

PRIVATE AND CONFIDENTIAL  
ARCHITECTS REGISTRATION BOARD

THE PROFESSIONAL CONDUCT COMMITTEE  
HELD AT

CLIFFORDS INN CONFERENCE CENTRE  
CLIFFORDS INN,  
FETTER LANE  
LONDON EC4A 1LD  
ON  
WEDNESDAY, 5TH FEBRUARY 2003

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Present:  
Mr Michael Churchouse  
Mr Colin Smith  
Mr Larry Rolland

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IN THE MATTER OF  
MICHAEL WILKEY  
(Registration No. 042908B)

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MR IAIN MILLER appeared as Solicitor Complainant.

MR PHILIP NEWMAN appeared on behalf of Mr Wilkey.

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(Transcribed by Harry Counsell & Co  
Cliffords Inn, Fetter Lane, London EC4A 1LD  
Telephone 020 7269 0370  
Facsimile: 020 7831 2526

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DECISION

THE CHAIRMAN: This case comes before the Committee as a result of a request from Mr Justice Jacob, who asked the Board to consider whether the Defendant, Mr Wilkey, had seriously broken his duties when giving evidence as an expert architect in the action of Pearce v Ove Arup & Others.

The issue which falls for decision by us is, did Mr Wilkey's evidence fall below the standard of conduct and competence required of an architect when acting as an expert witness? If it did, then this impacts upon the reputation of the architects' profession and it clearly breaches Standards 1 and 4 of the Standards of Conduct.

We have taken careful notice of the comments of Mr Justice Jacob in his judgment of 2nd November 2001, but we have approached the matter independently in reaching our conclusion as to whether or not we are satisfied that the charges are proved. Indeed, in his letter of 13th December 2001 to Ashurst Morris & Crisp, who were the Defendant's solicitors in the Pearce action, the Judge made it clear that we should form our own views and that he did not regard his judgment on the issues as unchallengeable. Our views have been formed on the evidence, both the written evidence, which has been voluminous, and the oral evidence which we heard yesterday from Mr Wilkey and from Mr Salisbury. We have, of course, had the benefit of considerably more information and documents than were before Mr Justice Jacob. For the sake of completeness - I do not think that it is necessary, as it is not a live issue in the case - we have ignored the Defendant's closing submissions in the Pearce action. Indeed, speaking for myself, I am not clear why the Judge thought that it was appropriate for us to consider those submissions without considering also the Plaintiff's closing submissions. We have considered neither.

We ask ourselves what are the duties of an expert witness? Well, those are very helpfully set out in Mr Miller's report and at some greater length in Mr Salisbury's evidence. I do not detect any dispute between them and I hope that I can summarise the position in this way. An expert witness owes a duty to the court to assist it in reaching a decision and that duty overrides any duty which the witness owes to his client or to the person who instructs him or to the person or body to whom he pays his fees. It is alleged in this case that Mr Wilkey did not give an unbiased opinion, that his evidence was "claimant based" and that he omitted to consider material facts and failed to mention these in his report.

The solicitor complainant's case sets out two charges which I have just mentioned, namely failure to provide an unbiased opinion and failing to consider material facts which could detract from the opinion, being qualified in his report by saying that he had not considered them, but I think that it might be helpful if I deal with the individual allegations which have been discussed in evidence and tell you of our findings on each one. I have taken these not necessarily in the order in which they appear in Mr Miller's report and not in the order in which they were dealt with in evidence, but I start with the allegations made in paragraph 58 of the judgment of Mr Justice Jacob. Having dealt with the allegations there, I will then deal with the other matters of criticism which did not appear in that paragraph.

The first criticism with which we deal is at the top of page 17 in Mr Miller's report, quoting the Judge, "Notwithstanding the seriousness of the allegations, he [that is Mr Wilkey] did not visit the Kunsthal before making his report, yet did not mention that fact in his report. It may be that there were funding difficulties, but it certainly would have been fairer to say that he had not actually seen the Kunsthal. After all, it was clear that its design as a 3D building was central to this case."

