IN THE COURT OF APPEAL OF NEW ZEALAND

CA529/2016
[2017] NZCA 458

BETWEEN	JEREMIAH MCLANAHAN AND E-LYN TAN Appellants
AND	THE NEW ZEALAND REGISTERED ARCHITECTS BOARDS Respondent
	STEPHEN MCDOUGALL Second Respondent

Hearing:	6 June 2017 (further submissions received 20 September 2017)
Court:	French, Winkelmann and Brown JJ
Counsel:	H N McIntosh for Appellants T Sissons for First Respondent J M Morrison for Second Respondent
Judgment:	17 October 2017 at 10.00 am
Reissued:	18 December 2017

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment is set aside.

C The decision of the first respondent dated 23 September 2015 is quashed in respect of the appellants' 23 heads of complaint that were dismissed, on the recommendation of the investigating committee, solely on the basis of r 62(a) of the Registered Architects Rules 2006.

D An order is made directing the first respondent to make a decision under r 70 of the Registered Architects Rules 2006 in respect of those 23 heads of complaint the subject of order C.

E The first and second respondent must pay the appellants one set of costs as for a standard appeal on a band A basis and usual disbursements.

F Costs in the High Court are to be dealt with in that Court in light of this judgment.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The Registered Architects Rules 2006 (the Rules) prescribe a code of minimum standards of ethical conduct for registered architects and a disciplinary procedure for addressing complaints about architects.[1] The first respondent, the New Zealand Registered Architects Board (the Board), is charged with the administration of disciplinary proceedings.[2]

[2] The disciplinary process is explained in more detail below.[3] In essence, when the Board receives a complaint about a registered architect, the Board must either refer the complaint to an investigating committee or dismiss it on one of seven specified grounds set out in r 62 of the Rules. If it is referred to an investigating committee, the investigating committee must investigate the matter and recommend to the Board that the complaint either be referred to a disciplinary committee or dismissed on one of the same seven grounds set out in r 62. If the Board then decides to refer the matter to a disciplinary committee, the disciplinary committee must hear the matter and decide whether there are grounds for disciplining the architect under s 25 of the Registered Architects Act 2005 (the Act) and, if so, what recommendation to make to the Board

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1 The Registered Architects Rules 2006 are made by the New Zealand Registered Architects Board pursuant to s 67 of the Registered Architects Act 2005.
2 See pt 4 of the Registered Architects Rules.
3 See [22]–[34] below.

about penalty. The Board must then decide whether to confirm or vary these recommendations.

[3] In this case the Board, acting on the recommendations of an investigating committee, dismissed a complaint made by the appellants against the second respondent, Mr McDougall. Dissatisfied with that outcome, the appellants then issued judicial review proceedings in the High Court. The application for judicial review was declined by Collins J.[4]

[4] The central issue on the appellants' appeal is whether, when dismissing the appellants' complaint, the Board erred by importing and applying an evaluation of the strength of the evidence to support the complaint in dismissing the appellants' complaint.

The facts

[5] In September 2012 the appellants decided to purchase the property at 21 McFarlane Street, Mount Victoria, Wellington. Their intention was to demolish the old single dwelling, sub-divide the land and build two new houses, one of which would be their family home and the other would be sold off the plans.

[6] After a number of discussions about the project with Mr McDougall, a registered architect practising in Wellington in a firm called Studio of Pacific Architecture (the firm), Mr McDougall sent the appellants a letter setting out the firm's offer to provide architectural services for the project. The appellants responded with a detailed list of their aspirations for the project, following which Mr McDougall commenced work on the feasibility, concept design and preliminary design phases of the engagement.

[7] Within a few months the relationship between the appellants and Mr McDougall began to deteriorate. The appellants were concerned about the high cost of the work and what they considered to be serious errors by Mr McDougall.

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4 *McLanahan v The New Zealand Registered Architects Board* [2016] NZHC 2276.

Eventually the appellants terminated the engagement. The terminated contract is the subject of a civil claim by the firm in the High Court.

[8] In March 2014 the appellants decided, irrespective of the outcome of the contractual dispute, to lay a complaint about Mr McDougall with the Board. After considering the complaint lodged on 5 March 2014, the Board advised them on 29 August 2014 that the complaint had been dismissed on the grounds that it was "probably vexatious". The appellants asked the Board to reconsider its decision but the Board declined to do so.

[9] In October 2014 the appellants filed an application for judicial review of the Board's decision. However, that application did not proceed to hearing because an agreement was negotiated which resulted in the appellants discontinuing their judicial review application on the basis that the Board would refer their complaint to an investigating committee.

[10] On 5 February 2015 the Board established an investigating committee comprising a professor of architecture, a registered architect and a consumer representative (a lay person) with extensive experience as a member of regulatory and disciplinary bodies. During the course of its investigation the investigating committee received approximately 3000 pages of evidence and submissions. It received a one hour presentation from the appellants and met with Mr McDougall for approximately two hours.

[11] On 21 September 2015 the investigating committee recommended that the Board dismiss the complaint primarily on the ground in r 62(a) of the Rules that there was "no applicable ground of discipline under section 25(1)(a) to (d) of the Act". The Board accepted the investigating committee's recommendation and dismissed the complaint on 23 September 2015.

The ambit of the appeal

[12] In the High Court, Collins J identified as a key issue the nature of the threshold for referring a complaint from an investigating committee to a disciplinary committee. The Judge stated:[5]

> The issue is whether the investigating committee is required to recommend that the Board refer a matter to a disciplinary committee if it finds the complaint discloses a prima facie case of disciplinary offending, or whether the investigating committee is required to determine there was a "real prospect" of a disciplinary charge succeeding before recommending disciplinary proceedings.

He concluded that, when viewed from a purposive perspective, the proper threshold was whether or not there is a real prospect of the architect being found guilty of a disciplinary offence.[6]

[13] Applying that standard, he rejected the various grounds for review. He further concluded that, even if he had found that the investigating committee and the Board had made reviewable errors, he would not have quashed the decisions or directed reconsideration.[7] In the Judge's view, the objectives of the disciplinary process for architects, namely to ensure professional standards are maintained in order to protect clients, the profession and the broader community, would not be served by allowing the dispute to continue.

