DETERMINATION

IN THE MATTER OF [THE ARCHITECT]
REGISTERED ARCHITECT NUMBER 14180

1. By Notice of Inquiry ("the Notice") dated 30 August 2017, the Architects Registration Board of Victoria ("the Board"), pursuant to Division 1 of Part 4 of the *Architects Act* 1991 ("the Act"), gave notice to the Architect that it had decided to hold an inquiry into the Architect's professional conduct ("the 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 14 separate allegations and the Particulars appended to each of the allegations.

5. On the morning of the hearing of the Inquiry on 18 April 2018, the Board and the Architect agreed, with the concurrence of the Tribunal, that allegations 6, 7, 8, 9, 10, 11, 13 and 14 would be withdrawn. The remaining allegations, as finally constituted, are set out below:

Allegation 1

In about May 2014, you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the provision of architectural services for the development of (**Site**), you failed to act in the interests of your client and not favour your own interest over that of your client, contrary to regulation 7 of the *Architects Regulations* 2004.

Particulars

1.1 In about February 2004, the then owners of the Site, [the Clients] , engaged your company [the Architect's Company] trading as [the Architect] (your company), to provide architectural services in relation to the proposed redevelopment of the Site. The services included preparing drawings to obtain a planning permit on [the Clients] behalf (Drawings).

1.2 On or about 5 March 2010, [the Clients] engaged your company to amend the design and obtain an amendment to the planning permit. Your company proceeded to carry out services for [the Clients] and amended the Drawings and other documents to enable an amended planning permit to be issued (Amended Drawings).

1.3 You failed to act in the interest of [the Clients] and not favour your own interest over that of [the Clients] in relation to the use of the Amended Drawings, as follows:

1.3.1 In about 2011, a dispute arose between your company and [the Clients].

1.3.2 When the dispute arose, your company withdraw [the Clients] licence to use the Amended Drawings.

1.3.3 Between about 2011 and 2014, [the Clients] attempted to sell the Site.

1.3.4 In about 2014, [the Purchaser] , a potential purchaser, contacted you to request information about the Site. On about 9 May 2014, [the Purchaser] advised you that it had purchased the Site and requested that you assist it with amendments to the planning permit.

1.3.5 Between about 9 and 14 May 2014, [the Purchaser] provided you with a copy of the contract of sale, which you provided to your solicitors on about 14 May 2014. The contract of sale was dated 8 May 2014 and showed a settlement date of 5 June 2014. Settlement of the sale of the Site to [the Purchaser] occurred on or about 7 July 2014.

1.3.6 On or about 16 May 2014, [the Purchaser] formally engaged your company to provide various services including to make further amendments to the Amended Drawing and use them to obtain an amended planning permit for its development of the Site.

1.3.7 You proceeded to prepare the application to amend the planning permit, which included amending the Amended Drawings in accordance with instructions from [the Purchaser] .

1.3.8 On 16 April 2014, your company advised a potential purchaser of the Site, via correspondence between solicitors, that the Drawings and plans are not to be used for any purpose until an agreement is reached with your company.

Allegation 2

In the alternative to allegation one above, in about May 2014, you were careless or incompetent in your practice as an architect in relation to the provision of architectural services for the development of (**Site**) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

Refer to the particulars for allegation 0 above.

Allegation 3

In about May 2014, you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the provision of architectural services for the development of (Site), you had a conflict of interest with a client and failed to give your client written notice of that conflict of interest, contrary to regulation 8(1) of the *Architects Regulations* 2004.

Particulars

3.1 In about February 2004, the then owners of the Site, [the Clients], engaged your company [the Architect's Company] trading as [the Architect] (your company), to provide architectural services in relation to the proposed redevelopment of the Site. The services included preparing drawings to obtain a planning permit on [the Clients] behalf (Drawings).

3.2 On or about 5 March 2010, [the Clients] engaged your company to amend the design and obtain an amendment to the planning permit. Your company proceeded to amend the Drawings and other documents to enable an amended planning permit to be issued (Amended Drawings).

3.3 You had a conflict of interest with [the Clients] in relation to the use of the Drawings, as follows:

3.3.1 In about 2011, a dispute arose between your company and [the Clients] and your company withdrew [the Clients] ' licence to use the Drawings;

3.3.2 Between about 2011 and 2014, [the Clients] attempted to sell the Site.

3.3.3 In about 2014, [the Purchaser], a potential purchaser, contacted you to request information about the Site. On about 9 May 2014, [the Purchaser] advised you that it had purchased the Site and requested that you assist with amendments to the planning permit.

3.3.4 Between about 9 and 14 May 2014, [the Purchaser] provided you with a copy of the contract of sale, which you provided to your solicitors on about 14 May 2014. The contract of sale was dated 8 May 2014 and showed a settlement date of 5 June 2014. Settlement of the sale of the Site to [the Purchaser] occurred on or about 7 July 2014.

3.3.5 On or about 16 May 2014, [the Purchaser] formally engaged your company to provide various services including to further amend the Amended Drawings and use them to obtain an amended planning permit for its development of the Site.

3.3.6 You proceeded to prepare the application to amend the planning permit, which included further amending the Amended Drawings in accordance with instructions from [the Purchaser].

3.4 You failed to provide [the Clients] with written notice of the conflict of interest, when it arose.

Allegation 4

In the alternative to allegation three above, in about May 2014, you were careless or incompetent in your practice as an architect in relation to the provision of architectural services for the development of (Site) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

Refer to the particulars for allegation 0 above.

Allegation 5

On or about 12 June 2014, you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the provision of architectural services for the development of (Site), you failed to ensure that a representation made in the connection with the supply of your architectural services was accurate and current, contrary to regulation 12 of the *Architects Regulations* 2004.

Particulars

5.1 On 6 June 2014 you prepared and signed, and on about 12 June 2014, you lodged with the City of Boroondara an application to amend the planning permit for the Site on behalf of [the Purchaser] (Application). The Application stated that [the Purchaser] was the owner and included a declaration that the owner had been notified of the application.

