

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL & HUMAN RIGHTS DIVISION  
DOMESTIC BUILDING LIST**

**VCAT REFERENCE NO. D595/2004**

**CATCHWORDS**

*Architect – nature of duty to client – extent of retainer – building surveyor – duty in issuing building permit to ensure a relevant planning permit exists – whether duties breached - loss due to delays arising when work stopped – responsibility for – whether caused by breach of duty of architect - causation*

[2005] VCAT 1051

<b>APPLICANT</b>	Mig Textiles Pty Ltd (ACN 083 111 013)
<b>RESPONDENT</b>	Leon Meyer Architects
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 – 15 April 2005
<b>DATE OF ORDER</b>	1 June 2005

**ORDER**

1. The application is dismissed.
2. Costs reserved.

**SENIOR MEMBER R WALKER**

**APPEARANCES:**

For Applicant	Mr D. Pumpa of Counsel
For Respondent	Mr E. Reigler of Counsel

## **REASONS FOR DECISION**

### **The proceeding**

1. The Applicant (“MIG”) was at material times the owner of a disused factory (“the Building”) constructed on a rectangular block of land (“the Land”) in a lane off Rathdowne Street Carlton which it developed into four three storey town houses and sold. The town houses were designed by the Respondent (“Meyer”) which is and was at all material times a firm of Architects. Meyer also obtained a town planning permit for the development and prepared the working drawings. Shortly after work commenced, at a time when most of the walls of the existing Building had been demolished, the Council intervened to stop the work on the project because the degree of demolition was, it was said, greater than that permitted by the Town Planning permit. As a result of the delay, MIG paid damages to the builder it had engaged and claims to have suffered further losses. It seeks to recover these losses from Meyer in this proceeding, alleging that it was the fault of Meyer that the work was stopped and the delay occurred.

### **Background**

2. The Director of MIG is Mr David Mond (“Mr Mond”). Following some discussions with the principal of Meyer, Mr Meyer, about the proposed development, the latter sent a letter to Mr Mond on 12 September 1997. At this time the Building was owned by Mr Mond’s parents. The letter contains a fee proposal for the architectural work required to redevelop the factory into four units. It divides the work into 5 distinct stages, with the work to be done at each stage set out in some detail and a fee quoted for the work in each stage.
3. The letter contemplated the possibility that Mr Mond might terminate the commission at any stage and I find that that was the intention of both Mr Meyer and Mr Mond. The letter is addressed to “M.I.G. Trading Pty Ltd” which is another company associated with Mr Mond. MIG was not incorporated until 24 June of the following year.
4. The proposed fees were acceptable to Mr Mond and, on 15 October 1997, Mr Meyer lodged an application with the Yarra City Council (“the Council”) for the

redevelopment of the site into 4 Units in accordance with drawings that were submitted with the application.

5. On 16 March 1998, the Council issued a Notice of refusal to Grant a Planning Permit. On 19 March 1998, Meyer lodged an appeal to this Tribunal against the determination to refuse to grant a permit. An experienced planning solicitor, Mr Cicero of the firm of Best Hooper, was engaged to conduct the town planning appeal on Mr Mond's behalf. On 20 November 1998, the Tribunal directed the issue of a permit and pursuant to this decision, the Council issued a planning permit ("the Planning Permit") for the development on 10 December 1998.

### **The planning permit**

6. The Planning Permit required the preparation of plans ("the endorsed plans") in accordance with certain specified conditions, such plans to be endorsed and to form part of the permit. Condition 1 of the Planning Permit provides:

*"The use and/or development as shown on the endorsed plans must not be altered without the written consent of the responsible Authority."*

A note at the foot of the Planning permit states:

*"This property is located in an Urban Conservation Area. A planning permit is required for demolition, repainting, and blasting or any exterior works."*(sic.)

