

TERMINATION OF ARCHITECT'S ENGAGEMENT

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**A project report submitted in partial fulfillment of the
requirement for the award of the degree of
Master of Sciences (Construction Contract Management)**

**Faculty of Built Environment
Universiti Teknologi Malaysia**

MARCH 2008

*To my beloved Father and Mother,
Sister and Brother.*

Thank you for your support, guidance and everything.

ACKNOWLEDGEMENTS

In the name of Allah most gracious most merciful

A research of this nature may not be undertaken without help and support of others. First and foremost, I would like to extend my sincerest and most heartfelt appreciation to all lectures in Construction Contract Management of Universiti Teknologi Malaysia for the knowledge given, to En. Norazam bin Othman for his tireless supervision and guidance throughout the whole process of writing this research

Most of all, I wish to express my deep sense of gratitude to my family, especially to my parents, brothers and sisters for their never-ending support and encouragement.

Last but not least, thank you to all who have made this research possible.

Thank you and God bless.

ABSTRACT

Issuance of Certificate Completion and Compliance (CCC) by Professional Architect has made the role of Professional Architect become more important. Professional Architect is required to become Principal Submitting Person to the Local Authority. Certificate of Completion and Compliance will be issued after getting clearance from all the respective department of Local Authority. Therefore termination of Architect's Engagement will create a lot of problem to the construction contract. Problem that may arise is withholding of Letter of Release by the Professional Architect whereby the client may have problem in appointing a new Professional Architect to proceed with the works. Is Professional Architect allowed to withholding the Letter of Release? Therefore the aim of this research is to ensure whether a Professional Architect can with holding the Letter of Release or not. The research scope will be limited to the Contract of Services between the Professional Architect and the Client in Malaysia. The research methodology is by analyzing cases regarding issue on Letter of Release, Interview with Professional Architect, Developer and Lawyers and the most important is by referring to the Architect Act 1967 (Act 117) & Architect Rules 1996. After analyzing the information, it shows that Professional Architect cannot with holding Letter of Release because that the architect can hold the client for ransom. From the research it can be concluded that Client have to comply with their obligation under the contract between the Professional Architect especially when matter on payment of consultant fees and if dispute arise it must be referred to Arbitration, Mediation or Court.

ABSTRAK

Pengeluaran Perakuan Siap Dan Pematuhan (CCC) oleh para professional terutamanya Arkitek Professional telah menyebabkan peranan Arkitek Professional menjadi lebih penting. Professional Arkitek dikehendaki untuk menjadi 'Prinsipal Submitting Person' kepada Pihak Berkuasa Tempatan. Setelah semua pihak berpuashati barulah Perakuan Siap Dan Pematuhan dikeluarkan. Oleh yang demikian penamatan perkhidmatan Arkitek Professional akan menyebabkan berbagai masalah kepada kontrak pembinaan. Masalah yang mungkin timbul adalah penahanan surat pelepasan oleh Professional Arkitek dimana ianya boleh menyebabkan klien tidak dapat untuk melantik Professional Arkitek yang lain untuk meneruskan projek. Adakah seorang Professional Arkitek dibenarkan untuk menahan surat pelepasan? Oleh yang demikian matlamat kajian ini adalah untuk menentukan samada seorang Professional Arkitek boleh menahan surat pelepasan atau tidak. Skop kajian ini terbatas kepada kontrak perkhidmatan diantara Arkitek Professional dan juga Klien di Malaysia terutamanya. Metodologi kajian adalah dengan mengambil keputusan mahkamah berkaitan dengan isu surat pelepasan, temuduga terhadap Arkitek Professional, Pemaju (samada swasta atau kerajaan) serta Peguam dan rujukan kepada Akta Arkitek 1967 (Act 117) and 'Architect Rules 1996'. Selepas menganalisa maklumat, penemuan menunjukkan bahawa Arkitek Professional tidak boleh menahan Surat Pelepasan kepada Klien kerana penahanan tersebut adalah merupakan tindakan untuk mengugut Klien. Kesimpulan dari kajian ini ialah Klien mestilah melaksanakan tanggungjawabnya seperti yang termaktub didalam Perjanjian Perkhidmatan Arkitek Professional terutamanya dari segi pembayaran yuran ikhtisas kepada Arkitek Professional dan sekiranya terdapat percanggahan ianya mestilah dirujuk kepada Penimbang Tara, 'Mediation' ataupun Mahkamah.

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF RESEARCH

Malaysian Institute of Architects has defined who is an architect. An architect is a qualified professional to assist developer in translating their requirement on building into practical reality. After five to seven years of university level education and practical training, an Architectural Graduate seeks registration with the Board of Architects (Lembaga Akitek Malaysia). Upon completion of the required practical experience and upon passing the LAM-PAM 3 examination, a graduate Architects joins Pertubuhan Akitek Malaysia as a Corporate Member and then seeks registration as an Architect with Board of Architects Malaysia. A Professional Architect is employed to seek planning and building approvals from the relevant authorities before a building approval from the relevant authorities before a building project can be implemented. ¹

¹ Malaysia Institute of Architects, Who is an Architect, http://www.pam.org.my/architectural_services.asp, surf on 14/3/2008,

Board of Architects Malaysia has defined the meaning of Professional Architect. 'Professional Architect' means a person registered under sub section 10(2).²

