‘The Architect Who Knew Too Much About Fire’

Think Twice When Giving Advice

By Bart Kavanagh

What can one expect from a Stage D Report

By Gerard Mclean

Planning Applications: *Hope and Homework*

By Frank Newbery

PROBYN · MIERS

INTERNATIONAL CONSTRUCTION DISPUTE RESOLUTION

'Perspective'

These articles are a compilation of Perspective Newsletter, our quarterly digital publication and part of Probyn Miers knowledge sharing policy directed to the construction industry and our clients. Perspective brings you news, information and points of view on topical issues relevant to architects, engineers, surveyors, construction lawyers, contractors, insurers and all of our colleagues in the industry. The articles, intentionally short, are the bases for further in-depth discussions at in-house talks and workshops that Probyn Miers runs for our clients. Our articles are published in other journals with prior agreement.

Should you be interested to receive information on any of our events, do contact us at:

E: *info@probyn-miers.com*

Our Events:

- Probyn Miers Annual Conference / London-Dubai
- *'The Thing is...'*: A forward thinking gathering of construction leaders and specialists. These are breakfast sessions *'by personal invitation only'*
- Perspective Newsletter
- Webinars
- Workshops / Talks on our areas of expertise and run at clients' offices

Follow us

"We have found Probyn Miers to be a highly responsive and customer focused organisation, offering a range of forensic technical services. They bring a unique blend of technical competence, together with commercial and legal awareness which make them a natural first port of call".

- Major Contractor Client

Our Expertise

International Dispute Resolution & Avoidance • Architect Expert Witnesses • Adjudicators • Project Procurement • Project Management • International Arbitration • International Dispute Boards • Mediators • Expert & Forensic Investigation • FIDIC Contracts • Power & Energy • Technical Audits • Building Design and Specification • BID/Tender Advisory • Building Defects • Litigation Support • Project Rescue Consultancy • Contract Management • Architectural Services • Contract Administration • Dispute Review of Construction Claims • Fire Cases Consultancy • Expert Determination • Remedial Works • Training & Workshops • Public Speaking

‘The Architect Who Knew Too Much About Fire’

First Published February 2014

One of Probyn Miers’ experts recently found himself in the unusual position of being the subject of a High Court hearing. Martin Edwards, our architect expert specialising in fire safety, was appointed to replace a retiring expert who had been involved in a fire damage case that had already run for 7 years.

Counsel for the Defendants opposed the appointment “because he is not just an architect but also an expert in fire safety.” [BAILII, 40] However, Mr Justice Edwards-Stuart (no relation) considered that:

“The issues raised in these proceedings call for an expert who is not only an architect, but also one who has knowledge or experience of the requirements for fire protection in buildings such as this shopping centre.” [41] and

“In my judgment, the evidence of Mr. Edwards is admissible in relation to the claim against the architects because he is an architect. I do not see how his specialist knowledge of fire precautions can make his evidence as an architect inadmissible.” [44]

The judgment also addresses:

- ‘Chinese wall’ established within Probyn Miers to avoid possible conflict of interest with architect expert who had assisted Defendant’s expert in his previous practice; [16]
- Allegations of expert-shopping; [17-22, 33-38]
- Disclosure of previously undisclosed reports; [23-32]
- Insurers’ guidance documents; [55-56]
- Press reports of similar fires. [58-60]

The publication of the judgment elicited an entertaining article in the Fire Safety Industry on-line press: *“The Architect Who Knew Too Much About Fire”*. [1]

For the judgment itself see [2].

[1] *http://www.ifsecglobal.com/author.asp?section_id=565&doc_id=561891*

[2] *http://www.bailii.org/ew/cases/EWHC/TCC/2013/3183.html*

Martin Edwards *is a Chartered Architect with over 35 years’ experience of private and public architectural practice in a wide spectrum of building types in the UK and abroad. He is an Associate Director at Probyn Miers with over 14 years’ experience as an Expert Witness and has been instructed in disputes up to £80 million value. He has also acted as single joint expert. With an extensive specialist knowledge on fire damage and fire safety and with wide experience of negotiations with Fire Brigades and Local Authorities over the fire strategies for large and unique buildings. Martin has been quoted as ‘The Architect who Knew Too Much About Fire’ (see Probyn Miers Newsletter ‘Perspective’, February 2013). He has also reported on fatal fires for criminal proceedings.*

medwards@probyn-miers.com

Think Twice When Giving Advice

By Bart Kavanagh

First Published June 2013

The duty of an Expert Witness to the court in England and Wales is succinctly summarised in CPR (Civil Procedure Rules) rule 35.3:

- It is the duty of experts to help the court on matters within their expertise.
- This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

These brief paragraphs, however, also contain an inherent acknowledgement that the Expert Witness is under a parallel obligation to his ‘client’. The balance between, possibly conflicting, allegiance to two masters has been addressed, and adjusted, by the court on several occasions.

