

ARCHITECT'S CONTINUING DUTY TO REVIEW DESIGN

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ABSTRACT

Architects are design professionals that are retained for their design expertise and an architect that enters into an agreement with the client has specific duties that he has to perform; he has a duty to exercise reasonable skill and care in carrying out the design work in which failing to do so will render him liable for negligence. The subject of this research is the ‘Architect’s Continuing Duty to Review Design’, the existence of this duty was established in the case of *Brickfield Properties Ltd v Newton*, where it was held that an architect is under a continuing duty to review his design and to correct errors that may emerge. The objective of this research is to understand the nature of this Duty to Review Design owed by the architect and the extent of such duty. Among the questions that arise for consideration are: does this duty mean that the architect is under a continuing duty to review his design constantly and that he is to reconsider all aspects of his design; and what does this duty comprise, when does it arise also to what extent is the architect liable to for this duty? The statement by Sachs LJ in *Brickfield Properties* which states: “*The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge.*”; also highlight the main issue, whether the proposition of the statement here is that the duty to review design amount to responsibility for buildability of the design, in which this contradicts with the principle that ‘buildability is the province of the builder’? Based on the case analysis, it was found that this duty to review design does not amount to responsibility for buildability; it merely emphasise the need for architects to exercise reasonable skill and care in ensuring that the design did not lack buildability. This duty arises when there is a need that necessitates the architect to keep his design under review; it does not mean that the architect is to keep constantly reviewing his design.

ABSTRAK

Arkitek merupakan seorang professional yang dilantik kerana kepakarannya di dalam merekabentuk dan mereka bertanggungjawab merekabentuk dengan menggunakan tahap kemahiran yang sepatutnya, dan tanggungjawab ini perlu dilaksanakan dengan teliti. Kegagalan dalam melaksanakan tanggungjawab ini boleh mengakibatkan mereka disabitkan dengan kecuaiian. Subjek di dalam kajian ini adalah berkenaan tanggungjawab berterusan arkitek di dalam menilai dan menimbang semula rekabentuk mereka; kewujudan tanggungjawab ini telah diputuskan di dalam kes Brickfield Properties melawan Netwon, di mana arkitek telah dipertanggungjawabkan untuk secara berterusan menilai semula rekabentuk dan memperbetulkan segala kesilapan yang mungkin berlaku. Tujuan kajian ini adalah untuk memahami asas bagi tanggungjawab ini. Antara persoalan-persoalan yang timbul adalah adakah tanggungjawab untuk menilai semula rekabentuk secara berterusan ini membawa maksud bahawa arkitek tersebut perlu sentiasa menilai semula segala aspek rekabentuknya pada setiap hari. Juga untuk mengetahui apakah sebenarnya yang terkandung di dalam tanggungjawab tersebut; dan sejauh manakah arkitek tersebut dipertanggungjawabkan untuk menilai semula rekabentuk mereka. Melalui kenyataan oleh Sachs LJ yang membawa erti bahawa *'Arkitek dipertanggungjawabkan untuk menilai semula rekabentuk secara berterusan dan memastikan ia berfungsi sepatutnya dan juga untuk memperbetulkan segala kesilapan yang mungkin berlaku'*, membawa persoalan utama bahawa adakah ia mencadangkan bahawa tanggungjawab ini bersamaan dengan tanggungjawab terhadap rekabentuk yang praktikal dan boleh dibina. Berdasarkan pada kajian kes-kes, ia didapati bahawa tanggungjawab ini tidak bersamaan dengan tanggungjawab terhadap rekabentuk yang praktikal, tetapi ia membawa maksud bahawa arkitek dipertanggungjawabkan untuk menggunakan kemahirannya dengan teliti di dalam memastikan rekabentuknya tidak kekurangan dari aspek praktikal.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
Build LR	Building Law Reports
Cal LR	California Law Review
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
ER	Equity Reports
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
EWHC	High Court of England & Wales Decisions
FMSLR	Federated Malay States Law Reports
HL	House of Lords
KB	King Bench
LAM	Lembaga Arkitek Malaysia
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
RIBA	Royal Institute of British Architects
QB	Queen Bench
SCR	Session Cases Report
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Architects are generally employed for their design expertise. The definition of an “architect” is one who possess, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works calling for skill in design and planning as he might in the course of his business reasonably be asked to carry out or in respect of which he offers his services as a specialist¹.

Architects’ design liability in contract depends upon the terms of the contractual agreement reached between the client and the professional architect. This agreement could be in the form of any of these three basic types, the first type it could be in a form of a standard form of agreement for

¹ Jackson & Powell (1985), at page 84. This is the definition adopted and acted upon by the Tribunal of Appeal from the Architects’ Registration Council and cited by the Divisional Court in *R v Architects’ Registration Tribunal, ex. P. Jaggar [1945] 2 All ER 131, 134.*

instance the RIBA Standard Form of Agreement or the LAM Memorandum of Agreement between the Client and the Architect for professional services. The second type could in the form of a self drafted contract which has been freely negotiated between the parties. The third type of agreement could be made orally where most of the terms are implied.

Two significant design liabilities imposed on architects and other design professions is a duty to use reasonable care and skill and a duty to achieve a result. The standard of service to be expected from a professional man was explained by McNair J in *Bolam v Friern Hospital Management Committee*²:

“Where you get a situation which involves the use of special skill or competence...the test...is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.”