Sub section 10(2) "subject to this Act, the following persons shall be entitled on application to be registered under Section A of the Register as Professional Architects:

(a) any person who-

- i. is a Graduate Architect
- ii. has obtained the practical experience as prescribed by the Board and passed the examinations as may be determined by the Board under paragraph (1)(b) and
- iii. is a corporate Member of the Pertubuhan Arkitek Malaysia or has obtained a qualification which the Board considers to be equivalent thereto.³

As a qualified expert in building and environmental design, the Professional Architect maintains close relationship with the building industry. He coordinates the necessary engineering and environmental service to his design so as to achieve developer objectives. He has knowledge about site analysis, building designs and complex regulations. He can clarify the developer requirements in respect of project, study possible solutions and make design proposal. Since the Professional Architect is familiar with building construction in term of what material to use, what problems to look for on site and which contractors to go on, he can prepare probable costs and the construction programmed in respect of any proposal he prepare. In this respect Professional Architect can become a developer advisor. The professional Architect also acted as an agent when he submits drawings to the Local Authorities on behalf of developer for planning and building approvals. He continues as agent when calling for and awarding tenders,

² Architects Act 1967 (Act 177) (incorporating amendments up to April 2007) , Lembaga Arkitek Malaysia, pg. 9

³ Architects Act 1967 (Act 177) (incorporating amendments up to April 2007) , Lembaga Arkitek Malaysia, pg. 32

contract administration and in helping to obtain Certificate of Fitness or issuance of Certificate of Completion and Compliance.⁴

However obligations, duties and liabilities of the Professional Architects are defers between types of building contract used by the developer. For example is in traditional procurement. Under traditional procurement mainly there are two types of building contract used by developer. For private sector the most popular form of building contract used is Agreement and Conditions of Building Contracts (Private Edition with and without quantities). The latest version is PAM 2006. However in public sector Conditions of Contract PWD 203 or 203A is used.

Under Agreement and Conditions of Building Contract PAM 2006 (with or without quantities), Architect plays an important role in supervising and administration the building contract. Employer is under obligation to specifying the Architect and other consultants involved in the contract and the scope of their duties. The name of the Professional Architect and the name of their practice and address are to be stated in Articles 3. Article 7 defined 'Architect' means the Person, named in Article 3, and shall be a Professional Architect or any other form of practice registered under the Architects Act 1967 and approved by the Board of Architects, Malaysia.⁵ The definition is also consistent in the Uniform Building by Law 1984 which states the 'Architect' means any person who is registered as an architect under any law relating to the registration of architects and who under that law is allowed to practice or carry on business as an architect.⁶ Under Agreement and Conditions of Building Contract PAM 2006 (with or without quantities), there are certain powers given and duty to issue only and to no one else. These include the power and duty to issue and certify Architect Instruction, Submission to Local Authority, Variations, Extensions of Time, Loss & Expense and

⁴ Malaysia Institute of Architects, Who is an Architect, http://www.pam.org.my/architectural_services.asp, surf on 14/3/2008,

⁵ Agreement and Conditions of PAM Contract 2006 (with quantities), pg. 4

⁶ Uniform Building By-Law 1984 (GN 5178/85)

Certificates & Payment. The Professional Architect is also required to supervise the work of actual construction to ensure it complies with intentions, standard of workmanship and quality in accordance with contract.⁷ Employer is under obligations to ensure for the purpose of the contract and the building control legislation, that the Professional Architect be employed to supervise the contract. In the event of the Professional Architect's death or ceasing to be the Professional Architect, to nominate a succeeding Professional Architect within twenty eight (28) days of the original Professional Architect ceasing to act. The Professional Architect performs essential functions within the contract and any failure to nominate a successor would be a breach of an implied term of the contract. This would render the employer liable for damages should contractor suffer any losses as a result of the breach.⁸

However under Conditions of Contract PWD 203 or 203A, the important role to supervise and administration the building is not a Professional Architect. This important role is hold by the Superintending Officer. The Superintending Officer is named in clause 1(a) (IV) and includes his successor in person. The position is to be assumed by an individual with his official designation stated. There is no express necessity that the person must be construction professional, e.g. an architect, engineer or quantity surveyor. It is nonetheless important to appreciate that the Superintending Officer must act impartially and fairly in performing his duties administering the contract, in particular the duties relating to certification for payment and grant of extension of time. The successor to the Superintending Officer is generally not authorized to disregard or overrule any decision, approval or direction given to the Contractor in writing by his predecessor. This includes any instruction or certificate issued by the predecessor Superintending Officer. The Superintending Officer's Representative is defined in clause 1(a) (VI) and the position can be assumed by an individual or a sole proprietorship, partnership or a body corporate. There is also no express requirement for the Superintending Officer's

⁷ Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, Malayan Law Journal (1999), 2nd Edition, pg. 40

⁸ Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, Malayan Law Journal (1999), 2nd Edition, pg. 41-pg42

Representative to be a construction professional.⁹ However it is normal practice in Malaysia, consultant architect, engineer and quantity surveyor will be appointed in the construction development especially on the fast track project and designs is not produce by the government. In this case normally Superintending Officer will delegate his power and authority to the respective consultant based of their expertise. By clause 2(c), the Superintending Officer may delegate from time to time in writing to the SO's Representative the powers and authority vested in him under the Contract save for those set out in Clause 3(a) of the Conditions.¹⁰ Upon such delegation, any instruction or decision of the SO's Representative is binding on the parties to the contract unless the Contractor refuses such instruction or decision and refers the matter to the Superintending Officer for reconsideration. If the Contractor so refers, the decision may either be confirmed, reversed or varied by the Superintending Officer. Besides it is also provided that the Superintending Officer retains the right to reject any work or materials which was not disapproved by the SO's Representative.

