CHARTERED ARCHITECTS
AND INTERNATIONAL
DISPUTE RESOLUTION
AND AVOIDANCE

SENSE STUDIO

ANGLES

SENSE STUDIO NEWSLETTER FEBRUARY 2014

Changes in the Architect's Role on Certification and Notification in Ireland - The Building Control (Amendment) Regulations 2013

From the 1st of March 2014, The Building Control (Amendment) Regulations 2013 will be effective in Ireland and will change the role of architects in practice in respect to certification and notification.

The new regulations were set out to "restore consumer confidence" in the construction industry to provide consumers with protection to prevent future dwellings breaching building regulations and to ensure compliance with statutory certificates.

The Regulations state that Building Control administration will be provided through the appointment of an "Assigned Certifier" who will become a single point of contact and will have a duty of "reasonable skill, care and diligence" to inspect and certify the works and co-ordinate the inspection work of others for compliance with building regulations.

Assigned Certifiers, can be registered architects, engineers or building surveyors, and will be employed by the owner or developer to inspect building works at key stages during the construction. Under the new Regulations, there will be seven new certificates which will be required. If an architect signs a statutory certificate for a building which subsequently proves to be non-compliant, they could be held legally liable for the consequences.

Although this is likely to add to the overall cost of a building, consumers will in effect have a certificate guarantee from those who are responsible for certification for any issues that may arise. A greater onus will be placed on architects to provide consumers with a more comprehensive service and as a result may make it easier for claims to be successfully brought against architects, having a significant impact on the potential liability of an architect. ●

Matt Cousins

More Than One Master – Being Aware of Your Duties as an Architect Under a Design and Build Contract

Novation is a tri-partite agreement consisting of an original Employer, an incoming contractor and an architect (or other consultants) in which the architect's appointment is transferred from the original Employer to the contractor. In doing so, the contractor effectively agrees to step into the shoes of the Employer and act as the new client and accept entire responsibility for the design including any design carried out by the architect prior to the contractor's appointment. Employers often favour novation especially in design and build projects as it can offer distinct advantages: there can be control over design before novation takes place, the contractor can have single-point responsibility and there is continuity by retaining the same consultant.

Following novation, the Employer's interest in the project remains unchanged, and as a result, sometimes, particularly in the case of an inexperienced client, there may be an expectation that an architect will continue performing services for them such as advising on technical matters, reporting and monitoring on progress of the works, and sometimes more.

As a profession, architects tend to be naturally helpful people, and want to please everyone but this can present a number of practical difficulties and possible additional liability for the unwary. It is important therefore, that architects understand their obligations and responsibilities in regards to novation agreements. Architects should ensure that their obligations are clearly stated in their novation agreement. Following novation, the legal obligation of an architect is to the contractor and not the client. The original Employer loses the benefit of the services of its architect and the architect may even be required to act against the original client's interests. Many Employers do not understand this and neither do some architects. Continued

If an Employer wants post contract representation then it should employ a separate Employer's Representative. If an architect tries to fulfil this role as well as its duties to the Contractor, not only are they faced with a conflict of interest, but they may end up with two masters, having assumed responsibilities to both. This dual role is bound to fail because the architect in such a position cannot act professionally for both parties at the same time, having regard to their very different interests.

In a recent case about a claim arising out of a design and build contract involving both the architect and engineer and where the contractor was insolvent, there was the strong belief by the Employer that the architect, who had worked for the him on a number of previous projects, still owed duties to him, regardless that the architect had been novated to the Contractor. The Employer simply could not understand that post novation the architect was no longer at his side to advise him about the progress and quality of the project. In this case, at least, the architect had understood his responsibilities and had acted only for the Contractor.

In another case, the architect had entered into an agreement with the Employer and then pre-contract had entered into a separate agreement (but using an almost identical letter) with the Contractor to provide detailed design and monitoring of the project on site.

There was no formal novation agreement and the architect had not advised the Employer that it would no longer be carrying out inspections, valuations and certification on behalf of it. The result was that the architect ended up producing further information on behalf of the Contractor, but then inspected, valued and certified on behalf of the Employer. Problems arose that involved the co-ordination of the works being carried out by the Contractor, which resulted in the architect unwittingly over certifying the works and being liable to the Employer.

In some cases, the original appointment between Employer and architect anticipates the latter will perform a full service for the Employer; comprising pre and post-contract design, contact administration and inspection duties. Some novation agreements simply import the terms of the original appointment into the new agreement between architect and Contractor, so that any duties not carried out pre-novation are to be completed post-novation. Clearly the duties concerning contract administration will no longer apply because a novated architect cannot act as Contract Administrator. However, the duties of design development and inspection may remain. Whether or not an architect is able to effectively carry out these duties will depend on the design and build Contractor, and its requirements, and to what extent it allows the architect to continue to design and specify and to inspect post novation. In the event defects are found and the architect has not carried out inspection duties defined in its original agreement properly, a question arises as to whether the architect is liable for the inadequate or defective inspection.

