A court case in which an architect was ordered to pay £500,000 in damages plus costs over a ‘wonky’ home cinema, could have ’wide implications’ for the profession, architects have been warned

The judge in the landmark High Court action held that architect Daniel Marcal’s failure to produce a written brief on the high-end domestic job ’was a serious breach of duty which went to the root of the difficulties which he and the claimants encountered’ (see full judgement below).

Banker Philip Freeborn and his wife Christina Goldie sued Marcal for negligence over his delivery of a floating ‘sleek modern’ cube in the poolhouse at their £7 million home in Totteridge, north London.

The clients claimed they were ‘shocked’ when the box-like structure was completed, saying the designs were not what they had expected, had not been agreed on and, according to judge Martin Bowdrey, had left them with an ‘ugly duckling’ which could not ‘be turned into a swan’.

The couple’s list of complaints included: that Marcal had delivered a ‘wooden box’ with glazed panelling rather than ‘glass walls’; that it had ‘visible spider bolts’; was supported on six legs and not four, and had a ‘wonky industrial’ aesthetic.

zoom in
zoom out

Marcal denied liability, telling the court that he had worked in line with his brief, that any perceived defects were within acceptable tolerances, and that his appointment had been on an ad-hoc basis – he'd been charging an hourly rate of £35. Marcal, who had been trading as Dam Marcal Architects, added that he had felt intimidated by Freeborn during the project.

At the trial the architect also insisted the evolution of the design had been talked through with the clients and that he had kept a note of the changes – described by him as a 'tumble-dryer of information'.

According to Marcal's evidence: 'The design intent, ie the steel/glass aesthetic, was frequently discussed … with the claimants and with Goldie in particular. [I] had created a Pinterest board with various images and the claimants agreed to the aesthetic.'

But the judge found that these notes 'could not be relied upon because they could not be reliably used as a source

document'.
Instead, the judge said: '[I] consider that any architect authorised to spend sums in excess of £460,000 on a glass box would be expected to produce a design not only in accordance with his clients' expectations but also something "bespoke" and "high end".
'That is not what the claimants reasonably thought had been provided. What was provided had not been discussed with them and had not been approved by them.'
He added: 'With regard to the spider [bolts], there was no agreed brief for visible spider bolts. Reliance on random photographs on the Pinterest board does not establish that what the claimants contend are unsightly were ever approved by them. They were not shown on the concept drawings sent for building contract. They were never discussed, explained or approved.
'Similarly, the claimants on the basis of the concept drawings were expecting a glass box, not a wooden box with glass panels.'
Bowdrey added: 'The claimants not knowing and not agreeing to the design of the cinema room as implemented, and the change from sleek modern design to industrial wonky design, was all as a result of the defendant's negligence in having no written brief and no consultation with the claimants as that brief changed so dramatically.
'None of those changes were shared with the claimants in writing or otherwise. They were entitled to be outraged by what they saw had been produced at great cost, which was not what they were expecting.'
As a result the judge order that the demolition of the cinema was 'reasonable' and that these costs and the wasted money spent on the job should be borne by Marcal.
Jerome O'Sullivan, a partner at the claimants' solicitor Healys, said: 'This case has wide implications for the

architectural profession and other professionals working in the construction industry and employers commissioning them.
’The judgment demonstrates that an architect must ensure that they enter into a written agreement with their clients that confirms; the scope of the work, what will be the architect’s, client’s and other contractor’s responsibilities; and any subsequent variation in this agreement.
He added: ’The initial planning brief must be recorded in writing by reference to drawings, sketches, or three-dimensional models and a detailed written description of the design. The brief should show what the final design will achieve in terms of accommodation, costs, level of finish and operational requirements.

Any variations to the planning brief should be recorded on the same basis and forwarded to the client

‘Any variations to the planning brief should be recorded on the same basis and forwarded to the client. An architect should ensure that these documents are agreed and counter-signed by the client before construction is commenced.
‘Minutes of meetings must be taken and circulated to all attendees and monthly progress reports issued to the clients and all interested parties. Any notes taken by the architect should be promptly typed up and distributed to all attendees.’
Former RIBA president Owen Luder agreed: ‘This case should be a warning to all architects, whatever the size or complexity of the project, that they must ensure they have a clear agreed detailed brief of the client’s requirements, a clear agreed appointment contract [stating] the fees to be

paid. [Architects should] keep detailed notes of all meetings and confirm all the changes, whoever makes them, immediately to the client.'
Marcal has been contacted for comment.

Comments

Mark Klimt, partner, professional indemnity at DWF solicitors

While the main issues discussed – the importance of a written appointment, the importance of a written brief and the importance of an accurate record of advice and warnings given to clients – are familiar subjects for architects, the judgement is somewhat unusual and noteworthy.

This is not a case where one side's expert evidence was clearly accepted over that of the other; indeed in many instances, the view of the defendant architect's expert, Salisbury, was preferred over that of the claimants' expert, Perry. While the factual evidence of the claimants was generally preferred over that of the architect, the latter's evidence was found to be confused rather than dishonest. Many of the individual allegations against the architect were either dismissed or found to be unfinished work, rather than actionable defects.