In April 2007 the Government of Malaysia had launched the improvement to the building delivery system to enhance the competitiveness of Malaysia globally. Certificate of Completion and Compliance (CCC) is issued to replace the Certificate of Fitness for Occupation issued by Local Authorities. The Certificate of Completion and Compliance will be issued by Professional Architects and Professional Engineers as well as Building Draughtsman registered with the Board of Architects Malaysia (Lembaga Akitek Malaysia).

Board of Architect Malaysia has issued circular on this matter. General circular No. 1/2008 has explained the objective of the implementation of Certificate of Completion

⁹ Lim Chong Fong, The Malaysian PWD Form of Construction Contract, Sweet & Maxwell Asia (2004), pg 13-pg 14

¹⁰ PWD Form 203 (Rev. 10/83), pg 5

and Compliance and also the features of the system.¹¹ This new system is an effort towards self-certification and self regulation approach in the construction industry. The features of this new system under Certificate of Certification and Compliance are as follows

- a. Building plans are still required to be submitted to and approved by the local authorities
- b. Certificate of Fitness for Occupation by local authorities will be replaced by the Certificate of Completion and Compliance (CCC) by the Principal Submitting Person (PSP) who is the Professional Architect, Professional Engineer and Building Draughtsman who submitted the building plans.
- c. Certificate of Completion and Compliance only be issued by the Principal Submitting Person (PSP) after all the certifications by the respective parties (professionals, contractors and licensed tradesmen) based on the prescribed 'Form G's under the Matrix of Responsibility is fulfilled and clearances from Tenaga Nasional Berhad, Water Authority, Sewerage Services Department (JPP), Fire and Rescue Department (except for residential buildings of not more than 18 metres high), Department of Safety and Health (where applicable), Relevant authorities / Public Works on Roads and Drainage.
- d. The local authorities still maintain their rights and power to enter the site during construction and issue an order to stop the issuance of Certificate of Completion and Compliance (CCC) by the Principal Submitting Person (PSP) if the construction on site is found to have breached the approved building plans and/or against the provision of UBBL or conditions of building plans approval on health and safety issues until such time the fault is corrected.
- e. The issuance of Certificate of Completion and Compliance is restricted to only issues concerning health, safety and essential services. The non technical issues such as bumiputera quota, low cost provision and contribution for public facilities etc are outside the preview of Principal Submitting Person (PSP) and will have to be resolved between the Owner and the Local Authorities at the planning and building plans approval stage or via other mechanism.

¹¹ Lembaga Arkitek Malaysia, General Circular No. 1/2008

- f. The issuance of Certificate of Completion and compliance will only apply to projects in which building plans are submitted after Certificate of Completion and Compliance came into force.

The issuance of Certificate of Completion and Compliance to replaced Certificate of Fitness for Occupation has made Professional Architect play an important role in any building contract whether in private or public sector. The Professional architect may perform functions as the agent or as impartial certifier. He may also do things which incur a duty under the law of tort to other persons. Therefore, it will depend largely on the professionalism and integrity of the Professional Architects. Professional Architect must carry their duties with due care and diligence.

1.2 PROBLEM STATEMENT.

The duty, responsibilities and liability of Professional Architect become more important after the issuance of Certificate of Completion and Compliance. This will make them play an important role in construction industry. Termination of architect's engagement may lead to various problems especially when architect withhold the letter of release. No architect will take over from another architect without a letter of release. This letter is a very important document because without it a builder or an owner of land will have difficulty in employing another architect to replace the one that has left. Besides that, it will affect the building contract especially on supervision of works, instruction to contractor, variation orders, extension of time and others. Building will not complete in time, buyers will suffer especially when it involved with housing development, and developer may face problem of granted extension of time and loss & expenses to the contractor. Questions on "Architect withhold Letter of Release, can it be avoided?" is the main issue that need to be discuss in detail in this research.

1.3 OBJECTIVE OF RESEARCH

The objective of this research is to understanding the Conditions of Engagement of Professional Architect. Identify the Professional Architect roles and duties. Identify the reason and procedure for termination of Professional Architect. The most important matter is to educate and inform the potential developer about the function of letter of release issued by the Professional Architect.

1.4 SCOPE AND LIMITATION OF THE RESEARCH

The main element in this research is regarding the withholding of Letter of Release by the Architect. This research will be limited to the Conditions of Engagement between the Client and the Professional Architect. Liability and responsibility under the contract will be discussed in detail. The scope of this research will be limited to the following areas:

- a. The research scope will only focusing on Standard Conditions of Engagement of a Professional Architect.
- b. The research scope will focusing on the duties and liabilities of Professional Architect
- c. The research scope will only focusing on the Termination of Engagement of Professional Architect

1.5 THE SIGNIFICANT OF RESEARCH

This research is very important in order to educate developer or potential developer regarding their right and responsibilities if the Memorandum of Agreement between the Professional Architect and the client may be terminated.

