

You made the bed
Rachel Barnes, August 2007

The *McGlinn* case has been the subject of some comment in these pages. One aspect of it that has not yet been considered is a designer's obligations in respect of unsafe designs specified by their client. As you may recall, the architect was found liable in the *McGlinn* case for the unsafe designs specified by the client for a residential dwelling.

One involved gaps in the stone balustrades on the terraces. These were wider than permitted by the building bylaws. The architects said that when the client was warned that this was potentially dangerous for children, the client made it clear that children would not be visiting the property and that therefore this was not a concern.

Another issue concerned the external stairs, for which a handrail was not provided. This was because the client did not want one, as the client, at the trial, accepted.

In the case of the gaps in the balustrades, the judge held that the architect should have been tougher with the client, and in the case of the missing handrail the judge said that there was no evidence that the grave danger posed was ever communicated to the client. The architect was also held liable for the balustrade being too low – this had been done because the client wanted to have a good view of the sea.

Curiously, the judge does not seem to have addressed the question of whether it would have made a difference if the architect had been “tougher” with the client or given sufficient warnings on any of these matters.

Maybe the client in this case would have agreed to the designs being changed: that is the implication of the judge's findings that the architect was liable.

Nonetheless, such instances do raise the question of what happens if a designer has a client that insists on the implementation of a design that is unsafe despite having being warned about it.

Again, the implication of the judgment is that, if the designer had been sufficiently tough with the client, it would not be liable – at least, not to the client. But how tough does the designer have to be? And what about liability to a third party who is injured many years later, after the client has sold the property?

Giving a warning to the client may not be considered a sufficient discharge of the duty that a designer owes to subsequent occupiers that suffer personal injury as a result of a negligent design, particularly if the client is not under a duty to such people.

And what about criminal liability, under the Health and Safety at Work Act or the CDM regulations, for example? The CDM regulations have now been extended to cover designs of buildings for use as a workplace, in other words, designs that, for such buildings, could give rise to defects in the completed works.

Some would say designers required to prepare designs that might be considered unsafe, either because of the way they would have to be constructed or because of the actual results, should simply decline to do so and may have to walk away from the job.

However, as the case illustrates, the relevant element of the design may be quite minor, and walking out could seem rather an extreme reaction.

It could also give rise to difficult contractual issues: is the client necessarily in breach of contract, thus entitling the designer to walk away? At the very least, the designer may have difficulty getting paid for the work done.

The terms of the designer's contract may assist if, for example, it is made clear that all instructions given by the client must be reasonable and that the client is under an obligation to comply with all safety regulations.

Perhaps the test will be this: has the designer given such clear and emphatic warnings to the client that it can fairly be said that the design in question will then, in reality, not be the designer's but the client's?

The CDM regulations define a designer as any person that prepares a design, whatever their nominal function on the project. A client that insists on an unsafe design, against advice, may arguably be treated as the real designer for the purposes of both civil and criminal liability. But the warning given to the client would have to amount to an effective disclaimer of responsibility.

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