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‘Sleek and modern’ or ‘wonky and industrial’: A reminder of an architect’s duties

Freeborn & Goldie v De Almeida Marcal (t/a Dan Marcal Architects) [2019] EWHC 454 (TCC)

Authors:
Nathan Modell
Priya Thakrar

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A recent decision in the Technology and Construction Court has found that an architect was negligent for altering the design of a cinema room without first informing or agreeing the changes with his clients.

Background

Phillip Freeborn and Christina Goldie (‘the clients’) engaged Dan Marcal Architects (‘the architect’) to design various improvements to their house in Totteridge, Barnet, North London, including work done to a pool house and floating cinema room above (‘the works’).

In completing the works, the architect invoiced the overall sum of £35,000 for the services provided.

The clients were unhappy with the finished works as, along with a number of other defects, the finished cinema room above the pool house had a *‘wonky industrial look’* rather than being *‘sleek and modern’* as requested.

Following an unsuccessful attempt at mediation, the clients issued proceedings in July 2017.

The key dispute between the parties was whether the architect had informed and sought approval from the clients about the changes made to the design of the cinema room.

Decision

It was found that the clients did not agree to the as built design of the cinema room and the architect had acted negligently by having no written brief and not consulting the clients as this brief changed. The clients were awarded damages of approximately £500,000.

The duties and obligations of architects

The judge considered that the following seven principles are an accurate summary of the general principles of law relating to the duties and obligations of architects:

1. The primary basis for the duties owed by an architect is the contract entered into between the parties;
2. It is common ground that an architect owes a duty to provide the services supplied with reasonable care and skill (s.13 of *the Supply of Good and Services Act 1982*);
3. The standard of reasonable care and skill is not a standard of perfection. It is not sufficient to prove an error to show that there has been a failure to exercise reasonable skill and care. A claimant must establish actual negligence;
4. An architect is entitled to recommend to a client that the client appoint a third party with the requisite knowledge to carry out work, which requires that specialist knowledge. Ordinarily, the architect will carry no legal responsibility for the work to be done by the specialist which is beyond the capability of an architect of ordinary competence;
5. An architect's obligation to supervise or inspect the works will depend on various factors including the terms of the retainer, the nature of the works and his confidence in the contractor;
6. A claimant is only entitled to recover any loss and damage caused by the architect’s negligence, which they have sought to mitigate;
7. The damage ordinarily recoverable where a building suffers from defects consequent upon the negligence of an architect is the cost of rectification.

Lack of project documentation

The judge found that the architect’s record keeping amounted to a *“tumble dryer of misinformation”*.

In particular, the lack of a written brief for the project was considered by the judge to be *“a serious breach of duty”.* Principle 2.3 of RIBA Code of Professional Conduct states

that architects should maintain appropriate records throughout their engagement.[1]

The Architects Registration Board (‘ARB’) Code of Conduct similarly requires that an architect should enter into a written agreement prior to undertaking any professional work and any variations to this should be recorded in writing.[2]

In this case, there was also no written contract and so the architect submitted that the works were conducted on an ad-hoc basis. Instead, it was held that the parties had entered into a partly oral and partly written agreement. A RIBA Standard Form of Agreement 2011 (2012 Revision) was prepared by the architect but sent to the wrong email address and no formal appointment was ever executed. The court held that this showed that the architect had intended to enter into the agreement.

Further, there were no minutes of any meetings with the clients or the contractors for the clients to agree or disagree, no progress or planning reports or interim valuations of the works.

It was also found during witness testimony that the architect’s answers to significant questions were *“self-serving assertions based on little thought and chaotic records”*.

When assessing damages, the court confirmed that the ordinary measure of damages for negligence would be the cost of rectification. However, as the design was so significantly and critically different to what the clients had expected, the judge ordered that the clients could recover the cost of demolishing the cinema room as well as the wasted costs of designing and building a cinema room that did not comply with their instructions.

Also of note is that in 2017, the Technology and Construction Court previously held that the architect had not filed its cost budget late by complying with a letter from the court to do so seven days before the case management conference, rather than 21 days prior as specified in CPR 3.13. The clients had argued that by complying with the letter from the court, the architect had filed their cost budget late, and so the architect applied for relief from sanctions. However, the judge stated that parties should not seek to abuse the court’s approach to non-compliance for minor breaches where it was not proportionate or appropriate.

Commentary

Although this case is fact specific, it provides useful guidance on the duties and obligations that the court expects an architect to meet.

The judge stressed the importance of clear and accurate record keeping and ensuring that architects have finalised written briefs prior to commencing work on a project, as well as complying with the RIBA Code of Professional Conduct and the ARB Code of Conduct.

It is all too common on construction projects for work to commence before appointments are finalised or executed and briefs fully developed. If this is unavoidable, keeping clear and accurate records is vital to demonstrate and evidence what was intended between the parties.

Any design changes should be first agreed with the client and recorded in writing, as in this case, the fact that the architect “*effectively went on a frolic of his own*”, was found to be a serious breach of duty. If there is a dispute about a divergence in design expectations, it will be easier to identify whether or not these changes were agreed between the parties if there are clear records kept throughout the project.

This article is only intended to provide general information and should not be relied upon as legal advice.

For further information please contact:

Nathan Modell
Partner
+44 (0) 20 7469 0442
n.modell@beale-law.com

Priya Thakrar
Trainee Solicitor
+44 (0) 20 7469 0432
p.thakrar@beale-law.com

[1] Principle 2.3, RIBA Code of Professional Conduct 2005.

[2] Section 4.4-4.5, Architects Registration Board Code of Conduct 2010.