

# **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

## **CIVIL DIVISION**

### **DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D681/2004

### **CATCHWORDS**

Domestic Building List; Retainer of architect; Conflicts with proprietor; Offer to resign and refund fees; Offer accepted; Bargain effective

<b>1ST APPLICANT</b>	Jolin Nominees Pty Ltd
<b>2ND APPLICANT</b>	Jolin Holdings Pty Ltd
<b>3RD APPLICANT</b>	Two Point Pty Ltd
<b>4TH APPLICANT</b>	John E. Muratti
<b>5TH APPLICANT</b>	Linda Muratti
<b>RESPONDENT</b>	Tom Paciocco
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	M.F. Macnamara, Deputy President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	13, 14 and 15 June 2006
<b>DATE OF ORDER</b>	5 July 2006
<b>CITATION</b>	Jolin Nominees Pty Ltd v Paciocco (Domestic Building) [2006] VCAT 1296

### **ORDER**

- 1 Within 14 days of this day the parties must bring in short minutes to give effect to these reasons.
- 2 **Set down for further hearing 9.30 am, 24 July 2006 at 55 King Street, Melbourne.**
- 3 Costs reserved.

**M.F. Macnamara  
Deputy President**

**APPEARANCES:**

For Applicants

Mr Joe Forrest of Counsel instructed by  
Schetzer Brott & Appel

For Respondent

In person

## **REASONS**

### **BACKGROUND**

- 1 Mr Paciocco has had a distinguished architectural career. After taking out his primary degree at the University of Melbourne he lectured and tutored architecture students. He has served on the Architects Board. At one stage he operated a large architectural practice in Melbourne. He gave that up to pursue post graduate studies in Italy and those further studies qualified him to specialise in architecture in the developing or Third World. As it was he says a health problem with one of his children required him to return to Melbourne. Upon his return he established a small one man practice based at his suburban residence.
- 2 Mr John Muratti has been involved in property development since 1959. His business activities are now carried out through Jolin Holdings Pty Ltd and Jolin Nominees Pty Ltd which are two of the applicants in the present proceeding. Mr Muratti is a registered builder himself but prefers to take the role of developer, leaving the building to others. In 2002 Mr Robert Di Manno who is also a registered builder and was a friend of Mr Muratti, introduced him to Mr Paciocco. Mr Paciocco said that Mr Di Manno had acted as builder in many projects in which Mr Paciocco was architect and that he had worked with him successfully over the years and with Mr Di Manno's father before him. Mr Paciocco and Mr Di Manno are equal shareholders in a company known as Tom Pat Pty Ltd which is in the course of completing a development in High Street, Northcote.
- 3 Mr Di Manno arranged a meeting between Mr Muratti and Mr Paciocco at 22 French Avenue, Brunswick, a property being developed by Jolin Nominees Pty Ltd. Mr Paciocco says the meeting was at a restaurant in Lygon Street, Carlton. According to Mr Muratti, he and Mr Paciocco discussed the possibility that Mr Paciocco would put a fees proposal to his company for work at 22 French Avenue, Brunswick. Mr Paciocco denies that there was ever any question of his doing work for Jolin relative to that property.
- 4 According to Mr Muratti, Mr Paciocco gave him a description of his qualifications and professional attainments with a view to '*selling*' himself. Mr Muratti said that in response to a direct question from him, Mr Paciocco said that he had professional indemnity insurance. Mr Paciocco denies having said any such thing, in fact he held no such insurance and was of the view that under the laws that then stood, there was no legal obligation upon a practising architect in Victoria to carry such insurance. He says by reason of statutory changes since, an architect is now obliged to have that insurance and he now holds such a policy. At the time of the meeting Mr Muratti's usual architect was Mr Peter Sgourakis. He was acting as architect for the property at 22 French Avenue, Brunswick and in January 2003 he prepared plans in support of a planning permit application to re-

develop a property at 35 to 41 Argyle Street, Fitzroy, converting an existing warehouse into six, two bedroomed townhouses. Mr Muratti says that Mr Sgourakis lodged the application for the necessary permit in early January 2003. Mr Muratti said that he mentioned this development in passing to Mr Di Manno and later Mr Di Manno said that Mr Paciocco had made enquiries with the Planning Department of Yarra City Council (the responsible authority considering the permit application relative to 35-41 Argyle Street) and had been told that no permit would be granted for the proposed development '*as there were only eight parking spaces instead of the required 10 parking spaces*'. Mr Muratti says that Mr Di Manno suggested he give Mr Paciocco '*a go*' and that Mr Paciocco would be able to obtain a permit for six, two bedroomed residential units with 10 car parking spaces.

