

DETERMINATION

IN THE MATTER OF SANDRA NERVEGNA REGISTERED ARCHITECT NUMBER 19444

1. By Notice of Inquiry ("the Notice") dated 12 November 2018, 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 four separate allegations and the Particulars appended to each of the allegations.
5. Subsequently, the Board and the Architect agreed, with the concurrence of the Tribunal, that allegations 2 and 3 would be withdrawn and this was confirmed by an order made by the Tribunal on 21 November 2019. The remaining allegations, as finally constituted, are set out below:

Allegation 1 – breach of section 32(c) of the Act

Between July 2017 and May 2018, you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 ("the Act") in that, in relation to the provision of architectural services for the design and construction of a residence at 66 Berrima Road, Donvale ("the Property"), you failed to ensure you entered into a written agreement with Mr. Tan for those services that complied with the requirements set out in clause 4(2) of the Victorian Architects Code of Professional Conduct ("the Code") set out at Schedule 1 to the *Architects Regulations* 2015 ("the Regulations").

Particulars

- 1.1 In about 28 April 2016, you entered into a written agreement with the owner of the Property, Mr Richard Tan ("Mr Tan") to provide architectural services in relation to the design and construction of a residence at the Property. The total amount payable by Mr. Tan under the agreement was \$50,000.
- 1.2 In or about 12 May 2016 you entered into a revised agreement with Mr. Tan ("Revised Agreement"). Pursuant to the Revised Agreement, either:
 - 1.2.1 Only \$30,000 was payable by Mr. Tan, with the remaining \$20,000 payable to be the subject of a separate agreement with the builder; or

- 1.2.2 \$30,000 was payable by Mr. Tan, with the remaining \$20,000 in payments to be deferred until a later time;
- 1.2.3 The basis on which the \$20,000 would become payable and to whom it would be paid was not recorded in writing in the Revised Agreement.
- 1.3 On 13 July 2017 you became registered under the Act as an architect.
- 1.4 Between 13 July 2017 and December 2017 you provided architectural services to Mr. Tan pursuant to the Revised Agreement.
- 1.5 During that period, the Revised Agreement did not accurately record the basis on which the \$20,000 would become payable and to whom it would be paid, contrary to clause 4(2)(g) of the Code.
- 1.6 Further, during that period, the Revised Agreement did not contain the following written terms:
 - 1.6.1 the registration number of the architect responsible for providing the services (clause 4(2)(b) of the Code);
 - 1.6.2 the timeframes for the provision of services (clause 4(2)(d) of the Code);
 - 1.6.3 how the architect may inform the client of progress in the provision of the services (clause 4(2)(h) of the Code);
 - 1.6.4 a requirement that the architect must inform the client how a change or amendment to the services will affect the professional fees and costs for the services (clause 4(2)(j) of the Code);
 - 1.6.5 how the architect may obtain the client's authority to change or amend the services (clause 4(2)(m) of the Code);
 - 1.6.6 how variations to the agreement may be made (clause 4(2)(l) of the Code);
 - 1.6.7 a reservation of the right of the architect to withdraw from the provision of services under the agreement in the circumstances set out in clause 14 of the Code (clause 4(2)(m) of the Code);
 - 1.6.8 how the agreement may be terminated and for what reason (clause 4(2)(n) of the Code).

Allegation Four – breach of section 32(c) of the Act

In May 2018, 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 design and construction of a residence at 66 Berrima Road, Donvale ("the Property"), you engaged in conduct that did not endeavour to engender confidence in and respect for, or maintain the standards and integrity of, the profession of Architecture, contrary to clause 17 of the

Victorian Architects Code of Professional Conduct set out at Schedule 1 to the Architects Regulations 2015.

Particulars

- 4.1 In about 28 April 2016, you entered into a written agreement with the owner of the Property, Mr. Richard Tan ("Mr. Tan") to provide architectural services in relation to the design and construction of a residence at the Property.
- 4.2 That agreement was revised on or around 12 May 2016 ("Revised Agreement").
- 4.3 Under the Revised Agreement you agreed to provide architectural design services and contract administration services.
- 4.4 On 13 July 2017 you became registered under the Act as an architect.
- 4.5 On or around December 2017, Mr. Tan entered into two agreements with Inbuilt Constructions Pty. Ltd. ("the Builder"), one relating to the design of the construction and the other relating to the construction itself.
- 4.6 On 15 May 2018 you sent an email to Mr. Tan seeking payment of an amount alleged to be owing by Mr. Tan to the Builder.
- 4.7 In the email you sent to Mr. Tan on 15 May 2018, you:
 - 4.7.1 referred inappropriately to Mr. Tan's religious beliefs; and
 - 4.7.2 used emotive and inappropriate language.