This research also will contribute for better understanding to the developer or potential developer regarding issue on Letter of Release. It also will give information on problem that will be rise if this contract of services terminated.

Besides that it also help in better understanding about contract of services between the Professional Architect and the client. And this will lead for a better management of construction contract.

1.6 RESEARCH METHOD

In pursuant of the aim or objective as stipulated, the primarily methods that have been used to complete this study are research by literature review.

Sources for literature review are from books, journals, newspaper article, lecturer notes and magazines. These sources provide a lot of data that can help to determine the background of the study - Termination of architect's engagement. And it also helps in understanding issue on 'Withholding of Letter of Release by the Architect'.

All this reading sources can be obtained at the internet sites that are related to this study and library in UTM City Campus and Universiti Malaya, Fakulti Undang-Undang. Cases are collected from the Malayan Law Journal and books.

Interviews were made to a few groups of people. Professional Architect, Developer and Lawyers are the chosen group. View and their opinion were analyzed to get better understanding on the research issue. Their view and opinion proved the reality happen in the construction industry on the subject matter.

1.7 RESEARCH STRUCTURES

This research consists of five (5) chapters. The brief descriptions of each chapter are as follows:

Chapter 1: Introduction

This chapter presents the overall content on the study. It introduces the background of the study, issue, objective and method to achieve the objective.

Chapter 2: Duties, Responsibility and Liability of Professional Architect

This chapter concentrates on the duties, responsibility and liability of Professional Architect to the client. The relationship as an agent to the client is explained in detail. Duty and responsibilities as contract administrator also has been discussed in this chapter. Elements and item that need to be included in the Agreement of Professional Architectural Services also discussed in detail.

Chapter 3: Termination of Architect's Engagement

This chapter discussed about termination of engagement by the client and by the Professional Architect himself. Termination procedure under the Architect Rules 1996 was explained in detail. The function and application of Letter of Release is discussed in detail. This is to ensure that issue of the study is achieved.

Chapter 4: Analysis on Research

This chapter analyzed about the results from the judicial decisions as reported in law reports which is related to the research issue on 'Withholding of Letter of Release by the Professional Architect'. All cases are discussed in detail. Data from interview with a group of professional were analyzed and present in the pie chart. Besides that analysis about the provision in the Architect Act 1967 (Act 117) and Architect Rules 1996 regarding the issue of Letter of Release is also discussed in detail.

Chapter 5: Conclusion

Conclusion on the research based on all the discussion in the previous chapter will be presents in this chapter.

CHAPTER 2

DUTIES, RESPONSIBILITY AND LIABILITY OF PROFESSIONAL ARCHITECT

2.1 INTRODUCTION

The development process involved three main party, the developer (or the client), the consultant and the contractor. When developer or the client decides to proceed with the project, consultant firm especially architect, engineer, planner will be appointed and engaged to formulate the design of construction work, whether architect, engineer, building, surveyor, contractor, or component supplier, carries responsibility and potential liability for his design work in both contract and in tort. (Figure 1 – Design Liabilities Table)¹²

¹² Nigel M Robinson & Anthony P. Lavers, “Construction Law in Singapore and Malaysia” Second edition. (Butterworth & Co (Asia) Pte Ltd), 1991, pg 47

The designer of construction work carries responsibility and potential liability for his design work in both contract or in tort. The responsibility may be expressed or implied and where one party carries responsibility, it is not necessary implicit that the other parties do not.

DESIGNER	DESIGNER'S LIABILITIES			
	To Developer or Employer	To subsequent purchaser	To Contractor	To Public
Consultant	Conditions of Engagement and Duty of care	Duty of care	Duty of care	Duty of care
Contractor	Building contract and Duty of care	Duty of care	Duty of care	Duty of care
Nominated Sub Contractor or Supplier	Collateral contract and Duty of care	Duty of care	Sub-contract and Duty of care	Duty of care
Domestic sub-contractor or supplier	Duty of care		Sub-contract and Duty of care	Duty of care

FIGURE 1 – DESIGN LIABILITIES TABLE

An architect is generally employed in two separate roles. He is initially employed for his creative talent, and his expertise in communicating and documenting his ideas, but once the building contract is let he may also be engaged in the capacity of agent for the building owner. In either of these areas an architect may find himself potentially liable either because of a breach of duty to his client or by exceeding his authority as agent. In the absence of personal injury, an architect's duty to his client arises only in contract, for it is not possible to disregard the contract to allege a wider liability in tort.

In tortious liability, where a duty of care to the plaintiff has to be proved, a person practicing a profession, which by its nature demands some special skill, ability or experience, has an implied contractual duty to his client to exercise to a reasonable extent, the amount of such skill, ability or experience which the task demands. If a person so practicing fails to possess that amount of skill and experience which is usual in his profession, or if he neglects to use the skill and experience which he possesses or the necessary degree of care demanded or professed, he will usually be liable for breach of contractual duty.

Therefore the architect is liable for any loss, damage or injury which the employer suffers due to his negligence. However, he is not under any rule of absolute liability. He is not liable merely because his client suffers some loss or damage, but only if he himself has committed some act or omission which, in the eyes of the law, constitute negligence.