In the event the Contractor is insolvent and the architect has signed a collateral warranty in favour of the original Employer, a further question arises about the liability to the Employer for inspections, whether or not the Contractor has allowed the architect to carry out the duties imported into the novation agreement. Being clear about the terms of the novation agreement therefore involves a careful comparison of the terms of the original appointment and the duties the contractor will allow the consultant to perform.

Importantly the architect must be aware that in novation it no longer owes a continuing duty to the client, and in the case of a lay or inexperienced Employer, this should perhaps be made clear. Whilst having two masters may initially keep both happy, it amounts to a conflict of interest and is most likely to end in tears. ●

Matt Cousins & Murray Armes

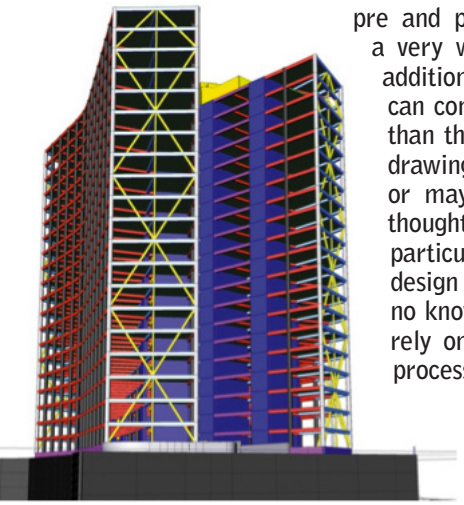
Welcome to the second edition of "ANGLES" our triannual newsletter which we hope you will find a source of interesting information and news.

We welcome feedback and contributions so please **let us know what you think**. We hope you will enjoy this and future editions.

Who did what, why and when - reliance on information in a BIM model

In traditional drawings the maxim "what you see is what you get" generally holds true. Drawings were traditionally a means to an end, they were the means by which information was provided to enable project to be constructed.

The author of a particular drawing was usually clear and the drawing would (or should) have had its status (therefore purpose) as "Preliminary", "Planning", "Tender", "Contract" or "For Construction" clearly identified. BIM is different because the model is expected to be used both pre and post construction by possibly a very wide range of disciplines. In addition, an element in a BIM model can contain much more information than that simply presented on a 2D drawing and all that information may or may not have been completely thought through by its author, particularly part way through the design process. The author may have no knowledge of exactly who might rely on it either during the design process or in the future, or exactly what reliance they might place on it.



Such issues are just beginning to emerge in the UK where BIM is still in its relative infancy but in America where BIM has been in use for some time, the American Institute of Architects (AIA) has made available a range of documents concerning the use of BIM, including the "Guide, Instructions and Commentary to the 2013 AIA Digital Practice Documents", published in 2013.

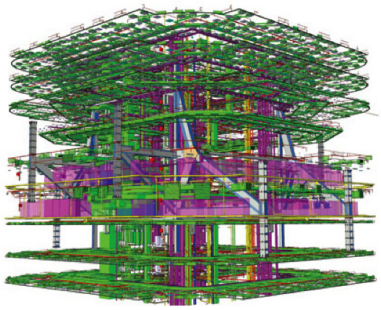
This document suggests that an extreme approach might be to prohibit reliance on any information contained in the BIM model on the basis that "because some of the information is not reliable don't rely on any of it". This of course rather defeats the object of promoting the use of BIM!

The AIA defines what it calls an Authorised Use which changes the position to "because some of the information is not reliable you can only rely on the information that I explicitly say you can." This allows project participants to include information in the model only for specifically intended purposes, at the same time preventing unintended reliance. The vehicle for defining Authorised Uses is the Model Element Table included in the AIA's Digital Practice Documents.

The Model Element Table lists each of the model's components (Elements), systems or assemblies and these intersect with three cells of data: the Level of Development (LOD), Model Element Author (MEA) and Notes. At the conclusion of a project milestone each participant will be able to see who is doing what and when together with any additional information. The AIA suggests the milestones be aligned with the architect's work stages, so in the UK that would correspond to the new RIBA Plan of Work, adjusting this as required to suit the work of other consultants. The Guide suggests the table has two primary purposes:

"a) To define reliance: to assure that users of Models do not infer more precision or information than the designer of the system or component intends at a given point in the design process, and

b) o coordinate between disciplines: to give the Project team an overview of who needs to provide what information at what time in order to meet milestones".



Just looking at a BIM model element does not necessarily reveal its state of development. By referring to the table, a user should be able to see just how much reliance can be placed on each of the components of the model. During the design stage it can be expected that some of the components will be more developed than others. This all sounds very complicated but in essence this is really a more comprehensive, electronic version of what, in the case of paper drawings, was referred to as the "revision box" in which the author (draughtsman) stated the nature of the revision and the date it was carried out.