7. The endorsed plans refer to each of the southern wall, the eastern wall and the western wall as "Existing Masonry wall", with a "New Brick Gable Wall" built on top of the eastern and western walls. I agree with Mr Pumpa that these plans indicate that those existing walls are to be retained from the Building, although I think that the plans necessarily required the demolition of the existing brickwork insofar as that would be necessary to allow construction of the penetrations and the limited demolition shown in the plans. The northern elevation shows no indication of existing brickwork and it would seem to be consistent with the plans for the whole of that wall to have been demolished.
8. Significantly, as noted on the Planning Permit, a further planning permit would be required before any demolition could take place although I think it would not

have been required for any demolition necessarily required by the endorsed plans.

### **The Working Drawings**

9. On 18 December 1998, Meyer received authority to proceed to Stage 4. The work that Meyer was engaged to do for this stage is clearly set out in the letter from Meyer to Mr Mond of 12 September 1997. That required:
  - Preparation of architectural specifications.
  - Preparation of a comprehensive set of architectural working drawings for building permit applications for construction purposes.
  - Liaison with building consultant to complete building permit.
  - Co-ordination of other consultants' documentation including conducting consultants' meetings and the incorporation of their documents.
  - Final scheduling of all finishes and fittings.
  
10. On 4 January 1999 Meyer sent Mr Mond a fee proposal from Meyer Consulting Group, Engineers, ("the Engineers") for the engineering work for the project. I note that although they have the same surname, there is no connection between Meyer and the Engineers. The letter from the Engineers containing the fee proposal includes a statement that the Units are to be built within the existing brick walls.
  
11. On 21 January 1999, Meyer sent MIG an account for the architectural work in all of the sketch plan and town planning stages, half of the design development stage and 20% of the working drawing stage. The figures used in this account for the various stages are the same as those set out in the quotation letter of 12 September 1997.
  
12. On some later date which does not appear from the evidence, discussions took place between Mr Mond and a builder, Alan Miller Constructions Pty Ltd ("Miller"), about Miller carrying out the building work for the development. Meyer was not involved in those discussions.

13. According to Mr Meyer's witness statement, during the preparation of the working drawings Meyer sought the advice of the engineer as to the structural integrity of the existing perimeter walls. Meyer's employee architect, Mr Meehan, inspected the site with the engineer and was advised as follows:

- the western wall, which abutted a wall on a neighbouring property and could not have been inspected beforehand from outside, was "shot to pieces" and the entire wall needed to be demolished and replaced.
- The southern wall had bad cracks in one bay and a panel of the wall would need to be demolished and reinstated.
- One half to three quarters of the eastern wall suffered from cracks and "other defects" that warranted its partial demolition and reinstatement.

These alterations were then incorporated in the working drawings. No-one at Meyer appears to have considered whether the working drawings would then be consistent with the endorsed plans that formed part of the Planning Permit.

14. Meyer finished the working drawings in late April 1999. On 5 May 1999, Meyer wrote to MIG advising that the documentation had been prepared for the application for the building permit and requesting a cheque payable to the proposed Building Surveyor, which was Bayside Building services ("Bayside"). The letter does not say what documentation had been prepared but according to Mr Meyer's witness statement, Meyer sent to Bayside on the same day the working drawings, the specifications, the structural and civil engineering drawings and the town planning permit documentation. Bayside did not express any opinion to Mr Meyer that there was any divergence between the endorsed plans and the Working Drawings although in my opinion there clearly was. According to the endorsed plans the walls on the east, west and south were to remain, except insofar as it was necessary to put in the windows, the doorway and the cutaway on the north eastern corner. The working drawings show substantial demolition of the whole of the western and northern walls and three quarters of the Eastern wall.

15. On 21 May 1999, Meyer provided the working drawings (both architectural and engineering) and the specifications to Miller. On 8 June 1999 a full set of these drawings was sent to MIG together with an account for the balance of the

design development and working drawing stage and the engineer's account. Thereupon, Meyer's retainer should have ceased because it had completed all the work that it had been retained to do.