Background / Agreed Facts

6. The Tribunal was greatly assisted by a Statement of Agreed Facts that was submitted by Counsel assisting the Tribunal and prepared in conjunction with the solicitors for the Architect. Those facts are as follows.

Background

7. Ms Sandra Nervegna ("the Architect") provides services through a business, Ink Studio Pty. Ltd. ("Ink Studio").
8. The subject of this inquiry is the Architect's conduct relating to the property at Lot 55, Berrima Road, Donvale ("Property").
9. Mr. Soo Hock (Richard) Tan was, at the relevant time, the owner of the Property and is the complainant in this matter ("Complainant").
10. In 2015, the Complainant purchased the Property, which was a vacant block contained within a development known as 'Mullum Creek Estate' in Donvale. The lots in the development are located in a bushland setting and are subject to design overlays imposed by Manningham City Council and design guidelines imposed by the Mullum Creek Design Review Committee ("DRC").

11. The conditions of the Complainant's purchase of the Property required him to construct a dwelling on the Property designed and built in accordance with the DRC approval process for a 7.5 star energy rated single dwelling. The Complainant sought the services of an architect to prepare a design for a dwelling on the Property which met the requirements of the DRC.
12. The Complainant met with the Architect in September 2015 after he was introduced to her by Helen Lee ("Ms Lee") who was the Complainant's wife at the time. Ms Lee was a friend of the Architect and was well acquainted with the Architect and her husband, Neil Williams ("Mr Williams") of Inbuilt Constructions Pty. Ltd. ("Inbuilt"). Mr Williams, a structural and civil engineer, is a registered commercial builder and a director of Ink Studio. The Complainant was informed at the initial meeting that the Architect worked at Ink Studio and that she had a bachelor's degree in Architecture but was not yet registered as an architect and was working towards becoming registered.

Facts relating to Allegation One

13. On 15 October 2015, Mr. Williams sent an email to the Complainant which indicated that Ink Studio would send him a fee proposal but that the Complainant would only need to commit to pay the planning component of that fee on the basis that the remaining fees would be included in a design and construct building contract and paid during the building process. The Architect was copied into the email from Mr. Williams. The Architect was not directly involved in discussions between the Complainant and Mr Williams. Her understanding is that the idea of incorporating any part of the fee into a design and construct contract was at the request of the Complainant and for the purposes of his financing requirements.
14. There were 3 written fee proposals sent by the Architect to the Complainant (which are set out in further detail below):
 1. Fee proposal dated 26 November 2015 for a lump sum fixed fee of \$48,000 ("Proposal 1") which did not proceed;
 2. Fee proposal dated 28 April 2016 for a lump sum fixed fee of \$50,000 ("Proposal 2") which did not proceed; and
 3. Fee proposal dated 12 May for a lump sum fixed fee of \$50,000 ("May 2016 Fee Proposal") which did proceed.
16. On 26 November 2015, the Architect emailed the Complainant, attaching a fee proposal (that is, Proposal 1). That fee proposal proposed total fees of \$48,000, including \$15,000 for pre design preliminaries, \$15,000 for the developer's approval submission and town planning application, \$10,000 for building permit documentation, \$6,000 for construction documentation and \$2,000 for construction phase services. The email stated that design fees for the pre-design preliminaries and concept design and town planning drawings would be paid directly to Ink Studio and the remaining design fees and other consultants fees would be *'rolled into the overall construction contract and would be paid directly by the builder'*.

