

IN THE MATTER of the *Architects Act 1991*

AND IN THE MATTER of an Inquiry into the professional conduct of [the Architect]

BETWEEN

ARCHITECTS REGISTRATION BOARD OF VICTORIA

AND

[Name] Architect

APPEARANCES:

Mr K. Loxley with Mr M. Waters

Ms S. Kirton with Mr Phil Atkins

DETERMINATION

This is the determination of the Tribunal constituted by the Architects Registration Board of Victoria to hold an inquiry into [the Architect] (Registered Architect Number 17054), and into his professional conduct. The Inquiry was conducted on 19th September 2017.

The Tribunal comprised Professor Bronwyn Naylor (chairperson), Ms Heather Howes and Mr Tony Mussen.

The Tribunal reserved its decision.

Allegation 1:

During the period in or about May 2011 - 19 September 2011 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the Architects Act 1991 in that, in respect of the redevelopment of [address] (Project), you acted as architect and developer without providing written notice of the scope of each of the roles to your clients (Owners), in breach of regulation 8 of the Architects Regulations 2004 and, pursuant to regulation 16(a) of those Regulations, you are therefore guilty of unprofessional conduct.

Particulars

- o By Memorandum of Agreement (Architecture Agreement) signed on 7 September 2010, the Owners engaged you and/or [the Architect's Company], of which you were sole director, to provide architectural services in respect of the Project.*
- o In or about May 2011 the owners invited you and/or F Square Group Pty Ltd, of which you were sole director, to tender for the provision of building services for the Project.*
- o On or about 10 July 2011, the services provided by you under the Architecture Agreement were completed.*
- o On or about 13 July 2011, a document titled 'Victorian New Homes Contract' (Building Contract) was signed by you (by or on behalf of F Square Group Pty Ltd) and the Owners in respect of the Project.*
- o On or about 19 September 2011, building works commenced in respect of the Project with F Square Group Pty Ltd acting as builder.*
- o You did not provide written notice of the scope of each of your roles as architect and developer to the Owners at the time you proposed to act as builder in respect of the Project, or at any other time prior to entering into the Building Contract.*

Findings: allegation 1

The Tribunal finds that the Architect was acting or proposing to act as an architect and a developer (defined to include builder) on the same project, being the redevelopment of Lot 17, 16 Myrtle Drive, Maidstone, Victoria.

The Architect was therefore required to give the written notice specified in Regulation 8.

Having found that the Architect was required to give written notice to the client of the scope of each of the roles, the Tribunal then considered whether he had fulfilled this obligation. It was argued for the Architect that the signing of the Building Contract amounted to such written notice.

Taking account of the purpose of the Regulation, for the protection of clients, the Tribunal was satisfied that the Regulation required a separate written notice, provided by the architect, expressly outlining the scope of each of the roles. Such notice was not provided and the Architect was therefore in breach of Regulation 8.

Allegation 2

During the period in or about May 2011 - 19 September 2011, you were guilty of unprofessional conduct within the meaning of section 32(c) of the Architects Act 1991 in that, in respect of the Project, you acted as architect and developer without obtaining written consent to act from the Owners, in breach of regulation 9 of the Architects Regulations 2004 and,

pursuant to regulation 16(a) of those Regulations, you are therefore guilty of unprofessional conduct.

Particulars

- o By Architecture Agreement signed on 7 September 2010, the Owners engaged you and/or [the Architect's Company], of which you were sole director, to provide architectural services in respect of the Project.*
- o In or about May 2011 the owners invited you and/or F Square Group Pty Ltd, of which you were sole director, to tender for the provision of building services for the Project.*
- o On or about 10 July 2011, the services provided by you under the Architecture Agreement were completed.*
- o On or about 13 July 2011, the Building Contract was signed by you (by or on behalf of F Square Group Pty Ltd) and the Owners in respect of the Project.*
- o On or about 19 September 2011, building works commenced in respect of the Project with F Square Group Pty Ltd acting as builder.*
- o You did not obtain written consent from the Owners to act as architect and developer in respect of the Project prior to commencing works pursuant to the Building Contract.*

Findings: allegation 2

Having concluded that the Architect had not given the required notice, the Tribunal is also satisfied that the Architect was in breach of Regulation 9. The Tribunal is in any event satisfied that no written consent was provided as required by Regulation 9.

Allegation 3

During the period in or about May 2011 - 19 September 2011 you were guilty of unprofessional conduct within the meaning of section 32(c) of the Architects Act 1991 in that, in respect of the Project, you failed to act in the interest of the Owners, in breach of regulation 7 of the Architects Regulations 2004 and, pursuant to regulation 16(a) of those Regulations, you are therefore guilty of unprofessional conduct.

Particulars

- o Refer to the particulars to allegations 1 and 2 above.*

Findings: allegation 3

The Tribunal is not satisfied that the failure to provide written notice as required under Regulation 8, or to obtain consent as required under Regulation 9, amounts to a breach of Regulation 7.

It was proposed by the Board that a separate set of facts could be relied on to demonstrate a breach of Regulation 7. The Tribunal was however satisfied that the Notice of Inquiry, as drawn, limited allegation 3 to the particulars stated.

Determination

The Tribunal is therefore satisfied that the Architect was guilty of unprofessional conduct within the meaning of paragraph 32(c) of the Architects Act 1991 as set out in allegations 1 and 2.

Penalty

The Tribunal received written submissions on penalty from the Board dated 20 October 2017 and the Architect dated 20 October and 3 November 2017.