By holding himself out as an architect he impliedly warrants that he possesses the requisite skill and ability and consequently if he fails to exercise such skill he may be liable in damages for any loss which is suffered.

In contrast to an action in tort it has only to be proved that:

1. there was a breach of implied duty of care,
2. there has been a material injury to the interest of the employer
3. The architect 'negligence caused or materially contributed to the loss, damage or injury.
4. there is absence of any conduct by the employer prejudicial to his recovery for the loss suffered

For the architect to be held liable.

In general there is no contractual relationship between the architect and the contractor. The architect's duties arise in contract and not in tort and consequently he owes no duty to the contractor in relation to the preparation of plans or quantities, or for measuring up the work.

This chapter focuses in the overview of Professional Architect as an agent, liability of the Professional Architect as a contract administrator and agreement for architectural professional services.

2.2 ARCHITECTS AS AN AGENT

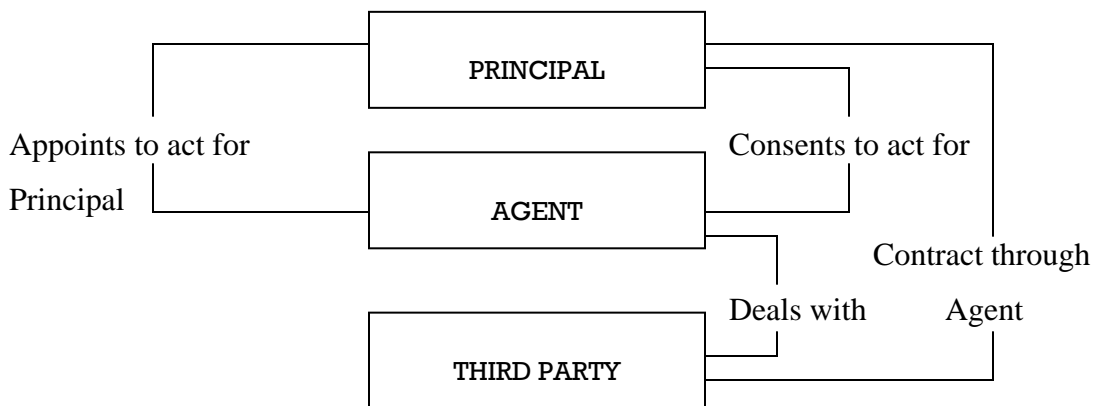


FIGURE 2 – AGENCY CONCEPT

Architect is to be regarded as an agent for his client in the satisfaction of the latter's duty and rendering the latter liable for any failure to so provide. The term 'Agency' implies the relationship which comes into being one party (the agent) is appointed to act as the representative of another (the client). The agent is authorized to

perform specified acts which affect his client's rights and duties in relation to third parties. The law of agency is governed by Part X of the Contracts Act, 1950 (Revised 1974)¹³. According to section 135 " An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is represented, is called the principal"¹⁴.

Thus in an agency there are in effect two contracts the first between the principal and the agent from which the agent derives his authority to act for and on his behalf, and the second between the principal and the third party through the medium of the agent.

The architect role is usually representing the interest of the employer during the course of the works. He also has a duty as an independent certifier under the building contract. Architects are normally employed under standard conditions of agreement which is being set by Architects Act 1967 (Act 117)¹⁵ & Architects Rules 1996¹⁶. Under such conditions, the work is usually divided into phases, and the authority of the client is necessary before each new phase is commenced. The conditions usually deal expressly with particular duties required to be carried out, such as supervision of the works. However such appointments rarely deal fully with the authority of the agent, and it is necessary to consider what implied and ostensible authority will exist, where not expressly given.

An express duty to certify payments to the contractor will usually carry with it an implied authority to supervise the works. There is no implied authority to vary the terms of the contract nor to warrant the accuracy of information in the contract documents.

¹³ Contract Act 1950 (Act 136), (International Law Book Services, 2007), pg 53 – pg 69

¹⁴ Contract Act 1950 (Act 136), Section 135 (International Law Book Services, 2007), pg 53

¹⁵ Architects Act 1967 (Act 177) (incorporating amendments up to April 2007) , Lembaga Arkitek Malaysia

¹⁶ Architects Rules 1996 (incorporating amendments up to December 2005), Lembaga Arkitek Malaysia.

There is further no implied authority to order variations or extra works. However standard building contracts invariably give express powers to the architect. He will always have an ostensible authority to exercise such power under the building contract, unless the contractor has been expressly informed of any limitation of authority. Thus the employer will not be able to deny the architect's authority when sued by contractor. Where the architect is an employee of the employer his ostensible authority is likely to be more extensive and may cover negotiation of the contract terms with the builder. This applies particularly to local government officers. This may allow the contractor to sue the employer directly on an oral variation order, if the contract requires an order in writing.

As an agent to the client, architect's duty is simply to apply reasonable skill and diligence to all he has been employed to do; in so doing he must see that he does not put himself in a position where his own interests might be in conflict with his duty.

Architect is asked for advice or instructions or volunteers his advice, following the dictates of his conscience or concept of professional duty, may result in his acting as an independent professional outside the scope of his duties as agent for the employer and render him personally liable for any adverse consequences.