The Court Supreme

In Cala Homes v Alfred McAlpine Homes [1] an architect expert, Francis Goodall, was mortally wounded when his own article came back to bite him, following a lengthy and detailed criticism by Laddie J in his judgement. The article had maintained that the duty of the Expert to the court became operational only on those occasions, rare at that time and even more so today, when he appeared before it.

“Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility.” [2] At earlier stages of his appointment, Mr Goodall suggested, an expert was not so constrained and:

"Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility." [2] At earlier stages of his appointment, Mr Goodall suggested, an expert was not so constrained and:

"If by (…) 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration." [3]
Laddie J did not agree. He decried the view, dismissed the evidence, "I did not find it of significant assistance in deciding the issues" and damaged severely the reputation of the expert.

The Client Restored?

The parallel obligations to court and client were examined again more recently in Stanley v Rawlinson. [4]

At first instance HHJ Moloney QC stated that:

"(…), Mr Croucher's conclusions remained favourable to the Claimants notwithstanding adverse developments in the evidence. Also, (…) he appeared to go beyond the usual role of an expert witness by advising [his client] on the evidence they needed to meet the opposing case; (…) in cross-examination he maintained that he owed a dual duty to the Court and to his "client". (…), I would generally therefore favour Mr Leeds's evidence, all else being equal." [5]

In giving the judgement of the Court of Appeal, however, Tomlinson LJ not only acknowledged the duty that an expert has to his client, he also accepted that this duty may encompass giving advice, in the early stages of an action. He referred to paragraph 4.1 of Practice Direction PD 35, which endorses this duty, "Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant code of ethics." and elaborated on what this might mean in practice:

"(…) There is nothing inherently objectionable, improper or inappropriate about an expert advising his client on the evidence needed to meet the opposing case, (…). There is nothing improper in pointing out to a client that his case would be improved if certain assumed features of an incident can be shown not in fact to have occurred, or if conversely features assumed to have been absent can in fact be shown to have been present." [6]

Conclusion

An Expert Witness must be aware that, whilst his duty to the court in England and Waleswill override his duty to the client, that duty to the client remains. Further, an effective Expert Witness will understand the value of his impartial and independent opinion on issues relating to the strength, and weaknesses, of the factual evidence.

It seems reasonable to suggest that, in helping the instructing party to arrive at a realistic understanding of the technical merits of the case, and thereby increasing the potential for reaching a negotiated or mediated settlement, the Expert Witness will discharge his duty to both client and the court.

[1] Cala Homes (South) Ltd & Ors. v Alfred McAlpine Homes East Ltd [1995] EWHC 7 (Ch)

[2] The Expert Witness: Partisan with a Conscience. Arbitration, Volume 56, Number 3. 1990

[3 - 6] Ibid, Stanley v Rawlinson [2011] EWCA Civ 405, Ibid Paragraph 16 (quoted), Ibid

Bart Kavangh *has master's degrees in both Architecture and Law and is a Chartered Architect and a Barrister (non-practicing). He also has a Diploma in International Arbitration and is an accredited mediator. Bart is an Associate Director at Probyn Miers with more than 35 years' experience in the construction industry, Bart has been involved in a wide range of building types. Over the last ten years he has had particular involvement in complex airport projects in the UK and abroad. He has been appointed as an Expert Witness in disputes valued at up to £500m and he has been cross examined on his expert evidence. Bart is the editor of 'Perspective' Newsletter.*

bkavanagh@probyn-miers.com

What can one expect from a Stage D Report?

By Gerard Mclean

First Published February 2013

An architect is expected to produce formal reports at certain stages of a project, and these reports form key points of reference: for a client to be reassured that the project design development remains within the brief in terms of scope and cost forecast; and for the design team to secure client agreement to proceed formally to the next design stage. However we in the UK regularly see disputes where, if the project runs into trouble, the contents of these reports are cited as an example of the architect's alleged wider failure to provide services in line with its appointment.

The most common source of contention is the Stage D Report, and I examine below the likely contents of such a report. As a basis for the services typically provided by an architect, I take the most recent form of the RIBA's Standard Conditions of Appointment for an Architect (2010 edition) (the "SCA"); the specific requirements will vary with the form used but, in the absence of any other definition, the services set out in the SCA's Work Stages are most likely to form the basis for an architect's understanding of the services expected.

According to the SCA, for "All commissions", the services to be provided include "Preparing Work Stage Reports and submitting to Client". The SCA suggests that these will be provided at every Work Stage; normally the reports are submitted less frequently, but the report at Stage D is the one least commonly omitted. The SCA does not prescribe the content of a Work Stage Report but does define the Work Stage services, and it is reasonable to take the contents of a Work Stage Report, usually expected to be delivered on completion of that stage, to reflect the specified services.

it is reasonable to take the contents of a Work Stage Report, usually expected to be delivered on completion of that stage, to reflect the specified services.

