

ARCHITECTS LIABILITY IN ISSUING CERTIFICATES

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In the name of Allah, the Beneficent, the Merciful

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ABSTRACT

Architect's liability is a vast knowledge area that can only be established with understanding of laws, statutory and terms of contractual agreement either implied and/or expressly. An architect is distinguished for his duty as professionals that purposely served as designers and lead consultants in building construction industry. However, not many understand the obligations that come with the professionalism. A professional is subjected to duties that are spelt out in statutory bodies. Architects in Malaysia are subjected to Professional Code of Conduct which specifically outlined his responsibility, obligation and duties. Architects have high expectation in terms of skills and judgment and are liable towards obligations that are imposed on him. Architects who had been engaged by client under employment agreement need to act as agent for that particular client. Among duty of an agent is to serve the needs of the client. Although architects are given discretionary power under contract of employment, his powers are limited and may only act upon express authority by the client. There are limits to what an agent can do in forming, varying or instructing. However, an architect has an independent duty to issue certificates in building contract. Architect's independent duty as certifier is laid down in famous case of *Sutcliffe v Thakrah* where it was contended that an architect acting as certifier has independent duty and not to act as employer's agent. As certifier, architect must form and act on his own. He must act fairly and impartial between client and contractor in rendering his duty as certifier. Being professional does not guarantee perfection. An architect is only required to render service to the extent of what a reasonable man of his profession may have done. However, if the architect is found to have breached of his duty and obligation, he may be held liable depending on the claim of the wrongdoings. Nevertheless, there are cases where the architect is being doubtful in rendering his duty as certifier. There are cases where the employer claims that the architect had been negligent by not issuing certificates of completion. There are also cases where the architect refused to issue certificate of payment. Although some of these claims is caused by architect's own negligence and are held liable, there are also cases where the architect did not issue certificates as there are conflicts of interest between client and the architect claimed that he only had acted so as he needs to perform his duty of care towards third party. Nonetheless, this research is conducted to determine the extent of liability that could be rendered upon architects in performing his duty as certifier.

ABSTRAK

Tanggungjawab sah seorang arkitek adalah tertakluk dibawah takrifan yang meluas dan hanya boleh ditentukan dibawah undang-undang, badan berkanun dan perjanjian kontrak yang mempunyai syarat-syarat samada tersurat dan/atau tersirat. Seorang arkitek profesional mempunyai tugas sebagai jurureka dan bertindak sebagai ketua penasihat dalam bidang pembinaan. Walaubagaimanapun, tidak ramai yang mengetahui kewajiban yang mentadbir para profesionalis ini. Seorang profesional tertakluk terhadap syarat-syarat di bawah badan berkanun. Arkitek di Malaysia khususnya tertakluk kepada Kod Kelakuan Profesional yang menyenaraikan secara teliti tugas-tugas, tanggungjawab dan kewajiban mereka. Arkitek mempunyai jangkauan yang tinggi terhadap kemahiran dan kemampuan membuat keputusan dan mempunyai tanggungjawab terhadap kewajiban yang dikenakan diatas mereka. Arkitek yang telah dilantik oleh majikan dibawah perjanjian pekerjaan diharuskan bertugas sebagai agen kepada majikan tersebut. Dibawah perjanjian bersama majikan, arkitek tersebut diberikan kuasa untuk bertindak namun ianya terhad dan hanya boleh bertindak dibawah kuasa nyata yang diberikan oleh majikan. Terdapat had keatas kuasa arkitek dalam memberi arahan. Walaubagaimanapun, seorang arkitek mempunyai tanggungjawab persendirian untuk mengisukan sijil di bawah kontrak pembinaan bangunan. Tanggungjawab persendirian arkitek didalam pensijilan di bincangkan dibawah kes *Sutcliffe melawan Thakrah* dimana dinyatakan bahawa, arkitek yang diberi kuasa mengisukan sijil harus menjalankan tanggungjawab tersebut secara sendiri dan tidak tertakluk dibawah tanggungjawabnya sebagai agen majikan. Sebagai pengisu pensijilan, arkitek harus membuat keputusan dan bertindak sendiri. Arkitek seharusnya bertindak adil dalam membuat keputusan yang melibatkan majikan dan kontraktor. Seorang profesional tidak mempunyai tanggungjawab untuk bersikap kesempurnaan. Seorang arkitek hanya perlu menjalankan kerjaya setakat mana seorang arkitek lain menjalankan kerjayanya sahaja. Walaubagaimanapun, jika arkitek tersebut telah melanggar tanggungjawab dan kewajiban keatasnya, beliau akan disabitkan kesalahan dibawah kecuaiannya sendiri. Namun, terdapat juga kes dimana arkitek merasa serba salah dalam menjalankan tanggungjawab sebagai arkitek persendirian. Terdapat kes dimana majikan telah menyaman arkitek dibawah kesalahan kecuaiian dengan tidak mengisukan sijil siap. Terdapat juga kes dimana arkitek berpendapat tidak mahu mengisukan pensijilan. Walaupun arkitek ini boleh disabit kesalahan, namun terdapat kes dimana arkitek tidak mengisukan pensijilan kerana mahu melindungi hak orang ketiga. Oleh demikian, kajian ini dijalankan adalah bagi mengkaji sejauh mana tanggungjawab arkitek boleh disabitkan dalam menjalankan tugas nya sebagai pensijil persendirian.

