



What We Know Already – Fact is King

The TCC sets out a reminder of the importance of maintaining accurate and detailed records which can be relied upon in the event of a dispute. Here Manoj Bahl, Senior Managing Director in FTI Consulting's Construction Solutions team in London, explains why.

Introduction

The decision in *Freeborn v De Almeida Marcal* (2019)¹ is essential reading not only for architects, which the facts of the dispute related to, but to all construction professionals. With construction output now recovering to pre-pandemic levels, it provides another timely reminder of the importance of accurate and clear record keeping.

Background

The Claimant (and client), a Mr Freeborn and Mrs Goldie, engaged the Defendant, Dan Marcal Architects, to act as architect and project manager during the conversion of a London property's pool house into a function room, together with the construction of a new home cinema.

Following completion, the client was unhappy with several aspects of the finished project.

The cinema room was due to be a raised glass box below the pool house roof with a modern look. The completed room was however described as having a “wonky industrial look” and was stated to have failed to meet the brief.

The Claimant accordingly asserted that the Defendant had re-designed the cinema room without approval (and that it was impossible to rectify). It therefore brought a claim against the Defendant for professional negligence.

The Defendant contended that the brief for this disputed element of the project had evolved. It argued that, on a domestic project, clients were on a “...journey of exploration”.

Decision

The Court agreed with the Claimant that the cinema room was significantly different from the design brief provided by the Claimant. It found that the Defendant had redesigned the cinema room and arranged for it to be constructed without consulting the Claimant. The Court also found that the finished product was not what the Claimant expected, nor had it been approved by them.²

It was decided that the Defendant “effectively went on a frolic of its own” and failed to obtain the Claimant's informed consent at key times in relation to the “significantly and critically different” design.

Crucially, Mr Marcal was unable to offer evidence to demonstrate that he had taken his client with him on the purported journey, nor had he provided clear advice, or obtained their informed consent, at key times. Furthermore, no written contract, no written brief, no minutes of any meetings with the Claimant and/or contractors, no progress or planning reports, and no interim accounts or valuations were able to be produced by the Defendant.

The Court determined that this failure to keep accurate records was itself a serious breach of duty.

Key Points

In arriving at its decision, the Court found that the Defendant was unable to offer evidence that the Claimant had approved changes to the design. Instead, in what may prove to be a well-repeated quote in the future, the Court referred to the records which the Defendant did maintain as a “tumble dryer of misinformation”, labelling them as “confused, confusing and chaotic”.

This in turn led to the Court’s view that the evidence given by the Defendant was merely “self-serving assertions”.

Conversely, the Claimants were described as “impressive witnesses” who “avoided exaggeration and speculation”, instead giving “clear and concise” evidence. Without documentary evidence to challenge this testimony, the Defendant was unable to address the records presented by the Claimant.

While the comprehensive failure to keep written records was an unusual feature of these proceedings, the decision serves as a reminder to construction professionals of the importance of accurate records and how they are vital to protect against potential claims. This failure to maintain accurate written records of what happened and what was agreed led here to a costly dispute, the requirement to rebuild parts of the project, along with reputational damage.

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Practical Guidance

The Society of Construction Law’s Delay and Disruption Protocol provides useful guidance, from a practical perspective, on the types of records to maintain as well as recommendations as to the means of storage.

In doing so it identifies that all parties ought to keep accurate and detailed records of progress and what was agreed (to a sufficient level of detail, proportionate to the scale of the project). This includes (at pages 14-18) detailed recommendations relating to the following categories of information:

- Programme
- Progress
- Resourcing
- Costs
- Correspondence and administration
- Contract and tender documents

These records can, in turn, then be relied upon in the event of a discrepancy or dispute. There are however a few additional considerations beneficial to complement this guidance.

- A picture is worth a thousand words; photographs allow progress and issues to be observed at a glance.
- A reliable programme is a powerful tool to convey intent, communicate what has been done, identify where delay is present, as well as to model the effect of change.
- Records contemporaneously shared between the parties provide convincing evidence of what the parties understood, anticipated or agreed at the time. Often itself an area of dispute after the event.
- Accurate supporting narratives/detailing/annotations help clarify why a specific record was maintained and what it demonstrates.
- Records ought to be easy to understand and contemporaneously dated to allow for unambiguous interpretation.
- Consistency, in quality and frequency, is key to creating a suite of reliable records.
- The cloud is increasingly replacing local storage with the advantages of security, protection from interference and against the loss of valuable information due to personnel changes.

Conclusions

While it's unrealistic to expect to eliminate conflicts entirely, all parties involved in a construction project stand to benefit from detailed, accurate records of key decisions, complaints and the progress achieved. Furthermore, modern technology now provides a powerful means of safely maintaining and cataloguing these records.

It must be acknowledged, however, that this is not a simple task.

Knowing what records to keep and maintain starts with understanding the critical and near-critical path to help focus effort and resource. This is in turn reliant upon a reliable programme, agreed at the outset, along with accurate periodic updates representative of the progress achieved and the scope of remaining work around which records can be structured.

Following this guidance can not only help avoid disputes in relation to what was agreed but also to what happened and when. For any disputes that do still crystallise, these same records will allow them to be resolved based on the facts; reliably and efficiently.

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- 1 Freeborn v De Almeida Marcal (t/a Dan Marcal Architects Limited [2019] EWHC 454 (TCC).
- 2 On the basis that the cinema could not be changed to the expected design, the Court awarded damages of just under £500,000 on the basis that the Claimant decided that it wished to demolish the cinema room that was at the heart of the dispute. The judge held that that decision was a reasonable one in stating "Whilst I accept that the ordinary measure of damage when an architect has acted negligently is the cost of rectification, I do not consider that this particular ugly duckling can be turned into a swan. What was provided was so different to from what the Claimants reasonably expected that I consider demolishing this cinema is the reasonable course going forward".

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