**Designing to budget: architects' duties and liabilities**

## 1.0 Introduction

Under most forms of building and engineering contract, building contractors are subject to a fixed price (or prices)[1] for delivery of client projects. Contractors therefore bear the risk of delivering within their price save for client variations or risk matters allocated to the client by the contract. Where contractors undertake design as well as construction, they invariably remain bound by their price(s) in the same way. When contractors' works are defective clients can usually abate the amounts payable for them[2] and in the event of delay in completion, contractors typically pay liquidated damages regardless of the actual level of loss. So far as a contractor is concerned, their contract price (along with any adjustments allowed under the contract) is their budget, to cover all their costs and profit. Culpable cost overruns and delays will be borne by the contractor.

In contrast, although architects may be subject to fixed prices for their services, their obligations to provide costs advice and deliver designs within clients' construction budgets are rarely absolute and they seldom face liquidated damages for delay. This is notwithstanding the profound impact that poor cost advice or an overly expensive design can have on project viability, progress and success. Reported cases of clients holding architects to account for poor costs advice, failures to design to budget and related delays are relatively rare[3].

Section 2 of this article summarises the nature of architects' obligations in relation to costs advice and budget. Section 3 highlights cases where architects were found in breach of such obligations. Section 4 highlights issues relevant to proving causation and loss arising from the cases in Section 3. Section 5 brings together the hurdles faced by those seeking to pursue architects in relation to costs advice or designing to budget. Section 6 concludes that, notwithstanding the stark contrast to the position of contractors, the treatment of architects is not unduly lenient and thoughts are offered as to how clients and architects can seek to achieve better outcomes in relation to cost and budget issues.

## 2.0 Obligations to design to budget

The precise obligations of an architect will depend on various factors including the terms of any contract of appointment, the extent of the architect's project role and the appointment and roles of other consultants. An architect may be appointed as lead consultant with an over-arching responsibility for design delivery across all disciplines, provision of cost advice and meeting budget. Alternatively, they may be appointed primarily for architectural design with the client directly appointing structural, geotechnical and services engineers, cost consultants and project managers. An appointment will often incorporate the RIBA stages[4], which emphasise establishing the client's budget at the outset and maintaining, monitoring and updating a cost plan throughout the design stages. Or an appointment may say nothing about budget and sometimes architects may work without any contract in place at all.

As is well known, both under statute[5] and at common law, an architect is obliged to exercise reasonable skill and care. This does not import an absolute obligation to achieve all a client's requirements. Where failings occur, provided a responsible body of architects would consider the way duties were discharged to be appropriate, no question of negligence arises. This is so even if a

[1] For example, the JCT and NEC suites of contract include widely used fixed price or lump sum variants and variants adopting re-measurement or target approaches which limit contractor entitlements by reference to rates and prices.
[2] *Model v Steel (1841) 8 M. & W. 858*
[3] At least in the context of reported decisions of the UK courts since 1900. It must be acknowledged that many disputes between clients and architects will be resolved privately using arbitration or mediation.
[4] See RIBA Plan of Work 2022 Overview at https://www.architecture.com/knowledge-and-resources/resources-landing-page/riba-plan-of-work#available-resources
[5] Supply of Goods and Services Act 1982, s.13 and Consumer Rights Act 2015, s 49

different responsible body might take a different view[6]. Put another way (by the Court of Appeal), *"The standard is that of the reasonable average"*[7]. In practice, most forms of appointment oblige the architect to discharge their services with reasonable skill and care contractually and in similar terms to the common law duty although extension and modification of the basic duty in contractual terms and conditions is common. Architects reviewing proposed appointments should also be astute to the fact that whilst a general requirement to exercise reasonable skill and care may be expressed in the head terms and conditions there may still be absolute requirements in other contract documents where exercise of reasonable skill and care would afford no defence should the requirements not be met[8].

