

IN THE MATTER of the *Architects Act 1991* (Vic)

AND IN THE MATTER of an Inquiry into the professional conduct of John HENRY, Registered Architect No. 13094

DETERMINATION

1. By Amended Notice of Inquiry (**Notice**) dated 12 June 2019, the Architects Registration Board of Victoria (**Board**), pursuant to Division 1 of Part 4 of the Architects Act 1991 (**Act**), gave notice to the Architect that it had decided to hold an inquiry into the Architect's professional conduct (**Inquiry**).
2. The Board, pursuant to Division 2 of Part 4 of the Act, has constituted a Tribunal to conduct the Inquiry on its behalf.
3. The Tribunal, having conducted an Inquiry into the matters raised in the Notice, now sets out its findings and reasons for findings and its Determinations.
4. The Notice issued to the Architect identified 2 separate allegations and the Particulars appended to each of the allegations.
5. The allegations, as finally constituted, are set out below:

(a) **Allegation 1:**

During the period in or about July 2017 to about October 2017 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the Act in that, in respect of the proposed caretakers residence at 69 – 71 Main Street, Greensborough, you provided architectural services in the absence of a concluded written agreement between yourself and your client, in breach of cl 4 of the Victorian Architects Code of Professional Conduct (**Code of Conduct**) which is set out in the *Architects Regulations 2015* (Vic) and, pursuant to regulation 9(1) of those Regulations, you are therefore guilty of unprofessional conduct.

Particulars

- (i) In or around July 2017, you reached a verbal agreement with Sam Pelligra in relation to the provision of architectural services for a proposed caretakers residence at 69 – 71 Main Street, Greensborough.
- (ii) Between August 2017 and October 2017 you provided architectural services to Mr Pelligra, including the preparation and provision of planning permit application drawings in respect of the proposed caretakers residence.
- (iii) At no time had a concluded written agreement been reached between yourself and Mr Pelligra for the provision of architectural services.
- (iv) Further and alternatively, at no time was a written agreement for the provision of architectural services entered into that satisfied the requirements of cl 4(2) of the Code of Conduct.

(b) **Allegation 2:**

During the period in or about September 2017 to November 2017 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the Act in that, in respect of the proposed caretakers residence at 69 – 71 Main Street, Greensborough, you failed to provide sufficient relevant information with reasonable promptness to enable the client to make an informed decision in relation to the provision of architectural services in breach of cl 7 of the Code of Conduct which is set out in the Architects Regulations 2015 (Vic), and, pursuant to regulation 9(1) of those Regulations, you are therefore guilty of unprofessional conduct.

Particulars

- (i) On or around 1 September 2017 you submitted the planning permit application in respect of the proposed caretakers residence to council.
 - (ii) In or around September to October 2017, following the lodgement of those plans, you had an informal conversation with David Pelligra, Sam Pelligra's son, in which you said that you should "get started on the construction drawings".
 - (iii) You failed to disclose, in respect of this "construction drawing" work:
 - (A) that additional costs to those already disclosed that would be payable by your client; and
 - (B) the scope of the work to be undertaken.
 - (iv) In the premises, you failed to provide sufficient relevant information to enable your client to make an informed decision in relation to the provision of architectural services in breach of cl 7 of the Code of Conduct.
6. The Architect, by his legal representatives DSS Law, has admitted allegation 1.
7. By orders dated 30 July 2019 allegation 2 was withdrawn.
8. The Architect has provided an outline of submissions in relation to penalty and costs dated 13 August 2019 together with the following material referred to in the outline of submissions:
- (a) Background & Experience of the Architect.
 - (b) Letter from DSS Law to the Board dated 8 August 2018 and enclosures.
 - (c) Witness Statement of the Architect dated 14 June 2019 and Annexures 1 to 12.
9. The Architect and Counsel assisting the Tribunal has provided an agreed statement of facts dated 11 September 2019.
10. The Architect, by his legal representatives agreed that the Tribunal make its determination of the Inquiry 'on the papers' following consideration of the material provided.