[14] At the hearing before us submissions were advanced on six agreed issues. They included the question of the correct evidential threshold test to be applied by an investigating committee when investigating a complaint referred to it under the Rules in force at the relevant time.[8]

[15] On that issue, the appellants contended for the "prima facie" case approach apparently applied by the investigating committee. The respondents supported the

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5 At [116].
6 At [129].
7 At [162].
8 In this judgment we refer to the provisions of the Registered Architects Rules as they were at the time the complaint was made. They have been significantly amended by the Registered Architects Amendment Rules 2015 (the 2015 Rules), most of which came into effect on 29 May 2015. Some of the relevant changes are noted in the context of discussion of particular rules.

threshold accepted by Collins J of a real prospect of a disciplinary finding against the architect. All parties' submissions assumed that the competing tests were relevant to the ground for dismissal of a complaint under r 62(a), namely no applicable ground of discipline.

[16] Our post-hearing consideration caused us to question that assumption. We considered it arguable that r 62(a) served a much more limited function in the nature of a jurisdiction sieve. Hence in a minute dated 22 August 2017 we requested written submissions on the issue whether r 62(a) is solely concerned with the situation where, even if the facts alleged in a complaint were true, they cannot provide a reason for disciplining an architect.

[17] In the further submissions received, while the appellants contended that the rule was so confined, both respondents submitted that in the statutory context a purposive approach was required to render the legislation workable. Before addressing those submissions we first review the statutory context.

The statutory regime

[18] To achieve its purpose, the Act requires a code of ethics and a complaints and disciplinary process to apply to a registered architect.[9]

Grounds for discipline

[19] The grounds for discipline are specified in s 25(1):

> **25 Grounds for discipline of registered architects**
>
> (1) The Board may (in relation to a matter raised by a complaint or by its own inquiries) take any of the actions referred to in section 26 if it is satisfied that—
>
> (a) both of the following matters apply:
>
> (i) a registered architect has been convicted, whether before or after he or she is registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more; and

[9] Registered Architects Act, s 3(b).

(ii) the commission of the offence reflects adversely on the person's fitness to carry out the work of a registered architect; or

(b) a registered architect has breached the code of ethics contained in the rules; or

(c) a registered architect has practised as a registered architect in a negligent or incompetent manner; or

(d) a registered architect has, for the purpose of obtaining registration (either for himself or herself or for any other person),—

(i) either orally or in writing, made any declaration or representation knowing it to be false or misleading in a material particular; or

(ii) produced to the Board or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or

(iii) produced to the Board or made use of any document knowing that it was not genuine.

Code of ethical conduct

[20] Part 3 of the Rules contains a code of minimum standards of ethical conduct for registered architects in four parts: standards relating to the public, standards relating to the client, standards relating to the profession and standards relating to other registered architects.

[21] The standards related to clients include provisions related to care and diligence,[10] confidentiality of clients' affairs,[11] conflict of interest[12] and terms of appointment.[13] The standard related to the profession states that a registered architect must pursue his or her professional activities with honesty and fairness.[14]

Disciplinary regime

[22] Part 4 of the Rules specifies the process for the discipline of registered architects. Complaints are to be in writing, specifying the provision in s 25(1)(a) to

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10 Registered Architects Rules, r 49.
11 Rule 52.
12 Rule 53.
13 Rule 50.
14 Rule 54.

(d) of the Act and, if applicable, provision of the code of ethical conduct that the complainant believes has been breached.[15] As noted, there are potentially three layers of process applicable to a complaint:

(a) preliminary investigation by the Board through a complaints officer;[16]

(b) investigation by an investigating committee; and

(c) determination by a disciplinary committee.

[23] We discuss each layer of the process in turn.

(a) Preliminary investigation

[24] As soon as practicable after receiving a complaint the Board must carry out "an initial investigation of the complaint in accordance with rule 63" and either refer the complaint to an investigating committee or dismiss the complaint on a ground in r 62.[17] Rule 62 states:[18]

> **62 Grounds for not referring complaint to investigating committee**
>
> The Board may dismiss a complaint without referring it to an investigating committee if—
>
> (a) there is no applicable ground of discipline under section 25(1)(a) to (d) of the Act; or
>
> (b) the subject matter of the complaint is trivial; or
>
> (c) the alleged complaint is insufficiently grave to warrant further investigation; or
>
> (d) the complaint is frivolous or vexatious or is not made in good faith; or

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15 Rule 59(2)(d).

16 We adopt the term "preliminary" instead of the term "initial", which appears in the subheading before r 61, because of the confusion associated with the use of the term "initial investigation" in both rr 61 and 68 (stage (a) and (b) of the disciplinary process).

17 Registered Architects Rules, r 61.

18 Under the 2015 Rules the grounds on which a complaint may be dismissed at the "preliminary investigation" stage are now confined to two situations: (a) the Board has received a prior complaint on the same subject matter and has already dealt with, or is dealing with, that prior complaint; or (b) the Board considers that it does not have jurisdiction to determine the complaint.

> (e) the complainant does not wish action to be taken or continued; or
>
> (f) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or
>
> (g) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint arose.

[25] In practice the Board itself neither carries out the preliminary investigation nor makes the decision on receipt of the recommendation. The procedure is detailed in r 63:

> **63 Way in which decision on whether or not to refer complaint to investigating committee must be made**
>
> The Board must carry out an initial investigation of a complaint against the grounds in rule 62 in the following way:
>
> (a) the Board must notify the person complained about of the general nature of the complaint before commencing the investigation; and
>
> (b) the complaints officer must carry out the initial investigation of the complaint and recommend to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 62; and
>
> (c) the complaints officer, or chairperson of investigating committees, may seek to verify the information provided in the complaint by a statutory declaration from the complainant; and
>
> (d) after considering the complaints officer's recommendation, the chairperson must decide whether the complaint should proceed or should be dismissed on a ground in rule 62.

[26] The Board must notify the complainant and the person complained about of the decision and the reasons for it and, unless the complainant is to be dismissed, appoint an investigating committee under r 90 and refer the complainant to that committee.[19]

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[19] Registered Architects Rules, r 64.

(b) *Investigating committee stage*

[27] When the decision is to proceed to the investigating committee stage, an investigating committee must investigate the matter and make a recommendation to the Board under r 68.[20] The powers of the investigating committee are stated in r 66:

> **66 Powers of investigating committee**
>
> An investigating committee may—
>
> (a) make, or appoint a person to make, any preliminary inquiries it considers necessary:
>
> (b) engage counsel to advise the committee on matters of law, procedure, and evidence:
>
> (c) request the person complained about or the complainant to provide to the committee, within a specified period of at least 20 working days that the committee thinks fit, any documents, things, or information that are in the possession or control of the person and that, in the opinion of the committee, are relevant to the investigation:
>
> (d) take copies of any documents provided to it:
>
> (e) receive any evidence that the committee thinks fit.

