

Matter No. ARBV_2019_081

IN THE MATTER OF *the Architects Act 1991*

AND IN THE MATTER OF an Inquiry into the fitness to practice or professional conduct of
[REDACTED] ARBV Registered Architect No. [REDACTED]

BEFORE:

THE ARCHITECTS TRIBUNAL

(“The Tribunal”)

Re: [REDACTED]

(“The Architect”)

Where Held: Melbourne By Video Conference

Date of Hearing: 4 and 5 November 2020

Before: Mr. Leslie Schwarz (Chairperson), Mr. Paul Porjazoski and
Mr. Peter Harkness (Tribunal Members).

Appearances: Mr. J. Stoller of Counsel, Counsel assisting the Tribunal
(“Counsel Assisting”), instructed by the Victorian
Government Solicitor’s Office,

Ms. A. Golding of Counsel for the Architect, instructed
by Lander and Rogers

Date of Determination: 11 November 2020

THE TRIBUNAL’S DETERMINATION

Having considered all of the submissions and information placed before it, noting that the Architect admitted the allegation of carelessness in respect of the matters contained in the Notice of Inquiry, the Tribunal finds:-

1. The Architect was careless in her practice as an Architect (“the finding”) and, pursuant to section 32(g) of the **Architects Act 1991**, the Architect is cautioned in respect of the allegation and the findings.
2. The Architect is to pay the costs of the Tribunal of this Inquiry in the sum of \$7,000.

NATURE OF INQUIRY

- A. The Tribunal, as constituted by the Architects Registration Board of Victoria ("the Board"), conducted an Inquiry on 4 and 5 November 2020 ("the Inquiry") into the professional conduct of [REDACTED] Registered Architect No. [REDACTED] ("the Architect") pursuant to a Notice of Inquiry dated 16 June 2020 ("the Notice of Inquiry"). The Notice of Inquiry contained the following allegation:-

"Allegation 1

That, between 22 April 2014 to 29 February 2016, [REDACTED] (Architect) engaged in conduct that was careless or incompetent in her practice within the meaning of section 32(a) of the Architects Act 1991, in that she designed and administered the construction of a building structure located at [REDACTED] Barwon Heads (Property) in contravention of a restrictive covenant applying to the Property.

Particulars

- 1. In April 2014, [REDACTED] (Clients) engaged the Architect to provide architectural services, including concept design, design development, contract documentation and contract administration for the proposed building works at the Property.*
- 2. On 22 April 2014, the Architect contacted the City of Greater Geelong and received oral advice that a planning permit was not required for the proposed construction works, and did not confirm that advice in writing with the council.*
- 3. On 30 April 2014, the Architect obtained a Plan of Title for the Property (Plan). The Plan made reference to the 'Creation of Restriction' and 'Description of Restriction'. Restriction number 2 states 'The Owners of Lots 1 to 14 (All inclusive) shall not develop the land other than in accordance with an approved Neighbourhood Design Plan pursuant to Planning Permit [REDACTED] (Restriction). The Architect did not make any further enquiries regarding the Restriction.*
- 4. On 6 May 2015, the Architect advised the building surveyor that a planning permit was not required for the proposed construction works.*
- 5. On 18 June 2015, the Architect obtained a Certificate of Title for the Property that displayed the Restriction.*
- 6. On 1 July 2015, the Architect lodged a building permit application (Application) that contained drawings prepared by the Architect for proposed buildings works that would, if constructed, contravene the Restriction.*
- 7. On 29 July 2015, a building permit was issued in response to the Application.*
- 8. In August 2015, works commenced in accordance with the building permit.*
- 9. In late January 2016, a neighbour notified council of suspected breaches of the Restriction. The Clients informed the Architect of this notification.*

10. *On 27 January 2016, the Architect was provided with a copy of the Restriction, which provided that no building shall be erected other than in accordance with the marked areas where a building or part of a building could be located.*
11. *On 29 January 2016, despite being alerted to the existence of the Restriction, the Architect advised the Clients to continue with construction works outside the permitted building envelope in contravention of the Restriction.*
12. *On 9 February 2016, the Architect received from the Clients written correspondence alleging that the building works was in contravention of the Restriction.*
13. *On 29 February 2016, the Architect issued an instruction to stop works.*
14. *On 12 April 2018, the Supreme Court of Victoria having ruled the works were in breach of the restrictive covenant, ordered the demolition of the building structures that contravened the Restriction.” (“the allegation”).*

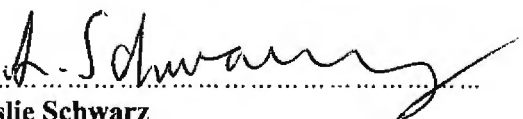
B. The Tribunal comprised Mr. Leslie Schwarz (Chairperson), Mr. Paul Porjazoski and Mr. Peter Harkness.