Given the importance of budget to a client, whether a procurer of a multi-million pound development or a private client building a new home, it is highly likely that at least a preliminary budget will be communicated to the architect, often before they are even appointed. Whether this happens or not it will almost certainly be the case that there will be, *"an express or implied condition* [of appointment] *that the project should be capable of being completed within a stipulated or reasonable cost, and a designer will be liable in negligence if, in fact, the excess of cost is sufficient to show want of care or skill on their part."*[9] Similarly, architects who provide cost related services, advice and estimates will be obliged to exercise reasonable skill and care in doing so unless the contract provides for a different standard.

Architects will typically owe concurrent duties in contract and tort (or only duties in tort if services are provided in the absence of a contract) both in relation to designing to budget and in relation to the provision of information and advice[10]. Nonetheless, contract rather than tort provides the framework to resolve the vast majority of claims against professionals such as architects[11]. Tortious duties are likely to include responsibility for economic loss[12] but save perhaps for issues of limitation, are unlikely to extend an architect's obligations and liabilities beyond their contractual remit[13].

**3.0 Examples of breach from caselaw**

In *Nye Saunders & Partners (A Firm) v Alan E. Bristow*[14] the client appointed the architect in relation to the proposed renovation and reconstruction of his property. At an early stage the client indicated his budget was £250,000 and the architect provided an approximate oral estimate for the works of £240,000. The architect then procured a detailed breakdown of costs from a quantity surveyor who investigated the likely quantities required in some detail, arriving at an overall estimate of £238,000. The architect duly provided a copy of the quantity surveyor's estimate and schedule to the client. On the face of it, the architect had taken a prudent and cautious approach in seeking the input of a quantity surveyor. Unfortunately, the estimate and schedule did not include any contingency for inflation and at no point was the client advised that the cost estimate excluded inflation or told that allowance would need to be made for inflation. Ultimately the client had to abandon the project when it became apparent that inflation had taken the likely actual costs way above his budget. The architect was held to have been negligent in failing to draw the client's attention to the *"inflation factor*".

In *Plymouth & South West Co-operative Society Limited v Architecture, Structure & Management Limited*[15]the client was a pursuing redevelopment of a site where the anchor tenant would be the retailer Argos. The architect had undertaken prior projects for the client and the parties' practice was

[6] From the medical negligence case *Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582* and see also *Nye Saunders and Partners v. Alan E Bristow (1987) 37 B.L.R. 92* at 103 for application of the Bolam test to an architect in the context of costs advice.
[7] *Eckersley v Binnie (1988) 18 Con. L. R. 1 CA* at 80
[8] See, for example, *Costain Limited v Charles Haswell & Partners Limited [2009] EWHC 3140 (TCC)* at [52]-[59]
[9] *Hudson's Building and Engineering Contracts* (14th edn, Sweet & Maxwell 2021) at 2.4(7)
[10] *Henderston v Merrett Syndicates Ltd. [1995] 2A.C. 145* at 184-194 and *Hedley Byrne & Co Partners Ltd [1964] A.C. 465*
[11] *Jackson and Powell on Professional Liability* (9th edn, Seet & Maxwell 2021), para 1-001
[12] *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2022), para 9-208
[13] *Keating on Construction Contracts* (11th edn, Sweet & Maxwell 2021), para 7-049 and see the cases there referred to *Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146* at [68]-[80] and *Biffa Waste Services v Maschinenfabrik Ernst Hese [2008] EWHC 6 (TCC)*
[14] *Nye Saunders & Partners (A Firm) v Alan E. Bristow [1987] 37 B.L.R. 92 CA*
[15] *Plymouth & South West Co-operative Society Limited v Architecture, Structure & Management Limited [2006] EWHC 5 (TCC)*

to confirm appointments in a letter rather than use detailed written appointments or RIBA terms. This was despite the architect being engaged to provide wide ranging architectural, structural engineering design and quantity surveying services including in relation to budgeting, procurement and costing. The architect knew at the outset that the client's budget for construction works was in the region of £5,000,000 to £5,500,000 for both the completion of the unit to be occupied by Argos and the balance of the project including areas to be taken by others.

