TURF WARS - SCOPING THE LIMITATIONS OF A PROFESSIONAL'S OBLIGATIONS WHEN WORKING FOR FREE

Burgess & Anor v Lejonvarn [2018] EWHC

Giles Tagg

We previously commented on this dispute in April 2017 when the Court of Appeal confirmed in declaratory proceedings that a duty of care could arise without a contract and where professional assistance was provided gratis - Formal Borders? Landscaping the Duty of Care in the absence of contract. A claim in negligence against Ms Lejonvarn ("the Defendant") a professional (non-UK practising) architect followed for in excess of £200,000. This article considers the Technology and Construction Court's decision on the merits of the matter.

The ruling provides comfort to professionals who have previously given ad-hoc advice informally without a formal contract. It also provides some useful guidance for architects and contract administrators as to what the law expects their supervisory duties to entail, particularly where third party contractors have failed to meet the standards to be expected.

Background

Mr and Mrs Burgess ("the Claimants") wished to landscape their garden ("the Garden Project") and initially instructed a well-known landscaper, Mark Enright. Mr Enright was not cheap and quoted £150,000 plus VAT for the works. The Defendant worked in a firm of architects and, previously having had a close relationship with the Claimants (she was a neighbour), became involved on the basis that she would be able to complete the Garden Project using Mr Enright's designs with her own team and at a lower price (£130,000 plus VAT). The Defendant did not charge for her involvement and assisted on the Garden Project between 6 March 2013 and 9 July 2013. During this period the Defendant found a suitable contractor, prepared a budget, received applications for payment from the contractor, advised and directed the Claimants in respect of payments and attended site on (at least) 10 occasions. The Defendant also made a number of revisions to the original design.

The Defendant and Claimants fell out on 9 July 2013 once Mrs Burgess became aware of the £130,000 plus VAT figure. Although the Defendant ceased to have any involvement with the project, the Claimants continued to use the Defendant's suggested contractor, ultimately paying them £168,370.33.

The Claimants subsequently re-instructed Mr Enright to carry out 'remedial works' for which he charged a further £181,065. Additional costs of £9,783.20 were incurred in respect of professional fees and repairs to a damaged bollard. The total cost of the work was £369,288.

The Claim

The Claimants sought damages from the Defendant on the basis that she had been engaged by them as a professional irrespective of payment and had been negligent in the course of that retainer.

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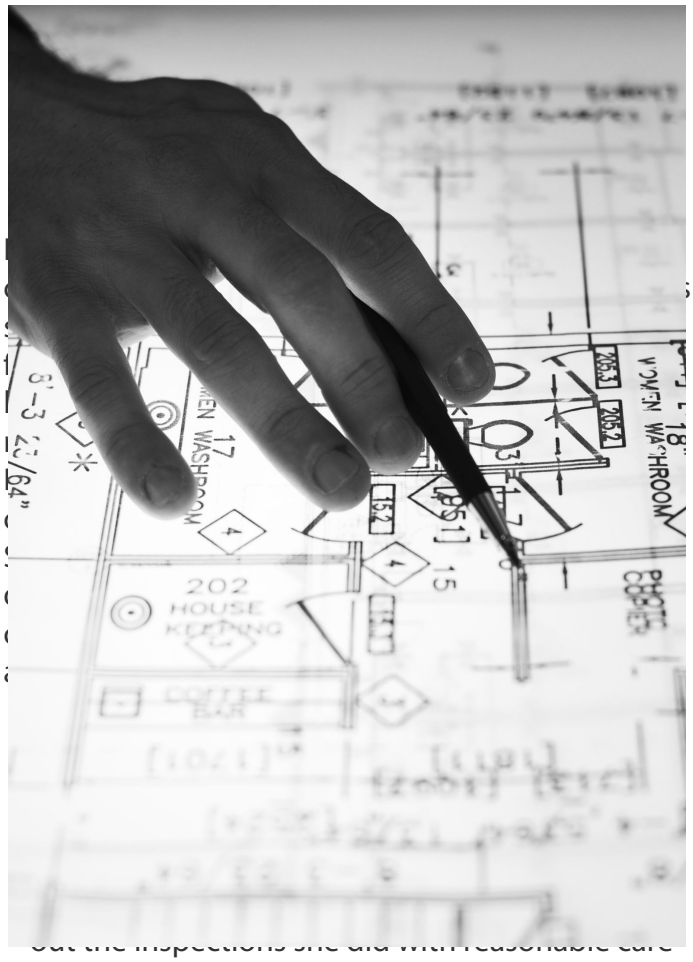
The allegations against the Defendant were, broadly, that:

