

By Act or Omission: a contractual obligation

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'We're extending!...you're an Architect, you'll do a few doodles for us won't you?'. It's the question many architects are asked by friends and the same question many dread, and for good reason. The closely followed *Burgess v Lejonvarn* trilogy recently culminated in a decision from the Technology and Construction Court which will no doubt spark caution in anyone undertaking gratuitous work for friends or family.

The Burgesses and Mrs Lejonvarn were friends and former neighbours. Lejonvarn had provided architectural services to Mr Burgess' firm through her previous employer and her own practice. The Burgesses had ambitious plans for their steeply sloped garden in Highgate and a landscape designer prepared a design which was costed around £150k. This was too high for the Burgesses and architect/project manager-friend Lejonvarn thought it could be done for less. She offered to help them deliver the project intending only to charge a fee for designing the finishes. She however went on to be involved in the preceding groundworks package (without formal payment) until the point there was a fundamental disagreement about the project budget. The parties fell out and parted ways. At the point Mrs Lejonvarn ceased to be involved, the works were behind schedule, costs overrunning and there were issues with quality. The Burgesses went on to claim against Mrs Lejonvarn for the alleged losses in her capacity as architect and project manager.

The dispute was heard as a preliminary issue hearing and judgement was given on the following questions: was there a Contract for professional services between the Burgesses and Mrs Lejonvarn? If so, what were the terms? Did Mrs Lejonvarn owe a duty of care as an architect/project manager for the defects in the groundworks? If so, what was the extent of that duty? Finally, whether and when a budget was discussed between the Claimants and the Defendant?

The preliminary issues judge found there to be no contract between the parties but that Mrs Lejonvarn owed Mr and Mrs Burgess a tortious duty to exercise reasonable skill and care in providing professional services as architect and/or project manager. Lejonvarn appealed the decision. The appeal was dismissed confirming a tortious duty of care was owed however, the scope of that duty was recast by the judge. The outcome was that '*a professional providing gratuitous services is liable for what he or she does but not for what they fail to do*'. In other words, Mrs Lejonvarn should only be judged for what she did (her acts) as opposed to what she failed to have otherwise reasonably have done (her omissions). This similarly extended to the professional's duty to warn.

The judgement in the final and most recent episode was that Mrs Lejonvarn had not fallen below the standard of reasonable skill and care for the services she performed and was thus not liable for the losses claimed, which in any event were held not to have been sufficiently proved.

From the days of the snail in the bottle and the man on the Clapham Omnibus, '*tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct*'. As the case between Burgess and Lejonvarn demonstrates, the tortious duty of care was not as onerous as one conferred by a contract. Whether a contract ultimately existed, was a

matter for the courts. Indeed, had the courts found a contract existed between the parties - either implied or by conduct, the duties owed by Lejonvarn to the Burgesses would have been significantly more onerous and the outcome of the case significantly different.

The case offers quite a stark reminder to those undertaking professional services or giving advice, even gratuitously and without a written contract, the importance of their duties implied by law. Whilst every similar matter will neither end up in litigation spanning several years or end up in the same result; with so much at stake when it comes to a construction project, is your friendship really worth it?

Written while employed at Sense Studio.

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