In the context of the informality of the architect's appointment the judge noted that, *'it is pertinent that* [the architect] *did not comply with good practice in failing to provide* [the client] *with a clear and definitive statement of the scope of its engagement and the terms on which that engagement was to be undertaken. Furthermore,* [the architect] *did not at the outset indicate to* [the client] *in writing what the critical project milestone dates were nor what major design decisions remained to be taken by* [the client] *and the dates by which these would be needed…"* and *"…the absence of clear and definitive advice on these matters…is an early indication of* [the architect's] *possible breach of duty in relation to procurement advice, project planning and the production of timely designs and details."*

What then transpired is that the detailed design was not completed in sufficient time for inclusion in the building contract for the development which was entered into nonetheless to ensure completion in time for occupation by Argos. A two-stage procurement process was used and the resulting contract was based almost entirely on provisional sums. Thus, the majority of construction work ended up being valued as variations using fair rates and prices[16]. The architect had considered it could control costs during construction by continuous cost monitoring and careful development of the remaining design but was unable to do so and the budget was exceeded by around £2,000,000.

The judge found that the architect had never given the client any advice as to the two-stage procurement method they recommended nor as to the reliance that could be placed on the provisional sums and the levels of cost increase that might be expected. Crucially, the architect was found negligent for failing to evaluate and advise the client of the possibility of letting a contract limited to the works needed to allow Argos to take occupation with a second contract for the balance of the works to follow once design and cost certainty was achieved. In other words, the architect's failure was not so much failing to design to budget but failing to promote an available cost mitigation strategy. In reaching their conclusion the judge noted that had the advice been given it would have been *"unexpected, unpalatable and unwelcome"* and that there would have been *"angry recriminations as to why and how the project had got into the state that required such a fundamental change of tack at such a late stage…"* but nonetheless it was held the advice should have been given.

The case of *Pickard Finlason Partnership Limited v Adele Lock, Matthew Lock*[17]concerned a project by an inexperienced client to develop and extend an existing grade II listed hall into multiple apartments. The architect's appointment was based on the (then) RIBA stages. In stage 1 the architect would develop a preferred option including an indication of the magnitude of costs. In stage 2 the architect would undertake scheme design and a broad cost plan would be developed reflecting the client's budgetary requirements. Stage 3 would see detailed development of both design and the cost plan and preparation of tenders for construction works. The service was also to include project co-ordination and cost control.

The client did not set a budget at the outset but advised they had done some initial costings based on £120 per square foot. The architect made clear to the client that this was likely *"too low"* as they had recent experience of a good quality new build scheme which cost £140 per square foot and costs for

[16] The lack of detailed design meant there were few specific rates and prices in the contract which could be used to value work subject to provisional sums which under the contract were to be valued in the same manner as variations.
[17] *Pickard Finlason Partnership Limited v Adele Lock, Matthew Lock [2014] EWCH 25 (TCC)*

work on listed buildings were difficult to predict and a high contingency and adequate design reserve would be required.

An initial preferred scheme was developed and would have cost around £2,500,000 based on £140 per square metre although this was not formally advised to the client. The architect was also aware that the client had advised their funder that the scheme would cost around £2,500,000 to £3,000,000 although it was not clear how the client had arrived at these figures. It then transpired that the preferred scheme might face some planning difficulties due to the height of proposed new blocks. The architect's solution was to partially sink the ground floors into semi-basements which was enthusiastically received by the client. At the heart of the case was whether the architect took sufficient and prompt steps to assess the risks and costs of the revised design especially given the obvious requirement for significant additional excavation, including adjacent to and partially underneath the existing, listed, hall.