17. 6 months later the Complainant made contact with the Architect and, on 28 April 2016, the Architect's assistant. Ms Mrudula Ghiridhar, emailed to the Complainant an amended fee proposal (that is, Proposal 2). That fee proposal proposed total fees of \$50,000, comprised of pre-design preliminaries and concept design in the amount of \$20,000 and developer's approvals submission and town planning application in the amount of \$30,000. The fee proposal then specified that nothing would be paid for the building permit documentation and construction documentation and construction face services, the proposal stating that those items were included in the '*design build cost*'.
18. On 13 May 2016, Ms Mrudula Ghiridhar emailed to the Complainant a further revised fee proposal (that is, the May 2016 Fee Proposal). In the May 2016 Fee Proposal, the total fees payable were stated to be \$50,000, of which \$15,000 was payable for pre-design preliminaries and concept design, \$15,000 for developer's approval submission and town planning application, \$10,000 for the building permit documentation, \$8,000 for the construction documentation and \$2,000 for construction phase services. The fee proposal stated that the latter three categories of fees were included in the design build cost. The term 'design build cost' was not defined nor explained in the fee proposal.
19. The Complainant signed the May 2016 Fee Proposal. After the agreement was signed, Ink Studio commenced work and the Complainant paid Ink Studios the amount of \$30,000 in respect of its work.
20. During the course of the project, the Architect became a registered architect on 13 July 2017. After her registration and until November 2017, the Architect provided architectural services to the Complainant, including the preparation and submission of the stage two and stage three design proposals to the DRC, Local Town Planning endorsement, and building permit issue along with final construction drawings.
21. After the Architect became registered, no further or amended terms of agreement were entered into. Accordingly, the terms of the May 2016 Fee Proposal constituted the entirety of the written agreement between the parties.
22. On 25 May 2017, Mr. Williams, who was providing construction costs estimates for the project, sent to the Complainant updated floor plans together with a revised costing of \$880,868.50. The revised costing stipulated that \$35,000 was payable associated with the '*design completion and documentation*'. The Complainant agreed to the revised floor plans and budget.
23. On 5 July 2017, Mr. Williams emailed the Complainant, stating that Ink Studio was continuing to develop the construction documentation and that an engineer, building surveyor and soil tester had been engaged and that the cost of that work would include costs of \$15,000 for Ink Studio (as well as costs for the other consultants). The email informed the Complainant that the costs would be '*covered under the overall building project cost so will **not** need to be paid by yourself directly*'. It added though that '*should the construction works not be undertaken and the project suspended for any reason, then all the above costs will be claimed and will be duly payable by you.*' The Complainant replied to that email on the same date, confirming that he was in the process of organising his construction loan and that he understood the costings provided and he asked that Inbuilt provide a construction contract for production to his bank.

24. Approval for the stage 3 design documentation was submitted by the Architect to the DRC in late October or early November and final DRC approval was obtained on 22 November 2017.
25. On 22 November 2017, the Architect sent to the Complainant (who was at the time overseas) a text message, stating that the Complainant was required to pay \$35,000 for the construction documentation, and engineering and building surveying fees.
26. The following day, on 23 November 2017, Mr. Williams sent to the Complainant an invoice for \$35,000 for various matters, including the '*provision of architectural plans for construction.*'
27. On 27 November 2017, the Complainant made a part payment of \$7,000 to Inbuilt.
28. In December 2017, the Complainant met with Mr. Williams. During that meeting the signed a contract with Inbuilt for the '*Complete construction documentation for Tan House, including all documents for building permit and all other approvals.*' The contract price was \$31,818.18 plus GST, being \$35,000 in total.
29. The May 2016 Fee Proposal contained the following relevant information:
 - The property address;
 - The client details;
 - Details for the design scope of services;
 - Details regarding the DRC approval process and town planning requirements;
 - The lump sum fee;
 - Hourly charge out rates for additional services;
 - Identifies the external consultants required for the completion of the architectural drawings & approvals and;
 - Authorisation form for client signature.
30. The May 2016 Fee Proposal does not contain the following matters required under the Victorian Architect's Code of Professional Conduct:
 - The Architect's registration number (noting that the Architect was not registered when the fee proposal was accepted and the terms of engagement were not amended after the Architect became registered);
 - Timeframes for the provision of services;
 - How the Architect would inform the Complainant of progress in the provision of services;
 - A provision requiring the Architect to inform the Complainant of how a change to the services will affect the professional fees for the services;
 - How the Architect could obtain the Complainant's authority to change the services;

- How variations to the agreement may be made;
 - A reservation of the right of the architect to withdraw from the provision of services;
 - How the agreement could be terminated and for what reason.
31. Further, the May 2016 fee proposal did not, nor was it amended to, reflect the arrangement that was reached between the Complainant, the Architect and Inbuilt as referred to in paragraphs 9, 15, 16 and 19-21 namely that some or all of the fees for the work carried out by the Architect in relation to building permit documentation, construction documentation and construction phase services would be paid by the Complainant to Inbuilt.