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CHAPTER 1

INTRODUCTION

1.1. Background of Study

A painter that makes an art is often regarded as using his own expression and application of skills and imagination primarily produced for beauty and power¹, while architecture, as written by Vitruvius in Ten Books on Architecture², should possess the quality of firmness, usefulness and beauty. Usefulness in architecture is defined by its functionality towards specific need. Architecture has practical values that are not mere objects of beauty but also cost a great deal of money that serves a public (client) express wishes³.

Van Rensselaer (1890) describes the mutual obligation between architect and client as '*the reciprocal loyalty in trust and services*'⁴. Architect is something more than an artists and the client has a part to play, as his point of view is important. A client should come with his vision, preference, and practical desires of his needs, his demand and put his faith in the architect. He should put his trust in the architect who is an experienced planner in his field, to work out the

¹ Oxford Dictionary

² Marcus Vitruvius Pollio (30-15 BC). De Architectura. Translated and published by M.H. Morgan (1914) Ten Books on Architecture. Harvard University

³ M.G. Van Rensselaer (1890). Client and Architect. North American Review Vol 151

⁴ Ibid

problem in his own way. The client need to trust the architect as much as he trusts professionalism of doctors or lawyers⁵, and accept that architects are not mere artist but are also competent in practicing their skills that they earn through education, graduate and post-graduate training and industrial experiences⁶.

With respect to the responsibility given, the architect should recognize its duty by delivering services that are up to his standard of professionalism, integrity and skills. Architects are under the duty to express his client's needs and not take matters without a cause. Architect is expected to do what is best for the client and to distinguish between what is desirable and what is necessary.

The nature and quality of architect-client relationship is critical for project success yet its management remains problematic⁷. For an industry that is easily riven by conflict, maintaining strong relationship between architect and client is crucial as there are many uncertainties, complex, fraught environment that would trump good judgment and problem solving. Architects with good management of knowledge and skills would increase client satisfaction⁸. This satisfaction level correlates with the product outcome delivered by architects. In *Sim & Associates v Tan Alfred*⁹,

“The normal measures of an architect’s skill are that of ordinary skilled architect. An error of judgment may or may not amount to negligence. If the majority of architects would, under the circumstances, have done the same thing this normally provides a good defense”

⁵ Ibid

⁶ UIA (1999). Accord in Recommended International Standards of Professionalism in Architectural Practice. <http://www.di.net/articles/professionalism-andethics-in-architectural-education/>

⁷ Siva J. and London K. (2009) Architects and Their Clients: Relationship Analysis Using Habitus Theory. International Journal of Interdisciplinary Social Sciences. Common Ground Publishing.

⁸ Abanyie S.A., Botchway E.A., Kwofie T.E. (2014). The Relationship between Level of Architect's Professional Competencies and Client Satisfaction Level. Department of Architecture. University of Science and Technology Kumasi, Ghana.