The judge held that the architect had not complied with its obligations relating to budget during the feasibility stage by failing to provide an indication of the magnitude of the cost of the revised scheme. Although the architect had at the outset flagged the figure of £140 per square metre it was clear this was not considered adequate and that further cost information would be needed, yet none had been provided. The architect had seemingly relied on issuing design information and area schedules to the client leaving them to calculate their own costs but did not check they knew how to do this and sometimes the client used £120 per square metre. The architect did an internal calculation of cost of around £5.7m shortly after proposing the revised scheme but did not provide this to the client. Although the architect later provided a cost plan in the sum of around £4.5m this was inadequate and did not contain sufficient contingency. In any event, once the client's funder was aware of it, they advised they could no longer support the project.

The architect also failed to promote the undertaking of prompt ground investigations for the revised scheme and did not promptly pass on tenders from contractors pricing the works. Crucially, in breach of an express requirement of their appointment, the architect did not provide a bound report at the end of the feasibility stage which should have contained advice on the complexities and risks of the scheme and its cost. This was despite the client chasing for it.

The judge found the architect's failings arose because nobody within the architect took responsibility to ensure delivery of the necessary information and because nobody wanted to give the client bad news. There was also a hope the situation could be salvaged. As the judge put it, *"*[the architect] *was only too aware…of the potential impact of the revised design on the overall complexity and hence risks and costs of the project, and was only too aware of the likely negative reaction from* [the client] *and* [their funder] *if they were presented with a feasibility report containing…an indication of the magnitude of costs along the lines of* [the architect's internal £5.7m estimate]. *As Mr Finlason* [architect] *said in cross examination when asked about this, 'no point in starting a hare running if we could sort the issues out and if it was affordable'. I am satisfied that* [the architect] *took the decision, consciously or unconsciously, not to produce a feasibility report…but instead chose to proceed directly to scheme design stage, so as to obtain the benefit of further design and input from potential contractors, with a view to identifying cost savings and producing a cost plan at a level which it considered* [the client and their funder] *were likely to approve."*

The preceding cases primarily concern negligent advice in relation to likely construction costs. The case of *Riva Properties Limited v Foster and Partners*[18] squarely concerns failure to design a scheme to meet a given budget. The client wanted to build a 5-star hotel on a site close to Heathrow airport and engaged renowned architects Foster and Partners. The client advised a budget of £70m at the

[18] *Riva Properties Limited, Riva Bowl LLP, Riva Bowl Limited, Wellstone Management Limited v Foster & Partners Limited [2017] EWHC 2574 (TCC)*

outset although this was ultimately increased to £100m. The design prepared by the architect was costed by the client's cost consultant at £195m. The architect then advised that their design could be "value engineered" down to £100m. In the event, the design could not be value engineered to achieve anything close to the required savings and the client was unable to proceed with the project using the architect's design.

The architect's position in the case was essentially that no budget was given to them and they were not costs specialists able to give costs advice. Furthermore, the client required a development which was iconic and had "impeccable green credentials". The judge found on the evidence that the budget had been advised to the architect from the outset and, even if it had not been, the formal appointment (incorporating amended RIBA stages) obliged an architect exercising reasonable skill and care to ascertain key project requirements and constraints which would have included any budget. The judge also found that whilst it was true the architects were not cost specialists (and here the client employed separate cost consultants) that did not mean the budget was of no relevance to them or the design. Further, the judge did not accept that the requirement to work to budget was incompatible with achieving other requirements such as iconic design and green credentials and if it were then the architects should have flagged this to the client.

Damningly for the architect in this case, the judge found that they had embarked on their design *"with no thought or consideration for the budget at all*". The design they had produced involved the hotel comprising separate pavilions with a "Village Theme" all contained within a giant glass "biosphere". This was undoubtedly innovative and impressive but, of course, would be extremely expensive. The architect had also included more rooms than required by the client in their hotel layout. Whilst the architect might not have been responsible to provide detailed costs advice they should have considered the overall budget when formulating their design and alerted their client to high cost elements they were considering such as the proposed biosphere.