16. On 16 July 1999, MIG became the registered proprietor of the Land.
17. On 4 August 1999, Bayside issued a building permit to Meyer as "Owner or agent", naming one Alma Hill Constructions Pty Ltd ("Alma Hill") as the builder. This is curious and has not been explained. Meyer submitted the application to the Building Surveyor in May. Why did it take two and a half months to issue the permit? Meyer's retainer had ceased and so the Building permit was presumably issued to Meyer because the application for it had been submitted in its name as MIG's agent. Further, although Alma Hill was the builder that eventually constructed the development, MIG did not enter into a building contract with it until the following year. According to Mr Mond's evidence, the builder contemplated at this time (August 1999) was Miller. The cost of the building work is stated in the permit to be \$800,000, whereas the contract price for which Alma Hill was to carry out the work was almost one and a half times that sum. Perhaps the reference to Alma Hill indicates that Mr Meyer thought that company was to be the builder when he submitted the application and he was unaware that Mr Mond was proposing to deal with Miller instead, but there is no evidence about that or any other explanation.

### **The Demolition Permit**

18. On 24 September 1999, one Martian Demolitions Pty Ltd obtained a Building Permit from a different building surveyor, Adrian Wheatley, ("Mr Wheatley") to "Demolish Building". The permit states that the building practitioner to carry out the demolition is to be one Ken Burge. The "Owner" named in this permit is Miller and Martian Demolitions is said to be its agent. According to Mr Meyer's witness statement, he was not involved in that process and had no knowledge of the application until around April the following year. The permit included a hand drawn sketch plan of the Building ("the sketch plan") to be demolished showing the two lanes, the adjoining buildings and the position where a

hoarding was to be erected. Only one wall of the factory is shown on the sketch plan, with the accompanying note:

“THIS WALL TO REMAIN”

In the area of the Building there is the note on the sketch plan:

“SINGLE STOREY BRICK WAREHOUSE TO BE DEMOLISHED  
KNOWN AS 721A RATHDOWNE ST.”

At the top of the on the sketch plan the following words appear:

“BLOCK PLAN FOR THE DEMOLITION OF A SINGLE STOREY  
BRICK WAREHOUSE WITH A CORRUGATED IRON ROOF, AT  
721A RATHDOWNE ST. CARLTON NORTH (NOT TO SCALE)”

19. There are the impressions of two stamps on the sketch plan. The first is that of Mr Wheatley and has a handwritten date of 24/9/99, initials which, when compared with his signature, appear to be those of Mr Wheatley and the number 00/01038/0, which is the number of the demolition permit. The second stamp is that of the City of Yarra Building Service and indicates that the document was received by it on that date.
  
20. There is no evidence as to the authorship of the sketch plan. I accept Mr Meyer's evidence that he was not involved in the application. Since it was Martian Demolitions that applied for the permit it is possible that it was an officer of that company that prepared the sketch plan. Further, the reference to Miller suggests that it obtained the permit on the instructions of Miller. Perhaps it was prepared by an officer of Miller. Significantly, there is nothing in the evidence to suggest that any plan or other document prepared by the Respondent was used in the application for the permit. Indeed, since the sketch plan is not the same as Meyer's plans it seems unlikely. Had those plans been used, the permit would have been to demolish only three quarters of the eastern wall, not the whole wall. There is no evidence as to what the instructions to Martian Demolitions were or by whom they were given. The builder contemplated by Mr Mond at the time was Miller and the permit applicant, Martian Demolitions, professes to be acting as agent for Miller. Mr Brott gave no evidence as to any instructions to Martian Demolitions and it is possible that

it had already agreed with Miller to do the demolition work before Alma Hill took over the job.