Mr Pearce's case, as pleaded in the action, was one of plan copying, or I think it has been described as graphic copying which I understand is not an architectural term of art, but it involves two-dimensional issues, and the case was put forward as one of Mr Pearce's plans being used as a basis of the Kunsthal plans. For some reason that was not accepted by the Judge, who said that it was much more than graphic copying, but, with respect to the Judge, we differ from his views on this point and, indeed, the Statement of Claim, as amended, plead the case as put by Mr Pearce's counsel and does not go further than that. In other words, it is a plan-for-plan copying dispute. That being so, the 3D aspect, as mentioned by the

Judge, was not really relevant to Mr Wilkey when he was writing his report, and a visit to the building was not necessary to enable him to report and to give evidence. But we find in his report a reference - and here I am looking at Mr Wilkey's first report at page 1, paragraph 1.5 - "I was appointed by Anthony Gould, solicitors, on 25th January 2001 as an expert and instructed to give an opinion on allegations of copyright against the Defendants. I was provided with copy documents as set out in Appendix 2 and was asked to (a) provide an opinion as to the similarity between the Docklands plans and (i) those provided of the Kunsthal and (ii) the Kunsthal as built." In evidence, Mr Wilkey has said that the wording "the Kunsthal as built" was, in fact, a reference to the "plans of the Kunsthal as built". I do not think that we accept that, but the fact remains that he had seen the pleadings before he wrote his report and he had seen the amended defence, where at paragraph 20 it was admitted that the Kunsthal was built in accordance with or substantially in accordance with the designs. The evidence related to the plans and, in our view, a visit before making his report, or indeed after, was not necessary for the issues on which Mr Wilkey had to report, but we consider, with the benefit of hindsight, which is a wonderful thing, that it would have been better for Mr Wilkey to have put a short paragraph at the end of his report, particularly in view of the fact in paragraph 4.33 of his report that he criticised the final designs of the Kunsthal as built, saying, words to the effect, "As this case relates to the copying of plans and not to the construction of the building, and as the Defendants admit that the building was constructed substantially in accordance with the plans, I have not considered it necessary to go to the expense of visiting the Kunsthal."

In Mr Salisbury's evidence, he said that he thought that it would have been (and he uses the word) "convenient" to have mentioned this. We agree but say that it goes further than convenient, but we do not consider that his failure to mention it amounts to a breach of his duty under part 35 of the Civil Procedure Rules, nor do we find that it amounts to serious professional misconduct or unacceptable professional behaviour. The second allegation made by the Judge and on which Mr Miller relies is shown again in paragraph 58, where at (d) - and I quote again from the judgment - "He [that is Mr Wilkey] never properly read an important document exhibited to his report. One of the similarities that he relied upon to indicate copying was the orientation of the two buildings on an uneven level, yet this was part of the design brief for the Kunsthal. Mr Wilkey exhibited the English translation" - it should be "English translations" - "of this, but failed to realise, as is abundantly apparent if you read it, that it predates the Kunsthal."

At the hearing of the Pearce action, there was considerable confusion about this document. Mr Wilkey in his report referred to it but did not rely on it and the conclusion was brought about, we think, by the cross-examination of Mr Wilkey by the Defendant's leading counsel and was not helped by a typographical error on Mr Wilkey's part as to the date of the document. We think that the Judge was inadvertently misled by counsel into thinking that the design brief for the Kunsthal was exhibited by Mr Wilkey in his report and that he never read it properly. We find as a fact on the evidence that the design brief - and for the sake of clarity I refer to the document dated 1986 - was never exhibited to Mr Wilkey's report nor did he place any great reliance on it. On this issue, therefore, we find also no serious professional incompetence on Mr Wilkey's part.