Mr Loxley, appearing for the Board, referred the Tribunal to the observation of Senior Member Smithers in *McSteen v Architects Registration Board of Victoria (Review and Regulation)* ([2016] VCAT 841 at para 5) that disciplinary powers in relation to professionals such as architects are ‘primarily protective’ but are inevitably also to an extent punitive, in which case general sentencing principles apply by analogy such that

...as well as specific and general deterrence and protection of the community, it is necessary to balance just punishment taking into account the nature of the conduct, denunciation and rehabilitation. The following may also be relevant: prior findings, aggravating factors, the extent of insight and remorse shown, mental health, character, delay, financial effect on the practitioner and his or her family.

Mr Loxley submitted that specific and general deterrence and denunciation were relevant here, as well as considerations of community protection. He submitted that the Architect had not demonstrated any insight into his wrongdoing but rather had denied the allegations. Further he had been disciplined by the Tribunal in 2013 for related deficiencies in his professional practice.

Ms Kirton, appearing for the Architect, submitted that the allegations in the previous matter related to issues that were not comparable to those under consideration here. She also submitted that there had been no opportunity for the Architect to learn from the earlier mistakes or the earlier Tribunal decision as the behaviour in question here had occurred at the same time as the conduct the subject of the previous case.

The Tribunal did not accept the Board’s argument in relation to the relevance of the previous matter. It also noted that the Board’s submission that ‘Unfortunately, time has proven that the inquiry and penalty imposed in relation to the 2013

Contraventions did not sufficiently deter the Applicant' (para 15(a)) was based on a misunderstanding of the facts of the two cases. The first case related to behaviour occurring between March 2010 and March 2012 and resulted in a decision dated 16 December 2013. The present case related to behaviour occurring between May 2011 and September 2011. It was therefore not appropriate to suggest that the Architect had failed to learn from the decision and the education requirements imposed in the first case, and thus should be further penalised, given that the decision was handed down two years after the behaviour being considered in the present case.

The Tribunal also expresses its concern at the inclusion of the materials relating to the previous (2013) matter in the Tribunal Book (tab 11).

Ms Kirton further addressed the need for deterrence, denunciation and community protection. She submitted that the Architect had taken the 2013 findings seriously, having complied with the requirements and also voluntarily restructuring his architectural firm to put in place an independent safeguard, by employing a sub-consultant to check the firm's work in the administration of building contracts.

Ms Kirton submitted that the Architect recognised the importance of protecting clients from potential conflict of interest as he had in place alternative forms which he used for this purpose in other client contracts. She submitted that the Architect acknowledged his mistake in believing that the building contract provided sufficient protection for his clients in this case. The Tribunal also takes note of the Architect's 2nd witness statement tendered on the question of penalty in which he acknowledges his mistake.

Ms Kirton also submitted that there was no evidence that the complainant had in fact been misled, or that he had suffered any impact as a result of the failure to provide the required notice or obtain the required consent.

It was further submitted that there was no risk that the situation would arise again as the Architect no longer operates a building company.

The Tribunal emphasises the importance of obligations under the Act such as that provided in Regulations 7 and 8 of the Architects Regulations 2004. The protection of the public is an important matter and any breach of the statutory obligation is therefore also important. The Tribunal does not accept that the breach here was 'trivial' as proposed by Ms Kirton.

The Tribunal accepts however that the Architect acted out of a mistaken understanding of the situation, as the agreements with the client evolved. It accepts that there was no dishonesty or fraud involved, and that there is no risk of recurrence of this specific behaviour given the restructuring of the business.

The Tribunal accepts that the Architect fully complied with the Tribunal's decision in the previous case and has put in place protections to prevent recurrence of that behaviour.

In the light of these matters the Tribunal is satisfied that aims including deterrence, denunciation and community protection are sufficiently served by the Architect's participation in the Tribunal process and by the proposed sanction of a reprimand.

The Tribunal recommends - but does not order - that the Architect proactively accesses sources of current information relevant to the practice of architecture from one or more of the following: the Australian Institute of Architects (AIA) Continuing Professional Development workshops and events; Acumen, the AIA's online practice advisory service; and the ARBV's Continuing Professional Development (CPD) framework, to maintain his awareness of the professional requirements for client and community protection.

In light of the potentially heavy costs order the Tribunal does not believe it is appropriate to impose a financial penalty.

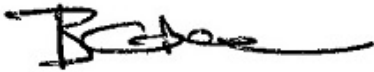
Determination as to penalty

In respect of allegations 1 and 2 the Tribunal determines to reprimand the Architect under section 32(h) of the Act.


Pursuant to section 32 of the Act the Architect is to pay the Board's costs of the Inquiry

The Board's costs shall be calculated on a party-party basis in accordance with the County Court Scale. In the absence of agreement between the Board and the Architect as to the quantum of these costs, the costs shall be assessed by an assessor appointed by the President of the Law Institute of Victoria, with the fee for obtaining such assessment to be borne equally by the Board and the Architect. Subject to the following paragraph the costs shall be paid to the Board within 60 days of the date of agreement as to the costs, or the date of the Certificate of Assessment, whichever applies.

The Tribunal also recommends that the Board consider any request by the architect for time to pay or to pay in instalments.



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BRONWYN NAYLOR
Chair of the Tribunal



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TONY MUSSEN
Tribunal Member



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HEATHER HOWES
Tribunal Member