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The Architects Act 2003 and The New South Wales Architects Registration Board

Discussion Paper - Recent Trend in Complaints
Retainers and Costs

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1 Recent Trend

Over the past few years, the NSW Architects Registration Board ("Board") has noticed a trend in complaints relating to the architect's retainer and costs.

The Board has received an increased number of complaints relating to the services provided by the architect, the architect's retainer and the client's perceived value of services. These complaints can be resolved, or at the very least minimised, by the architect exercising care and precision when describing the services they intend to provide, including by whom, by what date and at what cost.

Further, the Board has received an increased number of complaints involving situations whereby the client has disclosed a specific (maximum) budget for design and construction, the architect has prepared the design and issued the drawings for tender, but the tender prices exceed the client's budget by significant sums of money. These situations can place the client in a position where they can no longer afford to complete the project. This type of complaint is not easily resolved and has been the subject of recent court determinations.

Set out below is a summary of the relevant obligations imposed upon the architect in providing services to a specified budget by the client.

2 Architects' duties and obligations in regard to costs and budgets

It is common for an architect to be retained to design a project within a specific budget that incorporates both design and construction costs. Where an architect fails to perform the services to meet the specific budget, the architect may be liable for the financial harm suffered by the client, where for example, the final cost of construction escalates beyond the budgeted amount.

The relevant sources of the architect's liability are as follows:

The Architects Act 2003 ("Act")

The Act, when read with the NSW Architects Code of Professional Conduct ("Code") and Architects Regulations 2004 ("Regulations"), provides the minimum statutory requirements an architect is required to achieve in the performance of services to the client.

Sections 7 and 8 of the Act incorporate the Code into the Act. Part 2 and Part 3 of the Code deal with the provision of services and information in the performance of the architect's obligations. The relevant sections within Part 2 and Part 3 of the Code are as follows:



Clause 4:

In providing architectural services, an architect should:

- a) act with integrity and reasonable care, and
- b) provide the services:
 - i. in a manner that (at the time the service is provided) is widely accepted in Australia by peer professional opinion as competent professional architectural practice, and
 - ii. in conformity with any laws applicable to the provision of such services.

Clause 6(1):

An architect should provide sufficient relevant information with reasonable promptness to enable a client or prospective client to make an informed decision in relation to the provision of architectural services.

Clause 6(3):

An architect should take all reasonable steps to ensure that a client is informed of:

- a) the decisions required of the client in respect of the architectural service being provided by the architect, and
- b) the implications of those decisions for the performance of the service (particularly those implications related to timeliness, cost and changes to the service and any building or building related work consequential to the service).

A failure to comply with any of the obligations described above may expose the architect to a claim and potential finding of unsatisfactory professional conduct. This is because the Code falls within the definition of "unsatisfactory conduct" under the Act, for which disciplinary proceedings may be commenced.

Contract

In addition to the statutory obligations outlined above, architects are also subject to the contractual terms and conditions set out in their retainer agreement with the client. It is important to note that neither party may contract out of the minimum statutory obligations outlined above.

The Act requires all architects to enter into a written retainer which clearly specifies the information required under the Act. The terms and conditions of the retainer will to varying degrees set out the framework under which the architectural services are to be provided and the manner payment is to be made.



A detailed and well-considered retainer agreement provides significant benefit to the resolution of issues that may arise from time to time. Not only does a retainer provide

significant detail of the services to be provided, it also clarifies the expectations of both parties. It is good practice to ensure that the retainer agreement is precise, as in instances where there is an express term dealing with the client's budget, the written retainer will be the primary document relied upon to govern the rights and obligations of the parties.

Common Law (decisions made by the Court)

There is an inter-relationship between the contractual obligations imposed upon the parties and the architect's duty of care, such that the architect's common law duty of care, and any express obligations under the terms of the contract, co-exist to ensure that the services provided are to a professional standard.

A professional advisor owes a duty to a client to provide services using reasonable care and skill, whereby the measure of what is "reasonable" is judged by peer professional opinion. As professional advisors, architects have a common law duty to act in a reasonably competent manner, as noted by Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 where he stated:

"An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence...he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession".

This duty to provide services using reasonable care and skill is implied in all contracts.

Duties in Relation to Budgets

If an architect provides an estimate (or accepts a budget proposed by a client) which later escalates as the building work progresses, the architect may be found negligent and as a consequence of this, liable to the client for the value of the additional costs incurred over and above the original value.

A leading Canadian case on this topic is *Edgeworth Construction v N D Lea & Associates Ltd* [1993] 3 SCR 206. In this case, the owner engaged engineers to prepare tender documents for the construction of a road. The documents estimated that the final construction cost would total \$7 million, and the engineers won the contract on this basis. When the final construction cost far exceeded this amount, the owner sued the engineers for negligent misstatement (a false statement of fact made honestly but carelessly by the engineers to the client, where the engineers owed the client a duty of care and the client relied upon the engineer's statement to their detriment).

On appeal, it was determined that the engineers owed the owner a duty of care and that the engineers were negligent, as they knew the estimate would be relied upon and there were no mitigating factors that caused the estimate to be inaccurate.



It is apparent from this case that an architect should not propose or accept the obligation to perform the service of cost estimating unless they are reasonably confident that they have the ability to estimate building costs and can demonstrate that having regard to all circumstances at the relevant time that they believe the services provided were reasonable. Similarly, when an architect accepts a budget proposed by a client, the architect must demonstrate that the estimate was, and is, reasonably accurate, based on the information that was available to the architect at the time of accepting the estimate.

It is important to be aware that although an architect must use reasonable care and skill at all times, not every escalation in budget will be negligent. The standard of reasonable care and skill is not a standard of perfection. In the words of Lord Salmon in *Sutcliffe v Thackrah* [1974] AC 727, “It by no means follows that a professional valuation was negligently given because it turns out to have been wholly wrong. Nor does the fact that an architect’s certificate was given for the wrong amount of itself prove negligence against the architect”.