Facts relating to Allegation Four

32. In late 2017, the Complainant became aware that cost to build the dwelling using the plans approved by the DRC exceeded his budget. He decided to sell the property.
33. The Complainant refused to pay the remaining amount payable under the Inbuilt Contract, which amount incorporated the cost of the work undertaken by the Architect and other external consultants in respect of the building permit documentation and construction documentation.
34. In or around April 2018, the Architect became aware by a third party that the Complainant had listed the Property for sale with Jellis Craig without her knowledge. The advertisement for the Property indicated that it was to be sold 'with plans and permits'. The Architect contends that the Complainant was not entitled to use her drawings for the purposes of an advertising campaign without her prior permission.
35. On 18 April 2018 the Complainant emailed the Architect indicating that he would pay the disputed amount if he was given the right to use the architectural plans prepared by the Architect, he stated as follows:
- 'I am making preparation to pay the outstanding amount of \$28k into your trust account with your lawyer. However, before I do that, I would like to receive a confirmation letter from your lawyer to say that once payment is received that I will have the right to use all drawings that Ink Studio has prepared for me...'*
36. On 20 April the Complainant sent an email to the Architect stating as follows:
- 'Believe it or not, I will always pay the overdue. I was Hurt and it has taken me until now to let go. With lots of meditation. I sincerely hope that the house will be built as it has been blessed and you and Neil are beautiful souls despite what I have said in my anger. And I did not stop giving blessings to you, it was hard for me but I did it. I did let go.'*
37. On 15 May 2018 the Architect sent to the Complainant an email in which she demanded payment of the amount she claimed was outstanding. She did not specify what that amount was or to whom specifically she contended the amount was owed. The Complainant took her demand to relate to the amount of \$28,000 that remained owing under the Inbuilt Contract and which related in part

to preparation by the Architect of the construction drawings. In that email, the Architect stated, among other things:

'... This year your sugary façade of almost 2 years has revealed your true nature; one of disrespect and selfishness; far from any Buddhist sense of integrity, or in fact any integrity or decency to which I know well and experience as an Australian.

...May I also point out to you that such evidence will clearly show your manipulation and game playing...

...I strongly urge you to honour your client obligations and act conscionably and correct this most disrespectful situation which has caused distress and inconvenience to quite a few professionals. If your belief in Buddhism is real, I would imagine you would not want to have this kind of karma in your life.'

38. The Complainant has subsequently sold the Property. The Complainant has not paid the remainder of the fees owed and remains in dispute with Inbuilt regarding the unpaid fees.
39. The following works were completed by the Architect:
 - (a) Stage 1 Approval granted by the Mullum Creek DRC
 - (b) Feng Shui Approval granted by Dr Zhu (La Trobe University)
 - (c) Stage 2 Approval granted by the Mullum Creek DRC
 - (d) Town Planning Endorsement granted by Manningham City Council
 - (e) Building Permit Approval for Construction endorsed by Tekcon Group
 - (f) Stage 3 Approval granted by the Mullum Creek DRC

Findings

42. At the hearing of the matter on 2 March 2020, the Architect, through her legal counsel, entered a plea of guilty to both the allegations made against her. The Tribunal, being satisfied that the facts are sufficiently and accurately set out in the Statement of Agreed Facts submitted by the parties, found the allegations proven.

Submissions as to penalty and costs

43. Counsel for the Architect made written and oral submissions in respect of penalty, submitting that the Tribunal should take into consideration the following relevant factors:
 - (a) The Architect pleaded guilty and accepted responsibility for her conduct, avoiding the need for a contested hearing and the expenditure of resources that would entail;

