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Architects Keeping Good Records

By Michael Ogus

First Published June 27th, 2019

A recent case in the Technology and Construction Court (TCC): **Freeborn v Marcal** [2019] EWHC 454 (TCC), highlights the importance to all architects of good record keeping, providing a written brief and ensuring that any changes to the brief are clearly explained to the client.

In this case the court held an architect to be negligent, and in breach of contract, for amending the design of a floating cinema room without the agreement or knowledge of his domestic clients and awarded damages of nearly £500,000. Interestingly, this award was to cover the costs of demolition as the court considered that the final design was so different to the original proposal that demolition and reconstruction, rather than rectification, was a reasonable course of action.

Background

Phillip Freeborn and Christina Goldie, ("the Clients"), appointed Dan Marcal Architects, ("Marcal/Mr Marcal"), to design refurbishment works to their home in Totteridge, North London. The works included converting the pool house into a function room and constructing a "glass box on legs" as a cinema room. The Clients were unhappy with the result and brought a claim for professional negligence. The key dispute, as identified in closing submissions, was "*whether or not Mr Marcal redesigned the cinema box without telling the Claimants and arranged for the construction of a cinema box which they had not approved.*"

Appointment

Marcal maintained that the scope and nature of its role changed over time as its instructions changed. It argued that it entered into an "*ad hoc contract*" with the Clients to provide various architectural services at the hourly rate of £35 per hour, eventually invoicing the client for 1,000 hours or £35,000.

The Judge rejected this argument. He considered that a contract made partly orally and partly in writing based on email exchanges and meetings was effective.

Record keeping

Mr Marcal described his daybooks, notebooks and sketch pads as "*tumble dryer of information*". The judge however described them as:

"*a tumble dryer of misinformation. The note books are confused, confusing and chaotic.*"

(…)

"*They are not in any chronological order or indeed in any order. It was pure chance which led to any daybook, notebook or sketch pad being used on any particular day or for any particular project or, indeed, being used for personal rather than professional purposes. The Defendant had no clear recollection whether any entry was a proposed agenda, minutes of a meeting or subsequent retrospective musings. It was never clear from the notebooks who attended any particular meeting or who said what.*"

The judge observed that Marcal had produced no written contract, no written brief, no minutes of any meetings with the Clients or the Contractors, no planning reports and no interim accounts or valuations for the works. When asked to explain his recollection of events Mr Marcal had to rely on the "*tumble dryer of information*" in the absence of supporting contemporaneous documentary evidence.

Design development

In October 2014 the parties began discussing the idea of a glass box to house the cinema. This was to be suspended from the ceiling and supported on four legs. Marcal developed the design and and sent 3D renderings of the proposal to the Client. What was eventually constructed was described by ounsel for the claimants as a "wonky industrial design" not the "sleek modern look" illustrated in the 3D renderings.

Marcal contended that the transformation of the design was agreed over a series of meetings held between November 2014 and May 2015. The Judge considered each meeting in turn and concluded –

"*None of the Defendant's accounts as to how the design developed from sleek modern to wonky industrial to use the words of Counsel for the Claimants, which I consider is a fair description as to what was anticipated by the Claimants and as to what was provided, is convincing. The Defendant's general lack of credibility when it comes to making the best of what he scribbled in his daybooks makes his history of the alleged development of the design very difficult to accept.*"

(…)

"… Mr Marcal redesigned the cinema box without telling the Claimants and arranged for the construction of a cinema box which they had not approved and which was significantly and critically different from the sleek modern look they were expecting. The wonky industrial look was not discussed with the Claimants, was not what they expected to be provided and had not been approved by them."

The Architect's Registration Board (ARB) Code of Conduct 2010

Registered architects should be aware of their obligations under the Architect's Registration Board Code of Conduct 2010, ("the ARB Code"), in respect of appointments and managing the brief. The ARB Code, which was referenced during proceedings, sets out the duties of an architect before undertaking any professional work as follows:

"4.4 You are expected to ensure that before you undertake any professional work you have entered into a written agreement with the client which adequately covers:

- *the contracting parties;*
- *the scope of the work:*
- *the fee or method of calculating it;*
- *who will be responsible for what;*

(…)

4.5 Any agreed variations to the written agreement should be recorded in writing."

Written brief

The Judge considered that it would be bad practice not to have recorded the initial brief or any changes in design development in writing and considered on the evidence that there was neither a written brief nor a written agreement.