11. The Tribunal was able to satisfy itself that it was sufficiently appraised of the facts and behaviour giving rise to the admitted allegation 1 to enable it to determine an appropriate penalty from the range of penalties set out section 32 of the Act.
12. The follow facts were agreed:
 - (a) As to the first allegation, that he provided architectural services in the absence of a written client agreement (cl 4 of the Code of Conduct), Mr Henry admits the allegation.
 - (b) In mid-2017, Mr Pelligra asked Mr Henry to provide architectural services in respect of a proposed “caretakers residence”, to be built above 69 – 71 Main Street, Greensborough.
 - (c) Mr Henry advised that he proposed to charge \$5,000 plus GST for architectural services up to and including the grant of a planning permit. Mr Pelligra agreed and proposed to pay in cash.
 - (d) Shortly before the planning permit was granted, Mr Pelligra and Mr Henry had another discussion. Mr Pelligra asked if Mr Henry could perform the structural engineering works. Mr Henry said that he could not, and that Mr Pelligra would need to retain an engineer. Mr Pelligra asked about the next steps to obtain a building permit. Mr Henry indicated that he had already begun work on the plans for the building permit.
 - (e) Mr Henry issued two invoices, dated 1 September 2017 and 2 November 2017, for \$3,438.13 and \$6,457, respectively.
 - (f) On 1 September 2017, Mr Pelligra paid \$2,000 towards the first invoice and the remaining \$1,100.00 on 3 October 2017. The second invoice included the balance of the work for the planning permit and a significant portion of the work for the building permit.
 - (g) Upon receipt of the second invoice, a dispute arose between Mr Pelligra and Mr Henry. On 1 December 2017, Mr Pelligra paid \$2,000 towards the second invoice.
 - (h) In May 2018 Mr Henry withdrew any claim for the outstanding amount.
 - (i) Mr Henry regrets that, despite his better judgment, he did not insist on Mr Pelligra signing a written client agreement as required by the Victorian Architects Code of Professional Conduct set out in Schedule 1 of the Architects Regulations 2015 (Vic).
13. The Tribunal accepts that these facts substantiate the admitted allegation that during the period in or about July 2017 to about October 2017 the Architect was guilty of unprofessional conduct within the meaning of paragraph 32(c) of the Act in that, in respect of the proposed caretakers residence at 69 – 71 Main Street, Greensborough, the Architect provided architectural services in the absence of a concluded written agreement between himself and his client, in breach of cl 4 of the Victorian Architects Code of Professional Conduct (**Code of Conduct**) which is set out in the *Architects Regulations 2015* (Vic) and, pursuant to regulation 9(1) of those Regulations, he is therefore guilty of unprofessional conduct.

Penalty

14. The Architect made the following submissions as to penalty.
- (a) As to the First Allegation, that he provided architectural services in the absence of a written client agreement (cl 4 of the Code), Mr Henry admits the allegation.
 - (b) For the following reasons, Mr Henry submits that the appropriate determination is that he be cautioned.¹
 - (c) The severity of the breach of the Code is very low. Mr Henry has been a customer of Pelligra Cakes, of which Sam Pelligra (Mr Pelligra) is the proprietor, for many years. In mid-2017, Mr Pelligra asked Mr Henry to provide architectural services in respect of a proposed “caretakers residence”, to be built above the shop. Mr Pelligra specifically requested that there be no written agreement, as he proposed to pay in cash. Mr Henry advised that he proposed to charge \$5,000 plus GST for architectural services up to and including the grant of a planning permit and a further \$5,000 plus GST to prepare plans for the purposes of a building permit. Mr Pelligra agreed.
 - (d) Shortly before the planning permit was granted, Sam Pelligra and Mr Henry had another discussion. Mr Pelligra asked if Mr Henry could perform the structural engineering works. Mr Henry said no, Mr Pelligra would need to retain an engineer. Mr Pelligra asked about the next steps to obtain a building permit. Mr Henry indicated to Mr Pelligra that the construction drawings should be started. Mr Pelligra agreed.
 - (e) Mr Henry issued two invoices, dated 1 September 2017 and 2 November 2017, for \$3,438.13 and \$6,457, respectively. On 1 December 2017, Mr Pelligra paid \$3,000 towards the first invoice. The second invoice included the balance of the work for the planning permit and a significant portion of the work for the building permit. Upon receipt of the second invoice, a dispute arose between Mr Pelligra and Mr Henry. On 1 December 2017 Mr Pelligra paid \$2,000 towards the second invoice. In May 2018 Mr Henry withdrew any claim for the outstanding amount.
 - (f) Mr Henry regrets that, despite his better judgment, he did not insist on Mr Pelligra signing a written client agreement.
 - (g) There is no need for specific deterrence. Mr Henry is a senior member of the architectural profession. He has been in practice for over 40 years. He has held positions on numerous committees and organisations. A copy of his CV has previously been provided to the Board.
 - (h) Further, Mr Henry and Mr Pelligra have made amends. Mr Henry is currently in the process of completing the provision of architectural services to Mr Pelligra, pursuant to a properly documented written client agreement.
 - (i) There is little benefit in general deterrence. The circumstances of the breach, as set out above, are specific to Mr Henry and Mr Pelligra. There is little benefit in deterring the profession from engaging in similar conduct when such circumstances are unlikely to ever arise again. Whatever residual benefit