- (b) There are no prior adverse findings made against the Architect;
 - (c) The Architect was inexperienced at the time of the offending conduct, having only just become registered;
 - (d) That these proceedings have had a significant impact on the Architect in terms of legal costs, stress and anxiety, and had caused her to learn a valuable lesson about the importance of professional conduct when providing architectural services.
44. In respect of Allegation 1, the Architect's counsel submitted that the Architect deeply regretted the confusion arising from the Architect's Agreement with the Complainant and attributed it to her lack of experience during the early part of her career, as well as her lack of attention to detail arising from her attempt to juggle this project with other non-architectural work and night school required for her architectural accreditation.
45. In respect of Allegation 4, the Architect acknowledged that the way she expressed herself in the subject correspondence was not appropriate in any circumstances and the investigation of her conduct caused her to carefully assess what she did wrong and how she wished to conduct herself in her future practise as an architect. Accordingly, it was submitted that the risk of her re-offending in this way was low and the need for specific deterrence is reduced.
46. Counsel for the Architect submitted that the Tribunal should give primacy to the principle of general deterrence, as specific deterrence has already been achieved in this case. The Architect's career has been disrupted and negatively impacted as a result of the investigation, she had been forced to carefully evaluate her conduct, and had lost confidence in her own abilities. The Tribunal was accordingly urged to impose a caution as an appropriate penalty in respect of both allegations.
47. In respect of costs of the Inquiry, which were calculated to be in excess of \$20,000, Counsel for the Architect submitted that the Tribunal should exercise its discretion and not make a costs order against the Architect, on the basis that the Architect pleaded guilty, was not currently working and had limited capacity to pay. In the event that the Tribunal was to make a costs order, it was submitted that the quantum should be appropriately reduced to reflect that two of the allegations initially brought against the Architect had been withdrawn.
48. Counsel Assisting the Tribunal also made submissions referring to the facts of the case, the relevant factors the Tribunal should consider in determining the appropriate penalty (which were consistent with the submissions made on behalf of the Architect), and that the conduct of the Architect in this case was not considered to be at the severe end of the scale. It was submitted that a caution would be an appropriate penalty in the circumstances.

Determination

49. The Tribunal, having conducted an Inquiry into the matters raised in the Notice dated 12 November 2018, issued to Sandra Nervegna, Registered Architect No. 19444, of Ink Studio Pty Ltd, Suite 6, 207 Lygon Street, Carlton, Victoria 3053, pursuant to section 33 of the Act, now makes the following determinations:

- a) In respect of Allegation 1, the Tribunal finds the Architect failed to comply with the requirements of clause 4(2) of the Code and therefore pursuant to Regulation 9(1) of the *Architects Regulations 2015* was guilty of unprofessional conduct within the meaning of section 32(c) of the Act. The Tribunal has determined to caution the Architect.
- b) In respect of Allegation 4, the Tribunal finds the Architect failed to comply with the requirements of clause 17 of the Code and therefore pursuant to Regulation 9(1) of the *Architects Regulations 2015* was guilty of unprofessional conduct within the meaning of section 32(c) of the Act. The Tribunal has determined to caution the Architect.
- c) The Tribunal determines that the Architect is to pay an amount of \$5,000.00 to the Board in respect of legal costs, pursuant to section 58 of the Act, which payment is to be made within 3 months of the date of this determination.
- d) Pursuant to its powers under section 32(i) of the Act, the Tribunal determines that the Architect shall undertake the following further education for the purposes of professional development:
 - (i) The Architect is to prepare and provide to the Board a written report within twelve months of this determination (or such period as otherwise determined by the Board). The report is required to show a thorough understanding by the Architect of all the processes and the professional obligations required by the architect in the carrying out of an architectural commission for a single residential (domestic) project.
 - (ii) All stages of the commission, as set out in the current Client-Architect Agreement issued by the Australian Institute of Architects Victorian Chapter, must be addressed.
 - (iii) The project could either be within the Architect's own practice, OR a project within an established architectural practice. The Architect would be required to observe and record the observations on a weekly basis.
 - (iv) The report must be completed to the satisfaction of the Board.

Reasons

- 50. The Tribunal accepted the submissions made on behalf of the Architect as to penalty and for those reasons was of the view that a caution was an appropriate penalty in this case.
- 51. The Tribunal determined that it was appropriate to require the Architect to undergo the further education specified for the following reasons:

- (a) The evidence in the case showed that the Architect did not have a good understanding of her obligations in so far as client-architect agreements were concerned and the requirements of the Code in general. The Architect conceded that her breach was in large part occasioned by her lack of experience.
- (b) The Architect submitted that the investigation of her conduct in this matter had caused her significant stress and anxiety leading to a loss of confidence in her own ability.
- (c) The Architect expressed the intention to continue to carry out commissions for residential (domestic) projects.
- (d) The Tribunal is of the view that the proposed professional development would assist the Architect to improve her knowledge and experience, enable her to demonstrate her understanding of her obligations under the Code, re-build her confidence in fulfilling her professional obligations on future commissions, and ensure that the standards and integrity of the profession are maintained.

A handwritten signature in black ink, appearing to read 'Drago Dragojlovic', is written over a horizontal dotted line.

Drago Dragojlovic – Tribunal Chair

Dated: 6 April 2020