- 5 Mr Muratti therefore agreed to attend a meeting with Mr Paciocco at the Tankerville Arms Hotel at the corner of Johnston and Nicholson Streets, Fitzroy. The Tankerville as appears, became the established meeting place for Mr Paciocco and Mr Muratti.
- 6 Mr Muratti says that at the meeting Mr Paciocco claimed to be well connected and highly regarded in the Planning Department of Yarra City Council, that he would be able to re-design the development so as to provide 10 car parking spaces for the six, two bedroomed units, providing a sketch plan at no cost and would be able to obtain the permit '*in record time*'. According to Mr Paciocco, Mr Muratti's initial intention was not to develop the warehouse into six, two bedroomed townhouses but rather to demolish it and develop the site with three bedroom units. He denied that he ever made an approach to the City of Yarra to ascertain the progress of the application lodged by Mr Sgourakis on behalf of Mr Muratti's company. Mr Paciocco said that the first meeting which he had with Mr Muratti was about the possibility that he, Mr Paciocco would act as architect for the 35-41 Argyle Street project. The meeting at the Tankerville Arms Hotel was the second occasion on which the possibility of him acting as architect for this project was broached. He denied claiming to be well connected with the Planning Department of Yarra City Council or suggesting that Mr Sgourakis be discharged as architect. He denies promising to get a permit in record time. Mr Paciocco agrees that he told Mr Muratti that he would not be able to act for him unless Mr Muratti's company discharged Mr Sgourakis' retainer.
- 7 Mr Paciocco wrote a letter to Mr Muratti as a director of Jolin Holdings dated 31 January 2003. The letter referred to '*our discussions last Thursday*' and continued '*I would be pleased to confirm my appointment as architect for the above project [35-41 Argyle Street Fitzroy]*'. The scope of the work described as:

Concept design, design development and architectural documents for re-development of existing warehouse at 35-41 Argyle Street Fitzroy'.

- 8 The re-development was to comprise six residential two bedroom units with secure parking including visitor parking. The letter said:

Documentation will be prepared for town planning submission to City of Yarra only. Documents will not be suitable for tender or building permit application. The documents will be incorporated into subsequent architectural services, if required.

- 9 The letter observed that the fee for full architectural services would be fixed at the order of five to six percent of the cost of works but that the first stage of the works commanded a fixed fee of \$18,000. \$6,500 was payable for the preparation of the sketch design proposal, \$8,000 for preparation and lodging of documents with the City of Yarra and \$3,500 upon obtaining the planning permit. These fees were exclusive of GST. The letter said that Mr Paciocco's fee would include his time in instructing and co-ordinating additional consultants but that the consultants' fees were payable by Jolin directly to the relevant consultant. Under the heading '*Appeals*' the following appeared:

The fees quoted do not include attendance at any appeals hearings, but include all discussions and consultations with the Local Authority and resident groups.

- 10 Under the heading '*Time Frame*' Mr Paciocco said:

We aim to lodge the application within four weeks of commissioning. We are not in a position to indicate timeframe for the planning process – this will depend on advertising and the nature of objections lodged to the proposal, if any.

- 11 Mr Paciocco's letter had opened with the statement '*I am glad of your enthusiasm for the development proposal submitted* [at the meeting at the Tankerville Arms]'. Mr Muratti responded on Jolin Nominees letterhead on 3 February. His letter began:

I note your reference to my enthusiasm which, I hasten to advise, is due more to the concept you have produced and to your assurances of success rather than to the prospect of my having to dismiss Peter Sgourakis, withdraw the application he submitted to the City of Yarra and start all over again if I were to engage you at this stage.

- 12 The letter continued:

I advise that after careful consideration I accept your assurances that if I engage you, you will do for my company and I much more than Peter has in the past with the Miller Street project or would and I also accept your advice (based on your enquiries with the Council) that Peter's proposal to the Council will not be accepted whilst yours will be and that given your knowledge of the Council, you will be able to get the permits in record time.

- 13 Mr Muratti said that he would '*regretfully dismiss Peter Sgourakis, pay him the balance and withdraw the present application*'. He concluded that obviously that meant that he accepted '*your quote in full in the hope and*

*trust that our association will be long and fruitful*'. Mr Paciocco does not seem to have replied to this letter, denying any of the assertions in it, for instance that he promised to obtain the permit for the development '*in record time*' or that he had made enquiries of the Planning Department of the City of Yarra as to the progress and prospects of the permit application lodged by Mr Sgourakis.

- 14 The next project for which Mr Paciocco accepted appointment from the Murattis was the re-development of the Muratti family home at 120 St Georges Road, Toorak. Mrs Muratti was registered as the sole owner of this property under the *Transfer of Land Act 1958*. In 2002 arrangements had been made for the house to be renovated. According to Mr Muratti his company, Jolin Holdings Pty Ltd, was appointed builder and Mr Di Manno was project manager. Mr Di Manno advised in January 2003 that the renovations would be difficult and costly '*and that it would be better to build a new dwelling*'. According to Mr Paciocco the existing house at 120 was a relatively poorly built project structure from the 60s and 70s and was simply not durable enough to bear the proposed renovations.
- 15 Mr Muratti said he then had discussions with Mr Paciocco, appointing him to act as architect for a new house at 120. On 1 February 2004 Mr Muratti or his company paid Mr Paciocco \$8,000. In March 2003 Mr Muratti said that Mr Paciocco suggested that in lieu of the new house at 120 a re-development entailing three, two bedroomed townhouses be proposed. Mr Muratti says he expressed concerns because of likely objection from his neighbour, Mr Fisher, who was himself an architect and whose father had been a councillor of the former City of Prahran. Mr Paciocco forwarded a letter to Mr Muratti as a director of Jolin Holdings, referring to discussions and stating:

I would be pleased to confirm my appointment as architect for the project to develop the site [at 120 St Georges Road Toorak] as a three unit development.