The judge also found that negligent advice was given that the scheme could be value engineered[19] down to £100m. This was an inevitable finding given that the architect's own architectural expert witness considered it *"blindingly obvious that it could not be done"*.

## 4.0 Proof, causation and loss

Although findings of breach of professional duties (whether in contract or tort) are ultimately always matters for the court[20] it will almost always be necessary, save in the most straightforward cases, to base a claim on expert evidence that the architect has fallen below the requisite standard. The general rule is that expert evidence should, of course, be from an expert of the same discipline[21]. A claimant trying to rely on a quantity surveyor or cost consultant, instead of an expert architect, to opine on an architect's cost advice or failure to design to budget may struggle to make good their case. There are also often complex contested factual issues as to what was said in relation to budget, cost risks and as to the cost advice actually given.

The cases cited in Section 3 above are limited in number and with an unknown volume of similar cases likely to be arbitrated instead of litigated they may well not be representative. Nonetheless, subject to that warning, it is notable that, once the facts were established, all the cases appear relatively straightforward[22]. *Nye Saunders* was a failure to advise that inflation should be allowed for. *Plymouth & South West* was a failure to advise that construction should be let in two packages so that the second package could be designed sufficiently to facilitate firm tender prices. *Pickard Finlason*

[19] The judge considered that value engineering meant, *"reducing the cost of a scheme through changes in the method and type of construction, or specification, without making major reductions in scope."*
[20] *F v R [1983] S.A.S.R. 189*
[21] *Investors in Industry Commercial Properties v South Bedfordshire DC [1986] 1 All E.R. 787*
[22] Although in some cases they generated lengthy judgments and doubtless the substantive hearings consumed much court time and generated a great deal of complex argument and submission on the factual and expert evidence

involved a failure to advise as to the cost risks arising from a significant re-design which obviously required much more excavation. *Riva Properties* concerned a grandiose design prepared *"with no thought or consideration for the budget at all*" and a hopeless assertion that a £95m cost excess could be removed by value engineering.

However, even relatively straightforward cases on liability can run into insurmountable difficulties in relation to proof of causation and loss. In a case[23] where a firm providing quantity surveying and project management services was (unsuccessfully) sued for the totality of cost overruns on a project the judge noted that, *"establishing causation in construction related professional negligence claims against design professionals such as quantity surveyors and project managers is notoriously difficult precisely because of the difficulty in showing how things would have turned out differently even if the professional had not acted negligently."*. He also noted in the same case that there may be many causes of cost overruns and not all may be referrable to negligence of the professional providing costs advice.

Returning to the cases addressed in Section 3.0 above, it is illustrative to look at the financial claims made and how they fared. Starting with *Nye Saunders*, this was actually a claim for fees by the architect which the court dismissed in light of the negligent cost advice (failing to advise as to inflation) which led to abortive design work and the client ultimately cancelling the project once the true likely construction costs became apparent. There are a number of older reported cases relating to budget issues which are not referenced in Section 3.0 above but are are similar in nature supporting the broad proposition that an architect is not entitled to their fees where, by reason of negligent cost advice or failing to design to a client's budget, they deliver a design that has no value to the client because they cannot afford to build it[24]. From the client perspective, a finding that services are of no value (a total failure of consideration) and not therefore recoverable is highly beneficial because at common law it is not possible to partially abate fees for substantially performed professional services in respect of breaches of duty[25]. Instead, a set-off or counterclaim for resulting damages has to be proven[26].