¹ *Architects Act 1991* (Vic), s 32(g)

there is in general deterrence will be achieved by an order cautioning Mr Henry.

- (j) Mr Henry is an upstanding and exemplary member of the profession. The breach should be regarded as a one-off, momentary lapse of judgment at the end of a model career. Character references have previously been supplied to the Tribunal in respect of same. Any penalty greater than a caution would be disproportionate and harsh.
- (k) Finally, Mr Henry has admitted the allegation at the first possible opportunity and is remorseful and contrite.
15. Counsel assisting the Tribunal did not make any submissions in relation to the Architect's submissions as to penalty.
16. In determining penalty the Tribunal has taking into consideration the matters referred to in the decision of *Chiropractic Board of Australia V Hooper (Review and Regulation)*², a decision of the Victorian Civil and Administrative Tribunal which sets out the considerations of a Tribunal when forming a view on penalty.
17. Whilst that decision related to the *Health Professions Registration Act 2005*, the Tribunal is of the view that the considerations referred to in that decision apply equally to the considerations to which it ought have regard under the Act.
18. Paragraph 8 of that decision provides:
- In summary, the role of the determination is as follows:*
- (a) *Not punitive. That is, it is not to punish the respondent.*
 - (b) *Protection of the public;*
 - (c) *Maintenance of professional standards of the [relevant] profession in the eyes of the public; and*
 - (d) *Deterrence to other members of the profession.*
19. It is also worth setting out paragraph 9 of that decision, which provides:
- In considering the protection of the public, it is important to look at a number of factors:*
- (a) *the likelihood of recidivism ie an assessment of the ongoing risks posed by the practitioner;*
 - (b) *whether [the practitioner] has acquired insight into his wrongdoing; and*
 - (c) *the likelihood of the [practitioner] reoffending.*
20. The Tribunal says that it is necessary for any penalty to clearly demonstrate the Board's strong disapproval of any conduct by an Architect which breaches the provisions of the Act.
21. The Tribunal also says that members of the public are entitled to be satisfied that the standards of behaviour and professional practice of an Architect will be maintained at the level which the community is entitled to expect.

² [2013] VCAT 1346

22. The Tribunal has considered:
- (a) That the Architect has been an upstanding and exemplary member of the profession for in excess of 40 years without a prior complaint being made against him.
 - (b) That his referees describe him as highly professional, experienced and a credit to his profession.
 - (c) That he admitted the allegation at the earliest opportunity which shows remorsefulness and that he is contrite.
23. The Tribunal considers that it is unlikely that the Architect will breach the Code of Conduct in the same way in the future and that it is not necessary to impose a penalty to protect the public from his conduct.
24. The Tribunal also considers that the severity of the breach level in this case, is low, in that there was a verbal agreement as to the fee to be charged not an open ended fee arrangement, albeit that verbal agreement was not properly documented.
25. The Tribunal notes that the Architect and the client have reached a mutual agreement to continue with the project and that the client no longer presses his complaint about the Architect's conduct.
26. The Tribunal however considers that entering into a written agreement is a professional requirement which protects the public and records the agreement between the Architect and their client and that to impose a penalty will provide a deterrence to other members of the profession.
27. The Tribunal makes the determinations set out below with regard to penalty.