5.2 The Application was not accurate or current, as at the time you prepared and lodged it [the Clients] continued to be the registered owners of the Site and you had not provided notice to them of the Application.

5.3 Before you prepared and lodged the Application:

5.3.1 in about May 2014, you had been provided with a copy of the contract of sale between [the Clients] and [the Purchaser] for the sale of the Site, which stated settlement was to take place on 5 June 2014

5.3.2 on 5 June 2014, you emailed [the Purchaser] to request the owners' details and the response stated it was [the Purchaser]

Allegation 12

Between about 5 March 2010 and about 5 October 2010, you were careless or incompetent in your practice as an architect in relation to the provision of architectural services for the development of (Site) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

12.1 In about February 2004, the then owners of the Site, [the Clients], engaged your company [the Architect's Company] trading as [the Architect] (your

company), to provide architectural services in relation to the proposed redevelopment of the Site.

12.2 On about 5 March 2010, [the Clients] engaged your company to amend the design and obtain an amendment to the planning permit. The engagement was pursuant to your company's revised fee proposal dated 5 March 2010 (March fee proposal).

12.3 Your company carried out re-design work beyond the scope of the March fee proposal, yet only provided written notice of the change in the scope of the engagement in a revised fee proposal dated 19 October 2010.

Guilty plea to some allegations

6. The Architect, through his legal counsel, entered a plea of guilty to allegations 5 and 12, but contested allegations 1 to 4.

Evidence put before Tribunal

7. In accordance with orders made by the Tribunal at a preliminary conference held on 30 August 2017, the parties filed with the Tribunal an agreed statement of facts and a Tribunal Book containing all the documents and evidentiary material on which both parties intended to rely on for the purposes of the hearing. Neither party called any witnesses at the hearing.

8. The material considered by the Tribunal included:

<u>Folder 1</u> (Tribunal Book)

- VCAT decision dated [date]
- Fee proposal forms from [the Architect] to the [the Clients] ("the Complainants") dated 17 February 2010 and 5 March 2010.
- Letter from [the Architect] to the Complainants dated 19 October 2010.
- Reports of Peter Quigley, Architect, dated 1 May 2012 and 14 March 2014.
- Report of Roy Spencer, Architect, dated 28 April 2014.
- Statement of Bryan Miller, Architect, dated 6 June 2013.
- Letters from Robert James Lawyers (acting for [Business Name]) to R.T. Edgar dated 5 July 2012, 20 July 2012 and 21 August 2012.
- Letter from Robert James Lawyers to Jonathan Hirsh, Consult Solicitors (acting for potential purchaser [Name]) dated 16 April 2014.
- Contract of Sale dated 8 May 2014.
- Fee proposal (signed) between [the Architect] and [the Purchaser] dated 16 May 2014.

- Email correspondence between [the Architect], Mr Edmonds and Mr Shaw dated 5 June 2014.

- Application to Amend a Planning Permit dated 6 June 2014, and covering letter dated 12 June 2014.

- Affidavits of [the Client] dated 28 April 2016 and 18 November 2016.

- Statement of [the Client] dated 14 February 2014 (unsigned and undated)

- Affidavits of [the Architect] dated 28 October 2016 and 6 December 2016.

Folder 2 (Further Documents)

- Letter from Neville & Co. Commercial Lawyers (acting on behalf of Complainants) in support of Complaint filed with the Board, with copy of Complaint attached.

- Sketch plans and drawings prepared by the Architect, documents relating to fees paid, copies of emails and letters between various parties, Proposed Statement of Claim prepared on behalf of [the Architect] by his solicitors. Some of the documents in this folder were also contained in Folder 1.

Background / Agreed Facts

9. The inquiry was instigated as a result of an order made by VCAT member E. Wentworth [] that an inquiry should be held into the professional conduct of the Architect, following the hearing of an application by [the Client] that VCAT review the previous decision of the Board not to hold such an inquiry ("VCAT Hearing").

10. The Tribunal was greatly assisted by the Statement of Agreed Facts that was submitted by the parties in the hearing. Those facts may be briefly summarised as follows.

11. In February 2004, the Complainants engaged the Architect's company [the Architect's Company], trading as [the Architect] ([Business Name]) of which the Architect is the sole director, to provide architectural services in relation to the redevelopment of their property at (the Property). [the Architect] carried out those services and a planning permit was issued on 18 May 2006 for the construction of 14 apartments. The development did not proceed.

12. In early 2010, the Complainants again approached [the Architect] to provide further services in relation to the property, including amending the original drawings and planning permit. On or about 17 February 2010, [the Architect] provided its first fee proposal to the Complainants dated 17 February 2010.

13. On or about 5 March 2010, the Complainants engaged [the Architect] to amend the design and obtain an amended planning permit for the construction of 16 apartments and [the Architect] provided the Complainants with an amended fee proposal dated 5 March 2010. The fee proposal outlined the scope of work and the fees payable.

14. [the Architect] completed the drawings in about July 2010 and lodged the application for the amended permit shortly thereafter. The application was

subsequently the subject of a hearing at VCAT on 17 September 2010, where the matter was referred to mediation, resulting in an agreement between the parties to reduce the number of apartments to 15. This required the revision of the drawings and the Complainants instructed [the Architect] to amend the drawings accordingly.

15. By letter dated 19 October 2010, [the Architect] sought to amend the fee agreement which had been entered into with the Complainants pursuant to the 5 March 2010 fee proposal. The design fee stage was to be increased by $35,595 above the 5 March 2010 fee proposal.

16. The VCAT proceeding was heard on 9 November 2010, the outcome of which included a reduction of the number of apartments from 16 to 15. On or about 5 January 2011, the planning permit was amended by VCAT to allow the construction of 15 apartments on the property.