21. Mr Mond said in his witness statement that before the demolition work could be completed, Miller went into liquidation. Although this might suggest that Miller had carried out some demolition work that is not how I interpret Mr Mond's evidence. No contract was ever signed with Miller. Mr Mond said that he was unhappy with some of the contractual terms Miller wanted him to agree to. He did not say how far the demolition work had progressed when this occurred and indeed there is no evidence that Miller did any demolition work.
22. There is no evidence that anything happened then until 24 March 2000 when MIG engaged another architect, Mr Saul Rozenbes, to act as its project manager for the construction. His duties are set out in a letter from Mr Rozenbes bearing that date and do not amount to "supervision" of the builder's work. In his witness statement he described his duties as follows:

*"My agreement with the proprietor required me to liaise with members of the project team on behalf of the proprietor."*
23. It is significant that no one was engaged to supervise the builder's work or assume responsibility for the whole of the architectural work from start to finish. Further, neither architect was engaged to obtain either a town planning permit or a building permit for the demolition work that would be required. Under the terms of the building contract, it was not the responsibility of Alma Hill to obtain any permits. No contract was ever entered into with Miller but it appears that Miller assumed the responsibility to obtain a building permit for the demolition but not a planning permit.
24. On 27 March 2000, the replacement builder, Alma Hill, entered into a contract with MIG to carry out the necessary building work for a price of \$1.16 million. The contract contained a provision for agreed damages of \$450 per week to be paid to Alma Hill if the work were delayed. According to a payment schedule prepared by Alma Hill it was anticipated that \$269,000 worth of work would be completed before 1 July 2000.



25. Some time thereafter, work commenced. The director of Alma Hill, Mr Brott, said that the working drawings detailed the demolition required and that he subcontracted that work. He gave no details of the sub-contract. He said that the demolition work commenced in early April 2000 but did not suggest that any demolition work had been already been done by Miller. However it is apparent that Martian Demolitions had already obtained a demolition permit and Mr Brott engaged them to do the demolition work on Alma Hill's behalf.
26. On 10 April 2000, when the demolition was substantially under way, Mr Wheatley issued an inspection notice under the Building Act 1993 directing: "ALL FURTHER DEMOLITION WORK ON THIS SITE TO STOP". The notice states:

*"I have been advised by the City of Yarra Enforcement Officer that the planning permit issued for further development of this site did NOT have any reference to demolition work – That is the reason this notice is issued."*
27. This is a curious statement, since before issuing the permit for the demolition, Mr Wheatley was required to satisfy himself as to the existence of a planning permit. I deal with this matter further below. On the same day Mr Brott informed Mr Rozenbes who telephoned Mr Mond.
28. On 11 April 2000, Mr Rozenbes spoke to a Mr Wolf at the council who informed him that work on the site could not continue due to the lack of a planning permit for the demolition. He said that on the same day he visited Meyer's office to inspect the plans and saw that the working drawings provided for the walls to be demolished. This evidence would suggest that he had not previously seen the working drawings but in view of his role I think this is unlikely.
29. On 12 April 2000, Mr Rozenbes met a Mr Kroeger and Mr Wolf of the Council who told him that "a separate demolition permit was required". Presumably, this was a planning permit for the demolition because a building permit to allow the

demolition had already been granted. Mr Rozenbes adds in his witness statement:

*“They also advised me that, even if the working drawings had been identical to the enclosed plans, a planning permit for the demolition would still have been required.”*

No-one from the Council has been called and the planning scheme is not in evidence.