Architect as an agent may not without the employer's consent; derive any benefit from his position as agent other than that provided for by the contract of agency. Therefore the agent must make full disclosure of any personal interest. If the transaction is questioned, the onus lies upon the agent to show that he acted in good faith and made full disclosure. If the agent does make a secret profit, his client may recover any secret profit made by him arising out of the agency. If the secret profit is in the form of the bribe the principal may recover it as well as dismissing the agent without notice.

An agent who is employed at a remuneration, is presumed (in the absence of knowledge on the part of client) to have a certain degree of knowledge of the transaction upon which he is entering and he may be liable in damages if he does not exercise due care and diligence in performing his duties or if he does not in fact possess the knowledge which the his client has been led to believe he has.

There are certain consequences that flow from the relationship of agency between the architect and his client. He will not only have implied authority to ensure that the work is faithfully carried out in accordance with the contract provisions, but he will be liable for any consequential damage.

A question which frequently gives rise to disputes is the ownership of work produced by architects and engineers. The formal documents which are prepared for the purposes of a building project such as the drawings or specification, become the property of the client, but if there is a dispute about payments of fees, the architect has a lien over such documents in his possession, against the payment of money due. Documents such as working papers, calculations and correspondence, will normally not become the property of the employer. The ownership of the designs produced by the architect is known as the copyright. These remains vested in the designer and may be transferred or sold like other property. The person who employs an architect has an implied right to make use of the designs produced in constructing the project. But this does not extend to repeating the design. This was held in the case of *Meikle v Maufe (1941)* which concerned the design of premises in Tottenham Court Road for Heals. The original premises were designated and built in 1912. Using another architect Heals, in 195, embarked upon extensions based substantially on the original design. It was held that there was no implied right to reproduce the original design in an extension, and the copyright remained vested in the original architect.

2.3 DUTIES OF PROFESSIONAL ARCHITECT

An architect is the one professional person registered to practice architecture under the laws who is equipped by adequate training and experience, to guide through the design and construction of building or renovation project. Architect is a difficult profession because under a highly technical contract a proprietor and a builder have interests which often conflict. The Architect has the duty of solving any such differences and needs much skill and patience to do this and remain friends with the proprietor and the builder.

According to John Uff (1991), the architect may perform functions as an agent, or as the independent contractor of the employer, or as an impartial certifier. He may also do things incur a duty under the law of tort to other persons. The scope of works of architect can be divided into pre contract duties and duties which arise under or by virtue of the construction contract. In the pre contract stage, the duty is to prepare skilful and economic designs for the works. When the work is in progress, the duties arising under or by virtue of the contract are to supervise and administer the carrying out of the works in the best interest of the employer. In each case the duty is exercised with reasonable skill and care. Whether particular conduct will incur liability for its consequences depends primarily upon established practice, that is, whether or not others would do the same. This is ultimately a question for the judge to decide.¹⁷ However in term of legal responsibility of Professional Architect, it can be divided in four categories:

- a. Duties and Liability in Contract
- b. Tort of Negligence
- c. Duties and Liability under Statute
- d. Other Duties and Liability

¹⁷ John Uff, Construction Law, (1991) 5th Edition, pg. 175

2.3.1 Liability in Contract

Liability in contract will arise upon the term, express and implied, of the contract under which the Professional Architect is obliged to perform his duty professionally. According to Nigel M. Robinson & Anthony P. Lavers (1988), where one party carries responsibility, it is not necessarily implicit that the other parties do not. The standard of service to be expected of the professional man was explained by McNair J in *Bolam v Frien Hospital Management Committee 1957*,¹⁸ ‘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 of an ordinary competent man exercising that particular art.’ The application of this rule to designers does not depend upon the qualification of the designer, but only upon whether or not he exercises a design function and professes to be a designer. An unqualified man could not escape liability by pleading his lack of qualification.

2.3.1.1 Duty of Care

The term of the building contract require an architect to take a number of actions in which he will owe a duty of care to his employer, while at the same time being required to act fairly and impartially as between his employer and builder. In *Sutcliffe v Thakarah (1974) 1 All ER 859*,¹⁹ an architect was presumed to be protected from an action for negligence in certifying by the assumption that he was acting as quasi-arbitrator. The above court decision however ruled that while the architect still has a duty

¹⁸ Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.47

¹⁹ Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.331

to act fairly and impartially between proprietor and builder in issuing certificates and in carrying out similar functions, he will be liable if he performs these functions negligently.

Architect has contractual obligations to their client (the employer) and parallel duties of care to protect the employer's interest under the construction contract. It was confirmed by Newey J in *Equitable Debenture Assess Corpn v William Moss Group & Ors 1984, Digest 105*,²⁰ that 'supervision of construction would involved acting as 'the Architect' for the purposes of the standard form of contract and would carry with it an obligation to inspect the works as they proceed'. He continued: 'Apart from obligations in contract and in the absence of any agreement to the contrary, Morgan (the architect) plainly owed to EDAC (the client) a duty of care in negligence, which was, I think, precisely the same as their duty in contract. Morgan's duty in negligence obviously extended to design and to supervision and inspection and in my view it again, like their obligations in contract, continued until practical completion'