17. In 2011 a dispute arose between the Complainants and the Architect with the Architect commencing proceedings in Magistrates Court in relation to outstanding fees. These proceedings were uplifted to the County Court in October 2012, with [the Architect] claiming contractual entitlement to fees of $204,039.21 plus interest and costs, alternatively *quantum meruit*. To that point the Complainants had paid fees in the amount of some $88,000.

18. The Complainants' defence to the claim was to allege that [the Architect] was not authorised to perform the work charged for and was negligent. They also claimed damages for inability to sell the project with the architectural plans as [the Architect] withdrew the Complainants' licence to use the drawings used in obtaining the Planning Permit.

19. The fee proposal of 5 March 2010 included conditions of engagement that set out the terms of the agreement. In relation to copyright and licence entitlements it contained the following –

> *<u>Copyright</u>*
> *Copyright in the documents and drawings prepared by [the Architect's Company] and in any works executed from those documents and drawings shall, unless otherwise agreed in writing, remain the property of [the Architect's Company].*
>
> *<u>License Entitlements</u>*
> *The Client, unless otherwise agreed in writing, is licensed to use those documents and drawings to produce the project for which they were intended provided that:*
> - *THE ENTITLEMENT APPLIES ONLY TO THE SITE OR TO THAT PART OF THE SITE TO WHICH THE DESIGN RELATE OR DOCUMENTS:*
> - *[the Architect's Company] has completed the particular work for which they have been commissioned; and*
> - *fees properly due to [the Architect's Company] have been paid.*

20. [the Architect] claimed it was entitled to terminate the Complainants' license to use the drawings in accordance with the said conditions of engagement as the Complainants had failed to make full payment for them.

21. During the time of the dispute between the parties, being between about November 2011 and about October 2014, the Complainants attempted to sell the property. [the Architect] maintained that neither the Complainants nor their real

estate agents were entitled to use the drawings in their marketing of the property. The Architect instructed his solicitors to write letters to the Complainants' real estate agent in July and August 2012, putting them on notice that under the terms of engagement between [the Architect] and the Complainants, the drawings remained the property of [the Architect] and that they required the drawings to be withdrawn from any and all signs, promotional and/or sales materials, advertising or other publications relating to the property.

22. By letter dated 16 April 2014, solicitors for [the Architect] advised a potential purchaser of the property that the drawings and plans for the development of the property were not to be used for any purpose unless an agreement were to be reached with [the Architect] regarding its intellectual property. The correspondence explained that there was a dispute between the Complainants and [the Architect] that was listed for trial in the County Court on 14 May 2014. Also that the issue of the licence to use the plans and drawings was in dispute and that the use of those plans without the consent of [the Architect] or other entitlement constitutes copyright infringement. The letter further stated that [the Architect] had not given the vendors of the property a licence to use its intellectual property (including the plans), nor to provide the plans to potential purchasers.

23. During the litigation, several potential purchasers of the property asked the Architect for information about the property. Sometime during 2014, a [Name] contacted the Architect and said he was assessing the commercial viability of developing the property and asked the Architect to provide him with a copy of the drawings used in obtaining the planning permit, the permit conditions and an Excel spreadsheet of the floor areas, so that he could work out costings and sales figures for feasibility. The Architect provided copies of those documents in response to the request.

24. On about 9 May 2014, [the Purchaser] advised the Architect that it had purchased the Property and the contract of sale was unconditional. Specifically, Graham Edmonds of [the Purchaser] telephoned the Architect and said that [the Purchaser] had purchased the Property and proposed to develop it. Mr Edmonds asked if [the Architect] would assist with amendments to the planning permit for the Property. Immediately after that discussion, the Architect discussed the matter with his solicitors and then requested from [Name] a copy of the contract of sale.

25. Between about 9 and 14 May 201 [a representative] of [the Purchaser] provided the Architect with a copy of the contract of sale for the sale of the Property. The Architect provided a copy of the contract to his solicitors. The contract was signed by the purchaser . . . and vendor, with settlement date of 5 June 2014. The sale of the Property did not settle until on or about 7 July 2011. The Architect was not informed of the delayed settlement date.

26. On or about 16 May 2014, [the Purchaser] engaged [the Architect] to provide services including to make amendments to the drawings and use them to obtain an amended planning permit for its development of the Property. As detailed in the fee proposal signed by the parties, the architectural services included 'Design and Town Planning Amendment' and 'Architectural Documentation'. The Architect did not inform the Complainants of the engagement by [the Purchaser] .

27. On 3 June 2014, the Architect had a pre-application meeting with Council about the application by [the Purchaser] to amend the planning permit.

28. By email dated 5 June 2014, the Architect asked [Name] to provide the details of the owner of the Property. By email on the same day, [Name] informed the Architect that [the Purchaser] was the owner of the Property and the Architect then prepared the application to amend the planning permit for the Property. This included the drawings, which he had altered in accordance with instructions from [the Purchaser].

29. On 6 June 2014 the Architect prepared and signed an application to amend the planning permit for the Property on behalf of [the Purchaser]. He lodged the Application with the City of Boroondara on about 12 June 2014.

30. The Application stated that [the Purchaser] was the owner (the person who wants the permit) and included a declaration that the owner had been notified of the application.

31. As at 6 June 2014, the Complainants continued to be registered owners of the Site. The Architect did not provide notice to the Complainants of the Application. The contractual dispute between the parties in the County Court was finalised in October 2014, under a confidential settlement.

Conflict of interest issue (Allegation 1)

32. The Tribunal is required to determine whether the Architect breached his obligations under regulations 7 of the *Architects Regulations* 2004, which states that –

"An architect must –

(a) Act in the interest of his or her client or prospective client; and

(b) Not favour his or her own interest over that of his or her client or prospective client."