In the SCA, Stage D is the *"Design Development"* stage, at which the architect's services are:

- *"Contributing to completion of the Project Brief"*

The architect's failure to complete a brief for a project can lead to problems for all involved in the project at this stage and at subsequent stages, but this is not a failure claimed frequently by clients, possibly because of the necessity for client input to that brief. A detailed brief provides a reference against which each stage of the development of the design can be judged, and absence of an agreed brief is likely to lead to unhelpful ambiguity as to what the consultants and the contractor are expected, and are able, to deliver.

As well as the technical requirements for the building, for larger projects typically shown on room data sheets, services performance specifications etc., the brief can also be useful in defining the relative importance to the client of the various risks (most broadly cost, programme and quality) present in construction.

- *"Investigating effect of statutory standards and construction safety on Concept Design" and*
- *"Consulting statutory authorities"*

Although these requirements are not narrowly defined, they are unlikely themselves to be the source of a dispute regarding the contents of the Stage D Report. Discussions with the planners will, in most cases, have been superseded by submission of the planning application (see below), while a failure properly to consult building control would be unlikely to become apparent until a later stage. However, as changes to a design after Stage D are likely to have programme and/or cost implications, broad building control and constructional safety issues must be considered in advance of the detailed work to ensure that the design submitted for planning permission is buildable. If changes are necessary later to meet statutory or safety requirements, the planning drawings and the Stage D Report are likely to form a useful record of whether these known constraints were taken into consideration at an early enough stage.

- *"Developing the approved Concept Design to show spatial arrangements, type of construction, materials, appearance and detailed proposals for structural and building services systems and updated outline specifications"*

These requirements are open to broad interpretation, with the employer often expecting a greater degree of detail than the architect considers reasonable; this breadth of range is the most common source of disagreements. Given the scope of possible subject matter under this heading, it is surprising that the content of the Stage D Report is not defined, even as a default requirement, in the standard form. Experienced or well advised employers or architects may take the time at the appointment stage to set out in detail what level of design detail will be provided in the Stage D Report and so reduce the likelihood of disputes, but others are less likely to do so.

- *"Providing information for estimate of Construction Cost"*

Differences in expectations as to the Report's content often also have a consequence in terms of the cost estimate: the degree of detail normally provided at the planning application stage will allow only limited certainty as to building costs, and the cost estimator (whether the architect or a quantity surveyor) will often include a large percentage contingency to allow for completion of the design post-Planning. In many cases, the uncertainty of cost is likely to be compounded, especially in times of high building cost inflation, by uncertainty as to programme, as planning permission is not yet in place and as the architect's programme of work post-planning may be undefined; this is unwelcome to most employers.

- *"Preparing and submitting application for detailed planning permission"*

This requirement is noted as being subject to movement, presumably to another Work Stage,"…. to suit project requirements", although for most architects, the submission of a planning application is taken as the culmination of Stage D, or even its definition, while the other activities described may be subject to movement. Most commonly, the drawings submitted for planning permission are included in the Stage D Report; whether or not these drawings are sufficiently developed for the Work Stage is then largely a matter for determination by the planning authority.

Certain parts of the Report may be of particular importance to the employer for reasons that are not obvious to the architect unless they are spelled out. For example, for a commercial developer, advice on the likelihood of gaining planning permission and the expected programme for that permission may be critical to release of funding for subsequent stages. Alternatively, an employer having a house designed for him/herself may be more interested in a description of the causes and results of any design changes made since Stage C, or in the updated cost estimate that is usually included.

An employer's specific requirements at Stage D often exceeds the stage of design development consultants expect to have completed at that Work Stage. If work normally carried out in later Work Stages is necessary, disputes should be avoidable if the parties can agree in advance the extent of that work and note it in the architect's appointment as a special service.

Usually, it should be possible to negotiate such a rearrangement of services before the appointment is agreed, although if the normal services are greatly extended it may be necessary to postpone part of another service normally included in that Work Stage, or to change the usual apportionment of fees according to Work Stages.

The RIBA is about to revise the division of Work Stages for the first time since 1963. In the draft version of this revision, Stage D is shown as forming part of a new Stage 3 "Developed Design", which includes elements of the current Stage E activities. However, Stage 3 remains as loosely defined as the existing Stage D and the draft, as it stands, is unlikely to resolve the uncertainty about what is essential to an architect's report at this stage of a project.