It is also important to be aware that claims of negligent misstatement for a commercial development are rarely successful in light of the 2003 Australian case of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2003) 216 CLR 515. In this case, the Court emphasised the importance of a client establishing vulnerability as an essential element of a duty of care, going on to state that it is very difficult to establish vulnerability in a commercial construction context.

Although *Woolcock* has only been affirmed in relation to commercial cases, Architects must ensure that they do not provide false statements or act carelessly when dealing with clients.

In the 2006 case of *McKenzie v Miller* [2006] NSWCA 377 (20 December 2006), the NSW Court of Appeal clarified the obligations of an architect to a client in situations where the architect undertakes to provide and review construction costs.

In this case, the McKenzies engaged the services of Miller, a qualified architect with approximately forty years experience, to design extensions to their residence in Orange, NSW.

According to the McKenzies, they informed Miller that their initial budget was \$90,000, which Miller described as unacceptable due to the fact that the work involved alterations and extensions to a building that was already of some age. Miller, based on this information, recommended that the McKenzies enter into a cost plus building contract rather than a lump sum contract. This contract specified numerous obligations for the architect, including providing and reviewing project costs.

Miller advised the McKenzies that the estimate of construction cost in his view amounted to \$202,000 inclusive of GST but exclusive of council fees, insurance, architect's and engineer's fees. On 15 April 2002, Miller informed the McKenzies that the estimate construction cost had increased to between \$280,000 and \$285,000 including GST but excluding fees. This caused the McKenzies significant financial embarrassment and they were forced to abandon parts of the extension. Once the truncated work was completed, the McKenzies paid \$265,655.33 to the builder and \$39,565 for other materials and tradesmen, totalling



\$305,220.33 - a sum that exceeded the initial estimate by \$103,220 or 51%.

The McKenzies commenced proceedings against Miller, claiming damages for breach of contract, negligence and breach of the (Fair Trading Act 1987 (NSW)).

At first instance, Balla J in the District Court of NSW found in favour of Miller. However, this decision was overturned on appeal and Miller was found liable on all counts.

The decision in *McKenzie* confirmed that when an architect provides a client with a cost estimate, the architect has a professional obligation to inform the client of all assumptions made when providing that estimate and to consider and inform the client of cost revisions as they arise. In this way, *McKenzie* reflects the Canadian position in *Coleman v Gordon M Jenkins & Associates Pty Ltd* (1989) ATPR 40-960, 50,481, which states that an architect has a duty to take reasonable care to ensure that a cost estimate is reasonably accurate.

McKenzie does not go so far as to say that the provision of cost estimates should be an implied term in architectural contracts. However, it does emphasise transparency within the architect/client relationship and highlights how an architect's common law duties may arise out of contractual arrangements.

In the later case of *Karalis v Archonstruct Pty Ltd* [2008] SASC 368, the Supreme Court of South Australia further clarified the professional obligations of an architect when advising in relation to types of construction contracts and the likely costs of construction.

In this case, Mr and Mrs Karalis engaged the architectural services of Mr Carn to design a house. The Karalises informed Mr Carn that they had been advised the house could be built for between \$250,000 and \$270,000. Mr Carn warned the Karalises that this sum was too low and explained the different types of construction contracts available to them. The Karalises engaged Archonstruct Pty Ltd, of which Mr Carn was the principal, to build the house.

The total construction cost of the house amounted to \$411,878, which the Karalises failed to pay in full.

Archonstruct Pty Ltd brought proceedings against the Karalises for the amount outstanding. The Karalises disputed the claim and pleaded that Archonstruct Pty Ltd was not entitled to payment as the progress claims had been certified by an architect and in the alternative, that they had been induced to enter the contract by the architect's misleading and deceptive conduct and that the architect had breached his duty to provide a reliable cost estimate.

Kitchen J found in favour of Archonstruct Pty Ltd and Mr Carn at first instance, and this decision was upheld on appeal.

Importantly, this case states that unless expressly agreed, an architect does not have a duty to design a house so that it can be built within a particular budget, nor does an architect have a duty to advise in regard to a client's legal and financial interests. Further, the case emphasises that an architect has a professional duty to explain the different types of



construction contracts available and the way in which these contracts will affect the construction of a building, and that an architect should provide a warning to the client when the architect suspects that there are escalating costs, so as to avoid claims of breach of professional obligation and misleading and deceptive conduct.

Summary

- (ii) If a client proposes a project budget to an architect and the architect is of the view that this estimate is not realistic, the architect must inform the client immediately. This reflects Clause 6 of the Code which states:

An architect should advise a client on the likelihood of achieving the client's stated objectives having regard to the client's stated budget and time requirements for the architectural service concerned.

This requirement also arises as part of an architect's duty to comply with their professional obligations to their client.

- (iii) If a cost estimate is provided, this estimate must be a reasonable estimate in all the circumstances and must be updated if and when circumstances that may affect the likely costs to be incurred change again, having regard to all the circumstances occurring at the relevant time.
- (iv) An architect does not have a duty to design a building within a particular budget, unless the budget is specified.
- (v) If the architect makes a representation that the building will be built within a particular budget, the architect may be liable for the client's financial loss if the budget is exceeded.
- (vi) Architects must be cautious when providing estimates (or accepting estimates proposed by a client) as once an architect accepts a budget, common law duties are enlivened and the architect may be liable for the client's financial loss.
- (vii) An architect must be mindful of their obligations under the Code.
- (viii) An architect may seek to avoid any responsibility in relation to budgets by having the client retain an expert cost professional such as a quality surveyor.