PRODEMNITY RISK EDUCATION

PARTIES

Plaintiff
Philip Bloch, *masonry sub-contractor*

Defendants
Rubblestone Properties, *Owner*
Derek Wynch, *Construction Manager*

Added as Defendants by amendment
Architect A, *who had prepared the design and contract documents*
Local Architect B, *hired to do review*
Expert Architect C, *to advise on historical masonry.*

CONTEXT

A mason, Philip Bloch, was contracted to reconstruct some rubble stonework that was part of a larger historic renewal project. The specifications indicated the types of mortar to be used in different locations, related to the exposure and strength required. Old mortar had to be removed to a certain depth, and hollows in the rubble had to be grouted. The Expert Architect had rejected a large part of the completed work due to the mason's failure to follow the specs. The work had been redone under protest.

PLEAS

The mason Bloch claimed that there was nothing wrong with the mortar used, and he had experts' opinions from the National Research Council to prove it. His work had been inspected to death – the mortar had been seen and specifically accepted by the engineer and by both the design and the local architect. Both of them had many opportunities to correct any error at an early stage. Furthermore, he had no contractual requirement to please the expert architect. Accordingy, approval had been withdrawn improperly and unfairly.

Wynch, the construction manager, took the view that he had relied on the consultants who were present at various meetings and who had, except for the expert architect, accepted the work. The expert, however, reported to the architect A, and the construction manager was not involved.

(Design) Architect A admitted that he had observed the "wrong" mortar being used but denied that he recognized the significance at the time. He said that the Expert Architect C had remarked, before the bulk of the actual work had been done, that certain mortar did not look right and should be checked, but he had not taken any immediate action. Architect A claimed that the specifications were clear: No substitutions or changes were allowed without his written authority. As the mason did not have written authority, indeed was claiming only verbal instructions from Werner Strutt the engineer and Architect A's assistant architect, the specifications should govern. Architect A felt that the reason for requiring written instructions was to avoid just such a problem as had arisen.

A second argument was also put forward: In redoing the work after rejection, it was found that the mason had not removed old mortar to the specified depths, therefore, the mortar question was moot. The original work was unacceptable.

(Local) Architect B was nonplussed by the whole affair, which he thought was a storm in a teacup. He admitted to Pro-Demnity that, since all the mortar in question was to be covered up, the engineer had indicated acceptance. Besides, the mortar actually used was in common use – indeed was normally used in similar circumstances – so he had not bothered to make a fuss. Most other architects would have accepted the work. He knew that the old mortar had not been excavated to sufficient depth, but had tacitly approved it because the old mortar was so hard that removal "to refusal" (i.e., to the point that the mortar strongly resisted removal) seemed more sensible than to any prescribed depth. Why remove good mortar that had been there a hundred years anyway?

Furthermore, Architect B found it difficult to accept his subservient role. When on the job, he acted and was accepted as though he were the de facto architect of the works.

(Expert) Architect C marched to a different drummer. He was the expert hired to advise specifically on the preservation of old masonry. The purpose of his specification was to minimize deterioration of the walls by excluding moisture penetration and migration of deleterious salts from mortar to the face of the stonework, in fact, to preserve its natural beauty. Architect C told the plan that his contract with Architect A afforded him three site visits only, and that he relied upon the others to monitor the work. He did, however, maintain that the redoing was justified. Why was he employed if not to be listened to?

The engineer Werner Strutt had a good defence. The mortar was perfectly acceptable from an engineering point of view. He knew nothing of the preservationist's theories and had not been consulted on them.

SETTLEMENT

Pro-Demnity represented all three architects, therefore, a delicate balance had to be struck if liability were to be admitted. Among the three, each felt that the mason was at fault but "in the alternative," the other architects were responsible.

The Plan felt that a court would have little sympathy for the architects collectively, Phil Bloch being a "simple workman" who had believed what he had been told by an engineer and two architects. To point out the fine print of the specification with its requirement for written authority was not only self-serving, but it also put the architect in a bad light, since Architect A's assistant architect did not deny authorizing the continuing of the work. Furthermore, the claim that the work was discovered to be sub-standard anyway did not ring true, the defence being undermined by Architect B's position that he had accepted the work. He was, after all, the review architect. It was also a potential embarrassment that Architect A maintained that Architect B had no power, except to report to Architect A and was not entitled to waive the specification.

Wynch, the construction manager, also had a duty of care. He was present when all the decisions were made and should have insisted on the specs being followed. He could not claim, as he tried to, that he was merely an innocent observer.

CLAIMS CONTROL EXPERIENCE

As with most claims, the lessons to be learned are simple. “Too many cooks spoil the broth”is the obvious first lesson.

The second lesson is: “If you hire a chauffeur, let him drive.” Architect A wanted to be “in charge” and wished the local Architect B to have limited authority on the site. This arrangement was unsound. The expert Architect C was also hamstrung by having a minimal role. He should have been engaged to “review the work in situ when the essential preservation work was started, and at reasonably frequent intervals during the work.”

The third lesson, arising from the written specification instructions, is: “Don’t rely on the fine print.” There is a tendency to an excessive and unwarranted belief in the power of the written word. If an architect speaks directly to a contractor and authorizes work it is absurd to say later that “his word should have been ignored.” Similarly, if work is tacitly accepted by not having been rejected, there comes a point where it cannot be challenged. The law recognizes a quality called “reasonableness.”

POSTSCRIPT

The matter was settled with all defendants contributing. The expert Architect C contributed a very minor nuisance payment. Litigation, if it had been appropriate, would have cost far more than the settlement amount.

Names and places have been changed to protect the innocent, and partially innocent, also the guilty. Situations are slightly modified and fictionalized from Pro-Demnity’s actual claims files and imbued with our real experience in protecting and defending Ontario architectural practices over three decades.

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