26(1)(d) (deleted) be required to:*

- a) remain in employment, under the direct supervision of a registered architect, for a period of two years continuous employment, commencing on the date of the Boards decision on this matter; and,*
- b) undertake her next competence review required under s 22 of the Rules as a face to face interview*

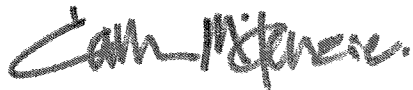
**Costs**

*Pursuant to s 26(4) (deleted) be required to contribute of 30% of the reasonable costs and expenses of and incidental to this inquiry.*

**Publication**

*Pursuant to s 26(5)(b) that it would not be appropriate to publicly notify any aspects of this matter.*

Signed and dated this 16<sup>th</sup> day of February 2015.



Callum McKenzie  
Chair Disciplinary Committee