⁹ [1994] 3 SLR R 169

Thus being said, as long as an architect acted as any professional man would, the client should be satisfied as he had acted to his standard of professional skill and care. Nonetheless, being professionals does not guarantee perfection. Lord Denning in the case of *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners*¹⁰ stated that,

“The law does not imply a warranty towards a professional man that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient nor does the solicitor warrant that he will win the case”

By law, a design professional is only accountable for conformance to the standards of care as practiced by others under the same name. Practicing architects provide a professional service based on years of education and experience, hence by entering into a contract with an employer, the designer implies that they possess the “*ordinary skills and ability*” necessary to serve the employer’s needs¹¹. A professional in construction industry is bound by two contracts;

- (i) The terms of his contract of employment
- (ii) The duties and obligations highlighted in the main contract between the employer and the main contractor.

A contract that involves professionals will incorporate express terms of the conditions of performance featuring words as *utmost skill and care*, and *professional standard of care and diligence*¹². Construction contract by their very

¹⁰ [1975] 1 WLR 1095 (CA)

¹¹ D. Guckert, J.R. King (2002) Who Pays for The Architect’s Mistakes. September/October 2002 Facilities Manager. University of Missouri-Columbia. www.appa.org

¹² Shirke S. (2009) Professional Negligence in Construction Industry. 2 MLJ clxii. Malayan Law Journal Articles.

nature is very complex and the parties are bound to experience complications in defining and distinguishing roles and responsibilities. In a standard form of building contract, a professional usually occupy an independent role between the parties in contract.

When a contract is being executed between two parties and one has failed in its obligation, the innocent party may recover damages for the loss. A famous case that brings architect's negligence to the eyes of Malaysian industry is in *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*¹³ where the purported architect violated local authority's order to stop construction works until appropriate drainage system for natural stream is incorporated in proposed layout plan in 1974 where 19 years later a landslide had brought down Block 1 of Highland Tower that is caused by collapses of high wall behind second tier car park. The collapse was found happened due to water stream. The judge, James Foong remarked that,

"I have reiterated my strong sentiments against this type of attitude of professionals whose only consideration is to guard and secure their own interest rather than their duties and obligations to those closely affected and the public on which so much faith and reliance are placed on them to carry out their professional duties. I need not elaborate further except to remind this defendant that he has to live out the rest of his life knowing truly well that he had contributed to the tragedy of Highland Towers."

Although architect may have act fairly according to his professional judgment, one might still cause disputes. In the case of *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*¹⁴, the architect (Respondent) was filed for an action for financial loss suffered by Appellants (purchasers of units of buildings in the named project) due to delay of 8 years of building completion. The delay was said being caused by negligence of the architect in his delay in obtaining

¹³ [2000] 4 MLJ 200

¹⁴ [2015] MLJU 261

certificate of fitness for occupation. However, the architect in his defense had actually acted to his duty of care as issuing certificate of fitness towards a project that is doubted of its safety thus would constitute to welfare issue of future users.

It is apparent that the architect owes duty of care to both employer and contractor. Lord Reid in the case of *Sutcliffe V Thackrah*¹⁵ stated that,

“The architect has two different typed of function to perform. In many matters, he is bound to act on his client’s instructions whether he agrees with them or not, but in many matters requiring professional skill he must form and act on his own opinion. In all such matters, the architect will act in fair and unbiased manner, and it must therefore be implicit in the client’s contract with the architect that he shall not only exercise due care and skill but also reach such decision fairly, holding the balance between his client and contractor (third party)”

*Sutcliffe v Thakrah*¹⁶ is the leading case in certifier’s liability. Although the principle of determining architect’s liability has long been established, the increasing development in construction industry nowadays displays the urgent need to define duties and extent of liability of construction professional. Therefore, the purpose of this research is to determine the extent of liability of architects specifically in issuing certificate.

¹⁵ [1974] A.C. 727

¹⁶ supra

1.2. Problem Statement

Architect is bound to act within contractual term with his client's instruction. Architect is also obliged to perform duty of care within his capabilities as a professional. Among duties of architect that are outlined in standard forms is to issue instruction, to order variation and to certify certificates. However there are limits to what architect can do without absence of powers by his client.

There had been past research conducted discussing on architect's liability in construction. However it had been identified that the scope of study on liability is limited to certain areas only. Among research topic that had tackle issues on architect's liability are design liability, inspection of work liability, and liability in making decision during construction stage. These past research create a gap in what this research will focus on.