- 16 The same text as quoted from the earlier proposal/confirmation letter appeared under the headings '*appeals*' and '*timeframe*'. Once again the fees for full architectural services were said to be in the order of five to six percent with a fixed fee of \$18,000 for the '*first stage of the work*'.
- 17 Mr Muratti says he replied on behalf of Jolin Nominees Pty Ltd in a letter dated 28 March 2003 stating:

As previously discussed and agreed I hereby confirm my acceptance of your proposal and quote provided that in the event that the proposal is not acceptable to Council and Linda and I decide to revert back to building a residence (for which we have already paid you sums totalling \$18,000) you will accept the sum of \$8,000 in full payment for any work you have carried out in respect to the three unit development.

- 18 Mr Paciocco denies receiving this letter. The proposed unit development did not proceed. There was some uncertainty in the evidence as to what happened. In his witness statement Mr Muratti said that in August or September 2003 Stonnington City Council, the Responsible Authority considering the permit application for No. 120 St George's Road issued a Notice of Refusal. Under cross-examination Mr Muratti said that Mr John Cicero of Best Hooper Solicitors, his company's legal advisers on planning matters, had filed a review application based on council's failure to determine the application within the prescribed period under the *Planning and Environment Act* and that Stonnington advised following the filing of this application that it would refuse the application. Mr Muratti said that Mr Cicero's advice was that the review application to this application would fail because Mr Paciocco's proposal included the following design flaws:
- (a) bedrooms which were approximately 2m x 2m; and
  - (b) living areas facing south instead of north
- 19 Mr Paciocco denied that this was an accurate description of his proposal. In cross-examination he took Mr Muratti to the plans for the unit development at 120 with a view to demonstrating, as he saw it, the falsity of the criticism attributed to Mr Cicero.
- 20 Mr Paciocco did not I think agree that the unit proposal was doomed to failure at VCAT. There was no direct evidence as to precisely what Mr Cicero advised. At any rate it is clear that the review application in the Planning and Environment List of the Tribunal was withdrawn and the proposed unit development abandoned.
- 21 Mr Muratti said that he met Mr Paciocco, informed him of his decision and Mr Paciocco agreed to accept '*the amount of \$8,000 that had been noted in my letter of acceptance dated 28 March 2003, in full and final payment*'.
- 22 In October 2003 Mr Muratti agreed to return to the proposal to erect a new house at 120 with Jolin Holdings Pty Ltd as manager and Mr Di Manno as project manager. Mr Paciocco said that Mr Di Manno was in fact foreman rather than project manager but this was denied by Mr Muratti. Mr Paciocco wrote to Mr Muratti as a director of Jolin Holdings on 12 October, referring to a proposed residence at St Georges Road, Toorak, he said:
- I would be pleased to confirm my appointment as architect for the project to the develop the site as a single occupancy, private residence for your family.
- 23 The letter stated:
- The fee exclusive of GST, will be a fixed fee of \$40,000 adjusted for work previously invoiced.

- 24 Under the heading '*timeframe*' the letter stated:

As instructed by you, building permits required for commencement of building works, at beginning 2004, on basis of no town planning application required.

- 25 There was no section in the letter relating to '*appeals*', presumably this was because a single residence was viewed as an '*as of right*' use on the relevant land such that no planning permit would be required and therefore there would be no opportunity for any objection to be lodged or appeal filed. Mr Muratti writing on behalf of himself and Jolin Holdings Pty Ltd on 15 October 2003 accepted Mr Paciocco's proposal. The letter concluded:

We will pay you a total of \$40,000 of which we have already paid you sums totalling \$18,000. The balance (namely \$22,000) to be paid on monthly instalments which would be worked out once we have an idea of the time frame of the project.

- 26 Meanwhile matters had been proceeding slowly with respect to the proposed development at 35-41 Argyle Street. According to the '*timeframe*' proposed by Mr Paciocco with his appointment confirmed by Mr Muratti at the beginning of February 2003 the permit application and supporting plans should have been lodged with Yarra City Council by early March 2003. In fact the plans were not completed until 26 March 2003 and were not lodged until 30 April under cover of a letter from Harlock Jackson Planning Consultants who lodged the documents under direction from Mr Paciocco. Mr Paciocco agreed that he had also failed to live up to his promises under the heading '*timeframe*' with respect to the 35-41 Argyle Street project. He said by this time with the various commissions he had accepted from Mr Muratti and his companies as a single home based practitioner he was overworked and this should have been obvious to Mr Muratti.

- 27 Mr Muratti says that by mid-October 2003 he was becoming '*increasingly concerned*' by the delays in the provision of a planning permit for 35-41 Argyle Street. He said that Mr Paciocco was evasive when pressed on this point. Mr Paciocco says that he made an enquiry of the Yarra City Council who advised him:

That a planning permit would not be issued for 35-41 Argyle Street development because of the proximity of the exhaust from the car body repairs business located on the neighbouring site at 43-45 Argyle Street Fitzroy.

- 28 He said Mr Paciocco advised him either to seek review from this Tribunal or buy the adjoining property at 43-45 Argyle Street. Mr Muratti's account would leave one with the impression that it was only in October 2003 that he became aware of the issue with the exhaust flue next door to 35-41. In truth however he was aware of it at least a year previously. In cross-examination Mr Paciocco took him to plans which entailed moving the

exhaust flue prepared by a firm of mechanical engineers commissioned by Mr Sgourakis when Mr Sgourakis was retained as Jolin's architect for the 35-41 Argyle Street proposal.