The investigating committee may explore alternative dispute resolution for complaints.[21]

[28] The alternative outcomes from the investigating committee's investigation echo those of a complaints officer's investigation in r 63. Rule 68 provides:

> **68 Investigating committee must make recommendation to the Board**
>
> An investigating committee must, as soon as practicable after completing an initial investigation of a complaint or inquiry, make a recommendation to the Board to—
>
> (a) refer the matter to a disciplinary committee; or
>
> (b) dismiss the matter on a ground in paragraphs (a) to (g) of rule 62.[22]

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[20] Rule 65.

[21] Rule 67.

[22] The seven grounds in r 62 are preserved in r 69 of the 2015 Rules as the grounds upon which the Board may dismiss a complaint at the investigating committee stage.

(Footnote added.)

[29] Irrespective of the recommendation from the investigating committee, the Board must make a decision on the complaint for itself and notify the complainant and person complained about of the decision and the reasons for it.[23] However, if the Board contemplate referring a complaint to a disciplinary committee, it must first observe r 69 which states:[24]

> **69 Board must give person complained about opportunity to respond**
>
> If the Board proposes to refer a complaint or inquiry to a disciplinary committee, the Board must—
>
> (a) notify the person complained about of the reasons for the proposed decision; and
>
> (b) give the person complained about a reasonable opportunity to make submissions on the matter.

[30] In cases where r 69 applies, assuming that the architect takes up that opportunity to make submissions, the Board will then have before it more material than was available to the investigating committee.

[31] The Board is required to make its decision whether or not to refer the complaint to a disciplinary committee as soon as practicable.[25] If its decision is to refer the complaint, it must appoint a disciplinary committee under r 91 and refer the matter to that committee.[26]

(c) Disciplinary committee stage

[32] A disciplinary committee is required to conduct a hearing, decide whether or not there are grounds for disciplining the person complained about under s 25 and, if so, what recommendation to make to the Board about any penalty to be imposed under s 26.[27] The powers of a disciplinary committee are found in r 73 and are broader than those of the investigating committee:

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23 Registered Architects Rules, rr 70 and 71.
24 Under the 2015 Rules the Board's obligation to give the architect the opportunity to respond is at the point at which a decision is made to refer a complaint to an investigating committee: r 65.
25 Registered Architects Rules, r 70(a).
26 Rule 71.
27 Rule 72.

73 Powers of disciplinary committee

A disciplinary committee may—

(a) make, or appoint a person to make, any preliminary inquiries it considers necessary:

(b) engage counsel, who may be present at a hearing of the committee, to advise the committee on matters of law, procedure, and evidence:

(c) request the person complained about or the complainant to provide to the committee, within a specified period of at least 20 working days that the committee thinks fit, any documents, things, or information that are in the possession or control of the person and that in the opinion of the committee are relevant to the investigation:

(d) take copies of any documents provided to it:

(e) request the person complained about or the complainant to attend before the committee, at that person's own cost, on at least 20 working days' notice:

(f) receive any evidence that the committee thinks fit:

(g) receive evidence on oath or otherwise in accordance with section 30 of the Act:

(h) use the power to summon witnesses under section 31 of the Act:

(i) provide information to assist the complainant and the person complained about in obtaining counsel or other advocacy assistance.

[33] Before making the decision under r 72, the disciplinary committee must send details of the complaint to the architect, invite him or her to respond in writing within a specified period, and give the complainant, the architect and any person alleged to be aggrieved at least 30 working days notification of the time and place of the hearing and the right of those persons to be heard and represented at the hearing.[28]

[34] After considering the disciplinary committee’s recommendations the Board must decide either to confirm the recommendation or vary a recommendation after

[28] Rule 74.

complying with r 77.[29] Rule 77 provides that the Board must meet additional requirements if varying a disciplinary committee's recommendation.[30]

The process followed in this case

[35] The passage of the appellants' complaint did not follow the normal course.[31] The Board's first decision to dismiss the complaint at the initial stage, apparently pursuant to r 62(d) of the Rules, was the subject of a compromise whereby, after the appellants filed an application for judicial review, the Board agreed to refer the appellants' complaint to an investigating committee.

The investigating committee's report

[36] After conducting its investigation,[32] the investigating committee produced an 18 page report which, after reciting the background and summarising the issues, recorded its process in this way:

> 3.0 **Investigation process followed**
>
> 3.1 The Investigating Committee investigated the complaint by considering the written complaint, the architect's written response and the complainants['] response to the architect['] s materials, and interviewing the parties on 24 July 2015.
>
> 4.0 **Evidence considered by the Investigating Committee**
>
> 4.1 The architect was sent details of the complaint and given 20 working days to make a written submission. The Investigating Committee considered the evidence received from the complainant and the architect as part of its investigation.
>
> 4.2 All documentary material considered by the Investigating Committee was made available to both parties to the complaint.

[37] The report then addressed each of the 27 individual heads of complaint, making in respect of each a recommendation that the complaint be dismissed as follows:

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29 Rule 76.

30 The Board must first require the disciplinary committee to reconsider the recommendation for the reasons given by the Board, the disciplinary committee must then reconsider the recommendation and report back on whether or not it should be amended, and the Board must then consider that reconsidered recommendation.

31 At [8]–[11] above.

32 See [11] above.

(a) Twenty-three recommendations were for dismissal under r 62(a) alone (no applicable ground of discipline);

(b) One recommendation was for dismissal under r 62(c) alone (insufficiently grave to warrant further investigation); and

(c) Three recommendations were for dismissal under both r 62(a) and (c).

[38] Save for noting that the complaint had been referred to it under r 61(a) of the Rules and that it was not its role to decide disputed questions of fact, the investigating committee did not record any explicit self-direction as to the nature of its function.