REASONS FOR THE FINDINGS OF THE TRIBUNAL

1. The Inquiry was held on 4 and 5 November 2020. There had been filed an Amended Statement of Agreed Facts dated 14 August 2020. Counsel for the Architect and Counsel Assisting agreed in respect of the factual matters the subject of the allegation. They both also submitted that the Tribunal should make a finding that the conduct of the Architect was careless and not incompetent. Further, a caution rather than a reprimand was also jointly sought. It was also agreed that the Architect should pay the costs of the Inquiry fixed in the amount of \$7,000. It is noted that joint submissions were filed with the Tribunal to the above effect dated 30 October 2020 (“the joint submissions”).
2. As the Tribunal needed to be satisfied that the finding proposed in the joint submissions (of carelessness rather than incompetence) was proven and appropriate, the Tribunal heard from Ms. Isabel Legge, senior technical advisor of the Registration Board of Victoria, Mr Peter Quigley, an architect called on behalf of the Architect and [REDACTED] the owner of the **Property**.
3. The Tribunal is satisfied on the evidence given and the submissions made that the conduct of the Architect as particularised under the allegation was conduct that was careless rather than incompetent. The Tribunal refers to the case of *McSteen v. Architects Registration Board of Victoria [2018] VSCA 96* in respect of the definitions of careless and incompetent.
4. In summary, the Tribunal is prepared to categorise the Architect’s conduct as careless in failing to enquire into the nature of the second restriction noted on the Plan of Subdivision. This restriction stated: *“The owners of lots 1 to 14 (all inclusive) shall not develop the land other than in accordance with an approved neighbourhood design plan pursuant to planning permit number 105/97.”*

5. The Tribunal heard evidence from the owner of the **Property** ([REDACTED]) that none of the other owners in [REDACTED] (apart from the original owner of one property) knew of the restrictive covenant. Neither did the Building Surveyor, nor the staff in the Geelong City Council's Planning Department.
6. Accordingly, and in the interest of avoiding similar costly errors, the Tribunal recommends that the ARBV discuss with the Greater Geelong City Council, the MAV, and the State Government how such covenants can be made more prominent, visible and detailed on Certificates of Title and related documents.
7. The Tribunal is also prepared to categorise the Architect's email to [REDACTED] the owner of the **Property**, as being careless. In summary, the email provides advice by the Architect to [REDACTED] to "soldier on" without the Architect explaining to [REDACTED] exactly what were the issues in dispute and the possible consequences of the Architect's advice.
8. As far as penalty is concerned, the Tribunal finds that:-
 - (a) the Architect had provided the documentation and information requested by the Architects Registration Board of Victoria ("the ARBV") in her letter dated 30 August 2019, had attended an interview conducted behalf of the ARBV on 9 April 2020 and had demonstrated some insight and remorse in respect of her conduct;
 - (b) it was not alleged that the Architect had wilfully deceived or misled [REDACTED];
 - (c) the circumstances giving rise to the Inquiry had had a significantly adverse affect on the Architect's health [REDACTED];
 - (d) the Architect was a well reputed and well respected member of the profession, a previous ARBV examiner and a previous member of the Tribunal. [REDACTED] utilised the Architect's services after the full gravity of [REDACTED]'s situation was known; and
 - (e) the costs of the Inquiry were \$7,000.00, which was not an insignificant amount.
9. The Tribunal notes the request on behalf of the Architect regarding the publication of this Determination. A written request will need to be made to the ARBV in respect of this issue.

Signed for and on behalf of the Tribunal:-



Leslie Schwarz
Tribunal Chair

Paul Porjazoski and Peter Harkness
Tribunal Members

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