30. After speaking to the Council officers, Mr Rozenbes informed Mr Brott that there was a problem with the planning permit and work could not recommence until it had been resolved.
31. On 14 April 2000 Mr Rozenbes visited the site together with Mr Cicero. Mr Meyer was also present and informed Mr Cicero of the state of the original walls and that he was unaware that a separate planning permit for the demolition would be required. Mr Cicero said that it appeared that the demolition work had been commenced but not completed at the time of his inspection.
32. Mr Cicero advised that an application should be made to this Tribunal to amend the endorsed plans to show that the relevant existing walls were to be demolished and reconstructed. The application would be on the ground of a change of circumstances, namely, the realisation that the walls were structurally unsound and could not be retained.
33. Mr Mond says that Mr Brott told him that he would not and could not do any further work due to the stop work notice. Mr Brott said that he was instructed to stop by Mr Rozenbes. Mr Mond says that Mr Brott was concerned with being prosecuted. I think it likely that they were all concerned about the situation. In any case, Mr Cicero says that the Applicant acted “reasonably and judiciously” by stopping construction work when told to do so by the council and that its cooperation with the Council “assisted in a speedy resolution of the matter”. I accept that evidence. It is clear that when the application for an amendment came on for hearing, the Council was supportive and this might well have assisted in obtaining a favourable result. In any event, the demolition and

reconstruction of the walls was so fundamental to the whole project that it is not clear that any worthwhile work could have been done in the meantime. I do not accept Mr Reigler's suggestion that up to four months work could have been carried out. Mr Brott suggested that some work could have been done but if this were so, it might have alienated the Council and cost the Applicant support for the necessary amendment. The proposed course of action was put to Meyer and no objection was made to it. I do not believe that the Applicant acted unreasonably in stopping work while an amendment was sought.

34. In any event, the only planning permit then in existence was for the construction of Units with "existing" walls. There was no permit at all to allow the construction of a similar development with re-used bricks. I am doubtful whether anything at all could have been lawfully done. The absence of a formal stop order meant that there was not an order under the Building Act to cease work and to that extent, it was not unlawful to continue but if any work at all had continued I doubt that it would have been with a valid permit.
35. After making some overtures to the Council, Mr Cicero lodged an application to this Tribunal on 20 April 2000, seeking to amend the endorsed plans that formed part of the planning permit to permit the demolition and reconstruction of the walls. The application was heard on 12 July 2000 and granted by the Tribunal. Amended plans for endorsement were then prepared.
36. In the meantime, on 1 July 2000, Goods and Services Tax became payable on all building work.
37. On 11 July 2000, another architect, Mr Epstein, was engaged to take over Mr Rozenbes' duties. On 26 July Mr Brott applied for a road opening permit to lay storm water drains and on 14 August Alma Hill resumed work.
38. On 20 September 2000, Alma Hill claimed delay damages from MIG of \$15,148.00 for ;
  - delay \$8,100.00
  - props and hoardings to secure the site – balance

This sum was paid by MIG

### **Was a planning permit required?**

39. A town planner called on behalf of the Respondent, Mr Verhoeven agreed that a planning permit was necessary to demolish, remove or alter externally any building or works but said that the partial demolition of the building was “clearly implied” on the town planning drawings. I accept that this was the case but only to the extent necessary to carry out the work. I do not accept Mr Verhoeven’s suggestion that the demolition might be categorised as “repairs” or “routine maintenance”, nor do I agree with him that it is “arguable” that as the demolition was undertaken for structural reasons and did not change the external appearance of the building, a further permit or approval was not necessary. Mr Cicero, who is an eminent planning solicitor, expressed the view that a planning permit would have been required and that the existing planning permit did not justify the demolition of the walls. I prefer the evidence of Mr Cicero in this regard.

40. Similarly, I prefer the evidence of Mr Cicero to the effect that the demolition of the east west and south walls could not be approved by the responsible authority in accordance with Condition 1 of the planning permit. According to Mr Cicero, this is a “secondary consent” and I accept his evidence that a council acting as responsible authority cannot by way of secondary consent allow something to be done pursuant to the planning permit that the planning permit itself did not grant primary permission to do. Mr Cicero cited a decision of this Tribunal in *Pisanelli v Yarra City Council* [2004] VCAT 2133 which supports his view.