1. She ought to have given a warning to the Claimants that the construction works should not be commenced or continued without sufficient construction detail being in place. That duty arose "because of her undertaking, as designer and project manager, the initial procurement and management of the project, identifying the necessary skills, locating the project team and arranging their appointments";
2. She failed to identify "the need for the detailed designs and specifications that needed to be produced (by her or by another competent professional) without which there existed the risk that the works could not be safely built" nor did she advise the Claimants of that need;
3. She did not include sufficient construction detail in her designs to enable them to be built and, in particular, a number of alleged key structural elements were inadequate; and
4. She did not exercise cost control, prepare an adequate budget for the works and/or appropriately oversee expenditure against the budget.

The Claimants sought the difference between £150,000 plus VAT (initial fixed quote) and the figure eventually incurred of £369,288.

The Decision

The matter was heard before Martin Bowdery QC. The TCC was tasked with considering in detail "what the Defendant actually did during the course of her involvement with the Project" and identifying whether in doing so she "was negligent whilst doing what she did". The TCC's language was necessarily restrictive on the basis that "positive obligations are the realm of contract" and "a continued failure to perform a positive act will not sustain a cause of action in negligence".



and skill, she was entitled to rely on her contractors and was not inspecting the structural work and groundworks for non-compliance which "no architect could be expected to inspect". Claimants should be careful not to fall into the trap of assuming that "any claim for bad workmanship against the contractor must automatically be reflected in a claim against the Defendant on the basis that, if there is a defect, then the Defendant has been negligent for not identifying it and having it remedied".1 Moreover, even on a reasonable examination "it is almost inevitable that some defects will escape [an inspector's]… notice".

3. In respect of the design elements, where revisions had been made these were necessarily minor changes and were not done with the intention that they would materially impact the finished designs. The Defendant was "not a design and build main contractor subcontracting the construction work…she was an architect fully entitled to let [the contractor] get on with their works to produce the necessary retaining walls and finished levels the Mark Enright design required".

4. In relation to budgeting and payment, the Garden Project could have been completed within the Defendant's initial budget of £130,000 and

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4. In relation to budgeting and payment, the Garden Project could have been completed within the Defendant's initial budget of £130,000 and there was no negligence in specifying this figure as an initial sum between March – July 2013. The Defendant could not be criticised for "asking for a quote from her builders and then providing what she considered to be a reasonable uplift for the balance of the works". Payments of £50,367 were made prior to 9 July 2013 on the basis of day works and the cost of materials. The TCC recognised those payments as "prudent and not excessive" given the work already carried out.

Comment

The initial Court of Appeal declaration that a duty of care arose in informal, non-paid, circumstances would no doubt have concerned many professionals. The decision of the TCC, however, shines a light on the practical realities of the situation and demonstrates that even at the more involved end of gratuitous work (as in this case) courts will be slow to create wide reaching tortious duties. An initial victory for the Claimants in the Court of Appeal proved Pyrrhic and they will now be facing both the additional costs of their project and their own and the Defendant's costs in the litigation. The case also proves useful for contract administrators and architects who will take solace in the TCC's recognition that sub-standard building work will not necessarily mean that there will also be a professional responsible for failing to appropriately design, inspect or supervise a project.

ABOUT THE AUTHOR

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Giles is an insurance litigator and has dealt with claims against a full range of non-medical professionals. He specialises in defending claims against construction professionals including architects, engineers and contractors.

He has experience of handling significant litigation in the Technology and Construction Court, arbitration, adjudication and mediation. Giles writes and speaks regularly on construction PI issues.

He also has a growing practice dealing with Educational Negligence claims, which is a relatively new but burgeoning area for negligence disputes.