In *Plymouth & South West* the client recovered the bulk of their cost overrun as the judge found that it was caused by a single construction contract being let containing an ill-defined and incomplete design and that costs could have been saved had the architect advised letting the works in two stages (as detailed in Section 3.0 above). In terms of causation the architects argued that even had they given the advice to split the works into two packages it would not have been taken. They asserted that there were various commercial and practical reasons relating to funding, obtaining of tenants and other matters. However, based on the evidence the judge concluded the advice, whilst unwelcome, would have been taken "*once the heat had died down"*, and therefore the loss avoided. This meant the judge proceeded to award the cost overrun as damages less the cost of variations instructed by the client.

*Pickard Finlason* saw a claim by the architects for significant professional fees with a counterclaim by the client for repayment of fees paid to date which they saw as abortive due to the architect's revised scheme exceeding budget meaning the client could not proceed with their original funder. More importantly the client also claimed costs and losses due to a delay of 27 months in completing the development using a different architect, different design and different funding arrangements, including costs of ownership (such as finance interest) and interest to compensate for the delay in receipt of profits from sale of apartments.

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[23] *William Clark Partnership Limited v Dock St PCT Limited [2015] EWHC 2923 (TCC)*

[24] See, in particular, the cases identified in *Hudson's Building and Engineering Contracts* (14th edn, Sweet & Maxwell 2021) at 2.4(7) namely, *Moneypenny v Hartland [1826] 2 C. & P. 378*, *Nelson v Spooner [1861] 2 F. & F. 613* and the Australian and Canadian authorities referred to.

[25] *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWCH 1341 (TCC)* at [652(vi)] applied in *William Clark* (n 23)

[26] Although a well drafted appointment can easily provide for abatement or for payment entitlements to arise only on full and proper completion of stages, deliverables, achievement of milestones etc

The architect's claim for further fees failed. The client recovered only a small fraction (£1,650.00) of the fees they had already paid to the architect being those related to a planning application which the judge held would not have been made had the client received timely warning of the cost of the architect's revised scheme. Other work which had already been paid for related to developing the stage 1 preferred design option and was considered to have been substantially performed and not repayable to the client.

In relation to delay to the project it was held that damages were recoverable in principle but, on the facts, only a two-month delay was caused by the architect's failure to give timely advice on costs risk following its revised design proposals. In essence, it was considered that had the proper advice been given sooner the result would still have been the same (albeit occurring 2 months sooner) – namely the withdrawal of the original funder and the need for the client to find a different way to proceed which would incur significant delay. Unfortunately for the client, the 27-month period claimed for did not include the 2 months of delay found by the judge who also had no evidence on which to deduce costs for the relevant period. The client's delay claims therefore failed meaning the net result in this highly contested case was the client emerging the "winner" to the tune of just £1,650.00. It should be noted that the result of this case might have been different if the relevant breach by the architect was not limited to failures of cost advice at a specific point in time but had included a failure from the outset to prepare a buildable and financially viable design meeting a set budget. In such a case then the more extensive delay arising from the loss of an initial funder and the need to redesign and make new funding arrangements might have been recoverable.

The losses claimed by the client in *Riva Properties* as flowing from the abandoned, over-budget hotel design comprised wasted professional fees (about half being fees paid to the architect) and loss of operating profits due to delay to completion of the project. The difficulty for the client in relation to the loss of profit claim was that the costing of the scheme at £195m and the negligent advice it could be value engineered down to £100m were both in 2008. Around this time the global financial crisis occurred which radically changed the willingness of funders to support projects such as the hotel in question and where support was provided it invariably required greater equity contribution from developers and less favourable loan to value ratios.

Although the client gave evidence of an alternative hotel scheme which could be built for £100m this was not being pursued at the time of trial and the judge found that the effective cause of the failure to construct a hotel and open it for business was lack of available funding. This would have been the case even if the architect's original design had been costed at £100m instead of £195m given that the client did not have had a sufficient equity contribution to be able to attract that level of funding in the post-crisis market. This claim therefore failed albeit had the client been in a position to progress their project the claim for loss of profits reflecting delay attributable to obtaining a design within budget would appear recoverable in principle.