Costs

28. It was submitted on behalf of the Architect that:
- (a) The Tribunal has the power to make any determination as to costs that it thinks fit.³
 - (b) In exercising its discretion, the Tribunal must act reasonably, not arbitrarily or capriciously.
 - (c) In circumstances where he has admitted the First Allegation at the earliest possible opportunity before the Tribunal, and the Second Allegation has been withdrawn, Mr Henry submits that the parties should bear their own costs.
 - (d) Mr Henry admitted the First Allegation in his initial response to the Tribunal in his correspondence dated 8 August 2018. He has maintained that position throughout.
 - (e) In relation to the Second Allegation, counsel assisting the Board has determined that no evidence can be brought against Mr Henry and as such, that position was disclosed on 5 July 2019, when Counsel assisting failed to file and serve any material. Prior to that time, Mr Henry expended significant time and incurred costs in relation to the Second Allegation.

³ *Architects Act 1991* (Vic), s 32

- (f) It would be manifestly unjust for Mr Henry to have a costs order made against him when:
- (i) he admitted the First Allegation at the earliest possible opportunity, and accordingly Counsel assisting's and the Tribunal's costs associated with the First Allegation should be low;
 - (ii) he has incurred costs associated with the Second Allegation which have been wholly wasted and, were he minded to do so, he could seek a costs order in relation to those costs; and
 - (iii) however, instead, he will bear those costs.
29. Counsel assisting the Tribunal did not make any submissions in relation to the Architect's submissions as to costs.
30. The Tribunal considers that where the Board has prima facie evidence of conduct which, if proven, might fall within one or more of the grounds for disciplinary action set out in s 32 of the Act an inquiry should be held⁴. In initiating an inquiry the Board will incur costs.
31. In circumstances where an architect is subsequently found guilty of conduct falling within one or more of the grounds for disciplinary action set out in s 32 of the Act, the Tribunal considers that it is fair that the architect is responsible for costs incurred by the Board.
32. The Architect is guilty of unprofessional conduct (as admitted by the Architect), and the Tribunal considers that it is fair that the Architect is responsible for costs incurred by the Board.
33. However, the Tribunal notes that the Board also initiated an inquiry into an allegation that was not proven, for which no evidence was submitted upon which the allegation was founded and which allegation was subsequently withdrawn.
34. The Architect engaged legal representation and incurred costs in relation to the Inquiry and the allegation which was withdrawn.
35. The Tribunal does not consider that in these circumstances that it would be fair for the Architect be responsible for all of the costs that the Board has incurred in the Inquiry.
36. The Tribunal makes the determinations set out below with regard to costs.

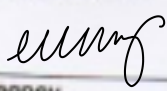
⁴ *Wallin v Architects Registration Board (Review and Regulation) (Corrected)* [2017] VCAT 442

Determinations


37. The Tribunal, having conducted an inquiry into the matters raised in the Amended Notice of Inquiry dated 12 June 2019 issued, pursuant to section 27 of the Act, to John Henry, Registered Architect No. 13094, of 131 Thompson Crescent, Research, Victoria 3095, now makes the following determinations:

- (a) Mr Henry be cautioned.
- (b) Pursuant to section 32 of the Act, half (50%) of the costs of the Board in respect of this Inquiry (including reserved costs) should be paid by the Architect. The Board's costs shall be calculated on a standard 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. 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.

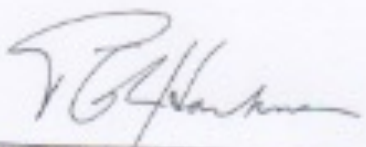
DATED: 24 October 2019



Ms Nicole Feaney
Tribunal Chair



Ms Mogan Hamer
Tribunal Member



Mr Peter Harkness
Tribunal Member