Submissions

33. The Solicitor for the Board submitted that the issues for the Tribunal to determine are whether:

- the Architect withdrawing the Complainants' licence to use the drawings to obtain the planning permit for the property; and/or

- allowing another party to use drawings in circumstances where that party was the ultimate purchaser of the Property and proposing to develop the site

amounts to the Architect favouring his interest ahead of his clients, or alternatively, being careless or incompetent in his practice as an architect.

34. It was further submitted that the Tribunal ought to consider this conduct having regard to the fact that:

- the licence was withdrawn in circumstances where there was a litigious dispute between the parties that covered matters including fees; and

- where the Architect maintained fees were owed to him and in doing so, asserted his rights as set out in his Conditions of Engagement.

35. The Tribunal was referred to previous cases where conflict of interest issues were raised, including those considered by the Tribunal [] and that of *McSteen v ARBV [2016] VCAT 291*.

36. Counsel for the Architect submitted that:

- The Architect was contractually entitled to withhold from the Complainants a licence to use the plans and drawings prepared for the Property until he had been fully paid his fees.

- The Complainants' payment of $88,000 in fees to the Architect was irrelevant, as once the licence had been revoked by the Architect, the Complainants ceased to have any interest in those plans and drawings and hence any duty the Architect had to the Complainants in respect of those plans and drawings ceased.

- The Architect was entitled to enter into an agreement with [the Purchaser] and provide it with a licence to use the said plans and drawings.

- That in any event, the actions of the Architect did not harm the interests of the Complainants.

Finding

The Tribunal finds the allegation proven, namely that the Architect did fail to act in the interests of his client and not favour his own interest over that of his client, contrary to regulation 7 of the *Architects Regulations* 2004.

Reasons

37. The Tribunal notes that the conditions of engagement forming part of the fee proposals of 17 February 2010 and 5 March 2010 included a clause in respect of termination of the agreement. It states –

> *"We will not continue to do the work if you do not pay our bills, if you fail to provide us with adequate instructions, or if you indicate to us that we have lost your confidence. We will give you at least fourteen (14) days' notice in writing of our intention to terminate our agreement and the grounds on which the notice is based. You will be required to pay our charges for work done and for expenses incurred, up to the date of termination. Services may be suspended without prior notification while we await payment of outstanding accounts. [the Architect] accept no responsibility for loss incurred by the client as a result of the suspension of services.*

38. Whilst a failure by a client to pay fees due to an architect can in some circumstances be construed as a repudiation of a contract, there is no evidence

in this case that the complainant had repudiated the contract nor that the Architect had considered the contract repudiated. There is no evidence before the Tribunal that the Architect terminated the agreement in accordance with the termination clause in the agreement, which required the giving of a formal notice of intention to terminate.

39. In those circumstances, notwithstanding that there were proceedings in the County Court to determine a dispute between the parties, the Tribunal finds that the architect-client agreement had not been formally terminated and therefore the architect's obligation to act in his clients' interests was ongoing.

Calculation of fees

40. The Tribunal notes that in the Architect's 17 February 2010 fee proposal, the fee to complete the Town Planning Permit Application stage of the work was a fixed fee of $59,900.00. The Construction / Tender documentation & Interior Design stage was calculated as 2.25% of final construction cost.

41. In the fee proposal of 5 March 2010, the Town Planning Permit Application fee is *"based on 65% of original fee 1.8% of $5.65m – i.e. %66,105.00"*. The Construction / Tender & Interior Design fee is 2.00% of final construction cost. The proposal specifies that the fees "*will be charged in accordance with a construction budget ex GST of $5.65m and adjusted in accordance with the final construction cost ex GST."* It is also states that the fee is based upon an indicative construction budget and scope, and that *"we are happy to reflect fees for Stage 4.1(1) & (ii) and 4.2* [being the fees for Town Planning Permit and Construction/Tender documentation respectively] *as fixed fees upon completion of town planning at VCAT and approval of unit numbers."*

42. In the fee proposal dated 19 October 2010 that the Architect sent to the Complainants, the fee in relation to the Town Planning Permit Application has again been changed on the basis that the scope of engagement had increased. It was *"proposed to charge the balance of design 35% of 1.8% i.e. $35,595.00 to the completion of town planning, including mediation drawings required and a fixed fee disbursement for the preparation of perspective $6,000 plus gst*." The total amount charged for this stage is therefore now $101,700 or 100% of 1.8% of $5.65m.

43. The Tribunal has reviewed the expert reports that were filed in the County Court proceedings in respect of the design and documentation prepared by the Architect and the invoices submitted for that work. They include:

- Report of Roy Spencer, Architect, prepared on the Instructions of Robert James Lawyers Pty Ltd acting on behalf of the Architect dated 28 April 2014 ("Spencer Report").

- Report of Bryan Miller, Architect, prepared on the Instructions of Robert James Lawyers Pty Ltd acting on behalf of the Architect dated June 2013 ("Miller Report"); and

- Report of Peter Quigley, Architect, prepared on the instructions of Logie-Smith Lanyon Lawyers acting on behalf of the Complainants dated 1 May 2012

("Quigley Report"), as well as his supplementary report dated 14 March 2014 ("Quigley Supplementary Report").

44. In his report, Miller agrees with the view of Quigley in that the October 2010 fee proposal provided by the Architect does not provide an explanation as to the basis of the revised fee of 1.8%.[1] Miller states: *"This is consistent with the two previous fee offers where [the Architect] provided no explanation as to the basis of any of his fees in any of his proposals."* He further says: "*In my experience the basis of a percentage fee is determined by the architect for the client to agree or disagree. How it is derived is normally of no interest or concern to the client."*[2]

45. The Architect has conceded, by pleading guilty to allegation 12, that his company carried out re-design work beyond the scope of the March fee proposal, yet only provided written notice of the change in the scope of the engagement in a revised fee proposal dated 19 October 2010.

