

# ANGLES

SENSE STUDIO NEWSLETTER OCTOBER 2013

Welcome to the first edition of "ANGLES" our triannual newsletter which we hope you will find a source of interesting information and news. We welcome feedback and contributions so please **let us know what you think**. We hope you will enjoy this and future editions.

**Murray Armes**



## Sense Studio Celebrates its 1st Birthday

Sense Studio celebrated its first birthday last week. It's been a busy year since Murray Armes launched the company a year ago, and thanks to our clients we have been instructed as expert witnesses, adjudicator, arbitrator and mediator in many interesting cases in both the UK and internationally. We welcomed Matt Cousins to the team in March. Matt joined Murray Fordham and Frances Forward to further enhance our expertise. Please visit our website [www.sensestudio.co.uk](http://www.sensestudio.co.uk) for our latest news.

## RIBA Plan of Work 2013

The latest RIBA Plan of Work was launched in May this year. The Plan of Work is a useful document as it organises the sometimes confusing array of architect's services into a number of key stages which can otherwise be difficult to define.

The 2013 Plan of Work features a number of changes from the previous version. Work Stages A to L have been replaced with eight new numbered stages. There are changes to existing stage activities and the addition of new stages in particular with regard to services involving BIM and the ever increasing need for sustainable design. The previous Stage D has been extended partly into the previous Stage E (now the new Stage 3: "Developed Design") and has been slightly expanded. Stage 6 now covers the defects liability period from the point of issue of the Practical Completion certificate up to the issue of the final certificate as well as post-handover activities. You can view the new Plan of Work [here](#).

The Plan of Work 2013 has been updated to allow for different procurement routes and this is helpful as the previous version dealt only with traditional and design and build contracts. It should be remembered that the Plan of Work is a summary of the much more detailed Architect's Job Book, which has also been updated. Although most architects' fee agreements will not incorporate the details in the Job Book it is worth noting that in the event of a dispute about the provision of architects services the Job Book will be used as a benchmark for good practice so it worth putting on your shelf and reading, especially before you embark on the next work stage of your project.

**Matt Cousins**



## A Burning Issue

Was it foreseeable that reflections from the new skyscraper in London, "The Walkie Talkie", could have caused damage to a car?

In most cases we think the answer would be "no", because at best it would require complex computer modelling of the façade, sun position and intensity throughout the year, the result of this building being a novel design. However, in this case the architect, Rafael Viñoly, has admitted he knew the curved facade would focus an intense beam of sunlight. What he didn't envisage was how hot it would be - because the UK has a reputation for a cool, damp climate.

Remarkably this happened before, in 2010, at the 57-storey Vdara hotel in Las Vegas. Designed by the same architect - which allegedly left hotel guests with severe burns. This is also a curved building with 1500 rooms clad in glass panels. For certain hours of the day, the sun's reflection melted plastic loungers and burnt holes in newspapers as hotel guests lay by the swimming pool. The glass façade has since been covered in non-reflective film and many poolside umbrellas have been installed by the pool.

Viñoly said the London tower was originally designed with horizontal sun louvres, which would have reduced the sun's reflection. However these were removed to reduce costs and because of opposition from neighbours.

Viñoly also blamed the bureaucracy and abundance of consultants and sub-consultants in the design process, specifically in the United Kingdom, which unlike Europe, has diluted the influence of architects to the point that they no longer lead the design process and do not have overall control over the design. This is a good point. Architects in the UK are generally undervalued, especially with the rise in popularity of Design and Build where the architect has been reduced to the position of design subcontractor.

So, was the problem foreseeable? With the architect's previous knowledge it may have been possible to foresee the problem, although the severity was dependent on an exceptionally hot summer, so the chance this would occur was likely to be negligible. Whether the problem might have been foreseeable is, we think, down to just how predictable our English weather will be in the future... which in itself is difficult to foresee!

**Matt Cousins and Murray Armes**

## Read the Small Print

Architects are often involved in the recommendation and selection of contractors. But does an architect have to enquire about the financial position of the contractor, and just how far is it necessary to go?

In the 1995 case of *Partridge v Morris*, the client house owner (Partridge) appointed an architect (Morris) for alterations to a house in London. After the contractor was recommended to the client by the architect, they entered into a JCT Minor Works Contract. Unbeknown to the architect and client, the contractor was on the verge of insolvency which had an impact on the quality of the work that was carried out. As a result, the client incurred additional expense by terminating the contractor's employment and employing another contractor. As the contractor was insolvent the client sought to recover damages from the architect claiming that the architect should have reviewed the financial standing of the contractor before recommending them.