"… to avoid any misunderstanding at the very least, a written brief is essential and changes to that brief must be recorded in writing whether by drawings, sketches and/or minutes of meetings."

"This is not only necessary but the absence of these documents was causative of the losses claimed on this claim. The Defendant effectively went on a frolic of his own producing a wonky industrial design rather than the sleek modern design the Claimants were expecting."

The Judge emphasized the importance of this in relation to small projects which have a novel design.

"… any reasonably competent architect who did not in exceptional circumstances produce a written brief and did not explain in those exceptional circumstances in writing why such a written brief had not been produced would be in breach of any duty of care owed to the client."

In summary the Judge stated –

"The central plank of the Defendant's case on approval was the so-called daybooks. However, these daybooks – the tumble dryer of information – could not be relied upon because they could not be reliably used as a source document. Not even the Defendant could understand what they recorded or when these records were produced. The Defendant's failure to produce a written brief was a serious breach of duty which went to the root of the difficulties which he and the Claimants encountered. What was also an important failure was his failure to record the design changes from the sleek modern design for the cinema box illustrated in the 3-D picture he commissioned to the wonky industrial design eventually produced to the Claimants for their approval … "

In essence, the failure to provide a written brief will amount to a "serious breach of duty".

Demolition

In cases of this type, the award of damages typically relates to the cost of rectifying the defective works. In this case, however, court accepted that rectification was not appropriate and awarded damages based on the cost of demolition.

"The Claimants have decided to demolish the cinema room. I consider such a decision to be a reasonable decision. Whilst I accept that the ordinary measure of damage when an architect has acted negligently is the cost of rectification, I do not consider that this particular ugly duckling can be turned into a swan. What was provided is so different to from what the Claimants reasonably expected that I consider demolishing this cinema is the reasonable course going forward."

This can be contrasted with the decision in **Ruxley & Forsyth** [1995] UKHL8 where demolition and reconstruction were held not to be reasonable steps, notwithstanding that the project (in this case a swimming pool) did not comply with the brief.

Aesthetics

Marcal's breach of duty was not attributable to a consideration of the aesthetics of the cinema box. The Judge was clear that opinions on the appearance of the cinema box are subjective. The issue at hand, he said, was the failure of Marcal to agree the brief with the Client and keep them informed of any possible changes during design development.

"The appearance of the cinema and who likes what are all issues which are somewhat subjective. There may be people who prefer the industrial wonky design to the sleek modern design. However, that is why it was essential not only to agree the brief but also to ensure that the Claimants had a clear understanding as to what would be provided."

Summary

This case highlights the importance to all architects of: keeping good records that can be relied upon; of defining and recording the brief; and, most importantly, where changes are made to the brief ensuring that the client is made fully aware of these changes at all stages. In addition, registered architects should be aware of their obligations under the ARB Code regarding appointments and variations to the brief.

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RIBA New Code of Conduct 2019

By Katerina Hoey

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The Royal Institute of British Architects (RIBA) published an updated Code of Professional Conduct on 8 April 2019, ("the RIBA Code"). This came into force on 1 May 2019 alongside new procedures for dealing with disciplinary issues.

The most significant aspect of the new disciplinary procedures is a change in the standard of proof from '*beyond reasonable doubt*' to '*a balance of probabilities*' (RIBA Disciplinary Procedures, para 9.16), aligning it with requirements set by many other professional and regulatory bodies, including the Architects Code (2017) of the Architects Registration Board, ("the ARB Code").

While the RIBA Code still retains its three principles of 'Integrity', 'Competence' and 'Relationships', it has been expanded into a comprehensive 18-page document, incorporating an introduction section and non-binding guidance notes within the various provisions as well as a comprehensive list of defined terms.

