Going to Trial and Winning

ARCHITECTS AND PRO-DEMNITY SET LEGAL PRECEDENT

Of the cases that Pro-Demnity has taken to trial, which are few, we are proud to say that we have won in every instance, including at the Appellate level. This good news story concerns a recently closed case where Pro-Demnity defended the architect all the way to the Ontario Superior Court and won.

THE DECISION TO GO TO COURT

The decision to take a matter all the way to the end of trial is not made lightly and, in fact, is not the norm for most insurance companies. Most cases of allegations of error, omission or negligence acts will settle long before trial, either at mediation or at other opportunities during the lengthy litigation process. This matter happened to take seven years to make it to trial. There were several attempts by us to settle earlier in the process, but settlement was thwarted at every turn. In our view, it was due to the intransigence of our opponent, a condo developer who was confident it was in the right. However, it eventually was proven wrong. Working in concert with the architectural practice, we reviewed the situation in great detail, conducted a thorough investigation, assigned and retained Shibley Righton (a top construction law firm), tapping into the extensive legal expertise of Charles Simco, senior partner and head of the Construction Law Group, alongside Megan Marrie, Partner. Further, we identified key experts, and carefully established the foundation for a strong, solid case.

THE PROJECT

The Project was a 17-storey condominium with four levels of underground parking completed in 2015 located in Toronto. The developer engaged the architect and all consultants independently. This arrangement was a key factor at trial.

FEE CLAIM AND COUNTERCLAIM

The matter started out as a fee dispute. The architect commenced a lien action for non-payment of fees in the order of $156,000 against its developer client. It was at this point that the Architect notified Pro-Demnity.

As is often the case, a counterclaim ensued from the developer for multiples of the unpaid fee claimed, intended to quash the architect's claim; the counterclaim was for $1.2 million.

The developer alleged negligence, breach of contract for design deficiencies, inadequate site review, delay and failure to coordinate. Failure to coordinate became the prime allegation and focus of the lawsuit.

THE ARCHITECT'S AGREEMENT

The architect used a standard OAA Document 600 with supplementary conditions. The developer engaged all the engineering consultants separately. As the engineering project consultants had not been engaged by the architect, the agreement was amended to reflect that and was expressly limited to *coordination with* the developer's consultants.

This became germane to our understanding of the case and in the Judge's reasons when Judgement was finally rendered. Many of the arguments were predicated on the consultant relationships and the duty to coordinate as defined in the agreement.

(LACK OF) COORDINATION

There were many instances showing a lack of coordination between the engineering designs, that is, as between the mechanical and structural drawings. There were very few involving architectural aspects of the project. The conflicts in the design drawings were discovered and

resolved during construction but not without the creation of extensive delays. In effect, certain aspects of the project were being designed, and conflicts worked out, as construction proceeded. The developer blamed the architect for the lack of coordination of the various disciplines. It viewed the architect as having an overarching coordination role akin to a prime consultant.

Pro-Demnity rejected this position based on the specific wording of the agreement and felt that the developer was the author of its own misfortune having taken on the primary role of coordination by virtue of the wording of the agreement and having hired the engineering consultants directly.

To back up its position, the developer engaged an expert who produced a report that opined that the architect was responsible for coordination of all consultants, even though the language in the architect's agreement suggested otherwise. Our view was that the architect was not acting as prime consultant and each consultant had an equal duty of coordination with each other.

Ultimately, this case came down to two simple words "coordination ***with"*** as opposed to "coordination ***of"*** other consultants.

In the end, the Judge ruled in Pro-Demnity and the architect's favour and found that the architect's duty of coordination was ***with*** that of other consultants. Moreover, the Judge found that the architect professionally discharged its duties and met the standard of care expected. His reasons were contained in a 34-page long document issued several months after the end of trial.

SUMMARY:

The case came down to a simple preposition in the contract, "*of*" or "*with*". The developer argued that the architect was responsible for the coordination *of* the consultants; we argued it was coordination *with* the consultants. Our position prevailed and the developer's counterclaim was dismissed.

The architect received a good portion of its unpaid fees owing and substantial legal costs were awarded to Pro-Demnity, offsetting the hefty litigation costs.

With respect to the Profession, this case set a legal precedent regarding an architect's duty to coordinate, enshrining into law a more nuanced definition of *coordination* on projects where architects do *not* engage the engineering consultants directly **and** have an agreement that accurately reflects that.

Pro-Demnity followed through with its conviction that its position was the correct one — and thankfully succeeded at trial.

This case was presented under the title *"A House of Cards: Risks in Residential Design"* at the 2024 OAA Conference, with the Architect's endorsement to socialize this issue more broadly: *"Anything to improve the awareness level of the membership has my support."*

HERE ARE FIVE LESSONS LEARNED THAT YOU CAN APPLY IN YOUR PRACTICE TODAY:

- Use the most current OAA documents as a form of contract.

- Ensure that any changes are reviewed by a lawyer and the document is signed before proceeding with the work.

- Be explicit about what you will or will not do in the Supplementary Conditions to your agreement with respect to duties that vary from the standard.

- Stick to your scope of work and consistently follow through on your duty of care.

- Use best practices for record keeping and archive your documents. Any verbal conversations must be recorded in case of future reliance. Treat each document as a potential court exhibit. Good record keeping can make or break a case. It helped win in this litigation.

Our Contributor

***Salvador Knafo, OAA, MRAIC**, leads Pro-Demnity's in-house architectural team and provides an architect's perspective across all facets of the company, working with leadership, stakeholders, claim specialists, legal counsel and of course, directly with Ontario's Certificate of Practice holders and their architects. Sal's breadth of experience includes having worked in professional liability*

claims with architects, construction dispute, as well as interacting with insurance underwriters in product development and other initiatives within the Company. Most importantly, Sal passionately services the profession of Architecture by providing consultation to architects on avoiding liability and minimizing risk. He is a licensed Ontario architect with over 30 years' experience at Pro-Demnity (previously the OAA Indemnity Plan).