The judge referred to the current version of the RIBA *Architect's Job Book*, where it stated that when tenders are returned an architect should discreetly check the financial status of a contractor. Although there was no express term obliging the architect to do this the judge ruled that the architect was under an implied duty to obtain a bank reference for, or at least the company accounts, of the contractor. It was a matter on which the client needed advice and as a professional the client relied on the advice of the architect. He said:

"In my view the duty which the defendant undoubtedly undertook of advising the plaintiff on the relevant merits of the tenders extended to consideration of the financial acceptability of the tenderers. It was a matter upon which the plaintiff needed advice; there was no other member of the professional team, as there might be, more immediately concerned with that responsibility, and it therefore remained with the defendant as the plaintiff's general professional adviser in relation to the review of tenders and the choice of a contractor".

Although the Architect's Job Book is for guidance only, the judge held that it should be followed and the necessary enquiries should have been made. The judge held that the failure of the architect to make the necessary enquiries was causative of the damages suffered because if such enquiries had been made the contractor would not have been selected. The judgment did suggest though that the enquiries might be dependent on the size and standing of the contractor.

Under Stage P of the new 2013 Job Book it is suggested that "...current information is obtained concerning the financial status of firms and that they have adequate resources...". The Job Book is not specific about the enquiries to be made and it will undoubtedly depend on the size and reputation of the contractor, so the 1995 judgment is likely to apply to architects services today. Financial checks can take many forms and not all will reveal the full status of the contractor. The most comprehensive checks can be expensive and also the architect needs to ask itself whether it is in the best position to interpret the data. So, who pays for the

time and the costs that will be incurred in doing this? Most clients I suspect will not be happy to see this on an invoice, so you need to incorporate an allowance in your fees.

If the contractor is small it can be very difficult to get reliable financial data. If it is large does the architect still have to have make a check on their financial status? Does a reasonably competent architect have to follow the Architect's Job Book word for word in order to carry out their duties? The answer seems to be that the architect must do what it can and if necessary warn the client of the potential problems of poor or inadequate financial data is obtained.

Ultimately the client (especially private individuals) will often be concerned about procuring the works for the cheapest price, the financial status of the contractor will not be top of their priority list, so you, the architect must make it so.

This case is a salutary reminder for architects to be aware of their wide ranging responsibilities in relation to the Architect's Job Book and the liabilities they may face as a consequence of not following them.

Murray Armes and Matt Cousins

## Professional Consultant's Certificates

In the absence of an architect or other person acting as Contract Administrator ("CA"), construction professionals may be asked to certify that a project was constructed in accordance with the Building Regulations and generally in accordance with the contract. Known as Professional Consultants Certificates, those issued by the Council of Mortgage Lenders are typical. Lenders and purchasers often rely on such certificate in the absence of traditional architect's certificates.

The process involves the professional carrying out regular inspections at regular intervals (often six or seven) and at pre-determined stages in the construction, such as ground floor slab, first floor structure, roof structure, etc. The inspection regime does not anticipate the same number of visits as that carried out by a CA, and neither does the fee which tends to be quite low. The process favours the builder who does not want to go to the expense of having a CA, but who nonetheless needs to provide assurances to the purchasers' lenders that the properties have been properly constructed.

The certificates cannot be qualified, so if the professional is unhappy with any aspect of the work, the only recourse he has is to refuse to issue the certificate, something that will make him very unpopular with the builder employing him. Failure to issue an accurate certificate is not a matter of reasonable skill and care (in other words, on balance the professional thought the works were satisfactory) but a matter of strict liability where any inaccuracies on the certificate could amount to negligent misstatement. In other words, the works either were or were not in compliance with Building Regulations and the contract.

It is difficult to make such statements unless the professional has seen most aspects of the construction. The dilemma is that neither the process nor the fee anticipates such a high level of involvement. The alternative would be for the professional to have previously executed work opened up or inspection, something that will not go down well with the builder. In the case of *McGlenn v Waltham Contractors* the judge decided that the architect had a duty to inspect the works, not just at regular intervals, but at critical stages of the construction, so six or seven visits may not satisfy that requirement.

In *Hunt & Ors v Optima (Cambridge) Ltd & Ors*, the developer engaged the professional to sign off certificates to the purchaser's lender. The architect was held liable for negligence in wrongly issuing certificates certifying that works on each property had been carried out to a satisfactory standard in compliance with the drawings and building regulations, despite the fact the predetermined regime of inspections would not have allowed him to inspect all aspects of the works, and neither was he paid to do so. On the basis the certificates were not issued in favour of the individual residents, there was no direct contract between them and the professional. However, the judge held that the certificates amounted to what were in effect contractual warranties and that there was consideration because the purchasers understood a certificate would be issued when they bought the properties, so the certificate was part of the purchase price and the purchasers were entitled to rely on them.

Any professional who is asked to sign Professional Consultants Certificates needs to understand that a failure to properly inspect, which means incorrect statements are made on the certificate, could lead to liability in negligence to parties with which it has no contract, but nonetheless to which it owes a duty of care. Professionals carrying out this service need to be sure they understand what they are to do. To withhold certificates if needs be and ensure they have the correct amount of fees for providing the service.

Murray Armes