Legal Aspects: Professional Liability & Architects’ Contracts

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SHIBLEY RIGHTON LLP
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The Apartment Fire
Overview

- Three storey mixed residential and commercial building;
- Building destroyed by fire caused by an electrical fault;
- Two competing theories of how the fire spread
  - Owner: up steel columns due to missing fire-stopping
  - Architect: between new fire separations and existing exterior masonry wall;
- Owner sues for $750,000 for damage to building and $150,000 for contents and loss of income.
# The Parties

<table>
<thead>
<tr>
<th>Role</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>Apartment building owner (subrogated insurer)</td>
</tr>
<tr>
<td>Architect</td>
<td>Prime consultant hired by owner to design renovation of old 3 storey hotel into a residential apartment building</td>
</tr>
<tr>
<td>Mechanical/Electrical Engineer</td>
<td>Architect’s sub-consultant</td>
</tr>
<tr>
<td>Building Dept.</td>
<td>Approved the plans and performed building inspections</td>
</tr>
<tr>
<td>Electrical Safety Authority</td>
<td>Approved the electrical work</td>
</tr>
<tr>
<td>Electrical contractor</td>
<td>Installed the electrical work</td>
</tr>
<tr>
<td>General contractor</td>
<td>Bankrupt and unrepresented</td>
</tr>
</tbody>
</table>
Description of Work

• Renovation of existing structure to convert to multiple dwelling;
• Structure and shell left intact – 100 year old timber within a masonry shell;
• Main floor – commercial with no new partitioning, except for fire compartments around stairs;
Description of Work

• 2nd and 3rd floors – subdivided into 4 apartments per floor with internal partitions;
• New structural steel to reinforce timber framing: two columns inserted into existing partitions around stairwell on main floor steel columns also on floor above;
• Steel columns carried up to the roof to be enclosed by drywall and fire-stopped at penetrations.
Fire Causation
– Plaintiff’s Theory –

• Fire originated in basement, just outside of electrical room;
• Fire caused by an electrical failure due to improper installation of wiring; a staple damaged the wire causing heating due to a ground fault;
• Fire spread upward from the basement through floor penetrations around new steel columns;
• No fire-stops were provided around the penetrations and the fire spread rapidly upward through the structure;
Fire Causation
– Plaintiff’s Theory –

- Wires located below joists, held in place by wood strapping and stapled;
- Fire confined to 5 joist spaces – fire spread along joists in direction of steel column and up the column which was not fire-stopped;
- Fire burned in wall cavities and ceiling cavities, shielded from fire suppression water;
- Fire spread vertically along the column and horizontally in the ceiling cavities on each floor. The wooden roof and floors collapsed.
Architect’s Response to Owner’s Fire Expert

- Owner’s expert failed to document (photograph) area or record detailed observations of absence of fire stop;
- Fire-stop could have been consumed during the fire or fire could have resulted from “drop burning”;
- The fire did not spread up the steel column, it spread along wall framing at a masonry bearing wall which caused severe damage to the underside of the second level floor assembly and continued to spread from there within concealed spaces;
Architect’s Response to Owner’s Fire Expert

- Based on the physical evidence, it was not possible to attribute the fire to an absence of fire-stop;
- The design did its job – the fire was compartmentalized and all residents escaped without injury.
Owner’s Allegations of Breach of Contract and Negligence Against Architect

• Architect failed to ensure plans complied with Ontario Building Code and other safety codes;
• Architect failed to adequately supervise the work;
• Architect failed to perform adequate field review and certification;
• Architect failed to warn the Owner that the work had been completed deficiently and had created a situation of danger.
Theory of the Architect’s Defence

• No evidence that fire-stopping was absent;
• If cause was metal staple through a wire then no liability to Architect;
• It was the GC's duty to supervise the installation of fire-stopping material;
• 100 year old timber framed building would’ve been destroyed regardless;
• Architect had no obligation or duty to inspect the electrical cable;
• The electrical sub-consultant was responsible for the electrical installation;
• Ontario Hydro conducted an inspection and approved the electrical work.
Facts Learned Through Discovery

