



Mind your language¹

Are you sure your bespoke contract is tight enough?

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Introduction

Perhaps the most important term of your appointment, from a commercial point of view, is the payment provision: how much and when will you be paid. Accordingly, as recent case law demonstrates, you must take care when drafting bespoke fee schedules.

Pickard Finlason Partnership Ltd v Mr and Mrs Lock, the first judgment of 2014 in the Technology & Construction Court, principally concerns professional fees and highlights just how wrong things can go if your payment terms are not clear.

The Architect was employed to provide a full professional service in relation to the design and construction of a development in Cheshire. In return, they would receive 10% of the final cost of the project. The parties did not contract on the RIBA standard form of appointment – bespoke terms were created and tailored to the particular client and project. The fee was payable in four stages and included terms entitling them to 40% of the total fee upon planning permission being obtained and the development cost accurately established.

The Architect was aware that the client required funding for the project and agreed to keep their fees low until planning was achieved and further funds raised. Accordingly, the following terms were agreed which specifically concerned the planning period:

- *"In accordance with RIBA guidelines we are entitled to 40% of our overall fee for the work up to planning determination, however for your project we recognise the need to be flexible and we therefore offer to reduce our invoicing to 20%."*
- *"Our fee entitlement remains at 40% but this proposal keeps our fee payments low during the early stages of a project. Once planning is obtained a more accurate cost of the building and contract works can be established and the professional fee entitlement and overall fee is recalculated and the balance of our fees due becomes payable. At that stage we would agree a lump sum for the remainder of our fees."*
- *"We will recalculate and re-advise you of our fee entitlement when the development area and cost become firm."*

By the time planning permission was granted, the relationship between the parties had broken down. The Architect raised their invoice but the Locks did not pay.

The Locks were unable to obtain funding for the revised scheme which ultimately had been granted permission. They considered that the Architect had failed to give them proper advice at the relevant times about the risks and costs of this revised scheme. In addition, the Locks claimed that the Architect had failed to obtain firm costs from contractors which would have enabled them to move the development forward.

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Ultimately the Architect commenced proceedings claiming the balance of their 40% fee.

The Judge held that, on proper construction of their bespoke terms, the Architect's claim failed – they were not entitled to their invoiced amount of approximately £182k. They had not established, post-planning permission, a firm and accurate cost for the building works – which was a condition precedent to rendering their invoice. The express wording of their appointment made it clear that the cost only became "firm" once the "cost estimates are refined and the contract sum is known" and once "a more accurate cost of the building and contract works is established". It was not enough to simply revisit the cost plan and undertake any recalculation required. As the Architect had not procured a tender from a contractor which the Locks were willing and able to accept, they were not entitled to present their invoice.

The Judge also held that the Architect failed to comply with their obligation to provide an indication of the magnitude of the cost of the revised scheme at any time during the feasibility stage.

Do keep in mind that the findings in this judgment are of course very fact specific. Nevertheless, it is a timely reminder that when you draft bespoke, complex provisions, you do so at your own peril.

Contra proferentem

The full phrase of this Latin term is: '*verba chartarum fortius accipiuntur contra proferentem*' or 'the words of an instrument shall be taken most strongly against the party employing them'.

Legally, it is a rule of construction whereby doubt about the meaning of words will be resolved against the party who has put them forward.

In the case of *Pickard Finlason Partnership Ltd v Mr and Mrs Lock* (discussed above), the Judge noted that if there was any ambiguity as to what was meant by the phrase "when the cost becomes firm" in the bespoke appointment terms, then it should be resolved against the Architect on the basis that they had drafted the appointment and were then seeking to rely on a particular construction of it when enforcing their right to payment.