There does not appear to have been any allegation that a greater duty of care had been assumed than that provided for under the RIBA 2010 Standard Form of Agreement (2012 Revision) (the issue instead being whether the claimants ever received the relevant written communication from the architect). The judgement states in terms that 'The standard of reasonable care and skill is not a standard of perfection'. Nonetheless, the architect has a very substantial judgement against him, in circumstances where the misalignment of the glass panels – which appears to have been the major factor in the failure to deliver the required sleek modern design – has

been found not to be outside tolerances. This could give rise to the suggestion that a higher duty of care is indeed somehow applicable to projects of this nature.

High-end domestic projects are traditionally fraught commissions

High-end domestic projects are traditionally fraught commissions, with clients perhaps vacillating over a final decision on features that they will then have to live with indefinitely, and budget being a frequent area of contention. Conventional advice to architects is to make sure that the characteristics of the project (for example, an evolving brief at the client's request, or warnings given to the client) are properly recorded, primarily so that the architect can defend itself in the event of facing allegations of breach of duty. However, the Freeborn ruling goes further and holds that the absence of a brief is a serious breach of duty in itself. The judgement is also critical of the architect for a breach of the relevant ARB Code of Conduct concerning having a clear, written agreement. The judgement is also clear that being engaged on an hourly rate basis, is not suggestive of an ad hoc appointment, and rejects the notion of the Brief on domestic Projects being of necessity less well defined whilst the clients engage in a "journey of exploration" – even though in reality, domestic clients do, and quite understandably, change their minds as the possibilities of their Project unfold before them.

This judgement represents a rather severe reinforcement of what is already known, namely that communication is key. In that way, the judgement is in line with consumer protection legislation, which stresses the need for professionals to explain with great clarity all relevant aspects of the engagement.

Central to the judge's findings was that the cinema was so

different to what was expected and discussed that the claimants were entitled to demolish it and recover the costs associated with the same. In practical terms, a messy and confused appointment, an incomplete and un-updated brief and confused records throughout the project, all appear to have played against the architect, before even the quality of the design fell for consideration. Once again, it shows that time taken at the start of the project to define roles and tasks fully is time well spent.
Paul Hyett, former RIBA president
This case demonstrates the enormous importance of communication between an architect and a client. Among the many issues that necessitate clear understanding, cost and design are paramount.

It is a basic duty of an architect to show clients what they are getting

Whether by the time honoured process of hand-drawn sketches, or by physical models, computer modelling or the written word, the prudent architect must ensure that the client ‘signs off’ the proposals which must be shown and/or described in sufficient detail, and with sufficient clarity, to confirm beyond any reasonable doubt what is to be built.
In short: it is a basic duty of an architect to show clients what they are getting.
Owen Luder, former RIBA president
The first main issue was the lack of a detailed clients’ brief for what was a complex set of client requirements. This was made all the more important with the number of other professionals, contractors, subcontractors and specialists involved. It is correct that often, particularly with residential projects, the client has a only a very broad idea of what they want and are not capable of putting that in words in

the form of a brief.
It is for the architect, in his own interests, to ensure he has a detailed brief as to what is required of him. If the client is not able to provide that brief it is for the architect to write the brief following a detailed question and answer session with the client.

The architect could not defend himself because of a lack of a comprehensive and accurate chronological set of notes

The other problem area in this case was the architect's inability to defend himself against claims as he did not have a comprehensive and accurate chronological set of notes of meetings, discussions with clients and others involved. It is crucial that having established a clear brief as to what they require and what the architect will provide and the fees to be paid, any changes by the client must be recorded in writing to them when they are made.
If this involves additional work by the architect then he must agree the additional fees then with the client. Also they must warn if necessary of any risks that may be created as a result of the changes.
If the architect finds it necessary to change the brief again this must be recorded with the client with an explanation why and any additional costs involved. If the architect is responsible for coordinating the work of subcontractors and specialists as in this case (he took on the responsibility of being the project manager) then the same applies to any changes required by them.
I suspect in this case, as usual, that the clients' involvement (sometimes perhaps interference) may have made some contributed to the problems.

This case should be a warning to all architects

This case should be a warning to all architects, whatever the size or complexity of the project, that they must ensure they have a clear agreed detailed brief of the client's requirements, a clear agreed appointment contract with the fees to be paid, and [they should] keep detailed notes of all meetings and confirm all the changes, whoever makes them immediately to the client.

Do not rely on oral agreements or your memories of what happened. If there is a dispute it's our word against theirs – and the client is likely to be given the benefit of the doubt. They are the layperson and you are the professional.

A spokesperson for the ARB
While we can’t comment on the facts of the individual case, if the court was noting the importance of having

proper terms of engagement in place then we would commend such advice. Having lack of appropriate terms is the most common element in ARB's disciplinary investigations.