PRODEMNITY

THE straight line

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Welcome to *The Straight Line*

This is the fourth issue of *The Straight Line*, a newsletter that appears several times throughout the year. Articles cover a broad range of topics that engage Ontario architects insured by Pro-Demnity, other OAA members – whether in practice or engaged in other businesses – and anyone with an interest in the profession.

We encourage readers to suggest topics for future issues of *The Straight Line*. Please send any suggestions to: **editor@pd-straightline.com**

IN THIS ISSUE:

Alberta case has important lessons for Ontario architects

The recent decision in *Swift v. Eleven Eleven Architecture Inc.*[1] not only effectively clarifies the reliance that architects can place on their limitation of liability clauses, but it also provides a veritable smorgasbord of litigation concepts.

There are so many "learning opportunities" for architects in this case, that we will present it in several parts. In this issue, we outline the circumstances that gave rise to the lawsuit, the legal process and the findings of different levels of courts that considered the case.

The Facts

In 2004, the plaintiffs (Mr. and Mrs. Swift) purchased land on Vancouver Island to build their family home. Mr. Swift engaged Eleven Eleven Architecture Inc. (the "Architect") to design the home. The agreement Mr. Swift entered into with the Architect contained the following limitation clause:

> *3.8.1 With respect to the provision of services by the Designer to the Client under this Agreement, the Client agrees that any and all claims which the Client has or hereafter may have against the Designer which arise solely and directly out of the Designer's duties and responsibilities pursuant to their Agreement (hereinafter referred to in this Article 3 as "claims"), whether such claims sound in contract or in tort, shall be limited to the amount of $500,000.00.*
>
> *The Designer in this paragraph includes officers, directors, his or her employees, representatives and consultants.*

The Agreement defined the Architect as "Designer" and "Prime Consultant/ Designer" and Mr. Swift as the "Client." Mrs. Swift was not a signatory to the Agreement.

The Agreement also specified that the Architect must retain a structural engineer:

> *3.8.2 The Prime Consultant/Designer agrees to enlist the services of a registered Professional Engineer (whose fees for services are included within the contract amount of this Agreement), whose professional stamp will be included on all relevant drawings and who shall certify to the structural soundness of the design.*

Accordingly, the Architect retained Tomacek Roney Little & Associates Ltd. (the "Engineer") as sub-consultant to address the structural engineering aspects of the design.

The building permit was issued in October, 2005, and construction began. The house was required to comply with the 1998 British Columbia Building Code, which characterized buildings as Part 9 or Part 4. Generally, Part 9 buildings had to be under 600 square meters and no more than three storeys in height. Otherwise the building would fall under Part 4, which required the design to meet certain seismic design standards.

In designing the house initially, the Engineer erroneously treated the house as a Part 9 building, and did not design it to meet seismic standards.

In 2006, as a result of concerns raised by the building contractor, an independent structural engineer retained to review the Engineer's design concluded that the

house should be designed under Part 4 of the Code, including the required seismic provisions.

The Engineer agreed to review and correct the design in compliance with Part 4, and subsequently confirmed that it had done so. This statement turned out to be false, and the house was constructed with serious deficiencies in the seismic design that were required to be corrected before it could be occupied.

Subsequently, the Swifts commenced litigation to recover the substantial additional costs they had incurred to correct the structural deficiencies.

The Swifts filed claims against both the Architect and the Engineer, with Mr. Swift, who had signed the contract with the Architect, claiming in contract and tort, and Mrs. Swift, who had not signed the contract, claiming only in tort.

Their tort claims included claims against the Engineer, alleging negligent representation when it falsely advised it had modified the design to comply with the seismic requirements in Part 4.

Decision at Trial

The trial judge held that the structural engineering failed to satisfy the relevant portions of the Code, particularly the seismic design criteria. He further found the Engineer negligent in its obligation to provide a suitable structural design for the residence, creating a real and substantial danger to the Swifts. The trial judge found no negligence on the part of the Architect, but concluded that, to the extent the structural engineering work done by their subcontractor was deficient, the Architect was in breach of its Agreement. Although the trial judge found damages were approximately $1.9 million, he found that the limitation clause applied to the Swifts' claims, limiting the amount payable to $500,000.

The trial judge determined that the limitation clause bound not only Mr. Swift, as signatory to the Agreement, but also Mrs. Swift. He said the evidence was sufficient to establish that Mr. Swift, in executing the Agreement, was acting both on his own behalf and on behalf of Mrs. Swift. The fact that she was not a signatory to the Agreement was of "no moment," as this was typical of their family arrangements.[2]

Lastly, the judge had to consider whether the Architect was entitled to an indemnity from the Engineer. He concluded that it was entitled, but that the limitation clause applied to limit the amount of that indemnity to $500,000, notwithstanding that the Architect had already paid $1 million to the Swifts under a settlement agreement. The Swifts appealed this decision.