Gerard Mclean *is a Chartered Architect with more than 20 years'experience in construction in the U.K and internationally and he is an Associate Director of Probyn Miers. He has worked extensively on Listed Buildings and in Conservation Areas, and has run projects under management contracts, construction management forms and bespoke partnering arrangements, as well as under more common standard forms. Gerard is instructed regularly as a party appointed Expert Witness on behalf of insurers, employers, architects, contractors and subcontractors, in a wide range of construction disputes valued at up to £10million. These disputes most commonly relate to allegations of breach of contract on the part of the contractor and/or claims of professional negligence against architects.*

gmclean@probyn-miers.com

Planning Applications: *Hope and Homework*

By Frank Newbery

First Published February 2013

Architects retain a vital role in the construction industry through their ability to obtain planning consents for building projects on the merits of their designs. In doing so the architect will often strive, in the client's interest, to maximise the value and/or size of accommodation to be built. This maximisation will typically find its limit at what the local planning authority (LPA) will permit.

In recent years I have been asked to advise on several UK cases in which it has been alleged that architects' wrong assumptions and poor advice have caused loss to clients by overstepping what the LPA would permit, thereby requiring expensive corrective works and/or failing to attain a fundamental commercial or functional objective.

The borderline between what an LPA will or will not permit can be a grey area in some respects, and architects will use their skill and experience in negotiating with planning officers to try to establish in advance of a planning application what is likely to achieve permission. Most standard forms of architect's appointment explicitly state that the architect cannot guarantee the outcome of a planning application, or ensure that any consent will be granted in good time or at all. This partly protects architects from allegations of negligence if applications fail.

However, architects will still retain their professional duty to take reasonable skill and care in advising their clients concerning planning matters.

Works of guidance well-known to the profession [1] explicitly advise that architects should check on whether their proposal is permitted development or not, and should ascertain what planning policies and restrictions might apply to it. From a client's point of view this might seem to be only common sense. Unfortunately, some architects on some occasions omit to do this, relying perhaps on outdated

precedents, or on the assumption that all can be resolved by pre-application discussions with the LPA. Such omissions can have serious consequences.

An architect might for instance advise a client that, although not guaranteed, there was a reasonable chance that permission might be granted to divide a row of houses into flats, leading to a profitable re-sale. The client buys the houses on the strength of that advice, and the planning application for a conversion scheme is made. The LPA then refuses the application, citing as its reason a particular policy in the Local Plan which exists to preserve houses specifically of the original type as undivided dwellings. Although the architect's appointment conditions might not have warranted that a planning application would be successful, the client could still reasonably claim to have been misled into an unprofitable investment by the architect's apparent lack of skill and care in failing to warn that a published and specific local policy made it very likely that the application would automatically be refused.

The professional guidance also advises that pre-application negotiations with planning officers cannot be relied upon, especially if purely oral. There is a high risk under such circumstances that the architect and planning officer will have divergent recollections as to what was agreed, or that the case might be passed on to a different planning officer with a different attitude or priorities. The first officer, for instance, might have said informally that the proposal could go ahead as permitted development without a planning application. The works are then performed on site, whereupon a different officer (the previous one having left), finds that the works are not permitted development, and enforces expensive adjustments to the work already completed. In the UK an architect can prudently forestall such a situation by obtaining in good time a Certificate of Lawfulness of Proposed Use or Development ("CLOPUD") from the LPA for half of the amount of a planning application fee.

Another common pitfall, especially in private residential work, is allowing the extent or external appearance of the proposal to vary so that it changes from compliance to non-compliance in relation to local planning policies, or perhaps exceeds the limits of previously ascertained "permitted development". Again, the architect should be as familiar as possible with the applicable policies in order effectively to assess whether a variation is trivial or will require resubmission to the LPA as an amendment.

In summary, whilst architects cannot remove the risk that planning applications may be refused, they should acquire the best possible understanding of the planning policies relevant to their proposals in order to minimise the risk of unforeseen disruption and cost.

[1] Architects Legal Handbook, currently ninth edition, 2010, Elsevier / Architectural Press;
The Architect's Job Book, currently eighth edition, 2008, RIBA Publishing;
Good Practice Guide: Negotiating the Planning Maze, currently third edition, 2009, RIBA Publishing

Frank Newbery *is a Chartered Architect with over thirty years' experience in the construction industry. He has been active in expert witness consultancy since 2004. He is experienced in all the key professional tasks including client liaison, design, planning and building control consents, technical detailing and production information, contract administration and obtaining resolution of defects. Frank has given expert evidence in court and has been a key participant in several mediations. In recent years Frank has taken a special interest in the evolution of BIM procedures and conventions, and gives public presentations on the topic.*

fnewbery@probyn-miers.com

London
Hamilton House
1 Temple Avenue, Temple
London, EC4Y 0HA
Tel: +44 (0)20 7583 2244
www.probyn-miers.com

Dubai
Emirates Towers, Level 41
Sheikh Zayed Road
Dubai, PO Box 31303
Tel: +971 4 313 2346
www.probyn-miers.ae

info@probyn-miers.com