46. In an email to the Architect dated 19 December 2010, [the Client] expresses some consternation as to the October 2010 fee proposal, stating: *"I feel to double the fees we should have had a new agreement signed and an explanation instead of attempting to send us broke."*

47. In the case of each of the three fee proposals, it is clear that the Architect did not provide them to the Complainants prior to commencing work, but only after work that was the subject of the fee proposal had in some measure been partly completed and in some cases invoiced. The Tribunal does not share the view of Miller that how a percentage fee is determined by the architect is of no interest or concern to the client. It notes that the fee in respect of the Town Planning Application work in the amended October 2010 fee proposal was increased by some 54% without prior approval of the client.

48. In their assessment of the October 2010 fee proposal, and whether the significant increase to the fee for the Town Planning Permit stage was justified, the expert reports are not in agreement. Quigley's view is that the increase in fee is not justified and the additional work and adjustments to the design were within the scope of the March 2010 fee proposal. Miller and Spencer are of the view that the increase is justified. They both express the view that the fee for the Town Planning Permit stage in both the March 2010 and October 2010 fee proposals is a fixed fee calculated as a percentage of the indicative construction budget of $5.65m.

49. [the Client], in her affidavit sworn on 28 April 2016, states that on 14 December 2011 she agreed for the Architect to prepare some preliminary drawings for the purposes of obtaining a construction estimate from [the Builder].[3] [the Builder] , as the prospective builder for the project, was to provide construction costings so that the Complainants could start pre-selling the apartments and obtain construction funding.[4]

50. On or around 7 March 2011, the Architect states that he received a quote from [the Builder] for the project, with an estimate that they could complete

1. [1] Paragraph 78
2. [2] Paragraph 79
3. [3] Paragraph 19
4. [4] Paragraph 18 of affidavit of [the Client] sworn 28 April 2016.

construction for $6,830,000 exclusive of GST.[5] On or around 13 May 2011, the Architect received an updated quote based on some modifications made to the project, with construction costs now estimated at $7,458,000 exclusive of GST.[6] Copies of these quotes were not amongst the materials provided to the Tribunal.

51. The invoices rendered by the Architect to the Complainants between February 2010 and October 2011 were based on a construction cost estimate of $5,680,000 as specified in the 5 March 2010 fee proposal. After receiving the first quote from [the Builder], however, all subsequent invoices were rendered on a construction cost estimate of $6,830,000.[7]

52. The expert reports all agree that the Construction and Tender Documentation prepared for the project was not complete. The Quigley 2012 report assesses the documentation as 50% complete.[8]

53. The Spencer Report states:

> *"In my opinion, Documentation and Architectural services were completed for each stage of services listed to a satisfactory standard with the exception of Construction and Tender Documentation. In my opinion, the Construction and Tender Documentation was 75% complete and, as such, not satisfactory for obtaining competitive Tenders for the construction of the project."*[9]

54. The Miller Report states that the documents for the construction stage of the commission were only 70% complete.[10] He further states:

> *"In fact the industry standard to measure the completeness of drawings and other construction documents is that they must be in sufficient detail to obtain competitive tenders from building contractors and also sufficiently detailed to obtain the required building permit for the works."*[11]

55. The evidence of [the Client] is that the Complainants never received in writing any [the Builder] construction costings, either from [the Builder] or the Architect, and that she first met with [the Builder] on 9 August 2011, the day before they went into liquidation.[12]

56. In view of the evidence that the construction documentation was not sufficiently complete to go to tender, and there is no evidence that a quantity surveyor was engaged to assess construction costs at that time, it is the Tribunal's view that the Architect was not justified in calculating his fees and issuing invoices on the basis of the [the Builder] construction quote of $6,830,000.

57. In his 2014 Supplementary Report, Quigley states:

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5. [5] Paragraph 18 of affidavit of [the Architect] sworn 2 June 2014.
6. [6] Paragraph 19 of affidavit of [the Architect] sworn on 2 June 2014
7. [7] Paragraph 23 of affidavit of [the Architect] sworn on 2 June 2014
8. [8] Paragraph 35
9. [9] Page 11 [at 490]
10. [10] Paragraph 98
11. [11] Paragraph 90
12. [12] Paragraph 21 of the affidavit of [the Client] sworn on 28 April 2016

> *"In invoice 2801 issued on 30 March 2011 the construction budget on which the fees are based on increased to $6.8 million. I have not seen any acceptance of an increased construction budget by [the Clients]. In addition this invoice includes a claim for Town Planning fees based on a fee of 1.8% of the construction cost of $6.8 million. I cannot understand the basis for this fee given the fee for the town planning state was stated to be a fixed lump sum*."[13]

58. Another relevant assessment is made in the Spencer Report, where the author states:

> *"Invoice Nos 2775; 2790; 2794; 2796; 2801; 2806; 2809; and 2813 for services in relation to Construction and Tender Documentation were presented in full to [the Client], although this work was not completed to a satisfactory standard."*[14]

59. In the matter of *McSteen v ARBV [2016] VCAT 291* (1 March 2016) at [175], Senior Member Smithers refers to the architect's obligation to keep their client informed when the estimate of the build cost, upon which fees are based, increases, This was in the context of the inherent conflict between, on the one hand, the interests of the architect in there being a higher build price, and therefore a higher fee, and on the other hand, the interests of the client, in achieving the lowest possible build price. This tension between the conflicting interests of architect and client in respect of how costs were being calculated is clearly evident in this case.

60. The Tribunal concludes that the Architect did not clearly explain to his clients how the professional fees and costs of his services would be calculated, that he did not obtain their written agreement to the proposed fees before commencing the proposed work, that he issued invoices for work that was not completed to a satisfactory standard, and he sought to increase his fees on the basis of an increased construction budget that was not justified in the circumstances.

Withdrawal of licence

61. Counsel for the Architect has submitted that once the licence to use the plans and drawings had been revoked by the Architect, the Complainants ceased to have any interest in those plans and drawings and hence any duty the Architect had to the Complainants in respect of them ceased. The Tribunal has given consideration to this matter and disagrees with the proposition.