### **Who is to blame?**

41. The immediate cause of the delay was the demolition work which was done without a planning permit. The only permit that was obtained for the demolition was the building permit issued by Mr Wheatley. There was dispute as to the blameworthiness of Mr Wheatley in issuing the demolition permit without first satisfying himself of the existence of a planning permit that would have allowed the demolition. Evidence was given on behalf of MIG by a Mr du Chateau, a

Building Surveyor, to the effect that Mr Wheatley had acted reasonably on the basis that a “relevant” building permit had been issued and Mr Wheatley was satisfied that the extent of the demolition was as per the relevant planning permit. He did not say in his evidence how he could have been satisfied of that without at least looking at the planning permit. He referred to the duty of the owner and the demolisher to comply with all approvals but I do not see how that is relevant to Mr Wheatley’s own responsibilities.

42. I do not accept Mr du Chateau’s evidence. Section 24(1)(c) of the *Building Act 1993*, in the form in which it existed at the time, required that a Building surveyor must not issue a permit unless satisfied that any relevant planning permit or other prescribed approval had been obtained or was to be granted concurrently with the permit. A “relevant” planning permit is not any permit at all that relates to the subject land. To be “relevant”, it must be a permit that the planning scheme requires to be obtained before the work, the subject of the application for the building permit, can be carried out. Clearly there was no such planning permit here. The only planning permit that had been issued was one that provided that most of the walls were to remain. There was no other permit that allowed the demolition to take place.
  
43. The Respondent called another Building Surveyor, Mr Lorenzini. He said that the building surveyor should have forwarded the plans to the Council for it to determine whether the planning permit covered the removal and replacement of the walls. He also produced a practice note issued by the Building Commission before the permit was granted, which includes the following passage:

*“In order to ensure that the town planning permit is relevant, the relevant building surveyor needs to be satisfied that the building and planning documentation resemble each other to the extent that building documentation is not inconsistent with planning permit documentation.”*
  
44. I accept Mr Lorenzini’s evidence that Mr Wheatley should have been guided by the practice note but I do not believe that a building surveyor can delegate to the Council his own responsibility to satisfy himself that there is a “relevant”

planning permit in existence. He might seek advice, but the final responsibility is his.

45. The *Building Act* was amended in 2000 by the insertion of a further subsection 24(1)(d), which requires a building surveyor to be satisfied that the building permit is consistent with the planning permit. The amendment came into force in November 2000, which was seven months after Mr Wheatley issued the permit, but in my opinion it did no more than state directly what was already implicit in subsection 24(1)(c).
46. For these reasons, the demolition permit should never have been issued by Mr Wheatley.

#### **The claim against Meyer**

47. The duty said to have been owed by Meyer to MIG was to use reasonable care and skill in the provision of the architectural services that it was to provide. I agree that it was under such a duty.
48. The particular breaches of duty alleged against Meyer are:
  - (a) **Failure to advise the owner as soon as practicable after February 1999 that the existing brick walls required demolition.**

Mr Mond says that he was not told these things by Meyer and Mr Meyer does not suggest that he was told. As to the requirement to demolish the walls, the engineer was aware of it as was the builder engaged to carry out the work. As the architect engaged to supervise the contract, Mr Rozenbes must also have been aware of it since he would, of necessity, have had to familiarise himself with the plans. But even if Meyer had advised MIG that the existing walls required demolition I cannot see how this would have made any difference. Mr Mond is an accountant who delegated the building matters to the persons whom he had engaged for the purpose. They were Mr Rozenbes and Alma Hill and both of them already knew that the walls were to be demolished to the extent required by the working drawings.