[39] In several instances where the investigating committee recommended the complaint be dismissed under r 62(a), the basis for that recommendation was said to be an absence of evidence. For example, in relation to a complaint concerning an alleged error in connection with a 100 mm movement of a property line, the investigating committee stated:

> The suggestion that the architect is said to have given several different reasons for the move is not supported by evidence and in any case would not constitute a failure to act with honesty and fairness unless it was established that he did so deceitfully.
>
> The Committee finds no evidence of deceit and therefore there was no breach of Rule 54.
>
> **The Committee recommends that this claim be dismissed under Rule 62(a) — no applicable ground of discipline.**

[40] In a number of other instances of recommendations for dismissal under r 62(a), the recommendation followed an express conclusion that a prima facie case had not been established. For example, in relation to a complaint concerning invoicing for detailed design that had not yet started, the report concluded in this way:

> The issue before the Committee is whether the architect was acting in the client's interests in undertaking work necessary for the successful approval of the Resource Consent and in developing a fuller understanding of the implications of what was being proposed, or whether, by charging for this work, and failing to provide a full explanation of the need for such work he was acting dishonestly or unfairly.

> The Committee finds that the evidence does not establish a prima facie case of dishonesty and nor does the architect's conduct display unfairness.
>
> **The Committee therefore recommends that this claim be dismissed under Rule 62(a) — that there is no applicable ground of discipline.**

[41] The extent to which the investigating committee reviewed and assessed the "evidence" it received was explained in an affidavit filed by the chairperson of the investigating committee:

> We read the evidence provided to us and listened carefully to the parties' presentations. We genuinely sought to understand the scope and detail of the [appellants'] complaint. We found that we had sufficient evidence to investigate the complaint as a whole and each aspect of the complaint. We considered the evidence conscientiously and made our separate recommendations based on the evidence and our own experience of architectural practice.

The Board's decision

[42] It is common ground that the Board's decision to dismiss the complaint was made two days following the report of the investigating committee. Surprisingly, we were not provided with a copy of the Board's decision. Hence there is no evidence of the process which the Board followed or the reasons for its decision to dismiss the complaint.

[43] The only information before us as to the process followed is in paragraph 6 of the amended statement of claim, which was admitted by the Board in its statement of defence:

> Complaint 45 [the appellants' complaint] was then investigated and resolved by IC15 [the investigating committee] and the Board as follows:
>
> (a) by written report dated 21 September 2015 to the Board, IC15 recommended that all heads of Complaint 45 be dismissed;
>
> (b) on 23 September 2015, the Board resolved to accept that recommendation; and
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> (c) by email dated 25 September 2015, the Board notified the plaintiffs of that resolution.
>
> (together, "**Decision**").

Consistent with the description of those three steps collectively as the "Decision", the submissions treated the investigating committee's report as being the Board's decision.[33]

[44] We have not had the benefit of submissions on the nature of the Board's power of decision. We note that the Board's consideration of a complaint and of an investigating committee's report is not explicitly constrained in the manner in which both the chairperson of investigating committees[34] and the investigating committee[35] are by reference to r 62. We think it improbable, however, that in such a specific regulatory scheme the Board could be entitled to dismiss a complaint on any ground additional to those prescribed in r 62.[36]

[45] However, given the state of the record in the present case, we make no comment on the process adopted by the Board. For the determination of this appeal it suffices to note that it was common ground that the Board accepted the investigating committee's recommendations. Hence the various heads of complaint were dismissed by the Board on the grounds set out at [37]above.

The parties' cases

[46] As noted above, the central issue on appeal is whether, when dismissing the appellants' complaint, primarily in reliance on the ground in r 62(a) of no applicable ground of discipline, the Board erred by importing and applying an evaluation of the strength of the evidence to support the complaint.

[47] The appellants contended that r 62(a) has the limited function of a mere jurisdictional threshold while the respondents maintained that the paragraph empowered the investigating committee (and hence the Board) to evaluate the evidential strength of a complaint and apply some form of threshold test.

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33 The introduction to the appellants' submissions stated the appeal was from a decision of Collins J dismissing the appellant's application for review of "the decision of the Investigating Committee ("IC15") of First Respondent ("Board") dated 21 September 2015 ("Decision").

34 Rule 63(d) of the Registered Architects Rules, set out at [25] above.

35 Rule 68, set out at [28] above.

36 It is now made explicit in r 68 of the 2015 Rules that, on receipt of the investigating committee's report, the Board must either refer the matter to a disciplinary hearing or dismiss the matter on a ground in r 69.

[48] Those competing interpretations were highlighted in the legal advice provided to the Board which was recorded in the "NZRAB Disciplinary Procedures Manual" (the manual). With reference to the ground in r 62(a)[37] the manual states:

> This ground applies in two situations:
>
> (i) where the facts alleged do not come within the grounds set out in s 25(1)(a) to (d), so that, even if the facts alleged were true, they could not provide a reason for disciplining the architect concerned (e.g. the architect is accused of something that has nothing to do with the architectural process, such as being a member of a particular religion or organisation); and
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> (ii) where the evidence does not establish a prima facie case. In other words there is no case to answer. This may occur where the complainant has failed to provide sufficient evidence, or where the architect has provided evidence, which completely refutes the complaint and there is no reasonable dispute about it (e.g. the complainant alleges that no terms of appointment were agreed before the architect undertook professional work; the architect produces an agreement signed by both parties containing all the necessary terms; and the complainant does not challenge the authenticity of the document).

[49] For the appellant Mr McIntosh submitted that on literal, plain and purposive readings r 62(a) was confined to the first situation and that insufficiency of evidence was not a ground for dismissal within the ambit of r 62(a).

[50] While acknowledging that the meaning contended for by the appellants was available on a literal interpretation, both Mr Sissons for the Board and Mr Morrison for Mr McDougall supported the analysis in the manual that r 62(a) applied in both situations. In their submission a purposive interpretation supported the conclusion that the rule permitted (indeed, in Mr Morrison's case, required) an investigating committee to evaluate the evidence against a threshold test.

[51] Emphasising the meaning of the words "trivial", "grave", "frivolous" and "vexatious", Mr Sissons submitted that the further grounds in r 62(b), (c) and (d) were inadequate to deal with cases where either there was no evidence to support the complaint, incontrovertible evidence to answer the complaint, or simply insufficient evidence to justify a full hearing before a disciplinary committee. He contended that

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[37] Rule 69(a) of the 2015 Rules.

it cannot have been the legislature's intention that complaints with no realistic prospect of being upheld should nevertheless have to proceed to a full hearing unless they qualify for dismissal under r 62(b) to (d).

