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'Perspective'

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Design Responsibility – The Unassuming Designer

By Bart Kavanagh

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In a judgment in April 2017 the Court of Appeal upheld the decision at first instance in the case of **Burgess v Lejonvarn**. [1] [2] In this case an architect became involved, informally, in a landscaping project that her friends and neighbours were undertaking at their house. There was no formal agreement and no fee was paid. Nevertheless, she helped to procure the services of a contractor for earthworks and hard landscaping; discussed and provided budgets for the works; monitored expenditure against the budget and also oversaw the works that were carried out. The client was unhappy with the quality of the work that was carried out during the architect's involvement.

The judge at first instance was asked to provide declarations regarding a number of preliminary issues. He found that there was no contract between the parties because there was no intention to create legal relations and there was no consideration. However, he also found that the architect had assumed responsibility for the work that she had undertaken. Furthermore, because the architect must have realised that the client would rely upon the advice given, the judge found that she owed the client a duty of care at common law, as distinct from the duties and liabilities that a contract would have imposed, to exercise reasonable skill and care in the provision of services.

This was despite the architect's contention that she was merely involved as a friend who happened to have a professional background. This is not an uncommon situation.

Professionals of all types are routinely asked for opinions and ad hoc advice by friends and acquaintances and anecdotal evidence suggests that architects are particularly prone to agreeing to provide these. This case highlights the need to be alert to the real possibility of straying beyond the bounds of friendship and into uncharted realms of professional responsibility.

The consequences of doing so may be harsh so it is important to consider where the boundary might lie between simply discussing matters or providing advice as a friend with a profession, and the assumption of a duty of care in tort for the provision of professional services. Lord Hamblen, in his Court of Appeal judgment, provides useful guidance. He identifies the following factors that were considered in this particular case:

- This was not brief ad hoc advice but a significant project which was being approached in a professional way;
- The services were provided over a relatively lengthy period of time and involved considerable input and commitment;
- The services involved significant commercial expenditure on the part of the client;
- Neither party saw this as akin to a favour;
- Although there was no consideration the architect did hope to receive payment for design services later in the project;
- The architect had received other benefits from the client beyond the normal bounds of friendship and the provision of gratuitous services should be seen in that light; and
- The losses allegedly sustained were of a type which would be expected to flow from a failure to perform competently the services which the architect provided.

However, these derive from more general principles which have long been established and applied. In his judgment in the case of **Henderson v Merrett**. [3] Lord Goff placed particular reliance on the following passages from **Hedley Byrne v Heller & Partners**: [4]

> "*My Lords, I consider that it follows and that it should now be regarded as settled that if* ***someone possessed of a special skill*** *undertakes, quite irrespective of contract, to apply that skill for the assistance of* ***another person who relies upon such skill****, a duty of care will arise. (…) Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.*"
> Lord Morris at pp. 502–503:

"… the ***categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships*** *or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton [1914] A.C. 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.* Lord Devlin at pp. 528–529:

So, design, and other, professionals who are approached with a request for informal advice should ask themselves the following questions:

- Does this require the application of a special skill?
- Would it be reasonable for this person to rely upon that special skill?

If the answer to these questions is "yes" then it is likely that by providing the advice, the designer is assuming responsibility for its effects, including potential liability for any economic loss caused. This is irrespective of the fact that the advice may have been given freely.

[1] *Burgess and Anor v Lejonvarn [2016] EWHC 40 (TCC)*
[2] *Lejonvarn v Burgess & Anor [2017] EWCA Civ 254*
[3] *Henderson v Merrett Syndicates Ltd [1994] UKHL 5*
[4] *Hedley Byrne & Co. Ltd v Heller & Partners [1963] 3 W.L.R. 101 (H.L.)*

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BIM and "Revocability"

By Frank Newbery

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With reference to Trant v Mott MacDonald

In the last few years Building Information Modelling (BIM) has been evolving towards ever-higher degrees of design integration and collaboration. In April 2016 "BIM Level 2" became mandatory for UK government projects, requiring project team members of different disciplines to co-operate in producing an electronically "federated" design/data model. "Level 2" integration presumes that the contribution of each team member can be distinguished, and may potentially be removed from the federated model without direct impact upon the contributions of others.