2.3.1.2 Design Duties

Architect duty is contractual, and that duty is to use the care and skill of an architect of ordinary competence measured by the professional standards of the time. The duty may normally be discharged by following established practice, but there no rule that doing what others do cannot give rise to liability. There may be situations where there is no established practice, such as where a new construction technique is used. In such cases the duty of reasonable skill and care may be discharged by taking the best advice available and by warning the employer of any risks involved. The duty being contractual, it is not owed to any person outside the scope of the contract by which the

²⁰ Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.307

architect was employed. In *Turner v. Garland and Christopher (1853)*,²¹ the plaintiff employed the defendant as an architect to prepare plans and superintend the construction of model lodging house after the latest improvements, he further instructed the defendant to put in a new pattern concrete roofing which costs only a quarter of what a lead or slate roof would have cost. On the completion of the building it was found that the concrete roofing was a failure because it was leaky and had therefore to be removed and replaced. It was held that the defendant could not be considered to have been negligent. The Judge, Earle J. said in summing up to the jury: *'The plaintiff will merit your verdict if the defendant was found to be wanting in the competent skill and was guilty of gross negligence, although of competent skill and was guilty of gross negligence, although of competent skill, he might become liable. If of competent skill, he had paid careful attention to what he undertook, he would not liable. You should bear in mind that if the building is of an ordinary description in which he had paid careful attention to what he undertook, he would not be liable, You should bear in mind that if the building is of an ordinary description in which he had abundance of experience, and if proved a failure, this is an evidence of want of skill or attention. But if out of ordinary course, and you employ him about a novel thing, about which he has had little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark on them, this may account for defect of roof'* From this case any risk involved must be brought to the attention of the employer, who is being asked to bear such risk. It is the employer who must decide the course to adopt and he must be given all necessary information to enable him to reach a proper and considered decision.

²¹ John Uff, *Construction Law*, (1991), 5th Edition, pg. 176

2.3.1.4 Delegation of Design

There may be many situations where design work is undertaken by persons other than the architect named in the building contract. Problems may then arise as to who can be sued for a design defect. Where the architect himself delegates design work, there is no contract between the employer and the designer. As a general rule the architect will remain liable for the design unless the employer concurs in delegation of responsibility. In the case on *Moresk Cleaners v. Hicks (1966)*,²² it was held that the architect was liable, when the architect delegated the design of reinforced concrete to the contractor, and the design proved to be defective. The Official referee in his judgment said: *“If the defendant was not able, because this form of reinforced concrete was a comparatively new form of construction, to design it himself, he had three courses open to him One was to say: ‘This is not my field.’ The second was to go to the client, the building owner, and say: This reinforced concrete is out of my line. I would like you to employ a structural engineer to deal with this aspect of the matter.’ Or he can, while retaining responsibility for the design himself seek the advice and assistance of a structural engineer paying for his service out of his own pocket but having at any rate the satisfaction of knowing that if he acts upon that advice and it turns out to be wrong, the person whom he employed to give the advice will owe the same duty to him as he, the architect, owes to the building owner.”*

In the case of *Merton v. Lowe (1981)*,²³ an architect was held a design responsibility in respect of a proprietary plaster system used for a swimming pool ceiling, but was found not to be in breach because he was entitled to rely on the manufacturer’s expertise, when details of the design were not revealed by the specialist. The decision of the Official Referee was approved by the court of Appeal, where Waller L.J observed: *“It was submitted (by the plaintiffs) that the fact that Pyrok (the sub-contractor) maintained*

²² John Uff, *Construction Law*, (1991), 5th Edition, pg. 177 and Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.324

²³ John Uff, *Construction Law*, (1991), 5th Edition, pg. 177-178

secrecy was immaterial, and reliance was placed on the case of Moresk Cleaners v Hicks. I entirely agree with the judgment in that case. There the architect had literally handed over to another the whole task of design. The architect could not escape responsibility for the work which he was supposed to do by handing it over to another. This case was different. Pyroc were nominated sub-contractors employed for a specialist task of making a ceiling with their own proprietary material. It was the defendant's duty to use reasonable care as architects. In view of successful work done elsewhere, they decided that to employ Pyroc was reasonable. No witness called suggested that it was not at the beginning."

2.3.1.5 Liability as Superintendent of Works / Supervision

The purpose of supervision is to ensure that the works are carried out by the contractor in accordance with the requirements of the construction contract the architect must provide reasonable supervision for this purpose. An architect is liable for not properly superintending building operations. The amount of supervision required depends on the nature of the works. The building of a house may require constant attention from a resident staff. The duty of supervision was discussed in the case of ***East Ham v. Bernard Sunley (1965)***.²⁴ This case concerning about 'reasonable examination' where Lord Up John observed: "*As is well known, the architect is not permanently on the site but appears at intervals, it may be of a week or a fortnight, and he has of course, to inspect the progress of the work. When he arrives on the site there may be many very important matters with which he has to deal, the work may be getting behind –hand through labour troubles, some of the suppliers of materials or the sub-contractors may be lagging, there may be physical trouble on the site itself, such as, for example, finding an unexpected amount of underground water. All these are matters which may call for important decisions by the architect. He may in such circumstances think that he knows the builder sufficiently well and can trust him to carry out a good job, that is more*

²⁴ John Uff, Construction Law, (1991), 5th Edition, pg. 180

important that he should deal with urgent matters on the site than that he should make a minute inspection on the site to see that the builder is complying with the specifications laid down by him...., It by no means follows that, in failing to disclose a defect which reasonable examination would have disclosed, in fact the architect was necessarily thereby in breach of his duty to the building owner so as to be liable in an action for negligence. It may well be that the omission of the architect to find the defects was due to no more than an error of judgment, or was a deliberately calculated risk which, in all the circumstances of the case, was reasonable and proper.”