[52] He argued that if meaning is to be given to the investigating committee's obligation to conduct an investigation with all its attendant powers, one is led to the conclusion that its essential role is to evaluate the evidence for and against in order to see whether there is a realistic prospect of a disciplinary charge being proved. Colloquially, is the complaint a runner? If r 62(a) is spent when an applicable ground of discipline in the jurisdictional sense can be ascertained at the outset simply on the face of the complaint, Mr Sissons questioned what would be the point of obtaining evidence and submissions from the architect.

[53] In a thoughtful submission, Mr Morrison observed that r 62 is not happily drafted having regard to the fact that it serves the dual purposes of:

(a) stating the screening test by which the Board may dismiss a complaint without reference to an investigating committee; and

(b) stating the grounds on which the investigating committee must make a recommendation to the Board to refer or dismiss the complaint after it has been investigated.

[54] Pointing out that, if r 62 is given exactly the same meaning for each of the first and second stages, it would undermine the investigating committee's investigation under r 66 to the point of being a meaningless exercise, he submitted that r 62 must be construed as allowing and requiring the investigating committee to evaluate the evidence ascertained from its investigation. He submitted that this proposition applied not only to r 62(a) but also to the other grounds for dismissal in r 62(b) to (d), observing that a different view would have the consequence that the investigating committee would be bound by the Board's prior determination following the preliminary investigation.

[55] Mr Morrison sought to demonstrate the impracticability of r 62(a) having a single meaning by reference to a hypothetical scenario of a complaint of serious misconduct about architect X which, on the face of the complaint, raised an applicable ground of discipline and could not be dismissed at the first phase on the grounds in r 62(b) to (d). However a case of mistaken identity was revealed at the investigating committee stage such that the complaint should have been directed at architect Y. Mr Morrison suggested that the only proper course would be for the committee to recommend dismissal under r 62(a) because the threshold of establishing the identity of the architect had not been met.

[56] Mr Morrison mounted an alternative argument that the investigating committee was entitled to make its recommendations for dismissal on other grounds which were not relied upon in its report. He identified a number of heads of complaint that were dismissed on the basis of r 62(a) in respect of which the investigating committee could equally have concluded in terms of r 62(c) that the relevant complaint was insufficiently grave to warrant a further investigation.

Analysis

The meaning of r 62(a)

[57] The word "applicable" is commonly used as a drafting technique for distinguishing an appropriate item from among a group of possible candidates.[38]

[38] The usual meanings of the word "applicable" are "able to be applied (to a purpose etc)", "having reference, relevant", "suitable, appropriate": see Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) at 102.

Such usage can be seen in the Act's provisions relating to applicable minimum standards for registration as an architect.[39]

[58] The use of the negative in r 62(a), in conjunction with the reference to s 25(1)(a) to (d), has the opposite function to the selection technique. The function of the paragraph is to state the circumstance where none of the qualifying grounds of discipline in s 25(1) apply which could justify the Board imposing a disciplinary penalty in s 26.

[59] We consider that the word is used in r 62(a) in its usual sense of "relevant" or "pertinent". The meaning conveyed is that the complaint lodged under s 59 does not raise a matter to which any of the grounds of discipline in s 25(1) extend. Such a meaning is entirely apt given the rule is seated in the preliminary phase where it serves what Mr Morrison described as a "screening test" in the nature of an early jurisdictional sieve, rejecting at the outset complaints which cannot fit within the s 25(1) grounds.

Two different meanings?

[60] While that may be the obvious meaning of the paragraph, the respondents argue that the broader scheme of the disciplinary process necessitates a different interpretation of the paragraph at the second inquiry phase. As noted, they argue that evidential evaluation must be allowed at the second stage, as otherwise the investigating committee processes, in particular the tasks it performs of collecting and reviewing extensive evidence, and the second decision by the Board would be meaningless. Both the committee and the Board would be constrained to addressing the same criteria and so would reach the same answer.

[61] As the analysis of the Rules reveals, the two phases of the disciplinary regime which precede the disciplinary committee stage are curiously similar. The first phase, the "preliminary investigation" stage, involves what is described as an "initial

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39 Registered Architects Act, s 4, definition of "applicable minimum standards for registration", and ss 12–15.

investigation"[40] by a complaints officer[41] who makes a recommendation to the chairperson of investigating committees.[42] The second phase involves what is also described as an "initial investigation"[43] by an investigating committee, which then makes a recommendation to the Board.

[62] Both phases of inquiry provide for what Mr McIntosh described as a "default outcome" in that the only recommendations open to the investigating body are either referral to the next stage or dismissal on specified grounds. Significantly, the specified grounds for dismissal are the same at both phases by virtue of the cross-references to r 62 in rr 63[44] and 68.[45]

[63] Hence this is not an instance of the same phrase being utilised in multiple statutory provisions. Rather there are dual cross-references to a single provision. We note that the phrasing of the cross-references is not precisely the same. Rule 63(b) and (d) refer to "a ground in rule 62" while r 68(b) refers to "a ground in paragraphs (a) to (g) of rule 62". However, we consider there is no significance in the difference and no submission was made to that effect. That then is the context for the competing views of the appellants and the respondents on the issue whether the various grounds in r 62 can bear different meanings at the different phases of initial investigation.

[64] In response to Mr Morrison's argument that an evidential evaluation must be permitted by r 62(a) at the second phase because otherwise the investigating committee's investigation would be a meaningless exercise, Mr McIntosh pointed to the inherent difficulty in interpreting r 62(a) as having different (indeed opposed) meanings, namely:

(a) at the first phase, the absence of an applicable ground of discipline (the actual words of the rule); and

40 Rule 63(b) of the Registered Architects Rules, set out at [25] above.
41 Who must be a registered architect: Registered Architects Rules, r 87(2)(a).
42 Registered Architects Rules, r 63(b).
43 Rule 68.
44 See [25] above.
45 At [28] above.

(b) at the second phase, the existence of an applicable ground of discipline on the basis of an initial investigation but one for which the evidence is not sufficiently strong to warrant disciplinary action (applying a contextual or purposive gloss to the actual words).

[65] In our view the appellants' submission is correct. It is not inconceivable that the same phrase deployed in different parts of a statute could be attributed different meanings because of the particular context. However, a phrase which appears only once in a statute or regulation cannot bear two distinctly different meanings by virtue of the fact that there are cross-references to it in multiple other provisions.

