

Feeling constrained by budget?

STEPHEN HOMER – PARTNER, ASHFORDS LLP OUTLINES THE RESPONSIBILITY OF ARCHITECTS WHEN PROPOSING DESIGNS, IN PARTICULAR IN RELATION TO A RECENT CASE HE ACTED ON WITH A DIALES QUANTUM EXPERT.

The English High Court recently ruled on a case concerning the duties of an architect in relation to budgetary constraints on a project. The decision involved the world-famous architects, Foster & Partners and the design of a proposed five star hotel at Heathrow airport. The judgment *Riva Properties Limited, Riva Bowl Limited, Riva Bowl LLP and Wellstone Management ("Riva") against Foster + Partners Limited ("Fosters")* [2017] EWHC 2574 (TCC) gives much food for thought for designers and architects alike.

Judgment was given by Fraser J on 18 October 2017. The case concerned Fosters and their duty to design a five-star hotel in line with a budget indicated by their client, Riva. The design included a 600 bed, five-star hotel with conferencing and leisure facilities, a bowling alley, and parking set out in a village theme. The proposed hotel had seven floors above ground, seven floors below ground and a large glass biosphere around the outside containing the 'village'. Riva notified Fosters of an intended overall budget of £70 million (later increased to £100 million). However, when the hotel design was costed in January 2008, the estimated cost was more than double the original budget, coming in at £195 million. Notwithstanding this high cost, the hotel design was submitted to and granted planning permission. However, the hotel was never built as it was not possible to obtain funding for a hotel scheme with such a high build cost.

Key points in relation to Fosters' appointment were that:

- Fosters were said to have no responsibility for costs advice.
- There was no mention of budget in the appointment.



The appointment did not refer to the Royal Institute of British Architects (RIBA) guide, 'The RIBA Job Book', but did refer to Fosters carrying out Stages A and B (now work stages 0 - 1) of the Royal Institute of British Architects Plan of Work.

Riva alleged three key breaches against Fosters:

1. Fosters failed to carry out the Royal Institute of British Architects Plan of Work Stages A and B (now work stages 0 - 1), including failing to establish the budget and as a result Riva was left with a hotel design that would cost more than twice its original intended budget

to build.

2. Fosters advised Riva, after receipt of the first costings, that the hotel design could be value engineered to within a budget of £100 million, the parties' respective expert witnesses having subsequently agreed that it was impossible to value engineer the design to such an extent.
3. In the alternative to 2, Fosters failed to warn Riva, when informed that Riva intended to value engineer the design to within a budget of £100 million, that this was not possible.

Riva claimed the fees required to have a new hotel designed and planning permis-

sion obtained, or in the alternative, reimbursement of the fees wasted on the Fosters' design. Riva also claimed lost profits due to the inevitable delay that will occur until the hotel is built and trading.

Over the course of an 11-day trial, Fosters raised a number of defences including:

1. They were never informed of the budget and denied there was any budget.
2. They denied they had a duty to establish budget or design to a budget as they were not required to advise on costs under their appointment.



3. Any cost advice could not be expected from Fosters and Fosters informed Riva that they needed to appoint a quantity surveyor.
4. Fosters denied that they had failed to carry out RIBA Stages A and B and denied that they were required to prepare the Strategic Brief under RIBA Stage B.
5. Fosters alleged that despite the cost advice received from the quantity surveyor, Riva decided to proceed to planning.
6. Fosters denied any advice was given to Riva that the project could be value engineered.
7. Fosters alleged Riva was contributorily negligent for, inter alia, delaying in the appointment of a cost consultant and failing to proceed with the project diligently or at all following the cessation of Fosters' appointment.

In a lengthy judgment, Fraser J found in favour of Riva on each of the alleged breaches on the following basis:

1. RIBA Stage A required Fosters to, "identify requirements and possible constraints". Stage B required Fosters to "confirm key requirements and constraints". Fraser J held that, "a client's budget for a project is plainly a constraint (it could also be argued that it is a requirement too)". In the circumstances, Fraser J considered that an Architect must, "establish whether there was a budget or not at an early stage, as that is the only way that all of the key requirements and constraints could have been identified". Having found that Fosters were aware of the budget, or in any event, should have identified the budget, Fraser J found Fosters in breach of contract for failing to complete RIBA Stages A and B with the reasonable skill and care to be expected. Fosters were required to identify any constraints and ultimately design the project to match the constraint of budget. However, Fosters appeared to have jumped straight to Stage C and designed without any thought for costs. Fosters' liability was not diminished by any delay in Riva not appointing a quantity surveyor until December

2007, as Fosters had not expressed any urgency when advising Riva to appoint a quantity surveyor. Indeed, Fosters themselves delayed in contacting potential quantity surveyors until November 2007. Further, and importantly, designing a project to match the constraint of budget is not synonymous with providing advice on costs.

2. So, what was Fosters' obligation in relation to value engineering the too expensive scheme? Fraser J found that Fosters undoubtedly knew that Riva intended to value engineer the Fosters design to a figure of £100 million and, in such circumstances, Fraser J considered Fosters to be under a duty to warn that this was not possible. Fraser J also accepted Riva's evidence that Fosters advised Riva positively that the scheme could be value engineered down to £100 million. Given the fact it was so, "blindingly obvious" that the Fosters design could not be value engineered to £100 million, Fraser J found Fosters in breach of contract for positively advising it could be value engineered or, in the alternative, failing to warn to the contrary.

Although Riva were not successful in claiming lost profits for reasons of causation, as a result of the breaches established, and the losses suffered in instructing new architects and consultants to design a hotel scheme that fulfils Riva's brief, they were awarded £3,604,694.

This case serves as a warning to designers that they cannot design in a vacuum. Cost and budget are a key constraint and should always be identified and considered when designing any project, even when the provision of cost advice is expressly excluded from the designer's obligations. The court also decided an architect has a duty to advise a client that a too expensive project cannot be value engineered down to a client's budget, at least in circumstances where this is obvious, and cannot simply stand by and remain silent. The judge's willingness to accept the guidance in the RIBA Job Book, as to what an architect should do at each stage of a project, is also noteworthy. ■