State encouragement and advancing technology are currently propelling the construction industry towards "BIM Level 3", a greater degree of integration which will not so readily allow the contributions of different parties to be isolated, leading potentially to disagreements concerning overlapping liabilities and/or intellectual property rights. Professional indemnity insurers are naturally wary of such exposure (except potentially under Integrated Project Insurance), and current BIM standards and protocols envisage integration no higher than "Level 2".

Nearly four years ago I wrote in this newsletter about BIM copyright and licensing issues [1], with particular reference to the CIC BIM Protocol, published in 2013 [2]. This Protocol may still be regarded as the "industry standard" for governing how Level 2 BIM is to be implemented through and between a project's various contracts – although its adoption is far from universal [3]. I understand that a revised edition is currently in preparation.

As discussed in my earlier article, the Protocol does not appear fully to resolve where the various parties stand in relation to licensing and "revocability", i.e. the entitlement to withdraw one's design material from a project if one does not receive due payment. Taking the Employer's point of view, some legal commentators recommend deletion of Protocol clause 6.4, which allows that a Project Team Member's licence to the Employer "*may be suspended or revoked in the event of non-payment to the extent that any licence in the Agreement provides for such suspension or revocation*". This could be lethally damaging to a project in which a BIM model has evolved through close integration of

different Project Team Members' contributions.

The recent case of **Trant Engineering Limited v Mott MacDonald Limited** [4] ("Trant v MML") has provided not so much a resolution as a "wake-up call" concerning BIM, revocability, and who controls a project's electronic Common Data Environment ("CDE").

Trant was the main contractor for a Ministry of Defence project, a power station in the Falklands with a contract value of about £55M. Trant retained MML in a dual role both as designer and BIM operator, i.e. the host of the project's BIM CDE. Following a dispute over scope of services in relation to fees, and non-payment by Trant of an MML invoice for £475K, MML changed the passwords to the BIM CDE so as to exclude Trant. This denied Trant access not only to MML's design contributions, but also to material contributed by others having no direct part in the Trant/MML dispute. Even though Trant had apparently been provided with up-to-date information in pdf file format, it was held that lack of access to the native BIM model would in effect require the project's design process to be re-started from scratch, causing delay and costs disproportionately high in relation to MML's claim and purportedly capped liability. The Court awarded a temporary injunction allowing Trant's BIM access to be restored, subject to Trant's payment into Court of the disputed amount of £475K pending the outcome of further case proceedings.

A key factor in the above case was that Trant and MML had failed properly to agree and execute an appointment contract, making it plausible for MML to claim that its standard terms and conditions should apply by default. These would entitle MML simply to revoke its contributed material and services in the event of non-payment. Evidently Trant had made no adequate provision to forestall this eventuality or mitigate its consequences. The award of the injunction was fortunate for Trant, but could not have been foreseen as inevitable.

The particular circumstances of this dispute will probably limit its value as a "test case". At present it serves principally as a warning to participants in BIM procurement that control of the BIM model must be carefully considered at contract formation stage. Some legal commentators suggest that it may be safer for the Employer in a project to set up a distinct BIM hosting contract separate from any other project contracts, possibly with BIM specialists who are otherwise unconnected with the project's team members and material contributors. As a basic precaution, it could be in the Employer's interest to establish that a Project Team Member serving also as the BIM host must allow extraction and ownership by the Employer of fully functional electronic copies of the BIM model/CDE at regular intervals, so that the project's progress does not risk being set back to square one by dispute and revocation as exemplified in Trant v MML.

[1] "*BIM, Copyright and Licensing*", *Frank Newbery, Probyn Miers Perspective newsletter number 11: June 2014*

[2] *Free download available at http://cic.org.uk/publications/.*

[3] *The NBS "National BIM Report 2017" has found that, in a sampling of construction professionals, 25% include the CIC BIM Protocol among their BIM references.*

[4] *Technology & Construction Court, Case No. HT-2017-000164*

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Architects: Beware the Budget!