The client's claim for wasted professional fees incurred in relation to the over-budget scheme were held to be recoverable as compensatory damages assessed on an expectation basis. In other words, quantum should reflect the value of the contractual bargain which the client had been deprived of as a result of the breach[27]. The pragmatic approach taken by the judge was to award as damages the amounts of fees paid to the architect and other other consultants for the original scheme on the basis this was the best evidence of what it would cost for new consultants to start from scratch to produce a new scheme within budget. This would put the client in the position they would have been in but for breach. Conceptually, this was not therefore ordering repayment of abortive fees although that was its practical effect.

[27] The judge citing *The Golden Straight Corporation v Nippon Yusen Kubishika Kaisha [2007] 2 AC 353 (HL)* per Lord Scott at [29], [32] and [36]

## 5.0 Hurdles to claims based on negligent cost advice and failure to design to budget

The cases described above may be small in number, but they are consistent with the formidable hurdles identified below to the successful pursuit of claims against architects based on alleged failures to give proper cost advice or to design to budget. In particular:

(a) The inability to abate fees for services substantially performed.

Clients need to show a total failure of consideration or raise a successful set-off or counterclaim to avoid or recover payment of fees.

(b) The need to prove a breach of duty supported by expert evidence.

Even where there is a detailed appointment expressly referencing duties to provide cost advice or design to budget the precise extent of the duties may be difficult to define with precision. The nature of design work and professional services is such that no two professionals are likely to approach their work in exactly the same way and there may be many different acceptable approaches[28]. In most situations, obligations are not absolute but subject to reasonable skill and care.

(c) The need to prove that the excess of cost over budget was the fault of the architect.

Construction costs, particularly for large or novel developments with long timeframes, are hard to estimate accurately and can be impacted by a wide range of unexpected events outside the control of an architect. The true costs of a project will only ever be known when they are actually incurred. The fact there is very significant excess of cost over budget or cost over an estimate does not of itself prove negligence[29].

(d) The need to prove causation.

As *Pickard Finlason* and *Riva Properties* show, when the counterfactual position is considered as to what would have happened absent the architect's default the conclusion may be that all or most losses would have been incurred anyway. In most situations where a client is confronted with a design exceeding budget they have the option of seeking a revised design within budget where losses will only arise from any resulting delay or abortive work. Alternatively, they may elect to forgo mitigating their position by not seeking a redesign and instead increasing their budget. In that case, it is difficult to see how they could recover all their costs over the original budget unless, on the facts, the client could not afford the delay of a redesign. If a client's budget was simply too low for an architect exercising reasonable skill and care to achieve then no question of negligence arises (except perhaps as to whether and when the client should have been advised of the inadequacy of the budget).

(e) The need to prove the scope of the architect's duty covered the losses claimed.

Although not related to architects the Supreme Court cases of *Manchester Building Society v Grant Thornton UK LLP*[30] and *Meadows v Khan*[31] set out an analytical framework for professional negligence claims including reviewing the scope of duty test set out in *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)*[32]. This framework includes identifying the purpose of any advice given by considering objectively the reason why it is given and whether any loss relates to a risk the duty was supposed to guard

[28] For a case where a claimant failed to prove that an engineer's slab design was too thick and expensive and that an alternative thinner design would have been cheaper see *London Underground Ltd v Kenchington Ford Plc [1998] WLUK 95*
[29] *Copthorne Hotel (Newcastle) Ltd v Arup Associates (No.1) 58 Con L.R. 105* at [68]
[30] *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20*
[31] *Meadows v Khan [2021] UKSC 20*
[32] *South Australia Asset Management Corp v York Montague Ltd [1997] AC 191*

against[33]. It also requires considering if there is a sufficient nexus between the claimed damages and the subject matter of the defendant's duty. For example, an architect who gives negligent advice on the cost of a project may be held to have assumed the risk of the client incurring delay costs whilst re-designing to reduce costs (the purpose of the advice being to inform the client about costs of construction and whether they could proceed with a project) but they would not be liable if the delay pushed the project into a period of economic downturn meaning funding was no longer available (a general risk of development which the architect would not be expected to advise on unless they were responsible under their contract for advising on the risks of the venture generally)[34].