62. The legal principles involved, may be summarised as follows:

    (a) When an architect contracts with a building owner to produce plans for the purpose of being used to carry out construction work at a particular site, there arises, subject to any contractual provisions to the contrary, an implied licence from the architect for the use of the plans for that purpose.[15]

13. [13] In answer to question h [page 10]
14. [14] At page 11 [510]
[15] *Gruzman Pty Ltd v Percy Marks Pty Ltd (1989) 16 IPR 87*, per Justice McLelland.

(b) The implied licence to use the plans and drawings in favour of the owners of the land extends to the subsequent purchasers of the land. The implied licence in favour of the subsequent purchasers does not arise out of any contract between the architect and the subsequent purchasers but is instead referable to the original relationship between the architect and the owners. The plans and drawings were brought into existence for the purpose of obtaining a development consent in relation to the land, which consent runs with the land for a period of 5 years and is not extinguished by sale.[16]

(c) In the absence of any reservation of copyright in the plans and drawings or the withdrawal of the development application prior to its determination, the implied licence to use the plans and drawings in favour of the purchasers is irrevocable.[17]

63. The Tribunal notes that the contractual dispute involving the issue of the fees owed to the Architect, as well as the withdrawal by the Architect of the Complainants' licence to use the drawings used in obtaining the planning permit, was ultimately not determined by the Court, having been settled by the parties on a confidential basis following the settlement of the sale of the Property.

64. It is not the role of the Tribunal to determine those issues in this hearing, nevertheless, the Tribunal makes a number of observations in respect of the Architect's assertion that he is entitled to terminate the Complainants' licence to use the drawings in accordance with the conditions of engagement, on the basis that the Complainants had failed to make full payment for them.

65. In order for the Architect to revoke the Complainants' licence to use the drawings and plans used in obtaining the planning permit, whether that licence is express or implied, there must be an express term in the contract or conditions of engagement that explicitly provides for such a revocation. This is because the practical effect of revoking the licence to use the plans and drawings that form part of the endorsed planning permit is to render valueless both the permit and the substantial financial investment made by the owners of the land in obtaining the permit. In the absence of such an express term, the Courts have generally held that the licence is granted in return for a debt recoverable, by ordinary litigious processes.[18]

66. The Architect did not use the standard Australian Institute of Architects *Client and Architect Agreement* which uses clear contractual language and sets out the nature of the licence granted and the circumstances in which it can be revoked. Rather, the terms of engagement document used by the Architect simply states that the client is licensed to use the documents and drawings provided that fees *properly due* [italics added] to the Architect have been paid. There is no specific mention of a right to revoke the licence and the circumstances in which the parties agree that this can occur. The clause does not deal with any implied licence that the client may acquire as a result of the engagement. Neither does

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15. [16] *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd and Another [2006] HCA 55*, per Per Kirby and Crennan JJ at [56], [86], [95].

16. [17] *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd and Another [2006] HCA 55*, per Kirby and Crennan JJ (Gummow ACJ agreeing): at [16], [95].

17. [18] Ng and Another v Clyde Securities Ltd [1976] 1 NSWLR 443

the termination clause [quoted at paragraph 37] in the terms of engagement provide for the revocation of the licence on the termination of the Agreement.

67. There is a further difficulty in making the licence conditional on payment of fees 'properly due' rather than on payment of fees invoiced. The Complainants have asserted that they did not receive the 19 October 2010 fee proposal until December 2010 and in any event did not agree to that fee proposal. If the fees for the obtaining of the planning permit are calculated on the basis of the 5 March 2010 fee proposal, then it could be said that the Complainants have in fact paid the fees that were properly due in respect of that stage of the work. Likewise, in light of the evidence of the Architects who provided expert reports, it cannot be said that the fees that were the subject of invoices rendered by the Architect in respect of construction and tender documents were properly due, as they were found not to be completed to a satisfactory standard.

68. That the Architect and his solicitors were alert to some of these issues is reflected in the amendments they made to the terms of engagement used in the agreement the Architect signed with [the Purchaser] dated 16 May 20014, which states:

> *14.1 "The licence is only granted up to and including the stage of architectural services for which the documents were prepared for and have been paid. The client acknowledges that drawings and documents prepared for Design and Town Planning purposes are not licensed for use in any Working Drawing Documentation or for the purposes of Construction.*
>
> *14.2 "The client acknowledges that the Licence entitlement will not run with the sale of the land and is not assigned to a third party as part of any property sale, unless authorized in writing by [the Architect], such authorization not to be unreasonably withheld."*

69. It is clear from the documents before the Tribunal that the Architect continued to do work on the project for the Complainants (notwithstanding that fees were alleged to be outstanding) until at least 15 August 2011, which was a few days after [the Builder] went into liquidation, and issued invoices until 30 September 2011.[19] The Complainants at that stage were not having success in selling sufficient units off the plan in order to obtain the required loan funds for construction.

70. The Architect, by letter dated dated 21 September 2011 sent to the Complainants, threatened to commence recovery proceedings in respect of unpaid fees and gave notice of withdrawal of consent to their use of copyrighted material.[20] A copy of this letter was not made available to the Tribunal. On 4 November 2011 the Architect commenced proceedings in the Magistrates Court for the outstanding fees.[21]

71. The Complainants thereafter attempted to sell the Property, but the Architect had his solicitors send threatening letters to the selling agents advising that the Complainants had no permission or licence to use the drawings and plans

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18. [19] Referred to in exhibit CFC-5 of Affidavit of [the Architect] sworn on 6 December 2016
19. [20] Referred to in exhibit CFC-6 of Affidavit of [the Architect] sworn on 6 December 2016
20. [21] Ibid.

prepared in respect of the Property.[22] The effect of this was that the selling agents could not proceed to advertise and sell the property with the planning permit. The Complainants attempted to sell the Property by public auction on 15 September 2012, without the planning permit, but were unsuccessful.[23]

Architectural services provided to [the Purchaser]

72. During the period that the dispute between the Architect and Complainants was before the Courts for determination, the Architect ceased providing his services to the Complainants. He, nevertheless, remained actively interested in and engaged with the Property. This is evidenced in the email exchanges between the Architect and [Name], at [Business].[24]

73. In an email dated 18 November 2013, the Architect states:

"Still trying to obtain payment on the above. Is there any chance of the permit being extended after 18th May next year. Site obviously maintains a higher value if it does."