Issuing certificates is within architect's independent skill and judgment however being an agent of client; he is in the midst to accord with client's instruction and not to act according to his own wish. This study is conducted to define the extent of architect's liability in issuing certificates either to comply with client's instruction OR to act on their professional duty of care.

1.3. Objective of Study

This research is conducted to determine the extent of architect's liability in issuing certificates.

1.4. Significance of Study

Architect's professional duties and responsibilities are without doubt complex in nature. The obligation imposed requires him to be technically competent and capable in arbitrate a judgment in his specialized field of work. This attributes will serve the Architect well and certainly minimize the likelihood of professional liability disputes with either of contracting parties.

However, there are cases where architect had caused loss in relating to issuing certificates, although he did act within his scope of work and duty of care. This research is conducted to determine the extent of liability of architect in issuing certificates.

1.5. Research Methodology

Research methodology is essential to develop a way to systematically solve research problem. There are various methods and techniques that might or might not be relevant as each method have different criteria of evaluating and is only applicable for certain problem¹⁷. Different research problem requires different methodology. This particular thesis is focusing on descriptive type of research where architect's liability will be measured through facts and information that is readily available, and makes critical findings using these materials. In legal research term, the thesis is can be categorized into doctrinal research as it focuses on investigating into legal rules, principles, and doctrines of law.

¹⁷ Kothari C.R. (1990). Research Methodology Methods and Techniques. 2nd Ed. New Age International Publisher.

Generally, sources of information would be gathered through readings of provisions, articles and common law. These general readings would be used as basis to further analyze the research. In order to explicitly gather relevant and recent information, analysis of case law will be conducted. Case law analysis plays a vital role in interpreting statutes, arguments and conveying points of view¹⁸. Case law will be selected from possible sampling to explain principles used to determine architect's liability.

1.5.1. Literature Review

A descriptive type of research includes reporting accurate description of a situation where accuracy becomes major consideration and it maximizes the reliability of evidence collected¹⁹. Firstly, basic information that is related to thesis keywords will be learned in order to have general comprehension and provide distinct scope of knowledge. In this research, data will be collected through readings of statutory law such as Architect Act 1967, together to be read with Architect Rules 1996 and Architect (Scale of Minimum Fees) 2010. This statutory will provide provision that is related to architect's duty and scope of work. Furthermore, articles that relates to professional liability towards client and third party will be studied as it will provide the basis to the insights of research objective.

1.5.2. Legal Case Analysis

This research uses case law analysis to demonstrate interpretive methods and outcome. A descriptive thesis research as this would requires evidences from practical applications to prove literature principles. Relevant

¹⁸ Hsieh A. (2012). Using Cases in Legal Analysis. The Writing Center at Georgetown University Law Center.

¹⁹ Supra 9

data would be extracted from cases which were primarily obtained from Malaysia Law Journal via Lexis-Nexis website. Analysis of data will be conducted specifically on cases that are pertinent towards architect's liability in issuing certificates.

1.6. Organization of Chapter

This research consists of five chapters that were thoughtfully sequenced and each chapter focuses on different subject to explore. Brief description of each chapter is as follows;

1.6.1. Chapter 1

This chapter is the introduction to what the thesis is. It briefly introduce the literal and practical background of the thesis including, the objective of the research, problem statement, scope of research, and the methodology to achieve the objective.

1.6.2. Chapter 2

This chapter focuses on establishing the keywords such as architect and liability. It would include establishing what architect is either as independent professional or as an agent of a client. Moreover, architect's contractual and tortious duty will also be explained through analysis of principles. There would also be analysis on governing bodies that outlined architect's duty as certifier.

1.6.3. Chapter 3

This chapter will discuss on the methodology used to collect data, and how a data is sampled. The methodology discussed will focus on developing keywords and finding suitable cases that relates to objective of the research.

1.6.4. Chapter 4

This chapter would explicitly explain the analysis of selected cases that is related to research objective. The analysis would include background facts, issues in disputes, and the principles undertaken by court.

1.6.5. Chapter 5

This chapter would summarized and conclude findings that are gathered through literature review and case analysis. There would also be recommendation of future research that relates to findings.

1.7. Conclusion

This chapter is used to establish basic background of what the whole research would be. From background study, the author had managed to inaugurate problem statement that is thus used to form objective of the research. This chapter also contains the significance of the research topic and methods to establish a finding.

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