The Appeal

The Swifts argued that the trial judge erred in finding that Mr. Swift was acting as his wife's agent in signing the Agreement, and in finding that the limitation clause applied to Mrs. Swift. They also argued that the trial judge erred in failing to address Mr. Swift's claim of negligent misrepresentation against the Engineer. Lastly, they argued that the limitation clause, if applicable, should limit the liability of the Engineer to each of the individual claims of the Swifts, not to $500,000 in total.

The Architect argued that the trial judge erred in his interpretation of the limitation clause and that it should have been construed more narrowly so as not to shelter the Engineer from liability. They further argued that the limitation clause did not disentitle the Architect to a full indemnity from the Engineer.

The Engineer argued that the trial judge's finding that Mr. Swift acted as agent for Mrs. Swift is a question of fact and the trial judge's reasons reveal no palpable error. It further argued that the limitation clause is unambiguous and it can bear no interpretation other than what was found by the trial judge. Lastly, it argued there was no negligent misrepresentation giving rise to an independent tort and if there was, it too would be subject to the limitation clause.

The Court of Appeal's Analysis

The Court of Appeal first dealt with who was a party to the Agreement and who was bound by the benefit of the limitation clause, and found that the only express parties to the Agreement were the Architect and Mr. Swift, and that nothing in the Agreement, or in the conduct of the parties, made Mrs. Swift a party to the Agreement or gave Mr. Swift authority to bind her to the contract. The Court of Appeal found that Mr. and Mrs. Swift had "separate legal identities, a fundamental legal concept that courts in the 21st century should not easily trample upon or dismiss."[3]

The Court of Appeal then dealt with the submission that the trial judge's interpretation of the limitation clause allowed the Engineer to shelter under it, limiting the damages payable by the Engineer. The Court of Appeal found that the limitation clause did not contemplate the Engineer's negligent misrepresentation that the design complied with the seismic criteria, stating that it would be unreasonable to conclude that such negligent misrepresentation was contemplated as being something that arose solely and directly out of the Architect's duties and responsibilities.[4]

The Court of Appeal awarded the Swifts an additional $906,318.70 from the Engineer, in addition to the $1 million settlement they had received from the Architect (the total amount of their damages). The Engineer was further ordered to indemnify the Architect for its $1 million settlement.

The Engineer sought leave to appeal the Alberta Court of Appeal decision in *Swift* to the Supreme Court of Canada. However, the application was dismissed.

Pending further consideration of the issues by the Supreme Court of Canada that may arise in another case in the future, the Alberta Court of Appeal decision represents established law in Canada and provides a number of learning opportunities that will be discussed in subsequent issues of *The Straight Line*.

Negligent Misrepresentation Explained

"Negligent misrepresentation" is a civil wrong or "tort." It is one of three recognized types of misrepresentations in contract law, the others being "innocent" misrepresentation and "fraudulent" or deliberate misrepresentation.

When the Engineer in *Swift* advised that the structural design complied with Part 4 of the building code, it may not have deliberately lied, but the court found it made the assertion without having reasonable grounds for believing it to be true. The assertion was wrong, but the false

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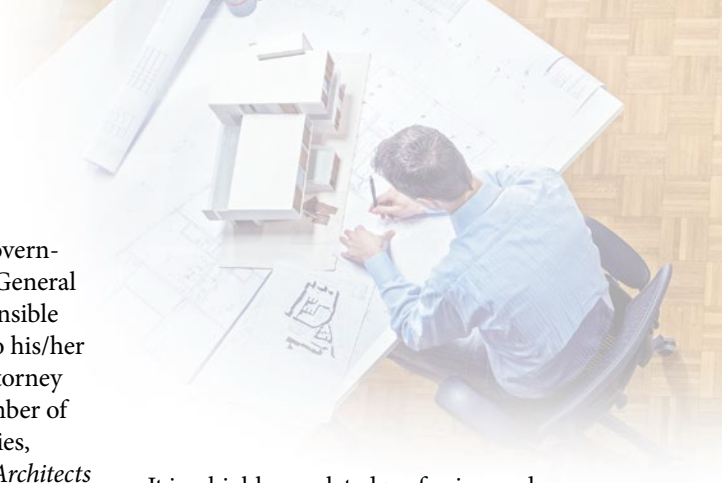
Ask an Expert



Recently we received a question regarding the use of the term "architect" and its derivatives:

What is required to be able to call oneself an architect and what is the meaning of the designation to the public?

Christie Mills of the OAA Registrar's Office offers the following answer:

Who May Use the Term Architect?

Only a licensed member of the Ontario Association of Architects may call him- or herself an architect. An architect may undertake the practice of architecture only with a Certificate of Practice granted by the Ontario Association of Architects (Association). "Architect" and "Practice of Architecture" are terms protected under the *Architects Act*.[1]

Definitions[2]

- "Architect" means the holder of a licence, a certificate of practice or a temporary licence.
- "Practice of Architecture" means:
  1. the preparation or provision of a design to govern the construction, enlargement or alteration of a building;
  2. evaluating, advising on or reporting on the construction, enlargement or alteration of a building; or
  3. a general review of the construction, enlargement or alteration of a building.

