

How to inspect things
Rachel Barnes, June 2007

Tony Bingham has now written twice about Ian McGlinn's claim against his professional advisers arising out of the construction, and then the demolition, of his hoped-for luxury home in Jersey. Tony recommended that all architects read the 163 pages of the judgment, especially those concerning the specific items of defective work claimed against the architects.

Some further elaboration may be helpful. What was once referred to as a duty of supervision is generally downgraded to a duty of inspection, but still gives rise to much concern among professionals, who fear being held liable unfairly for builders' defects. However, as the judge said, the role of the inspecting architect has been the subject of surprisingly few cases.

This case was certainly a classic example of what architects fear – not only was the contractor in administration, leaving only the architect and other professionals to be sued; but the works had come to a halt before handover, at which stage a snagging list would have been prepared and many of the defects put right by the contractors. Would the architects be liable for not having had these sorts of defects rectified earlier?

On inspections generally, the judge said the frequency and duration of inspections should be tailored to the nature of the works, so that the important elements of the works were inspected at the appropriate stages. In particular, it was not good enough for an inspector to religiously carry out an inspection either before or after fortnightly or monthly site meetings and not otherwise.

The fact that defective work has been carried out, and covered up, between inspections will not necessarily, therefore, be a defence for an inspector who should have become aware of the defects by being present at the right time. The inspector should also time their visits so that covering up of work does not have to be delayed pending their inspection. If an element of the work is to be repeated throughout parts of the building, the inspector should ensure that they inspect that work at an early stage so as to form a view of the contractor's ability to carry it out.

However, the judge was clear that the inspecting professional was not required to go into every matter in detail, and it is almost inevitable that some defects will escape their notice. The approach of automatically blaming the inspecting professional for every builder's defect is misconceived.

As for leaving defects to be rectified under the snagging process, the judge drew a distinction between temporary disconformities, where the work has not yet been finished and where it could be premature and counter-productive for the inspector to interfere and defective work which has been completed. In the latter case, the inspector should usually require the work to be rectified as the works progress.

The judge also had some comments on what the inspecting professional should do when they notice a defect. Generally, it is not sufficient simply to point it out verbally to the contractor, or even to write to the contractor, without any follow-up. He must take all possible steps to ensure that the defective item is replaced. The alternative would be to make a deduction from the contractor's valuations.

If the inspector does not take the appropriate action at the appropriate time, they may well be liable for the cost of rectification if, for whatever reason, it is not subsequently possible to require the contractor to rectify the work and the cost cannot be recovered from it.

The architects were not held liable for not noticing defects that only became apparent after the element of work in question (the laying of roof slates) had been completed. The architects' duty required them to inspect this element of the work when it commenced and when it was completed. They did not have a duty to re-inspect it before the snagging stage, which of course was never reached.

It is necessary to show that the inspector has been negligent (unless their contract imposes a stricter duty). In the case of the M&E works, there were a number of items that the experts agreed “might ideally” have been identified on periodic inspection. The judge held that this did not form the basis for a finding of negligence.

In deciding whether an ordinarily competent architect would have picked up any particular defect, the judge said at one point that he has endeavoured not to lose touch with reality. Those who read the case will no doubt decide for themselves whether he succeeded.

For further information, please contact:

E: [Rachel Barnes](#)

T: +44 (0) 20 7240 3474

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