• Owner acknowledged limits of Architect’s contractual duty to perform field review;
• Fire-stopping was observed to be installed in some locations;
• The electrical sub-consultant inspected the electrical work and was satisfied that the electrical roughing in was proceeding satisfactorily;
• ESA inspection was satisfactory.
Outcome of Case

• Mediation
• Pre-Trial Conference
• Initial claim for approx. $900,000
• ESA offered to settle for $80,000
• Architect offered to contribute $25,000 + $2,500 for costs
• Eventually settled case for:
  • Main action - $400,000
  • Architect contributed $38,400 in total
  • Electrical sub-contractor contributed $300,000
  • ESA and the electrical sub-consultant contributed the balance
Take Aways

Questions or Comments

- Clearly define the scope of work particularly in relation to field review duty;
- Set clear limits on the scope of review for conformance to design drawings, not construction deficiencies;
- Indicate frequency of reviews;
- Maintain written field review reports and consider keeping photographic record of typical conditions;
- Use standard form of agreement.
Judicial Process

1) Generally by independent courts
2) Other entities exercising judicial functions
   • Workers’ Compensation Board
   • Ontario Municipal Board
   • Discipline Committees (OAA)
3) All of the above are subject to review by courts
COURT SYSTEM
OAA Admission Course - 2017

COURT SYSTEM

Superior Court of Justice

General Division
Deals in civil matters
i.e. claims for breach of contract, claims for negligence

Provincial Division
Deals in criminal matters or provincial offences

Divisional Court

Ontario Court of Appeal

Supreme Court of Canada
ALTERNATE DISPUTE RESOLUTION

Most common forms are:

1) Arbitration  
   (Arbitrations Act; Arbitration Agreements)

2) Mediation
Dispute Resolution Spectrum
## Dispute Resolution Spectrum

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<th>Mediation</th>
<th>Arbitration</th>
<th>Litigation in Court</th>
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<tr>
<td>Party to party</td>
<td>Third party intermediary facilitates negotiation</td>
<td></td>
<td>Parties are adversaries presenting evidence before a judge</td>
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Mediation

The mediator sensed that the negotiations were in trouble.
Mediation

- Mandatory now for court proceedings commenced in Toronto and Ottawa
- Before a neutral third party
- Mediator does not decide merits
- Mediator utilizes “shuttle diplomacy” in an attempt to broker a settlement.
Mediation

• Parties must agree that they would both like to mediate their dispute

• Agree on a mediator, should be lawyer experienced in design and construction - Good ones a challenge to find.

• Prepare and exchange briefs setting out their positions and the facts

• Mediation itself is an informal process
Mediation

• Everything that is said is “off the record”
• Opening statement
• Opportunity to ask questions
• “Break out” into separate rooms
• Exchange settlement offers
• If there is a resolution, the parties record the settlement in written form
Mediation

• Low risk exercise
• Number of advantages
• Empowers the principals to take control of the settlement process
• Private process
• Cathartic opportunity
• Opportunity to reach a compromise solution and end legal proceedings
Mediation
Mediation

- Mediation can fail because:
  - one party or the other is so unrealistic and inflexible in their position
    - e.g. recent case: sole purpose building vacated by fitness club tenant. Architect blamed for $5mm financial failure on basis that mold appeared in wet areas. The owner did its own interior finishes, badly.
  - relief sought in the dispute, for example an injunction, is only available in court
Arbitration

• Closely resembles court process although less formal
• Arbitration can be as expensive as going to court but can also be a quicker process
• Arbitration is private whereas courts are public
Arbitration

- Trial out of court
- Parties select their own adjudicator
- A consensual process
- Often agree to arbitrate their disputes in advance
- Process generally more streamlined than a court case
Arbitration

• Like a courtroom trial with live witnesses, cross-examinations and legal submissions from lawyers
• Generally arbitrator’s award is binding on the parties
• Arbitration agreement may provide for rights of appeal to court
Arbitration

