WHO'S IN CHARGE?

In this claim story, too many cooks spoil the broth. Three architects, a construction manager and one engineer, all review one mason's work; there is confusion on the jobsite; an expert is hired, but his advice is ignored.

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

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

PLEAS

The Mason claimed that there was nothing wrong with the mortar he used. His work had been inspected to death, and the mortar used had been specifically accepted by the engineer, as well as the Design Architect and the Local Architect, who had many opportunities to correct any error at an early stage. He had experts' opinions from the National Research Council to prove it. Furthermore, he had no contractual requirement to please the Expert Architect. Approval had been withdrawn improperly and to his prejudice.

The Construction Manager took the view that he had relied on the consultants who were present at various meetings and had, except for the Expert Architect, accepted the work. However, the Expert Architect reported to 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 remembered that, before the bulk of the actual had been being done, the Expert Architect had remarked that certain mortar did not look right and should be checked. But he had not taken any immediate action.

According to Architect A, the specifications were clear: No substitutions were allowed and there

were to be no changes without his written authority. As the mason did not have written authority, indeed was claiming only oral instructions from the Engineer and Architect A's assistant architect, the specifications should govern. Architect A felt that the reason for requiring written instructions in the first place was to avoid such problems as this.

A secondary argument was also put forward: it was found that, in redoing the work after rejection, 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 had a solid 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.

Pro-Demnity 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.

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.

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.

LESSONS TO BE LEARNED

As with most claims, the lessons to be learned are simple, and in this case at least, well established.

Lesson 1: “Too many cooks spoil the broth.” When there are multiple professionals, establish a clear chain of command.

Lesson 2: “If you hire a chauffeur let him drive.” The Expert Architect C was 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.” Architect “A” wanted to be “in charge” and wished his local architect to have limited authority on the site. This arrangement was unsound.

Lesson 3: “Don’t rely on the fine print.” (Note: This lesson might appear to contradict two cardinal rules “Get it in writing,” and “Avoid reliance on oral instructions.”)

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 the words should have been ignored. Similarly, if work is tacitly accepted by not being rejected, there comes a point where it cannot be challenged. The law recognizes a quality called reasonableness.

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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