- (b) **Failing to advise the owner that written consent was required from the responsible authority or that the planning permit would require amendment to allow demolition to take place.**

Apart from the note at the foot of the planning permit, this is established to the extent that Mr Mond was not informed that any amendment to the planning permit or the endorsed plans would be needed and indeed, it was Mr Meyer's view that they were not. The Applicant complains that, following the preparation of the working drawings, Meyer did not notify Mr Mond of the change nor apply for the consent of the responsible authority to the alteration of the endorsed plans that formed part of the planning permit. However, after preparing the working drawings the Respondent's retainer was at an end. The Applicant then engaged Mr Rozenbes, another architect, to provide "project management services". Mr Mond says that Mr Meyer told him that he had "forgotten" to amend the planning permit after altering the plans. Mr Meyer denies this and I am not satisfied that he made such a statement. It seems to me that Mr Meyer did not consider that any further permission from the council was required and that the existing planning permit would suffice for the carrying out of the work in accordance with the working drawing. I find this was a mistaken view but he was not instructed nor was it part of his retainer to obtain any permits other than those he obtained. Did he have any wider duty to advise beyond what he was specifically instructed to do? I think that is the key to the claim.

- (c) **Preparing amended plans and submitting them for a building permit when it was aware or ought to have been aware that they were contrary to the planning permit.**

Although the working drawings provided for demolition beyond those permitted by the planning permit, there was nothing negligent about either preparing the plans or submitting them for the permit. Indeed, it would have been negligent to prepare plans that relied upon the retention of, and then building upon, structurally unsound walls. Further, Meyer was not negligent in amending the plans to accord with the advice of the engineer that had been retained for the project in regard to the demolition required

of unstable brickwork. It is not sensible to suggest that working drawings should be prepared for work incorporating existing brickwork that is not structurally sound.

49. The note at the foot of the original planning permit stated that a planning permit was required for any demolition. There is no direct evidence that Mr Meyer was provided with a copy of the town planning permit but since he applied for it in the name of his firm I think I should infer that it would have been sent to him and that he was, or ought to have been, aware of its terms. Further, he prepared the plans for endorsement by the Council and he could not have done this without looking at the permit to see what was required to be included in those plans. Merely seeing this note might have made no difference to his actions, because he appears to have formed the view that the Planning Permit was itself the only planning permit required for the demolition.

**Was there a duty to advise?**

50. The relationship between an owner and an architect is contractual and there is no residuary liability in tort (*Halsbury 4<sup>th</sup> Edition Vol.4 para 1330*).
51. In terms of its retainer, Meyer appears to have done everything that it was instructed to do. The planning permit that it obtained was in accordance with its instructions and, in view of the location of the development, it was reasonable and indeed usual to indicate that walls that were to remain should be designated on the endorsed plans as “existing”. The re-use of existing walls was clearly thought to be significant to the Council. It might be that it would have lessened the impact of the development and this might have been particularly important in this urban conservation area. It might have made the difference between obtaining a permit and not obtaining a permit but whether it did or not, there is no evidence that Meyer was remiss in obtaining the planning permit in the form that it did. Having obtained the permit I do not believe that there was any continuing obligation on Meyer to amend it when circumstances changed.
52. The next stage, for which Meyer was not engaged, was contract administration. According to the letter setting out the terms, that was to commence with issuing



documents to prospective tenderers and continue through the contract and administration stages. Meyer was not engaged to do any of this. The two subsequent architects were engaged to do some but not all of the duties in this stage. It is not suggested that Meyer either knew or ought to have known the extent of the retainer of those two later architects. In these circumstances, can a term be implied into the contract that Meyer would advise MIG that it needed to have other work done beyond what Meyer had agreed to do?

53. On the implication of terms, Mr Reigler referred me to the majority opinion of the Privy Council *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 where their Lordships said (at p. 276):

*“...for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”*

54. I think it is impossible to imply into the contract in this case a term of the nature or effect sought to be relied upon by MIG. Even if one could formulate the wording of such a term, which is not obvious, it does not seem to me that it would be necessary to imply it in order to give business efficacy to the contract, nor would it be so obvious that it would ‘go without saying’. There was no general retainer for Meyer to be responsible for the whole project. Mr Mond was particular about what he wanted Meyer to do. Where an architect is engaged to carry a project from inception to completion, it may be appropriate to imply into the retainer, in addition to the specific tasks that he undertakes, some sort of overall responsibility to advise the owner of matters of things that he ought to know along the way. But where an architect is only engaged to do specific parts of the work and another architect is to be engaged to carry on with the project when the first architect has finished what he has been engaged to do, it seems to me impossible to imply into the first architect’s contract of engagement a term that he will be responsible to give the owner advice

concerning the future conduct of the project. That advice might well be given by his successor.