The above hurdles sit atop the usual burdens on claimants to prove the facts relied on and losses incurred. Naturally, the cases with the best prospects of success are those based on limited and clear allegations of breach where causation can be readily demonstrated together with linkage to the specific losses arising. However, on projects which run into significant difficulties with relationships breaking down irretrievably it can be tempting for clients to trawl their appointments and seek to elevate every delayed deliverable, drawing correction, deviation from the schedule of services and under-estimate into allegations of alleged negligence said to collectively cause cost overruns and losses.

Such a scenario appears to have arisen in *William Clark Partnership Ltd v Dock St PCT Ltd*[35] albeit in the context of project management and quantity surveying services on a project which suffered a significant cost overrun. Numerous breaches were alleged and some were made out. However, the cost overrun was claimed on a global basis with no investigation of individual cost increases and linkage to the various alleged breaches. The claim failed because the client could not show that no substantial part of the losses would have occurred in any event for reasons which were not the responsibility of the consultant. Insofar as such reasons were identified there was no evidence to allow their deduction from the global sum claimed[36].

## 6.0 Conclusion

As foreshadowed in the introduction, save in the clearest cases, it is difficult for clients to hold architects accountable for budget overruns and delay related costs. The contrast with the position of contractors is a stark one. However, it should not be thought that the author considers architects are treated unduly leniently. Far from it. Estimating the cost of work which will be done by others and developing designs within a budget, often whilst seeking to meet a wide variety of client requirements, is challenging at best and impossible at worst. It is not realistic to expect these to be matters of absolute obligation or to expect architects to assume responsibility for all possible project losses that might arise if a cost estimate is inaccurate, or a construction budget exceeded.

Moreover, professional indemnity insurance often excludes cover for contractual obligations which go beyond the standard duties owed at common law. So, clients thinking of making their professional appointments more onerous in relation to budget might want to consider if that is really worthwhile. Greater collaboration with their architect and professional team in the management and estimating of cost and perhaps fee incentives for delivering to or beating budget might be a better approach.

For their part, architects obviously need to ensure they understand the budget related obligations they are taking on for each project and that the resources and systems are in place to mange and deliver

[33] See the similar approach taken in a purely contractual context in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48*

[34] Although decided before *Manchester Building Society* and *Meadows* the judge in *Riva Properties* concluded obiter that if *Hughes-Holland v BPE Solicitors [2017] 2 WLR 1029* and SAAMCO were applied the architect owed no duty to the client to keep them harmless from the risk of a financial crisis impacting funding availability.

[35] n 23

[36] Thus, it was not the global nature of the claim per se that was objectionable but rather the client's failure to surmount the evidential difficulties in maintaining one as identified in *Walter Lilly v Mackay [2012] EWHC 1773 (TCC)* at [486]

them. Maintaining clear records of the cost and budget advice given is also crucial as well as promptly notifying any circumstances which cause costs to rise. It is also clear from the cases that architects should not shy away from giving their clients bad news about costs when necessary and regardless of how uncomfortable it might be to deliver such news. It is no defence to failing to give timely (or any) advice to say that a client would have reacted unreasonably or that the architect thought they could reduce the costs at a later stage.

In closing, it is worth noting that overly optimistic estimates of construction costs are not always a bad thing. As Best, C.J. said in 1826 in relation to the fine buildings of the time, *"There are many in this metropolis which would never have been undertaken at all, had it not been for the absurd estimates of surveyors."*[37].

[37] *Moneypenny v Hartland [1826] 2 C. & P. 378*