What Distinguishes an Architect?

Architects are governed by the Ontario Association of Architects (OAA), which is a self-regulating professional association. The Principal Object of the Association is to regulate the practice of architecture and to govern its members in order that the public interest may be served and protected.[3] This is a critical distinction between architects and other designers; architects are duty-bound to prioritize the public interest.

Architects work within a self-regulating, professional context governed by the *Architects Act*, a statute of the government of Ontario. The Attorney General of Ontario is the Minister responsible for the legislation. In addition to his/her other powers and duties, the Attorney General is responsible for a number of self-regulating professional bodies, including the OAA. Under the *Architects Act*, the Attorney General also oversees the activities of Council.[4]

The Council of the OAA is the governing body charged with managing and administering its affairs. Effective and inclusive management is accomplished by appointment of volunteer members to sit on regulatory and policy-driven committees.

The Office of the Registrar exists to enforce the standards set out in the *Architects Act* and Regulation. *Act* enforcement includes cease and desist requests in the event that someone is holding themselves out as an architect or practicing architecture without a license and certificate of practice. Other duties include overseeing the Internship in Architecture Program, licensing new members,[5] authorizing certificates of practice,[6] dealing with complaints and disciplinary matters, and general enforcement related to non-compliance with the mandatory continuing education program or payment of insurance and fees.

The Association ensures that architects remain familiar with the best practices and emerging technologies via its Regulatory Notices, Practice Tips, News Bulletins, Mandatory Continuing Education Program and Practice Advisory Services. Architects must uphold the standards of practice and performance as laid out in the *Architects Act* and Regulation. Professionalism and integrity are not only expected, they are legislated.[7] Through its regulations, licensure requirements, Continuing Education Program and oversight, the Association provides Ontarians with the confidence that architects in the Province are qualified and working to promote a safe built environment that prioritizes the public interest.

Using the term "architect" should never be taken lightly, nor should anyone misrepresent themselves as an architect. It is a highly regulated profession and protected term. There is a process for dealing with complaints related to someone holding themselves out as an architect who is not an architect:

1. Investigation
2. Collection of evidence
3. Letter from the Registrar
4. Letter from OAA's lawyer
5. Injunction sought in court

If anyone but a licensed member of the OAA refers to themselves as an architect the Association will request that they cease and desist. If that person continues, the OAA has it within its power to take legal action. Historical litigation and a trial court decision some years ago led to the Office of the Registrar not enforcing against anyone using the title "architectural designer."

An *Architects Act* has existed since 1890. The most recent version came into effect in 1984. As the Association looks toward future changes, protecting the professional designation "architect" and the architect's protected scope of work remain the priority.

Notes

1. *Architects Act*, R.S.O. 1990, c. A. 26
2. Definitions are found at section 1 of the *Architects Act*
3. *Architects Act*, s. 2
4. *Architects Act*, s.6
5. *Architects Act*, s. 13
6. *Architects Act*, s. 14
7. Pay specific attention to s. 42, 43, 47, 48, 49, 50 of the Regulation.

"Ask an Expert" offers readers the opportunity to obtain advice from members of a panel of experts familiar with architectural practice and insurance considerations. Answers provided will be general in nature and cannot be taken as legal or insurance advice for readers to apply to their own circumstances. Please consult your own lawyer or Pro-Demnity with respect to any questions or concerns impacting your own practice. Questions should be directed to: ask@pd-straightline.com

Alberta case (continued)

statement was attributed to its negligence rather than being deliberate; hence "negligent misrepresentation." As a result of the misrepresentation by the Engineer, the owner suffered very large damages in correcting the structure after it was constructed.

Essential elements of a finding of negligent misrepresentation in this instance were:

- The Engineer had a "special relationship" with the owners sufficient to establish a duty of care to them;
- The Engineer falsely stated that the design complied with Part 4 without having reasonable grounds for believing this to be true;
- The representation made by the Engineer was intended to induce the owner to proceed with the Engineer's design without further changes;
- The owner reasonably believed and relied upon the misrepresentation made by the Engineer; and
- The owner suffered damages due to its reliance upon the Engineer's misrepresentation.

— *Ana Simões*

Notes:

1. *Swift v. Eleven Eleven Architecture Inc.* 2014 ABCA 49.
2. Ibid, para. 12
3. Ibid, para. 32
4. Ibid, para. 57

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Pro-Demnity Insurance Company is a wholly owned subsidiary of the Ontario Association of Architects. Together with its predecessor the OAA Indemnity Plan, it has provided professional liability insurance to Ontario architects since 1987.

Questions related to the professional liability insurance program for Ontario architects may be directed to Pro-Demnity Insurance Company. Contact information for the various aspects of the program can be found on the Pro-Demnity website:

www.prodemnity.com