It is likely that as BIM develops, particularly as we move from BIM Stage 2 to Stage 3, that the Model Element Table will be supplanted by software that provides an audit trail providing information on exactly who made what changes and when. It seems a natural extension of such systems to also provide information about reliance on elements of the model. ●

Murray Armes

Be careful what you promise

Architects are not always the best people to provide cost advice to their clients, although many try to be helpful in this respect. A recent case in the TCC, Pickard Finlason and Adele and Mathew Lock, should serve as a benchmark about the standard of advice to be given if an architect chooses to do so, particularly in the case of a multidisciplinary architectural practice which also offered structural design. It also provides a warning to those that offer to provide a particular service but do not do so because a client has not specifically insisted it is done.

The Lock's purchased Butley Hall with the intention of developing it with the aid of funding from its bankers. PFP was to provide services including an initial feasibility study, scheme design, detailed design, statutory consents and services up to completion.

The design was ambitious and when it was submitted for planning permission was subject to a number of objections which resulted in the revised scheme being lowered, incorporating a semi basement in which some of the apartments were to be lit by roof lights which offered limited views out. In the meantime the estimated costs had increased substantially as had the complexity of the structural works.

The bank decided it did not want to provide funding citing concern about the costs and the suitability of the design of the apartments lit only by rooflights. The lack of funding meant the Lock's could not pay the considerable amount of fees which PFP had accrued, so, following an unsuccessful adjudication, PFP pursued the matter of its unpaid fees to trial.

The Lock's were unhappy that PFP had failed to provide a reliable cost estimate, which they could present to their current and other bankers and instead had obtained costs from contractors. They were also unhappy that it was not possible to carry out PFP's scheme on structural grounds. It was argued that PFP, despite contracting to provide a bound feasibility report and a cost estimate for the revised scheme anticipated in the first part of its services, failed to provide a cost plan as part of the second stage. It was argued that PFP had failed to provide proper advice about the risks of the revised scheme and that the planning submission should not have been made until those risks had been properly considered.

PFP's terms of appointment were written in such a way that the court decided that entitlement to be paid only arose after PFP had completed the first three stages of its services. Firstly, the Lock's maintained that it was a condition precedent that completion of the stage two post planning services involved PFP in obtaining a firm cost for the project. Secondly there was no entitlement to be paid because PFP had not completed its stage one services because no feasibility report had been prepared. Thirdly, the scheme was not in any event possible to build.

The court decided that although PFP was not providing the services of a QS, that nonetheless the RIBA standard form of appointment anticipated that an architect could provide cost advice without the involvement of a QS and that was in fact what PFP had agreed, but failed, to do.

In the court's words:

"…the RIBA work stages, to which the service proposal expressly referred, included alternative options for where a quantity surveyor was and was not appointed, and in the latter case the architect was obliged at the equivalent of stage 1 to review the cost implications of the alternative design and construction approaches, and at the equivalent of stage 2 to prepare an approximation of construction costs and then to prepare a cost estimate…"

Despite its obligations, and requests from the Lock's, PFP had failed to provide an estimate of construction costs in order to complete the feasibility stage because it considered that the Lock's should have been able to work these out for themselves from the square metre rates provided. The court considered there was little or nothing in what PFP provided that enabled the Lock's to take into account the contingencies, nor to enable them to understand the range of best and worst case construction costs that were likely to arise from the revised design.

PFP argued that it was not necessary to provide a feasibility report and in any case the Lock's had not specifically asked for one.

The court decided said that:

"There was also some debate about whether the provision of a bound report at the end of the feasibility stage was an absolute requirement. Mr Finlason contended that it was simply an offer to provide one, and that it was not necessary if the client did not require it and if all of the work required to be done at feasibility stage had in fact been done. Whilst I have no doubt that it was always open to the client to dispense with the need for a bound report, it is quite clear in my judgment that unless the client did so it was intended to be an important part of the professional service which PFP was offering to provide".

Finally, the court decided that PFP had failed to give advice that a proper ground investigation should have been carried out with the result that the revised structural design proposed by PFP was not in fact possible to construct in the prevailing ground conditions.

In summarizing the court said:

"What however is at the heart of this case is whether or not PFP subsequently took sufficient and prompt steps to assess the risks and costs of this revised design…"

In summary PFP had failed to provide a feasibility report which "…was not a formality, nor was it waived…, and which it had not sought its client consent to omit. It had failed to provide an estimate of construction costs at feasibility stage and a more reliable costs post planning approval, including advice on contingencies and the range of accuracy of any predicted costs. Finally, PFP had failed to give advice about the importance of obtaining a ground investigation report and as a result had produced a structural design that was unfeasible on this site.

Perhaps unsurprisingly PFP was not successful in its fee claim. ●

Murray Armes