By Katerina Hoey

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Riva Properties Ltd & Ors v Foster + Partners Ltd. [2017] EWHC 2574 (TCC) considers the duties that an Architect owes to their client, particularly with regard to designing and working within a budget. The case concerned a professional negligence claim against Foster + Partners Ltd ("Fosters") brought by Riva in connection with Fosters' design for a 5 star hotel near Heathrow Airport.

There were originally ten different breaches alleged against Fosters which were eventually reduced to the following two allegations:

- The failure to carry out Stages A and B: It was alleged that Fosters failed to identify (in Stage A) and thereafter confirm (Stage B) a key constraint of the development, namely the budget.
- Provision of negligent advice and/or failure to advise: It was alleged that advice was given by Fosters that the development could be value engineered from £195m to £100m.

The Court held that that Fosters

- had been informed of their Client's budget;
- was obliged to ascertain and consider the budget, which was a key requirement and constraint;
- was obliged to design the development to the budget indicated to them; and
- had a duty to advise their Client that the design could not be value engineered down to £100m.

In failing to do the above, Fosters were found to have been in breach of their obligation to exercise reasonable skill and care.

Express or implied duty?

The case was considered on its facts, which included that Fosters had contracted under their appointment to carry out RIBA Work Stages "A to L", of which, A and B included the 'identification of key requirements and constraints'. However, it is worth considering that, even if not included as an express provision under the terms of appointment, an Architect may in any event be obliged to identify the budget and consider it when undertaking their design.

The RIBA Code of Professional Conduct comprises three principles: Integrity, Competence and Relationships. Under Principle 2 – Competence, it states:

> *"2.1 Members are <u>expected to apply high standards of skill, knowledge and care in all their work</u>….*
>
> *2.2 Members should realistically appraise their ability to undertake and achieve any proposed work. <u>They should also make their clients aware of the likelihood of achieving the client's requirements and aspirations</u>…..*
>
> *2.3 Members <u>should ensure that their terms of appointment, the scope of their work and the essential project requirements are clear</u> and recorded in writing…..*
>
> *…*
>
> *2.5 Members are expected to use their best endeavours to meet the client's agreed time, cost and quality requirements for the project" (my emphases).*

Paragraph 2.1 essentially reiterates the "*reasonable skill and care*" standard required of all architects; paragraph 2.2 arguably includes a client's budget within the "*requirements and aspirations*" referred to; paragraph 2.3 refers to "*essential project requirements*" that likely encompass a Client brief (which may or may not include a budget) and advises that they are recorded in writing; and paragraph 2.5 requires members to use "*best endeavours*" to meet the client's agreed cost requirements.

It appears, therefore, that Riva v Fosters applies standards that are no more onerous than those set out in the RIBA's Code of Professional Conduct.

Budget, contract value or total outlay?

For the project team, the term 'budget' is often used to describe no more than the contract sum, typically as a basis for cost management and the calculation of professional fees. For the Client, however, 'budget' may often represent the total sum of money which the project should cost; including, in addition to the cost of construction, a contingency allowance, professional fees and VAT.

This distinction should be borne in mind by the architect, especially where dealing with consumer clients who may have had no experience of construction and might assume that the identified cost of

construction is all inclusive.

Adherence to budget or cost consultancy?

Most architects are not cost consultants and should not be expected to give advice related to costings. However, cost and budget are key constraints and should be considered by the architect when designing any project. Management of client's expectations is fundamentally important and advising on the appointment of a cost consultant at an early stage to comment on project feasibility would be prudent in most circumstances.

The way forward?

While the judgment in *Riva v Fosters* has really only clarified obligations that are enshrined in the RIBA Code of Professional Conduct, a prudent architect should be sure to:

- Clarify client's requirements including any budget, preferably in writing;
- Understand what the client expects to be included within the budget (e.g. contingency, fees, VAT, etc.); and
- Suggest that a cost consultant is involved from an early stage of a project, particularly if the budget appears tight or has no flexibility;

While it does not necessarily follow that an architect whose design comes in over budget will be negligent, architects should attempt to design within budget, as far as reasonably possible. This is not the same as offering cost consultancy services, which architects generally should avoid unless they hold appropriate qualifications.

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