The degree of success of each profession vary between one another, it is not surprising if a litigator says that some of his clients lose their cases; or if a doctor says that some of his patients do not recover. However, the expectations required of an architect or engineer is different; it is not a reasonable expectation if an engineer says that some of the bridges he designed falls down. Professionals are people with specialised skill and training, but very often the success and failures depends upon factors beyond the professional man’s control; and that no human being can be right every time. Lord Denning MR in a case against consulting engineers, *Greaves & Co. v Baynham Meikle*³ stated:

² [1957] 1 WLR 582 at p 586

³ [1975] 1 WLR 1095

“Apply this to the employment of a professional man. The law does not usually imply a warranty 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.”

However, on the particular facts of this case, the consulting engineers were held liable as they had given a warranty that they would achieve a certain result.

Even though established in earlier cases that architects may not warrant that desired result will be achieved (provided that a warranty was not given for a desired result to be achieved) but the architect has a duty to check their design and check for errors, this is decided in the case of ***Brickfield Properties v Newton***⁴, where Sachs LJ said at page 873 that:

“The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge. It savours of the ridiculous for the architect to be able to say, as it was here suggested that he could say: ‘True my design was faulty but, of course, I saw to it that the contractors followed it faithfully’ and to be enabled on that ground to succeed in action.”

⁴ [1971] WLR 862

1.2 Problem Statement

The statement of Sachs LJ above in *Brickfield Properties v Newton* that states that architects has a continuing duty to check and correct their design gives rise to these three main research questions:-

- What does this duty to review design comprise of?
- When does this duty arise?
- To what extent is this duty?

From the same statement by Sachs LJ, two issues that arise which are as follows:

1. It is established law principles that builders owe a duty for buildability whereas professionals have a duty of care to exercise reasonable skill and care⁵. However, the word '*design will work in practice*' in the statement by Sachs LJ seems to be in conflict with the principle and it seems to suggest that the architect is responsible for buildability or fitness for purpose for their design.
2. The architect's retainer will end until the required services have been completely performed, or it is mutually terminated in advance or until further performance of the duty becomes impossible. Does this duty mean that the architect has to constantly keep his design under review throughout the retainer?

⁵ See Hudson's Building and Engineering Contracts, 11th ed., vol 1 at para 1.295; and see Greaves & Co. v Baynham Meikle [1975] 1 WLR 1095

1.3 Objective of the Research

From the problem statement, the objective is as follows:-

- a. To answer the three research questions that is significant in understanding this duty.
- b. Identify the implication of this duty to review design with the duty of care.

1.4 Scope and Limitation of Research

The scope of this research is limited to the following that is suited to the restricted time frame allocated to complete this research:-

- a. Limited to cases that relates to architects' liabilities only on design duty to continuously check and correct design
- b. Restricted to case base analysis in formulating a conclusion.

1.5 Research Methodology

1.5.1 First stage: Background Study

The first stage involves an initial study before the identification of the research topic, and the problem statement. The main approach used here is the initial literature review on subject of the research topic.

After the research issue is obtained, the objective and scope of the research are determined as well as the research outline is formulated to guide the process of the whole research.

1.5.2 Second Stage: Data Collection

After identifying all the background and relevant issues through literature review, legal cases based on previous court cases which are related to the research issue will be collected. The previous court cases which are related to the subject matter 'Architect's Continuing Duty to Review Design' will be sorted out from the collected cases.

The cases are obtained from the primary source which comprise of the law journals, law reports such as Building Law Report, Construction Law Report, and other law journals; that could be obtained online or printed out materials.

Data is also collected from the secondary source which is obtained from a list reading materials. Sources of secondary data consist of books, publications by professional bodies, articles, research paper and seminar papers, and others.

1.5.3 Third Stage: Data Analysis

Once the previous related court cases are collected, case study analysis on the related legal cases is conducted. The case analysis is done objectively by carefully analyzing and interpreting all the facts of the cases, legal principles and statutory provisions.

1.5.4 Fourth Stage: Writing-Up

Fourth stage of the research is mainly involves writing-up after the data has been collected, interpreted, analysed and arranged. The conclusion is formulated based on the findings during the analysis stage.

1.5.5 Fifth Stage: Checking and Correction

In the last stage, checking for error will be done with the guidance of supervisor. The identified error will be rectified immediately and accordingly. In essence, the research is reviewed it has achieved the research objective.

1.6 Organisation to Thesis

Chapter 1 Introduction

Discuss the background of the research in the as aspect of architects' design duty. This chapter will also identify the problem statement, as well as objectives of the research.

Chapter 2 Principles of Professional Negligence

This chapter will briefly discuss the principles of professional negligence; this is pertinent as the subject relates much to the concept of liability in tort of negligence.

- Chapter 3** Architect's General Duties and Liabilities
Discuss the general duties and liabilities of architects; their contractual and tortious duties and liabilities.
- Chapter 4** Architect's Continuing Duty to Revise Design
Case Law Analysis on architects' duty to revise their design and correct errors are discussed in this chapter. Several cases will be discussed in this chapter. This chapter will also discuss the implications of this duty to the duty of care principles.
- Chapter 5** Findings and Conclusion
This chapter will compile the findings of the research and a formulation of the conclusion will be made at the end.

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