- 29 Mr Muratti then contacted a business associate Mr Dal Santo who had been involved in real estate for many years through his company Two Point Pty Ltd which is the third applicant in this proceeding. Mr Dal Santo agreed to become part of a joint venture with Mr Muratti's company to develop 43-45 Argyle Street. Two Point and Jolin Nominees Pty Ltd then purchased 43-45. Mr Muratti says that in mid-November he and Mr Dal Santo met Mr Paciocco to discuss developing 43-45. Following this meeting Mr Paciocco wrote to Messrs Muratti and Dal Santo as directors of Jolin Holdings Pty Ltd and Two Point Pty Ltd stating '*I am pleased to submit a proposal for the [proposed joint venture development existing factory, 43 Argyle Street, Fitzroy]*'. The fee for full architectural work was to be based on a percentage of the cost of the works in the order of five to six percent. '*The fee for this first stage of the work would be a fixed fee of \$25,000*'. The same text relative to appeals was included as appeared in the earlier letter of the proposal/confirmation with regard to the adjacent premises. Under the heading '*timeframe*' the letter stated:

We would aim to lodge the application early in the new year. We are not in a position to identify a timeframe for the planning process – this will depend on advertising and the nature of objections lodged to the proposal, if any.

- 30 Mr Muratti responded in a letter dated 10 December 2003 on behalf of Jolin Nominees and Two Point Pty Ltd stating:

We accept your quote even though it is substantially higher on this project than your quote on 35-41 Argyle Street, on the basis of your assurances of what you are going to do for us and the benefits in engaging you.

- 31 Mr Dal Santo said that he directly enquired of Mr Paciocco as to whether he had professional indemnity insurance and was assured that he did. Mr Paciocco denies giving any such assurance and in fact did not hold indemnity insurance at the time.

- 32 Mr Muratti said that in December 2003 Mr Dal Santo and he met Mr Paciocco and Mr D'Mano at Mr Paciocco's home in Kew. According to Mr Muratti, Mr Paciocco told him that he had prepared most of the documentation required to obtain building permits for the house at 120 St Georges Road and that a building permit would be obtained '*by early 2004*'. Mr Muratti continued:

He also said that he would provide all detailed documentation required to enable Di Manno and I to go to tender prior to and during construction.

33 Mr Paciocco says that Mr Di Manno said to him '*don't do to me what you've done to me in Victoria Street*'. Mr Muratti said that this was a reference to Mr Paciocco's failure to provide detailed drawings to Mr Di Manno promptly on a development in Victoria Street in which they were both working. Mr Paciocco denies that Mr D'Mano said this. The building permit for No. 120 St Georges Road issued on 21 February 2004. Mr Paciocco denied promising the early provision of drawings to enable Jolin to go to tender. He referred to the provision in his letter of offer or proposal dated 12 October 2003 relative to fees where he stipulated for the payment of

The sum of \$10,000 being for preparation and lodging of documents for building permit, minimal documentation for permit requirements, joinery/construction details/schedules to follow progress of construction;

- 34 Mr Muratti claimed that once construction of the house at 120 began it was dogged by a number of difficulties caused by Mr Paciocco. He said there was a design mistake providing a driveway that was too narrow. Mr Di Manno was not properly supervised and so WorkCover inspectors issued a stop order for various breaches of health and safety regulations etc. Mr Pociocco denied that he was obliged to supervise Mr Di Manno. Since Mr Muratti's own company was acting as builder the concept of him as architect, supervising Mr Muratti's own company was unrealistic he said.
- 35 By June 2004 Mr Muratti said that no permits had issued for the proposals either at 35-41 Argyle Street or 43-45 Argyle Street and work at 120 was not proceeding satisfactorily. In early June 2004 Mr Paciocco took his children and his aged mother on a holiday to Italy. Mr Paciocco says that he had told Mr Muratti in 2003 that he proposed working through the Christmas New Year break in 2003-4 and taking his major holiday in June 2004. He says he wrote a letter to Best Hooper when it appeared that there was an imminent hearing in the Planning and Environment List at this Tribunal advising that he would be overseas from early to mid-June until 28 July. This letter was shown as being copied to Jolin. Mr Muratti denied receiving it. According to Mr Muratti he first became aware of Mr Paciocco's trip after he made an advance payment to him in early June. Both Mr Muratti and Mr Dal Santo regarded matters as being at an unsatisfactory stage. There was no permit for 35-41 Argyle Street or for 43-45 Argyle Street. Mr Muratti remained dissatisfied with progress at 120 St George's Road. They say they both believed that by taking a six week overseas holiday Mr Paciocco had effectively abandoned the projects. Consequently Mr Dal Santo and Mr Muratti made a personal attendance at the City of Yarra. They said they found the progress with the two Argyle Street permit applications unsatisfactory. A planning officer, they say, complained that Mr Paciocco was conducting himself like an old fashioned architect and was slow in responding to queries or providing further material. According to Mr Muratti they were told that no permit would

issue for 35-41 ‘unless the building at 43-45 Argyle Street had been substantially demolished’. Mr Muratti complained that there were certain engineering requirements relative to the proposed structure at 43-45 which were not adequately dealt with in the architectural drawings prepared by Mr Paciocco.