55. The duty pleaded was to carry out the architectural services with reasonable care and skill. I agree that an architect engaged to carry out specific work that is, to prepare plans and obtain permits, has a responsibility to do that properly. But that duty relates to what he does and what he has undertaken to do, not what he omits to do, unless he omits to do something that he undertook as part of his retainer.
56. It is unnecessary to consider Mr Reigler's submission that, because there was no evidence that a reasonably prudent architect in the position of Meyer would have formed the view that an amendment to the permit was required, a breach of the duty was not established in any case.

### **Causation**

57. There are other difficulties with the claim. One lies in the manner in which the excessive demolition came about. It was done pursuant to a demolition permit obtained by Martian Demolitions, apparently on the instructions of Miller. How the sketch plan that formed part of the permit came to be prepared is not known but I cannot infer that it was prepared from the drawings produced by Meyer because it differed from those drawings, in that it did not leave in place one quarter of the eastern wall as the working drawings required. I also cannot infer that the extent of demolition that took place was due to the drawings produced by Meyer. It seems to me to be more likely that the extent of actual demolition was the result of the sketch plan that formed part of the demolition permit. Since a permit was sought and obtained to demolish the whole of all walls, save the one that was to be left standing, the intention of Martian Demolitions in obtaining the permit must have been to demolish those three walls and leave only one. How it came to form this intention is not known because there is no evidence concerning any communications that took place between Miller and Martian Demolitions. Crucially, there is no evidence that Meyer had anything to do with those communications. Indeed, it is Mr Meyer's evidence that he did not.

58. More significantly, it obtained the permit as agent for Miller who must have been acting either on its own behalf or on behalf of Mr Mond. It demolished the walls as subcontractor of Alma Hill and pursuant to a sketch plan prepared by someone other than Meyer.
59. Further, if Meyer had advised Mr Mond of the need for a further permit, what would Mr Mond have done? If he had consulted the Council, the officers there would probably have confirmed the correctness of the advice and so would Mr Cicero. But if he had asked Bayside it is by no means obvious what he would have been told, because having issued the building permit, Bayside must have already formed the view that there was no inconsistency between the endorsed plans and the working drawings and so no amendment would have been required.
60. Even if Meyer had been aware, as it should have been, of the need for a planning permit to allow the demolition, should Meyer have anticipated that:
- (a) Mr Wheatley would issue a building permit for the demolition without there being a relevant planning permit?
  - (b) Mr Rozenbes would not apply or advise Mr Mond of the need to apply,
  - (c) for a planning permit to allow the demolition?
  - (d) The later architect's retainer would be restricted to the tasks Mr Rozenbes agreed to do?
  - (e) The later architect would not satisfy himself that a planning permit was obtained for the demolition when the only planning permit that had been obtained specifically warned that a further permit would be required?

I think the answer to all of these questions is: "No".

### **Conclusion**

61. Since its retainer was at an end and since another architect was being retained before work commenced to administer the contract, I do not think there was any continuing duty on the part of Meyer to advise the Applicant to obtain further permits before any work was done. Had Meyer's retainer been wider it might have been possible to imply a duty to advise Mr Mond or MIG but I cannot do so in this case. Mr Mond took upon himself the task of deciding what was to be

done and by whom. In doing so he might have saved money in the short term but he left himself without anyone who had an overriding responsibility to ensure that everything that needed to be done was done. It does not seem to that Meyer had any obligation to advise the Applicant as to anything further that would be required once it had carried out the work it was retained to do. Accordingly, the Application will be dismissed.

**SENIOR MEMBER R WALKER**