Another issue of criticism which does not appear in paragraph 58 of the judgment is Mr Wilkey's failure to inspect the drawings at the Netherlands Architectural Institute. Mr Wilkey did recommend in August 2001 that he should visit the NAI and, because he had not visited, he qualified his report and referred to the lack of documents, but the solicitors acting for Mr Pearce either did not seek or obtain

authority from the Legal Services Commission - or they may have sought it and been refused - but the position from Mr Wilkey's point of view is that he never received instructions to visit. We note from the Legal Services Commission letter in relation to another matter that they refused to fund a visit to the Kunsthal as being an unnecessary waste of costs for both sides and they may well have taken the same view about the visit to NAI. It is fair to say that more than once the Defendant's solicitors in the Pearce action, Ashurst Morris & Crisp, either confirmed that they had trawled through all the drawings or they referred to Professor van Dansyk\*, who was acting as their agent in Holland, who had been to the NAI and who had identified all the relevant documents. We refer in particular, and it is referred to elsewhere, that in Ashurst Morris & Crisp's letter of 23rd April 2001 they said that all relevant documents had been disclosed.

Faced with that letter, it might have been better for Mr Wilkey to have added a paragraph to his report in the same way that I mentioned in respect of the Kunsthal visit, saying that he had not visited the NAI and that he did not think it necessary in the light of the evidence from Ashurst Morris & Crisp that all relevant documents had been disclosed.

In view of the fact that he qualified his report in this respect, we do not consider it right to criticise him or certainly to the extent of saying that he is guilty of serious professional incompetence.

The only other matter that is the subject of criticism, and that is not in paragraph 58 of the judgment, but is in paragraph 57, and again I am quoting from the Judge, is where the Judge says: "I am sorry to have to say that Mr Wilkey supported the allegation of copying to the point when he said that Mr Koolhaus must be lying if he said he did not copy".

Now, the allegation of lying or perjury is a slightly strange one in this case, because we have read and re-read Mr Wilkey's reports and no such allegation was made in any of his reports. The first time that we see it referred to is at an early stage in Mr Wilkey's evidence - indeed while he was still being examined in chief by Mr Pearce's counsel - and in the course of that Mr Justice Jacob interposed and said, and again I am quoting from the transcript at page 160, "I just want to be absolutely sure, Mr Wilkey, in giving your evidence that you understand exactly what you have, in effect, said. (A) Yes. (Q) You have said that Mr Koolhaus and an assistant, when they are making their witness statements, are committing perjury. I want to be absolutely sure that that is your position." Answer from Mr Wilkey: "Yes, that is my position. From the evidence I have seen, that is the only possible explanation that I can find".

Later on in the evidence, on page 224, the word "perjury" was not used, but the word "lying" was used in answer to a question from leading counsel for the Defendant.

We think that, on reflection, the answers given by Mr Wilkey were not ones that he might have given had he had an opportunity to consider them, but the words, in our view, on the evidence that we have heard and we have read in the transcript, were put into his mouth - the words "perjury" and "lying" - and that they did not originate from him. They were the words of the Judge and of the opposing leading counsel, possibly, and, again with the benefit of hindsight, he might have found some other explanation or might more sensibly have said, "That is not a matter for me as an expert witness, I do not think that I should answer the question." Certainly, on that issue we do not find evidence of serious professional incompetence.

Having considered those individual criticisms which have been raised in the last few days, we do not consider that Mr Wilkey was guilty of any unacceptable professional conduct or serious professional misconduct, but, having looked at the individual items, we have then, as it were, stepped back and looked at all the evidence - that is his written reports and his oral evidence - and we have asked ourselves whether there is anything else in his reports or in his oral evidence that could support a charge of unacceptable professional conduct or serious professional misconduct. We have decided that there is not and, accordingly, we find Mr Wilkey not guilty of the charges.

I just want to add that we are very grateful to Mr Miller and Mr Newman for the manner in which the case has been put and defended. In particular, we were helped by the agreement mentioned after the lunch adjournment yesterday that an architect acting reasonably could have found similarities in the drawings. It was, in our view, a perfectly proper agreement to reach in the light of the Court of Appeal judgment and the report of Mr Hill, which we know was not read by the Court of Appeal, but which we have had the benefit of reading. Certainly, that agreement, reached by Mr Miller and Mr Newman, saved us a good deal time and tedious work with the drawings and the booklet of similarities. We are very grateful to you. Thank you