- Advantages
  - Parties determine the process to be followed
  - Parties can choose their adjudicator
  - Allows parties to set their own schedule
  - Process is private
  - A less formal process
Arbitration

"Then it's agreed. Watson, Smith, Teller, and Wilson go to Heaven; Jones, Paducci, and Horner go to Hell; and Fenton and Miller go to arbitration."
CONTRACT LAW
Elements of a Contract

- An agreement between parties
- “Consideration” from both parties
- Intention to create legal obligation
- Consensus ad idem (a meeting of the minds)
- Essential terms (e.g., scope of services, fees, schedules, etc.)
- What if the parties do not agree on minor issues?
- What if the contract is verbal?
Offer and Acceptance
Offer and Acceptance

- Acceptance must be in same terms as offer
- Offers may be withdrawn at any time before acceptance
- Acceptance of offer may be:
  a) verbal;
  b) written;
  c) implied.
Consideration

• Most often money, but can be an act or promise
• May affect who may enforce the contract
Types of Contracts

• Written or oral

“An oral contract isn’t worth the paper it is printed on.”

• Limited retainer
Why you should have a written contract

1) Minimize later disagreements
2) Precision of terms
3) Much easier to enforce
Claims for Breach of Contract

To establish liability, one must prove:

1) a breach of a term of the contract
2) loss or damage caused by breach
3) damage suffered within limits permitted by law
Case Illustrations
Case Illustrations

• Design Breach
  • (building dimensions)

• Field Review Breach
  • (Construction deficiencies)
NEGLIGENCE
Necessary Elements of Negligence

1) Duty of care owed by architect
2) Failure to meet standard of care
3) Damages or injury suffered
4) Damages must be caused by breach of standard of care
Duty of Care

• Every person owes a duty of care to take reasonable care not to cause injury to persons whom they might reasonably anticipate would be injured by their act or omission
  • i.e. owners, inhabitants of buildings, users of buildings
Standard of Care
Standard of Care

• All architects must live up to the standard of care of the average, reasonably prudent architect possessing the ordinary skill and knowledge necessary to perform his or her duties
Standard of Care

Standard usually determined through:

- Expert advice
- Rules of professional conduct
- Practice bulletins
- Geographic considerations
- Specialty considerations
Case Illustrations

• Personal Injury
• Over - Certification
The Behind-Schedule Retirement Centre
Overview

• Owner was building a senior's retirement centre;
• Surety bond: if GC defaulted, Bonding Company obligated to finish the Project;
• GC fell behind, defaulted, and abandoned the Project;
• The Bonding Company finished the job;
• Job completed 2 years late;
• Owner claimed against the Bonding Company for $5 million;
• Bonding company counter-claimed against the Owner and the Architect for $2.2 million it paid to complete the Project;
• Crossclaim and indemnity.
## The Parties

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<td>Plaintiff</td>
<td>Bonding Company for General Contractor of Retirement Home</td>
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<tr>
<td>Owner/Developer</td>
<td>Claimant under Bond</td>
</tr>
<tr>
<td>General Contractor</td>
<td>Defaulted during construction (Project completed by replacement contractor)</td>
</tr>
<tr>
<td>Architect</td>
<td>Owner/Developer’s consultant for the Project</td>
</tr>
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Bonding Company’s Allegations of Negligence Against the Architect

- Over-certified the work of the defaulting General Contractor;
- Failed to identify the deficiencies in the work of the defaulting General Contractor;
- Failed to provide interior design details in a satisfactory fashion (reference to another retirement development);
- Failed to coordinate with mechanical/electrical design;
- No construction schedule;
- Manipulated by client to facilitate claims for over-payment from Bonding Company;
- Architect included in re-tender documents items which were not in original tender documents.
Coverage Issues