'Principle 1: Integrity' has been significantly expanded and includes re-written and extended sections on the following:

- Impartiality and undue influence';
- 'Statements';
- 'Conflicts of interest';
- 'Confidentiality and privacy' (incorporating legislative requirements under GDPR); and
- 'Bribery and corruption' (incorporating legislative requirements under the Bribery Act 2010).

New requirements have been added, relating to:

- 'Handling client money' (aligning the RIBA Code with Standard 7 of the ARB Code); and
- 'Criminal conviction / disqualification as a director / sanction' (aligning the RIBA Code with Standard 9 of the ARB Code as well as incorporating para 1.3 from RIBA Guidance Note 1).

'Principle 2: Competence' has been significantly expanded and almost entirely re-written. Extended sections include:

- 'Skill, knowledge, care, ability' (aligning the RIBA Code with Standard 2 of the ARB Code regarding arrangements for work to continue in the event of a Member's incapacity or worse);
- 'Terms of appointment' (significant detail added);
- 'Time, cost, quality' (including a new requirement under 3.4 regarding the need for specialist cost control advice); and
- 'Record keeping' (incorporating legislative requirements under GDPR).

New requirements have been added, relating to:

- 'Health and safety' (incorporating statutory requirements under the CDM Regulations);
- 'Inspection services';
- 'Building Performance' (aligning the RIBA Code with the updated Plan of Work, new section 7);
- 'Heritage and Conservation';
- 'Town and country planning';
- 'Law and regulations';
- 'Certification' (possibly in response to recent case law);
- 'The environment' (aligning the RIBA Code with, and significantly expanding upon, Standard 5 of the ARB Code); and
- 'Community and society'.

Several obligations have been added to principle 2, which are significantly more onerous or may present a challenge in terms of assessment of an alleged breach and/or the application of the RIBA Code. These include:

- **1.6:** "*Members must make appropriate arrangements for their professional work to continue in the event of incapacity, death, absence from, or inability to, work*". While this is already contained within the ARB Code (paragraph 2.2) and appears feasible for a medium to large practice, a small practice or sole trader is likely to breach this requirement on a regular basis. Guidance note GN 16 suggests that "*appropriate arrangements*" might include having an agreement with another local practice for them to offer to continue the work for the client. It is difficult to see how this might work in practice, however, and such an arrangement is unlikely to be of great benefit to a Client who will still need to put their project temporarily on hold while the new Architect plays 'catch up'.
- **1.14:** "*Members should reflect on and evaluate their own work*". It is not at all clear how any potential breach should be assessed or how fulfilment of this obligation could be demonstrated.
- **3.2:** "*Members should endeavour to deliver projects that: (a) are safe; (b) are cost effective to use, maintain and service; and (c) minimise negative impacts on the environment during their anticipated life-cycle*". In the current climate, the definition of 'safe' is being continually re-assessed. Any reference to this obligation should be viewed, therefore, within the context of an Architect's obligations under their Appointment, and the industry guidance available and regulatory framework in place at the time the work in question was carried out. Cost effectiveness in use, and impact on the environment during the project's life cycle, may also present difficulties in interpreting what is reasonable in the circumstances. It will be preferable to clarify these so far as possible in the Brief and the instructions.
- **6.4:** "*Members must take reasonable steps to protect the health and safety of those carrying out, or likely to be directly affected by, construction work for which they are providing professional services. This includes clients and members of the public*". While this would appear to align the RIBA Code with an Architect's obligations under the CDM Regulations, the guidance notes (GN 6.2, 6.3 and 6.4) state that "'*reasonable steps' may require doing more than is strictly required by law and regulations*" (my emphasis). I anticipate challenges in assessing what may be considered 'reasonable' without clear reference to statutory requirements. I would expect an Architect's obligation under this section of the Code to be assessed within the context of the obligations of other relevant parties, including the Contractor's responsibility for the site during the construction period.
- **13.9:** "*Members should practice evidence-informed design and should keep records of the evidence used in reaching design decisions*". The guidance note GN 13.9 advises that members should "*keep written records of the evidence and data examined and used by them in reaching decisions in the design process… and any reasons for not acting on particular pieces of evidence considered*". This is an onerous obligation and I anticipate challenges ahead in assessing allegations of non-compliance.
- **14.2:** "*In performing professional services, Members should promote stronger communities and improve equality, diversity and inclusion in the built environment*"; this is an onerous blanket requirement that does not appear to take into account the requirements of the Client's brief or any other contextual issues including assessment of existing equality diversity and inclusion. Reference to "*in the built environment*" is broad and I anticipate challenges ahead in assessing allegations of non-compliance and dealing with a potential proliferation of third-party claims.