- 36 Mr Paciocco returned from his trip on 28 July. He says that he became aware that at a Planning Committee Meeting on the evening of 3 August 2004 Yarra City Council determined to issue a Notice of Determination to Grant a Permit for the development proposal at 43-47 Argyle Street, Fitzroy. It is common ground that a meeting occurred on 5 August and that Mr Di Manno was in attendance. According to Mr Muratti and Mr Dal Santo they attended a meeting on 4 August at the Tankerville Arms at the request of Mr Paciocco. At that meeting, Mr Paciocco tabled the Notice of Determination to Grant by Yarra City Council with respect to the proposed development at 43-47 Argyle Street together with an invoice for architectural fees which he said were now payable because the permit for the development had issued. Mr Paciocco said there was no meeting on 4 August, just a single meeting on 5 August at which he handed the Notice of Determination and invoice to Mr Muratti. If there was a meeting on 4 August, Mr Di Manno was not in attendance. Mr Muratti said that at the meeting on 4 August he expressed grave misgivings and displeasure at the quality of the service which Mr Paciocco as architect was providing to his company and Mr Dal Santo’s company. Mr Dal Santo supports this account. Mr Muratti said that he told Paciocco:

He had to straighten everything out or we would have to take legal action against him for all the loss and damage that he had caused to us.

- 37 He and Mr Dal Santo said, according to Mr Muratti that no further money would be paid to Mr Paciocco ‘until all relevant issues were resolved and all of the problems were addressed and rectified’. According to Mr Muratti, Mr Paciocco said that he needed time to consider and the group arranged to meet again the following day. Mr Paciocco denies that the meeting on 4 August ever took place. Mr Dal Santo says that Mr Muratti told Mr Paciocco ‘that he [Mr Muratti] had had experience in litigation and that he was prepared to recover the damages that Paciocco had caused him’. Mr Dal Santo supported Mr Muratti’s account of the meeting of 4 August. Mr Muratti says he did not accept the Notice of Determination as equivalent to a permit.
- 38 All parties are agreed that the group this time including Mr Di Manno met at the Tankerville Arms on 5 August 2004. On 5 August, according to Mr Di Manno and Mr Paciocco, Mr Muratti complained that the Notice of Determination only referred to the joint venture property at 43-47 Argyle Street. He said he wanted a determination on his property, No. 35. According to Mr Paciocco, Mr Muratti ‘went into a wild rage’. Mr Muratti said that the discussions were tense but businesslike. According to Messrs

Muratti and Dal Santo they continued to air grievances about the professional performance of Mr Paciocco. According to Mr Paciocco and this is supported by Mr Di Manno, the allegations against him were that he was being disloyal, having secret discussions with Yarra City Council, failing adequately to support Mr Muratti's interests in the dispute which had broken out between him and his neighbour Mr Fisher relative to the re-development of a section of No. 120 St Georges Road etc. Mr Paciocco said that Mr Muratti demanded that he, Mr Paciocco had to conduct himself as his employee and show proper allegiance and loyalty. Mr Paciocco said he responded that he gave advice and did not necessarily follow instructions blindly. He was a consultant not an employee. Mr Muratti denies ever characterising Mr Paciocco as an employee.

- 39 According to Mr Paciocco voices were raised to such a degree that the publican directed the party either to calm down or leave the premises. Mr Paciocco took the opportunity to leave, going outside and smoking to try and calm down. Eventually Mr Paciocco says he had risen from the table and:

I then offered John Muratti the opportunity, if he were unhappy, to dismiss my services, that I would tender my resignation without protest, that I was also prepared to return fees paid for services rendered on his outstanding projects. ... John Muratti immediately accepted my later offer without any hesitation.

- 40 Mr Paciocco says he added that Jolin should:

Return all relevant documents to me and that I as architect would retain copyright and possession of the documents and that I would not consent to the use of the documents by other parties.

- 41 Mr Muratti and Mr Dal Santo deny that the issue of copyright was raised at all. Mr Paciocco says that when he raised copyright Mr Muratti:

Erupted into a fit of rage, threatening legal action and my personal destruction.

- 42 According to Mr Di Manno, Mr Paciocco mentioned the copyright issue after he had left the table, turning back to the party as he headed to the door.

- 43 Mr Paciocco says that 5 August was a Thursday. The following Monday he sent a letter to Mr Muratti setting out his position at some length. He said he was:

Greatly offended and surprised at the comments regarding my professional and personal integrity.

- 44 The three matters which he said impugned that integrity were:

- That you have regretted your decision in engaging me as an architect for your project.
- That you would rather just have my drawings and build the thing that you want and not argue with me.