[66] We consider that the power of the investigating committee to consider and recommend dismissal of a complaint on the ground in r 62(a) is confined to considering whether the circumstances which form the basis of a complaint would, if established, qualify as one of the grounds of discipline specified in s 25 of the Act about which the Board must be satisfied before taking any of the actions referred to in s 26. That power is no more extensive than the power exercisable at the first phase. It is confined to the first of the two situations described in the manual.[46] Consequently we do not accept that r 62(a) confers a power on an investigating committee to form a judgment whether or not a prima facie case is established, as described in the second situation in the Manual.

[67] In our view, the grounds in r 62 that empower an investigating committee to engage to any degree with the sufficiency or merits of the complaint are to be found elsewhere, namely those in r 62(b), (c) and (d). Of those three, the one which primarily imports the application of an evidential threshold is (c), namely that the alleged complaint is "insufficiently grave to warrant further investigation".

[68] Those words envisage that the investigating committee will weigh the gravity of the complaint against the implications which would follow if the complaint was referred to a hearing before the disciplinary committee. The wording is similar to that in former s 101 of the Law Practitioners Act 1982 which authorised the District

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46 At [48] above.

Council or a Committee to make a charge against a practitioner if in its opinion the case was “of sufficient gravity to warrant the making of a charge”.

[69] We do not agree with Mr Morrison’s contention that the investigating committee or the Board would be bound by the prior determination at the preliminary stage of the chairman of investigating committees acting on the recommendation of the complaints officer. They cannot be bound by that original view because the decision has to be made again, against a different evidential background. Thus, for example, in the context of the consideration of the degree of gravity under r 62(c) it would be perfectly possible for the conclusion to be drawn at the first phase that further investigation was required but for a different conclusion to be reached following the investigating committee’s fuller inquiry.

[70] Nor do we agree that the mistaken identity hypothetical scenario advances the respondents’ case. A complaint is specific to a named architect.[47] When the mistake was discovered at the investigating committee stage, we consider that dismissal could be recommended under r 62(c) and possibly r 62(d). A more likely outcome would be that r 62(e) would be engaged — the complainant would not wish the application to be continued in respect of architect X and would instead lodge a fresh complaint against architect Y.

The investigating committee’s recommendations

[71] There was only a single instance in the report of a recommendation to dismiss the complaint solely by reference to the ground in r 62(c). It concerned the complaint that in breach of r 54 (honesty and fairness) the architect’s fees charged for the preparation of resource consent documents were higher than estimated. Because the architect’s fee was discounted to a level reasonably close to the original estimate of $20,000 the investigation committee, appropriately in our view, concluded that the difference of $1,710.15 was insufficiently grave to warrant further investigation.

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[47] Registered Architects Rules, r 59(2)(b).

[72] While we did not hear argument on the issues, at first blush we consider that the three other instances of recommendation for dismissal of the complaint under r 62(c) were justified:

(a) Amenity deck area error — an allegation of a mathematical error in the calculation of the amenity deck area.

(b) Unnecessary quick consent error — an allegation that the architect unnecessarily causing the complainants to apply for a quick demolition consent at a cost of $1,000.

(c) Access decks — an allegation that the appellants' complaint that the architect had valued the external aspect of the house from the street more than their mandate for cost and functionality and failed to put the access decks on the costs savings list.

[73] Those three complaints were the subject of a recommendation for dismissal also on r 62(a). At least in respect of the first and second of those complaints we do not consider that r 62(a), as we have construed it, was a proper basis for recommending dismissal of the complaint. Indeed we consider that in respect of those two matters there was substance in the allegation in the amended statement of claim that there was an error of law in:

> Dismissing the complaints … simultaneously in each case on two logically incompatible bases, ie [Rule] 62(a) and [Rule] 62(c).

However, that particular allegation did not carry through to the content of the appellants' argument presented in this Court.

[74] It follows that we disagree with Collins J's view at [123] of the High Court judgment that the r 62(a) criterion required the investigating committee to take the further step of deciding if there were sufficient grounds to refer the architect to a disciplinary committee for breach of the code or for practising in a negligent or incompetent manner. So far as the sufficiency or merits of the complaint was concerned, the investigating committee's power to recommend dismissal was confined to r 62(c) (assuming that r 62(b) or (d) were not applicable).

[75] Similarly, we do not agree with the Judge's view at [127] that the purpose of r 62 includes enabling the investigating committee to reach a judgment on whether or not material before it justifies recommending an architect be referred to a disciplinary committee if that involves an evidential assessment on some basis other than provided for in r 62(b), (c) and (d).

The way forward

[76] As noted above,[48] the investigating committee's report recommended that four heads of complaint be dismissed in reliance on the ground in r 62(c). However 23 heads of complaint were the subject of recommendations for dismissal on reliance on the ground in r 62(a) alone. In most instances the basis for the recommendation was stated to be an absence of evidence to support the complaint, although a number of recommendations acknowledged evidence in support of the complaint but stated that it did not establish a prima facie case of a ground of discipline under s 25 of the Act.

[77] It is clear in our view that most, if not all, of the 23 recommendations applied the second of the two approaches recited in the manual.[49] In making recommendations on that basis we consider that the investigating committee exceeded its powers given that, unlike in the case of the other four recommendations, the investigating committee did not also invoke r 62(c) in support of its dismissal recommendations.

[78] Given the terms of r 68 with its default mechanism as to the form of a recommendation, we consider that, if none of the other grounds in r 62 applied, the only proper recommendation which was available to the investigating committee in respect of those 23 heads of complaint was to refer those matters to a disciplinary committee.

[79] It is idle to speculate about the view which the Board may have formed upon receipt of recommendations pursuant to r 68(a) to refer the 23 heads of complaint to a disciplinary committee. The Board would have been required to make a decision as soon as practicable under r 70. However, if the Board had proposed to refer some or

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48 At [37].
49 At [48] above.

all of them to a disciplinary committee, it would be necessary for the Board to notify Mr McDougall of the reasons for its proposed decision and to give him a reasonable opportunity to make submissions on the matter. In the circumstances that did not occur.

[80] For the appellants it was contended that the appropriate remedy would be to refer the complaint in its entirety back to the Board with a direction that it be referred directly to a disciplinary committee. The Board submitted that if the investigating committee, and thus the Board, erred in relying upon r 62(a), when they could reasonably have made the same decision relying on r 62(c) or (d), then this Court would be justified in dismissing the appeal in the exercise of discretion in the same fashion as Collins J in the High Court.[50]

[81] We do not agree with the submissions for either party. We consider that the appropriate course is to make an order quashing the decision of the Board in respect of the 23 heads of complaint that were dismissed, on recommendation of the investigating committee, solely on the basis of r 62(a).