'Principle 3: Relationships' has also been expanded and re-written in places. Extended sections include the following:

- 'Peers' (new paragraph 3.4 aligns the RIBA Code with Standard 9 of the ARB Code);
- 'Equality, diversity and inclusion' (incorporating legislative requirements under the Equality Act 2010);
- 'Employment and responsibilities as an employer' (bringing in and expanding upon RIBA's Employment Policy);
- 'Competitions' (incorporating reference to applicable procurement law); and
- 'Complaints and dispute resolution' (aligning the RIBA Code with Standard 10 of the ARB Code).

New sections add requirements relating to:

- 'Copyright';
- 'Previous appointments';
- 'Modern slavery' (incorporating legislative requirements under the Modern Slavery Act 2015);
- 'Advertising / business names / use of RIBA crest and logo' (incorporating previous RIBA Guidance Note 2 'Advertising');

- 'Insurance' (incorporating previous RIBA Guidance Note 4 'Insurance' and bringing the Code in line with ARB Architects Code Standard 8);
- 'Non-disclosure agreements'; and
- 'Whistleblowing'.

Two obligations have been added to principle 3, which are significantly more onerous or may present a challenge in terms of assessment of an alleged breach and/or the application of the RIBA Code.

- 4: "Members who become aware of a probable breach of the Code by another member shall report it to the RIBA Professional Standards team, with such supporting information and evidence as is available". Further explanation of this obligation is provided in the guidance note (GN 3.4) which states that "failure to report a probable breach is only justified when prevented by law or the courts…". While this requirement is included within the ARB Code (para 9.3), it is less stringent and requires reporting "in appropriate circumstances" and where conduct "falls significantly short"; the language used in the RIBA Code indicates that this applies to a probable breach of any aspect of the RIBA Code, which is broader in scope than that of the ARB.
- 3: "Members shall use reasonable skill and care to use supply chains which are free from Modern Slavery". Further explanation of this obligation is provided in the guidance note (GN 5.3) which states that "'Supply chains' includes both materials and people. Members should be aware of the labour used in the extraction, manufacture and production of materials they use or specify, as well as the direct labour involved in their projects". This wide interpretation of the supply chain imposes an onerous obligation on Architects; while appropriate enquiries can be made of Manufacturers during the specification process and in theory it is possible to incorporate a Modern Slavery statement by a Contractor into the tendering process, the expectation expressed in the guidance note that Members "should be aware of the… labour involved in their projects" is somewhat unrealistic.

The recent cases of Riva v Foster [2017] EWHC 2574 (TCC), Burgess v Lejonvarn [2018] EWHC 3166 (TCC) and Freeborn v Marcal [2019] EWHC 454 (TCC) highlight failures regarding obligations which are the subject of the amendments made the RIBA Code; these include:

- 'Skill, knowledge, care, ability' and paragraph 1.9 "Members shall advise their clients in writing as soon as is reasonably practicable if the Member's assessment of the likelihood of achieving the client's requirements and aspirations changes during the project": Freeborn v Marcal.
- 'Terms of Appointment': Riva v Foster and Burgess v Lejonvarn;
- 'Time, cost, quality' and paragraph 3.3 (b) "Members must carry out their professional work without undue delay and, so far as it is within their powers… in accordance with any cost limits agreed with their clients": Riva v Foster;
- 'Keeping the client informed': Freeborn v Marcal;
- 'Record keeping': Freeborn v Marcal; and

To conclude, the updated Code has gone a long way in aligning itself with standards of professional conduct required by other regulatory bodies and has responded to updated legislation, regulation and recent case law. However, some requirements have been introduced that may cause difficulties in defining and/or assessing in terms of non-compliance. These may have been best left within the guidance notes.

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