- That you are not convinced that I am acting in your best interest.
- 45 The letter then dealt in some detail with the issue of the conditional permit on 35 Argyle Street, the issue of the boundary fence at St Georges Road (one of the matters the subject of a dispute with neighbour Mr Fisher) and conflicts with Mr Fisher. Toward the end of the letter Mr Paciocco said:
- At this point I offer you my resignation as the architect for your projects. On full payment of my fees for services rendered to date, you are at liberty to the use of my documents as prepared – I will not pursue my rights under copyright law for the documents as prepared.
- 46 Mr Muratti responded in a lengthy letter of the same date. Towards the end of the letter he said:
- At our latest meeting at the Tankerville you have stated inter alia that you would resign and refund to me all moneys we have paid to you to date. You made this statement to me in the presence of others. You now wish to tender your resignation in incredibly unacceptable totally different and self serving terms.
- 47 Mr Murratti said that he did not accept the resignation from Mr Paciocco:
- Unless you are prepared to refund all moneys we have paid you to this date ... as well as your release to any copyrights you may have to the relevant architectural drawings.
- 48 Mr Paciocco responded in a letter dated 10 August 2004. He was greatly embittered, he said, by Mr Muratti's letter of the previous day. He accused Mr Muratti of '*verbal jargon, menacing legal threats, and outrageous demands; mostly based on miss-information (sic), and error*'. The concluding paragraph began:
- John, I do not wish to discuss the contents of your letter, there is no point in doing so with your miotic (sic) vision. I strongly suggest you review some of your statements, which are made on mis-interpretation or error.
- 49 Mr Muratti in his letter of 9 August said that he considered the statements made by Mr Paciocco with regard to the boundary fence at St Georges Road '*highly prejudicial, slanderous and defamatory to myself, Mrs Muratti and to my company, Jolin Holdings Pty Ltd*'. He threatened defamation proceedings. In his letter of 10 August Mr Paciocco said he wished to take up only one item and reply to it:
- Neither in my letter to you, or at any other stage, have I made any comments regarding your good wife. I have the utmost respect for Mrs Muratti and see no need for a demand of an apology to her. Furthermore, nor did I make any slanderous comments. The comments were directed solely at you, and solely to you in writing – I did not mention any other parties, other than Dale Fisher.

50 Earlier in the letter he said:

I did not resign, I merely put the option to you to accept my resignation.

51 Mr Paciocco told me that this sentence referred not to anything that occurred on 5 August but to the terms of his letter of 9 August. In an undated facsimile transmission Mr Muratti acknowledged receipt of Mr Paciocco's letter of 10 August and stated that he had referred matters to his solicitors.

## PROCEEDINGS

52 On 2 September 2004 Mr Paciocco filed an application in the Civil Claims List under C3851/2004 making a claim against Jolin Holdings Pty Ltd and Two Point Pty Ltd seeking the sum of \$5,619.90 for architectural services rendered '*for a planning permit 47 Argyle Street Fitzroy*'. That proceeding was eventually transferred to this List and designated D723/2004. On 6 October 2004 solicitors acting for Jolin Nominees, Jolin Holdings, Two Point Pty Ltd and Mr & Mrs Muratti commenced the present proceeding in this List. The application included attached particulars of demand alleging appointment of Mr Paciocco by one or more of the applicants as architect for a project at 35-41 Argyle Street, Fitzroy, 120 St Georges Road, Toorak and 43-45 Argyle Street, Fitzroy and alleging various breaches of duty in the performance of those retainers. It claimed recovery of loss or damage under various headings including misleading and deceptive conduct. At paragraph 23 an alternative claim was made to the effect that the parties:

Entered an agreement on or about 5 August 2004 in which it was agreed that the respondent, [that is Mr Paciocco] in consideration of the applicants forbearing to sue in respect of the complaints being then made in relation to the projects ... would refund in full the moneys [paid] and forego any claim for unpaid fees in relation to the projects.

53 This agreement was said to be oral and the cause of action was alleged under the heading '*Accord and Satisfaction*'.

54 The disputes were referred to mediation the mediation extending over two days, 24 November 2004 and 8 February 2005 failed to resolve the matter as did a compulsory conference conducted by Member Walsh on 28 April 2006. Following the conference Mr Walsh made orders setting down for separate determination:

The issues referred to in paragraphs 1 – 13 and paragraphs A, B, D and E in the prayer for relief in the amended points of claim dated 20 January 2006.

55 He gave directions for an exchange of material preparatory to the hearing which came on before me on 13 June 2006.

56 The amended points of claim dated 20 January 2006 bring the '*accord and satisfaction*' claim to the forefront as being the first articulated cause of action. The heading above paragraph 7 is '*Accord and Satisfaction* –

*Settlement Agreement*'. Paragraph 7 – 13 allege a settlement agreement made '*in or about 2004*' requiring Mr Paciocco to refund all the moneys paid to him by the applicants in consideration of his being released from all claims by the applicants. Paragraph 9 asserted inter alia that Mr Paciocco was '*estopped from making any claim in relation to [the building projects]*'. It was said therefore that according to paragraph 12 Mr Paciocco was not entitled to make any further claims for payment in respect of the building projects and was estopped from making any such claim (paragraph 13). The prayer for relief included at paragraph A:

An order that the parties have settled their dispute in accordance with the settlement agreement.

B An order for the refund of all moneys paid to the architect by the applicants.

...

D Interest

E Costs

- 57 The parties were agreed that the proper figure for refund if the applicants were entitled to a refund was the sum of \$80,545.45 being the total amount paid to them minus disbursements made by Mr Paciocco and Goods and Services Tax payments.