[82] A further order should then be made directing the Board to make a decision under r 70 of the Rules in respect of those 23 heads of complaint. Save in one respect, we do not consider that it is appropriate to express any views on the proper approach to be adopted by the Board in undertaking a decision under r 70 given that we have not had the benefit of submissions on the issue. However we note that if the Board proposes to refer the complaint to a disciplinary committee it must first comply with the requirements in r 69.

[83] The one issue on which further comment is appropriate is the interpretation of r 50. That issue, which concerns one of the heads of complaint that is to be referred back to the Board, was one of the six agreed issues[51] addressed at the hearing.

The meaning of r 50

[84] Rule 50 states:

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50 *McLanahan*, above n 4, at [162]–[164].

51 See [14] above.

50 Terms of appointment

A registered architect must not undertake professional work unless the registered architect and the client have agreed the terms of the appointment, which may include but need not be limited to,—

(a) scope of work:

(b) allocation of responsibilities:

(c) any limitation of responsibilities:

(d) fee, or method of calculating it, and terms of trade:

(e) any provision for termination:

(f) provision for professional indemnity insurance.

[85] The point of contention is whether, as the appellants contend, r 50 requires all the terms of appointment to be agreed before work commences or whether it is sufficient, as the High Court accepted, that there is agreement on only the essential terms of appointment.

Factual context

[86] We briefly explain the factual context to the conclusions of the investigating committee and the High Court.

[87] The firm's offer to provide architectural services to the appellants was contained in an eight-page letter of 16 November 2012 headed "21 MacFarlane Street: confirmation of fee proposal". That fee proposal covered the following 12 headings:

(a) description of project;

(b) budget;

(c) scope of services;

(d) outline programme;

(e) fees;

(f) other terms;

(g) conditions of engagement;

(h) additional services — resource consent (including subdivision);

(i) additional services — general;

(j) other conditions;

(k) assumptions; and

(l) conclusion.

[88] The "scope of services" summarised the services to be provided to the appellants and was divided into seven parts: feasibility; concept design; preliminary design; developed design; detailed design; procurement (tendering and negotiations); and contract administration.

[89] The "conditions of engagement" stated:

> The provision of our services for your project will be based on the New Zealand Institute of Architects Agreement for Architect's Services Long Form (AAS 2011) and this letter should be read in conjunction with that document. Please note that the contents of this letter take precedence over the agreement. We will follow up this letter with a full copy of AAS 2011, to be issued to you at a later date or if we are successful.

[90] The appellants responded in an email of 23 November 2012 headed "21 MacFarlane — basic plan", commenting on a number of aspects and including a detailed brief of their requirements. The appellants concluded:

> I hope this is sort of what you are looking for to start the process. Happy to do anything else you need as well.

[91] Although Mr McDougall started work on the project soon after receipt of that email, the firm did not send AAS 2011 to the appellants. Collins J recorded that after a meeting with the appellants and Mr McDougall on 29 August 2013, at which the appellants' concerns about errors in billing records were raised, the appellants

reviewed the 16 November 2012 letter and realised they had never received a copy of AAS 2011.

[92] They then requested that document from Mr McDougall, who provided it on 4 September 2013, ten months after the commencement of work. The appellants said that they did not agree to all the AAS 2011 terms and requested further meetings to sort out the proper contractual basis for their relationship. It was that state of affairs that formed the basis for the appellants' complaint that Mr McDougall had breached r 50.

The investigating committee's report

[93] In its report the investigating committee concluded in this way:

> The Investigating Committee is of the view that the fee proposal dated 16 November 2012 was a sufficiently detailed offer to meet the requirements of Rule 50 'Terms of Appointment' and that the clients accepted the fee proposal by continuing to engage with the architect in the development of the project and by paying him for that work. Therefore no breach of the Rule 50 was committed.

The High Court's ruling

[94] On review Collins J observed that, while the investigating committee's reasons for recommending against a prosecution in relation to this aspect of the appellants' complaint appeared to involve a degree of confusion, the lack of clarity in the committee's reasons did not justify quashing that aspect of the recommendation.[52] He reasoned:

> [152] First, I agree with Mr Morrison when he submitted that plainly there was a contract between [the appellants] and the firm. That agreement was in the form of the letter of 16 November 2012 from the firm setting out is proposal and its reference to AAS 2011. [The appellants] accepted the firm's letter of engagement. The agreement was given effect to by Mr McDougall and the firm providing architectural services and the payment of those services for almost a year. The essence of this aspect of [the appellant's] complaint is that the AAS 2011 terms were not provided until some 10 months after the commencement of the agreement.
>
> [153] When the AAS 2011 terms were provided, the only real issue raised by [the appellants] concerned the level of professional indemnity insurance that was required to be provided.

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52 At [151].

> [154] Regardless of the uncertainty about a specific provision, when it comes to the enforcement of the contract, or to claim damages for alleged breach of the contract, the investigating committee was entitled to conclude the parties had agreed to terms of appointment which enabled Mr McDougall to undertake professional work in accordance with r 50. Rule 50 does not require agreement on all terms. The investigating committee was entitled to conclude that in this case, the essential elements of r 50 had been complied with.

[95] Although Collins J refers to "the essential elements of r 50", we do not consider that he was referring to the requirements contained in r 50(a)–(f) being mandatory. This would not sit with his conclusion that, despite the level of professional indemnity insurance cover not being agreed and therefore r 50(f) not being satisfied, the essential elements of r 50 had been complied with. It appears what was mean was that there must be agreement on the essential terms of appointment, of which r 50(a)–(f) are merely examples.

The parties' contentions

[96] Mr McIntosh contended that the phrase "the terms of the appointment" referred to the particular terms of appointment between the parties involved. Hence all the terms expressly desired by either architect or client must be agreed before work commenced. Such an interpretation achieved the purpose of lessening the risk of problems arising later in the relationship and required the architect to ensure that the parties considered the terms of their relationship in advance.

[97] He submitted that the interpretation preferred by both the Board and the High Court failed to achieve the rule's consumer protection purpose; it left the line of compliance uncertain. It gave rise to unanswered questions such as: how many terms must be agreed upfront before the rule is satisfied? What would happen if some terms were expressly not agreed?

