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Good Record Keeping or Consensus Ad Idem?

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Riva Properties Limited v Foster + Partners Limited considered one of the most fractious synergies in construction: design and cost. How do designers remain creative whilst keeping fundamental matters (such as cost) recorded, in control and firmly in the minds of the client and project team?

THE CASE

Fosters, the internationally renowned firm of Architects, was appointed by developer Riva to advance the design of a 5-star hotel adjacent to Heathrow Airport. The case before the Technology and Construction Court fell on whether Fosters exercised reasonable skill and care in designing a building which, as it transpired, was estimated to cost more than double the budget given to them at the project outset. Fosters contended that they had not been given a budget to work to and that there was no Quantity Surveyor appointed by Riva to advise them on project costs. Riva asserted that they had provided a budget figure, initially of £70 million, which was later increased to £100million. It subsequently transpired that the £195 million designed scheme could not be value-engineered to achieve even the upper-end of Riva's budget. By this time, nearly £4million had been expended by Riva on professional fees.

Fraser J preferred the arguments of Riva and ordered Fosters to pay £3.6million in damages. The nub of the case is quite succinctly summarised in paragraph fifty-three of his judgement: '*if a client provides a budget to his architect, that budget should be taken into consideration by the architect in designing the project. It cannot be simply ignored.*'

ARCHITECT'S PERFORMANCE

In arriving at the decision, the judgement provides a lengthy (and in places scathing) critique of both Fosters' performance whilst appointed to Riva, and; the evidence given during the trial. For many architects and designers, the situation which Foster's found themselves is a familiar one: the aspiration and the resulting design are misaligned with the estimated cost. The difference in the present case is: a) Fosters by their own admission were not designing to any budget, and; b) the late stage the project reached before the magnitude of misalignment was discovered. What lessons can therefore be learned following Riva v Fosters and how can these be thought about to ensure designers are adequately discharging their wider duty of care?

Thinking about the case with an architect's hat on: the design process, for at least a fleeting moment in the very earliest stages, is boundless. It needs to spark the imagination of clients, drive innovation, but more fundamentally; it needs to test what is important, what the right solution is and what is technologically possible. One could argue that only from the 'blue-sky' ideal can a more rounded and affordable, but appropriate and sustainable solution be developed. That fleeting moment must become a reality, however harsh it is when it hits.

The Architect's Job Book, a Royal Institute of British Architects guide extending to over 300 pages, provides checklists of the different ta processes and outputs which should be considered at the various stages of a building project. By way of example, a key output of Stage 0 is the final project brief which encompasses matters including a **budget** for all elements. The Handbook goes on to say that '*the final project brief should be signed off by the client after approval. Any subsequent changes to the signed off Final Project Brief should be recorded, identifying their impact on the project and architect's services and formally agreed with the client*'.

In reference to the Fosters case, it was decided that no budget was ascertained by Fosters at Stage 0. The chapter on Stage 1 dedicates a sub-section to financial appraisal: '*the cost consultant is the expert on costs... however, on a small project where no cost consultant is appointed the architect may have to write an appraisal for inclusion in the feasibility report. This is likely to be little more than an estimate to test the viability of the client's budget figure*'. In the present case, even in the unusual absence of a cost consultant on such a significant project, there should have been some contemplation of costs - even if only based on a rudimentary price per metre-squared. The subsequent chapters go on to set out the level of cost information expected at the various project stages.

For Architects, the important point is this: BUDGET should be on the agenda from the outset perhaps even before pen touches paper. COST can then begin to be considered at varying degrees of accuracy once there is something tangible by way of a brief or sketch design. Design and cost may not always align but at the very least, everyone should be aware of that. Despite the lack of a Quantity Surveyor on Riva's Heathrow 5-star, Fraser J placed more importance on the fact that Fosters shied away from budget and cost on the basis they are architects and not quantity surveyors. In doing so, they fell below the expected standard

Checklists, reports and sign-offs are often seen as overly formal in what is an otherwise creative, exciting, fluid and generally amiable process. But if one puts a contractual hat on and thinks about the design process slightly differently: the stages become a series of mini-contracts formed through an instruction at the beginning with an output delivered at the end. There are rights, there are obligations, there is supply of a product/service and there is a fee (or consideration) for that work. With the words "contract formation" sound the doctrinal bells of consensus ad idem: the term used in contract law to describe the mutual understanding of terms and the mutual intentions of the parties. In the case of *Riva Properties v Foster + Partners*, a key ingredient of the parties' intentions and mutual understanding, per the RIBA's reckoning, was absent: at Stage 0 there was no contemplation of budget and at Stage 1 there was no contemplation of cost.

Whilst the RIBA Job Book sees the setting out of such factors a matter of process and record keeping in line with an architect's duties, many creatives find such activities mundane and detractive from the cut and thrust of the design process, which is their priority. But by considering the dicta in *Riva v Fosters*, and by thinking about the design process and the end of each stage slightly differently - the recording and establishment of consensus ad idem at the end of one stage into the beginning of the next takes on a whole new significance.

CONCLUSION

The design process will and should always be iterative: at points in that process, the costs will exceed the budget and work will need to be undertaken to realign the two. For architects, the wider process is not just about design; it is also about cost, feasibility, viability and practicality. It should take a big idea or concept at the start and try and make it possible. Irrespective of the trials and tribulations, everyone on the team needs to be working towards the same goal and everyone needs to understand what that goal is. The RIBA suggests that written reports and formal sign-off processes are the way to

achieve this. Regardless of how such consensus is achieved, it must be achieved nonetheless; after all: those who fail to consider the commercial realities, will one day be haunted by them.

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