## FACTUAL ISSUES

- 58 There are therefore substantial inconsistencies between the accounts given by the various witnesses of what did or did not happen on 4 and 5 August 2004. It is difficult therefore to reach any confident conclusion as to what really happened. On the other hand this is a civil proceeding and fact finding is on a balance of probabilities only. It is not necessary for me to be satisfied of anything beyond reasonable doubt or to achieve any sense of moral certainty as to what occurred. In *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 the Full Court of the High Court, Dixon, Williams, Webb, Fullagar and Kitto J were considering the adequacy of proofs that the deceased was killed by reason of negligent driving. The Honours said:

All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probability such an inference might reasonably be considered to have some greater degree of likelihood.

(1951) 217 ALR 1, 6

- 59 I prefer the evidence of Mr Muratti and Mr Dal Santo that there were meetings on 4 August and 5 August rather than that there was but one single meeting on 5 August. When Mr Muratti commenced the proceeding that became D723/2004 he filed the original of the letter from City of Yarra

covering its Notice of decision to Grant a Permit. The original included a black biro notation in handwriting which Mr Paciocco admitted was his own '*copy given to John Muratti on 4th August, 2004 at meeting at 'Tankerville Arms Hotel', Fitzroy*'. In the body of his application he alleges '*on 5th August I had a conflict with John Muratti regarding various projects ...*'. In this application therefore, Mr Paciocco refers to two meetings, one where he tabled the Notice of Determination on 4 August and the second, on 5 August where he '*had a conflict*' with Mr Muratti. In paragraph 68 of his written statement filed in this proceeding, in subparagraph (b) he denied that there was a settlement agreement made '*at the meeting of 5th August 2004*'. In paragraphs (c), (d) and (e) he refers to a meeting on 4th August 2004. I conclude therefore that it is more likely than not that there were two meetings, one on 4 August and two on 5 August, rather than a single meeting on 5 August.

- 60 There were aspects of the evidence of all participants that I found somewhat troubling. In the case of Mr Muratti and Mr Dal Santo I found it of concern that they repeated in identical words particular statements that were allegedly made at these meetings. These identical words were employed spontaneously and even although Mr Dal Santo who gave evidence second was not in the hearing room when Mr Muratti gave his evidence. Conversely when cross-examined about his relationship with Mr Di Manno, Mr Paciocco rather improbably asserted that the company which they had a 50% interest, namely, Tompac Pty Ltd which was undertaking a commercial development in Northcote had been able to secure its development finance from National Australia Bank Limited without either he or Mr Di Manno being required to give personal guarantees of the loan. Mr Di Manno gave what I regarded as far more probable evidence where he said that personal guarantees had been required by the bank together with guarantees from '*other entities*' including trusts. Mr Paciocco's evidence was inconsistent as to whether or not he drafted Mr Di Manno's witness statement. Mr Paciocco's evidence as to what he told Mr Muratti at their initial meetings was inconsistent with what he put to Mr Muratti when he cross-examined him.
- 61 Given that I regard the evidence of Messrs Muratti and Dal Santo as the more reliable on the question of whether there was one meeting or two over the period 4-5 August 2004 I have a general preference for their account of events over the one given by Mr Paciocco.
- 62 In particular aside from my preference amongst the witnesses I regard it as inherently improbable that a man such as Muratti who according to Mr Paciocco himself had the reputation for threatening Supreme Court proceedings at the drop of a hat, could have got through two tense meetings with Mr Paciocco or even a single one without having threatened litigation, at least before the very last moments of the meeting according to Mr Paciocco. Both Mr Muratti and Mr Dal Santo complained that their companies were being financially damaged by holding costs. The narrative

which I have already given shows that upon his own admission and an analysis of the progress of the various projects Mr Paciocco had not lived up to the promises that he made in his letters of engagement under the headings '*time frame*'. The maxim '*time is money*' is at its truest in the world of property development. Again, Mr Muratti clearly believed that with regard to the premises at 35-41 Argyle Street, Fitzroy, he had been promised a permit in '*record time*'. He said so in his letter of acceptance and there seems to have been no denial of that assertion by Mr Paciocco in any contemporary correspondence. In that frame of mind I regard it as highly likely that Mr Muratti would have accused Mr Paciocco of breaching his contract of retainer and threatened litigation and highly improbable that he would not have.

- 63 Mr Paciocco admits that he offered to resign his commission and refund moneys to the applicants in this proceeding and that Messrs Muratti and Dal Santo accepted that offer. It is curious therefore that in the correspondence immediately following the meeting beginning with Mr Paciocco's letter of 9 August 2004 he avoids mentioning this matter at all. On Mr Paciocco's account, this was the very climax of the conflict, the dramatic point at which he walked out. A likely interpretation of the way he chose to frame his post-meeting correspondence was that having a passionate and emotional personality as he himself says he does, he got carried away and made what in the cold light of day soon afterwards seemed to be a most imprudent bargain with his proprietors. In his correspondence he sought to shift his position from the most unsatisfactory ground in which he found himself.
- 64 For reasons which I explain below the outcome of this proceeding does not depend upon whether or not Mr Paciocco turned and raised the issue of contract as he was heading for the door of the Tankerville Arms on 5 August. Given my general preference for the evidence of Messrs Muratti and Dal Santo as to what occurred over the evidence of Mr Paciocco and Mr Di Manno, I think it more likely that the issue of copyright was not raised at the meeting on 5 August at all. It was something raised only later in correspondence.