[98] In support of Collins J's interpretation of r 50, Mr Morrison contended that the appellants' formulation necessitated initial and continuing agreement on all terms of the contract for its duration. In his submission, the consequence would be that any post-contract dispute as to the meaning, effect or application of a term would automatically be a breach of r 50. This was submitted to be untenable.

Discussion

[99] As noted above,[53] r 50 is one of the standards related to the client in the code of minimum standards of ethical conduct in pt 3 of the Rules. Unlike most of the minimum standards of conduct in pt 3, which are expressed as affirmative obligations,[54] r 50 prohibits activity, namely the performance of professional work, prior to the completion of a preliminary step, namely agreement as to the terms of the architect's appointment.

[100] While r 50 does not purport to regulate the terms of appointment as such, it does identify six aspects of the terms of engagement in r 50(a)–(f), all of which can be viewed as central to the professional relationship and its duration. The rule states that the terms of appointment agreed "may include but need not be limited to" those six specified terms.

[101] Thus, as Mr McIntosh contended, read literally the rule provides that those six terms are optional but non-exhaustive. Such optionality is surprising given the significance of such terms for any architect and client relationship. It is all the more so since r 51 provides that a registered architect must be remunerated solely by the fees and benefits specified in the appointment or employment agreement.

[102] We harbour the suspicion that the literal meaning of r 50 was not the result the draftsperson intended. A more likely intention is that the six identified terms listed in r 50 were to be mandatory while additional terms were to be optional. If that was the intention, then the intent may also have been to constrain the commencement of work without prior agreement to the six terms identified.

[103] Can r 50 be interpreted by construing the prohibition as being limited to cases where there is an absence of agreement on the six identified terms? While there have been cases where the word "may" has been construed in the particular context to mean "must", in its ordinary usage the word is permissive.[55] We did not receive any

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53 At [21].

54 For example, r 49 imposes an obligation that a registered architect "must perform his or her professional work with due care and diligence".

55 *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [31]–[32].

submission to the effect that the circumstances here were such that the rule should be construed in a directory fashion limited to the six items listed in the rule.

[104] Rather the submissions for the appellants and Mr McDougall were confined to the question whether all the terms or only some so-called essential terms need to be agreed before work may commence.

[105] The precondition for undertaking professional work is unqualified —the "terms of appointment" must have been agreed. Nor is there any accommodation allowed for preliminary or insubstantial work in anticipation of agreement as to the appointment terms. In both respects, comparison can be made with the more confined requirements for lawyers in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which state:

> **Provision of information**
>
> 3.4 A lawyer other than a barrister sole must, in advance [of commencing work under a retainer], provide in writing to a client information on the *principal* aspects of client service including the following:
>
> (a) the basis on which the fees will be charged, when payment of fees is to be made, …
>
> (b) the professional indemnity arrangements of the lawyer's practice. …
>
> (c) the coverage provided by the Lawyers' Fidelity Fund and if the client's funds are to be held or utilised for purposes not covered by the Lawyers' Fidelity Fund, the fact that this is the case:
>
> (d) the procedures in the lawyer's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how the Law Society may be contacted in order to make a complaint.
>
> …
>
> 3.5 A lawyer other than a barrister sole must, prior to undertaking *significant work* under a retainer, provide in writing to the client the following:
>
> (a) a copy of the client care and service information set out in the preface to these rules; and

> (b) the name and status of the person or persons who will have the general carriage of, or overall responsibility for, the work; and
>
> (c) any provision in the retainer that limits the extent of the lawyer's or the practice's obligation to the client or limits or excludes liability. The terms of any limitation must be fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances.
>
> …
>
> (Emphasis added and footnote omitted.)

[106] Given its terms, we do not consider that r 50 can be read as contemplating that work may commence when some terms of appointment have been agreed but others have not. Hence if an architect comes to an arrangement with a client whereby some terms are left open for agreement at a later date, as envisaged in *Stevenson Brown Ltd v Montecillo Trust,*[56] then in commencing work the architect will be acting in contravention of the prohibition in r 50.

[107] In our view, r 50 makes it a precondition of commencing work that the terms of appointment in their entirety are first agreed. Such an approach serves a consumer protection function by requiring that the terms of appointment, whatever they may contain, are settled before architectural work commences and liability for fees is incurred. The practical consequence of r 50 is that, having commenced work, an architect will be estopped from subsequently seeking to introduce additional terms of appointment if a complaint of contravention of the rule is to be avoided.

[108] We appreciate that a prohibition in such absolute terms may seem severe. However its purpose is to promote certain standards to protect both parties in the architect–client relationship as an element of the code of minimum standards of ethical conduct.[57]

[109] Furthermore, it is important to recognise that, because of the subject matter filter inherent in the disciplinary procedure,[58] instances of minor departures from the

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56 *Stevenson Brown Ltd v Montecillo Trust* [2017] NZCA 57 at [24], citing *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [51].

57 As is made explicit in the heading to pt 3.

58 As discussed at [67] and [74]–[75] above.

standard in the rule should not give rise to disciplinary consequences. Where there has been substantial compliance with r 50 but a complaint is nevertheless made, the investigating committee is vested with the responsibility to recommend that the complaint be dismissed on the grounds of triviality or insufficient gravity as provided in r 62(b) and (c) respectively.[59] By that means, the high standard set by r 50 is tempered by the power of dismissal in cases where a disciplinary consequence is clearly unwarranted.

Result

[110] The appeal is allowed.

[111] The High Court judgment is set aside.

[112] The decision of the Board dated 23 September 2015 is quashed in respect of the appellants' 23 heads of complaint that were dismissed, on the recommendation of the investigating committee, solely on the basis of r 62(a) of the Rules.

[113] An order is made directing the Board to make a decision under r 70 of the Rules in respect of those 23 heads of complaint the subject of the order in [112].

[114] The first and second respondent must pay the appellants one set of costs as for a standard appeal on a band A basis and usual disbursements.

[115] Costs in the High Court are to be dealt with in that Court in light of this judgment.

Solicitors:
Gibson Sheat, Wellington for Appellants
Lundons Law, Blenheim for First Respondent
Rainey Collins, Wellington for Second Respondent

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[59] This power is now given to the Board, with dismissal able to be exercised under r 69(b) or (c) of the 2015Rules.