74. The response from Beatty on the same day was (in part):

"Boroondara are advertising the new residential zones that are to be applied at the moment. If that site ends up in the wrong zone it will have some implications on Council extending the permit."

75. In an email dated 19 November 2013, Beatty adds:

"I've had a look over the proposed application of the new residential zones in Boroondara. They are currently proposed to apply the Neighbourhood Residential Zone (Schedule 1) to the site. This new control would not have allowed for approval of the development that was achieved for this site.

There are transitional arrangements in the new zones that allow for permit to be extended if it was granted prior to the new zones being introduced, which this one was. However, the extension of a permit could still not be supported by Boroondara, and I'd anticipate that this would be the case."

76. The Architect's email to [Name] on 12 December 2013 states (in part):

"I am following up when and if you think an extension might be applied for? Even if it is only granted for a shorter period?"

77. {Name's] response (in part) states:

"The current expiry date on this permit is 18 May 2014 (for commencement of works). Council won't consider an extension to this until approximately 1 month prior to the expiry.

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21. [22] Refer to letters from Robert James Lawyers (acting for [the Architect]) to R.T. Edgar dated
22. 5 July 2012, 20 July 2012 and 21 August 2012
23. [23] Referred to in exhibit CFC-6 of Affidavit of [the Architect] sworn on 6 December 2016
24. [24] Email correspondence contained in Further Documents Folder at tab 5

Amendment C190 for Boroondara will introduce the new residential zones (as per previous emails). This amendment is currently with the Minister for Planning awaiting final approval – I'd anticipate that this will occur prior to April/May next year. If we were confident that works could commence, and could get endorsed plans, etc lodged with Council to show them that there's some action on the ground then I'd think we'd be a good chance, however, with no action on the project Council may not want to support us.

Happy to discuss further to see if we can come up with a good approach for this one to try and resolve it."

78. A potential purchaser [Name] made a written proposal dated 3 April 2014 to the Complainants' lawyers to purchase their property for the sum of $3.4 million (GST inclusive) and proposed terms of settlement.[25] It is not clear how, but the Architect obtained a copy of this letter and instructed his solicitors to write to the lawyers for the prospective purchaser, in terms as outlined in paragraph 22.[26]

79. [the Client], in her affidavit sworn on 18 November 2016, gives evidence that she was approached by her sales agent with an offer to purchase the Property on or about 17 March 2014. The Contract of Sale, which she did not authorise or request to be prepared, was for a sale price of $2.75 million. The nominated purchaser was [Name] and/or nominee.[27]

80. The Complainants subsequently signed a Contract of Sale on 8 May 2014 for the sale of the Property to [Name] and/or nominees for the sum of $3.0 million.[28] The nominee purchaser was ultimately [the Purchaser] .

81. In his affidavit, affirmed on 28 October 2016, the Architect confirms that he met with and provided [an Agent of] [the Purchaser] with a copy of his drawings in respect of the Property, and an Excel spreadsheet of the floor areas, so that [the Agent] could work out costings and sale figures and assess the commercial viability of developing the Property. Whilst the date of this meeting is not specified, it was clearly before the Contract of Sale was signed.

82. The Architect subsequently entered into an agreement with [the Purchaser] on 16 May 2014 to amend the architectural drawings and use them to obtain an amended planning permit for the development of the Property by [the Purchaser]. The Architect had a pre-application meeting with Council on 3 June 2014 (believing that the Complainants were still the owners of the Property at that time[29]) and lodged the application to amend the planning permit on or about 12 June 2014. Council documents show that the application for amended planning permit was received by Council on 16 June 2014, submitted by [the Architect] on behalf of [the Purchaser] . The amendment increases the number of apartments from 15 to 18.[30]

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25. [25] Exhibit 3, included in affidavit of [the Client] sworn on 18 November 2016
26. [26] Exhibit 4, included in affidavit of [the Client] sworn on 18 November 2016
27. [27] Exhibit 1, included in affidavit of [the Client] sworn on 18 November 2016
28. [28] Exhibit CFC-2 included in Affidavit of [the Architect] sworn on 28 October 2016
29. [29] Paragraph 18 of affidavit of [the Architect] sworn on 6 December 2016
30. [30] Refer to copy of the Urban Planning Special Committee Agenda (Exhibit 6) to affidavit of [the Client]
31. sworn on 18 November 2016 and referred to in paragraph28 of said affidavit

83. Implementation of changes to the Boroondara Planning Scheme came into effect on 19 June 2014.[31] It was clearly a real imperative for the Architect and [the Purchaser] to lodge their application for an amended planning permit before this date, as once the Planning Scheme changes came into effect, it was not likely that Council would be able to support the proposed development, as suggested by Paul Beatty. The directors of [the Purchaser] would have been aware that at the time that the application was lodged with Council, the Complainants were still the legal owners of the Property, as settlement of the sale was not effected until 7 July 2014.[32]

84. The evidence of [the Client] is that the Architect did not make the Complainants aware that he had entered into a fee agreement with [the Purchaser] [33] or that he had lodged the amended planning application in respect of the Property whilst they were still the legal owners.[34]

85. The fee proposal forming part of the agreement entered into by the Architect and [the Purchaser] indicates that [the Purchaser] would be charged $8,500 (plus GST) in respect of Design and Town Planning Amendment, and $40,000 (plus GST) in respect of Architectural Documentation.[35] These fees are very modest compared to the fees charged to the Complainants for the same work and clearly indicates that [the Purchaser] was deriving a significant benefit from the work previously completed by the Architect for the Complainants and for which he was paid a substantial sum.