## **LEGAL ISSUES**

- 65 The applicants frame their claim in this proceeding as one under an arrangement of '*accord and satisfaction*'. In his classic exposition of the concept of accord and satisfaction in *McDermott v Black* (1940) 63 CLR 161 Dixon J as he then was, said:

The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent

to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one.

(1950) 63 CLR 164, 183-4

- 66 Here the applicants claim that the accord and satisfaction has discharged the retainer arrangements with Mr Paciocco and created a new claim in their favour, namely, for the refund of the fees which he received under the discharged retainers. An accord and satisfaction as explained by Dixon J is a contract like any other requiring offer, acceptance, consideration and an intention to create legal relations. The evidence clearly establishes that there was an offer by Mr Paciocco and an acceptance by Mr Muratti on behalf of himself and the other applicants. The putative consideration moving from the applicant was a promise of forbearance to sue. Once again, according to the analysis of Dixon J in *McDermott v Black* a promise may be good consideration for an accord and satisfaction (cf *Howes v Miller* [1970] VR 522 where the Full Court of the Supreme Court considered that the arrangement under consideration required payment of a settlement sum rather than merely the promise of such payment, hence, in the absence of payment there was a mere accord executory).
- 67 The learned editors of *Chitty on Contracts* state:
- A creditor's promise not to enforce a valid claim may be good consideration for a promise given in return.  
*Chitty on Contracts* (28th Edition) [3-044]
- 68 At paragraph [3-050] the editors state:
- If, however, the validity of the claim is doubtful forbearance to enforce it can be good consideration.
- 69 This position stands in contrast to a claim which was known to be without foundation. Forbearance to sue on which would not be good consideration.
- 70 Mr Paciocco's contention that the matters under discussion at the meeting or meetings related solely to issues of loyalty and 'honour' amounts I suppose to a contention that since there was no reference to litigation there was no issue of forbearance to bring suit and therefore no good consideration to render enforceable any promise which he admittedly made to refund his professional fees. Alternatively it might be said that a discussion that turned purely upon matters of 'honour' rather than matters of legality might lead to arrangements being made without an intention to create legal relations.
- 71 I have already found that upon the balance of probabilities there was a threat by Messrs Muratti and Dal Santo on behalf of the applicants to bring legal proceedings for alleged breach of retainer. A 'deal' to prevent such an eventuality in my view is clearly a commercial transaction in which the parties would intend to create legal relations. I accept in favour of Mr

Paciocco that any claim brought by the applicants might be a doubtful one. For instance the engineering drawing to move the flue adjacent to the development site at 35-41 Argyle Street, Fitzroy, commissioned by Mr Sgourakis in 2002 shows that Mr Muratti was aware of the adjacent flue as an obstacle to obtaining planning permission long before he retained Mr Paciocco. In those circumstances it might be said that the obstacles to obtaining a planning permit for 35-41 Argyle Street were pre-existing known to Mr Muratti and independent of any breach of retainer by Mr Paciocco. The merits of the issues relative to the redevelopment at 120 St Georges Road, Toorak were not gone into at the hearing before me. Indeed to have gone into those matters in any detail would have subverted the logic of the order made by Member Walsh for the '*accord and satisfaction*' issue to be separately tried. I did hear enough however to conclude that the actual or alleged grievances held by the applicants against Mr Paciocco were arguable. There was at least a doubtful claim to be brought. A promise not to bring such a claim would be good consideration and not merely illusory. Mason J (as he then was) in *Wigan v Edwards* (1973) 47 ALJR 586, 595 column 1 said that a promise not to bring a claim where the claim was honestly brought and was not vexatious or frivolous would amount to good consideration. His Honour said it was unnecessary for him to decide whether it was sufficient that the claim was honestly brought or whether it was necessary in addition to demonstrate that it was not vexatious or frivolous. On the evidence before me I have no reason to doubt the honesty of the claims made by the applicants against Mr Paciocco both at the time of the hearing and at the meeting or meetings in August 2004. I do not believe that these claims were frivolous or vexatious whether or not they would if the subject of a contested hearing have led to victory for the applicants or Mr Paciocco.

## CONCLUSION

- 72 It follows that the applicants have made out their claim and should be entitled to the remedies which they seek. This conclusion is unaffected by whether or not Mr Paciocco sought f belatedly to raise the issue of copyright at the 5 August 2004 meeting. I incline to the view that he did not as stated above. Once the accord and satisfaction was concluded it was not competent for Mr Paciocco unilaterally to add new terms or set it aside – even only moments later.
- 73 The amount claimed by way of refund is as noted at [57] \$80,545.45. Mr Paciocco's case is that he is not obliged to refund any sums but I did not understand him to disagree with the view that this was the proper sum to refund if he were found liable to refund the fees that he had received.
- 74 The prayer for relief also seeks interest and no calculations

## **RELIEF**

75 Given that this matter will have to be re-listed to consider any consequential matters such as costs, the convenient course is to invite the parties to bring in short minutes to give effect to my reasons and to list the matter before me to consider the form of final orders and consequential matters.

## **COSTS**

76 I have heard no submissions as to costs and so I will reserve them.

MFM:RB