• Architect knowingly signed inflated Payment Certificates to assist Owner;
• Architect aware that correction of deficient work was being deferred by Developer to keep Contractor on the job;
• Value of work certified as complete did not reflect cost to correct substantial deficiencies.
Theory of Architect’s Defence

- Denied duty of care to the Bonding Company;
- Owner directed Architect to sign payment certificates and accepted full responsibility;
- Architect not responsible for Project delay;
- Architect sufficiently represented on the re-tender documents that some items were part of an expanded scope of work;
- Project had further deteriorated as parties were attempting to negotiate completion costs;
- Trust monies held from subsequent sale of Retirement Home were to be used to indemnify Architect.
Facts Learned Through Discovery

- Owner admitted instructing Architect to increase payment certificates to the GC to keep GC on the job;
- Owner admitted Architect to incorporate by reference interior finishes from another retirement facility;
- Owner admitted instructing Architect that correction of deficiencies would be deferred;
- Owner extended duration of the contract with the GC, and didn't report same to the Bonding Company;
- Scope of work for the mech./electrical work was not completed or designed at the time of signing of the construction contract.
Outcome of Mediation

- Initial claim was from the Owner against the Bonding Company for $5 million, and from the Bonding Company against the Owner and Architect for $2.2 million;
- The Project was sold before the mediation for $2.5 million;
- Sale funds were released to the Owner, and the Bonding Company paid the Owner an additional $150,000;
- The Architect contributed $0.
Professional Liability Insurance

• Required to engage in the practice of architecture in Ontario; S. 40 *Architects Act*, s.48 Reg 27

• Minimums enough? – do you need excess insurance?
  - Size of the project
  - Size of staff
  - Have you assumed the liabilities of others in your contract? Do they have adequate insurance?
"I think you misunderstood. The million dollar umbrella policy only covers you for claims involving an umbrella."
Coverage

• Indemnifies architects for legal liability arising from errors or omissions in the performance of professional services for others
• Covers:
  1) Damages
  2) Legal defence costs – lawyers and experts – [not all insurers]
  3) Interest and costs awarded
Types of Claims

• Typical claims may involve
  – School Boards
  – Condo Corporations
  – Custom homes
  – Hospitals
  – Design/Build projects
  – Envelope issues
  – Delay claims
  – Extras
  – Co-ordination issues
How to give notice of a claim

• Notify Pro-Demnity Insurance Company

• Addressed to:

  Pro-Demnity Insurance Company
  111 Moatfield Drive
  Toronto, Ontario M3B-3L6
Anatomy of a Lawsuit

• Claim received from client, for example e-mail, demand letter or statement of claim
• Pro-Demnity insurance claim
• Your insurer appoints a defence counsel
• Provide details and relevant documents to insurer
Anatomy of a Lawsuit

- Prepare defence
- Prepare Affidavit of documents
- Attend examinations for discovery
- Attend mediation
- Attend Pre-trial
- Prepare for trial and attend trial
Risk Management

1) Clear concise contract
2) No oral contract
3) Avoid terms which warrant or guarantee result
4) New means and methods of construction and new materials = large number of claims. Therefore warn client of risks.
5) Evaluate whether the commission is appropriate. Do you have the capabilities?
6) Evaluate the client’s resources
7) Skimping on general review = lawsuits - if client refuses to pay for general review or suggests skimping, think seriously about declining the contract
8) If not retained for review, do not drop in because you are in the neighbourhood
Risk Management

9) Suggest client contract directly with engineers – Document 600
10) Sub consultants should be married to client/architect agreement
11) Sub consultants should have adequate insurance coverage
12) Owners should agree and limit claims re: E&O of sub consultants
Risk Management
13) Limit liability through clauses in contract
14) Carefully consider prospect of a counter claim before sending account to collection, suing for fees or exercising lien rights
15) Be evenhanded and fair in dealing with contractor
16) Take care in signing standard progress certificates of lenders or surety companies
Closing Remarks

• Questions
• Comments
• Discussion
*Please be careful when you put revision clouds on your drawings, some of the contractors do not understand.*