86. The Tribunal finds that the actions of the Architect in:

(a) withholding the right of the Complainants to use the drawings and plans (associated with the planning permit) in the sale of the Property whilst there was an unresolved dispute before the Court in respect of fees and the licence; and

(b) making the said plans available to [the Purchaser] prior to the signing of a Contract of Sale for the Property, whilst denying access to those plans to other interested prospective purchasers; and

(c) Entering into an agreement with [the Purchaser] to provide architectural services in respect of the Property prior to the settlement of the sale of the Property; and

(d) Allowing [the Purchaser] to have the benefit of the plans and drawings for which the Complainants had paid substantial consideration; and

(e) Preparing an application for an amended planning permit, attending a pre-application meeting with Council, and lodging the application on behalf of [the Purchaser] whilst the Complainants were still the legal owners of the Property;

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32. [31] Refer to copy of Boroondara Council Mewsletter (Exhibit 6) to affidavit of [the Client]
33. sworn on 18 November 2016 and referred to in paragraph27 of said affidavit
34. [32] Paragraph 29 of affidavit of [the Client] sworn on 18 November 2016
35. [33] Paragraph 22 of affidavit of [the Client] sworn on 18 November 2016
36. [34] Paragraph 30 of affidavit of [the Client] sworn on 18 November 2016
37. [35] Exhibit CFC-3 included in Affidavit of [the Architect] sworn on 28 October 2016

do amount to him acting in his own financial interest and favouring his own interest over that of his clients, the Complainants.

87. Counsel for the Architect submitted that the actions of the Architect did not harm the interests of the Complainants. The Tribunal does not agree. It is generally accepted that a property for sale has a greater value if it is offered for sale with a planning permit. The Architect has himself stated that the site maintains a higher value if it has the benefit of a planning permit (refer to paragraph 73).

88. Whilst the Tribunal acknowledges the Architect's right to be properly paid for the services provided, as well his copyright in the drawings and plans produced, he must ensure that he acts honestly and with reasonable care so as not to put his interests ahead of the interests of his clients or otherwise breach his obligations under the Act or regulations. In this particular case the Architect had commenced proceedings in respect of outstanding fees and ceased providing services as he was entitled to do pursuant to the terms of engagement. His subsequent conduct, however, was clearly designed to advance his own interests at the expense of the interests of his clients.

Failure to give notice of conflict of interest (Allegation 3)

89. The Tribunal is required to determine whether the Architect breached his obligations under regulations 8(1) of the *Architects Regulations* 2004, which states that –

"An architect who –

(a) Acts, or proposes to act, on the same project in the capacity of –

(i) An architect and a developer; or

(ii) An architect and an estate agent; or

(b) Has any other conflict of interest with a client or prospective client -

must give the client or prospective client written notice of the scope of each of those roles or that conflict of interest."

2. Sub-regulation 8(2) requires the said notice to be given:
3.

(a) In the case of a client, when the conflict arises or appears likely to arise; or
4.
(b) In the case of a prospective client, prior to acting for that person.
5.

Finding

90. The Tribunal finds the allegation proven, namely that the Architect did fail to give his clients written notice of a conflict of interest, contrary to regulation 8(1) of the *Architects Regulations* 2004.

Reasons

91. Counsel for the Architect has submitted that if the Tribunal finds that there was a conflict of interest, the Architect had provided written notice of it to the

Complainants by his correspondence insisting on his contractual right to withhold a licence to use his plans and drawings. The Tribunal does not accept that such correspondence constitutes the notice required under regulation 8(1).

92. As previously set out, the evidence of [the Client] is that the Complainants were not advised by the Architect of his dealings with [the Purchaser] in respect of the drawings and plans they had paid for, and the amended planning application being made whilst they were still the owners of the Property and the court proceedings were still ongoing. This is not disputed by the Architect. The Architect has not therefore provided the Complainants with the required notice in respect to this activity which represented a conflict of interest.

Submissions as to penalty

93. Counsel for the Architect made written and oral submissions in respect of penalty, specifically in relation to allegations 5 and 12, and more generally in respect of the other allegations. It was submitted that there were exculpatory factors in the conduct of the Architect that warrant no greater sanction than a caution in this case. The solicitor for the Board accepted that a caution would be appropriate.

94. Whilst the Tribunal accepts that the Architect has cooperated substantially in order that the Inquiry may be determined efficiently, it considers that the breaches of the Act and Regulations were of a serious nature and therefore warrant a penalty more substantial than a caution.

Determination

95. The Tribunal, having conducted an Inquiry into the matters raised in the Notice dated 30 August 2017, issued to [the Architect], Registered Architect No. [], of [Address], pursuant to section 33 of the Act, the Tribunal now makes the following determinations:

a) In respect of Allegation 1, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 7 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

b) In respect of Allegation 3, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 8(1) of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

c) In respect of Allegation 5, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 12 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

d) In respect of Allegation 12, the Tribunal finds the architect guilty of being careless or incompetent in his practice as an architect. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

e) Allegations 2 and 4 were set out in the alternative to allegation 1 and 3 and so do not require further consideration.

Penalty

96. The Tribunal imposes the following monetary penalties.

97. a) In respect of Allegation 1, the Tribunal imposes a monetary penalty of $1,500.00;

b) In respect of Allegation 3, the Tribunal imposes a monetary penalty of $1,000.00;

c) In respect of Allegation 5, the Tribunal imposes a monetary penalty of $1,500.00; and

d) In respect of Allegation 12, the Tribunal imposes a monetary penalty of $1,500.00.

98. Payment of the penalties set out in the preceding paragraph is to be made to the Board, pursuant to section 58 of the Act, within 3 months of the date of this determination.

Drago Dragojlovic – Tribunal Chair

Dated: 22 July 2018