In *Rogers v. James (1891) 8 T.L.R. 67: 56 J.P 277* the plaintiff, an architect employed by the defendant to supervise the erection of a house and to certify the work done by builders, brought an action for the balance of the amount due to him for services rendered. The defendant counter-claimed for damages for negligence by reason of the builders omitting to do certain works. The plaintiff in answer to the counter-claim denied negligence and further pleaded that in giving certificates is binding between him and the defendant employer. The jury found that the plaintiff was negligent and that he should pay certain amount on the counter-claim. The Court of Appeal held that the certificate was only final and binding as between the builder and the owner, and not between the owner and the architect.

Whatever the frequency of inspections, they must be sufficient to check the important items, especially those which will be covered up by later work. Thus, where the architect made weekly visits to a house under construction but failed to inspect the bottoming of floors, which was defective, it was held that he was liable to the employer. In *Cotton v. Wallis (1955) 3 All E.R. 373*, the architects were held liable for not taking care to see that floors were properly laid. Denning L.J said “*In my opinion the duty which the architect owes the building owners is to see that the builder does his work and does his work properly. The specifications required that the whole of the materials were to be the best of their respective kinds, and to full satisfaction of the architect. The architect is*

employed by the building owners, and paid by him to see that the builder does his work properly. If the architect allows shoddy work to pass or work that scamped, he does not do his duty to the owner. The contract provides that, if there are defects which appear, it is the duty of the architect to call on the builder to make them good. The architect has no dispensing power. He had to hold up the final certificate until the defects are made good that was not done in this case”

The above case is similar with the case of *Jameson v. Simon (1899)*,²⁵ Lord Justice Clerk said: *”There may, of course be many things which the architect cannot be expected to observe while they are being done, minute matters that nothing that daily or even hourly watching could keep a check upon. But as regards so substantial and important a matter as the bottoming of a cement floor considerable area, such as this is shown by the plans to have been, I cannot hold that he is not chargeable with negligence if he fails before the bottoming is hid from view by the cement to make sure that unsuitable rubbish of a kind that will rot when covered up with wet cement has not been thrown in quantities as bottoming contrary to the specification.’*

2.3.1.6 Administration

Administration is part of the duty normally included under the supervision. However it includes many matters not related directly to superintendence on the site. The most importance of these is issuing certificates, ordering variations and issuing instructions and drawings. In each case the scope of the particular powers or duties depends on the express or implied terms of the contract.

²⁵ John Uff, *Construction Law*, (1991), 5th Edition, pg. 181 and Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.317

During the course of carrying out construction work the architect may sometimes issue instructions permitting a deviation from the contract to assist the contractor.

- a) Architect's refusal to issue an instruction to cover varied work already performed. The issue of written instruction is a condition precedent to the contractor's entitlement of payment for varied work. See *Brodie v Cardiff Corpn 1919*
- b) Architect's refusal to issue certificate. Certification is a conditions precedent to the contractor's entitlement to payment for work properly completed, and to other matters. Failure to make payment to the contractor amounts to breach of contract by the employer (under his vicarious responsibility for the actions of his agents) and breach of duty on the part of the architect. See *Croudace v Lambeth London Borough Council 1985*.²⁶ The necessity for an architect's certificate to the plaintiff contractor's action for recovery loss and expense was accepted as common ground. In the absence of such a certificate, the action was pursued on the basis of breach of contract.
- c) Architect's failure to act upon contractor's claim. Where the architect is of the opinion that the contractor has suffered claimable loss and expense, he comes under a duty to ascertain it, or to instruct the quantity surveyor see *London Borough of Merton v Stanley Hugh Leach Ltd 1985*.²⁷ It should be noted that situations of an architect's refusal to act up on the contractor's reasonable request under the operative contractual provisions are themselves disputes within the meaning of the arbitration clause.

²⁶ Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.304

²⁷ Nigel M. Robinson & Anthony P. Lavers, *Construction Law in Singapore and Malaysia*, Butterworth & Co Asia Pte Ltd, (1988), pg.320

- d) Architect's acceptance of the alternative amounted to a variation. In *Simplex v. St Pancras B.C (1958)*,²⁸ the contractor undertook to install piles of specified capacity. This proved impracticable and the contractor offered alternatives, differently priced schemes. The architect accepted one of these 'in accordance with quotations submitted'. It was held that although the contractor would have been liable for the failure of the first scheme, the architect's acceptance of the alternative amounted to a variation. The contractor was therefore entitled to be paid the price of the alternative scheme and not the lower price originally tendered. In giving judgment, Edmund Davies held: "*The architect's letter of 30th July contained an instruction involving a variation in the design or quantity (or both design and quality) of the works which the plaintiffs were being instructed to perform, and I have already indicated my view that he did so in circumstances in which he was accepting on the employers behalf that they would be responsible for the extra cost involved. Such an action fell, in my judgment within the absolute discretion vested in him by clause 1 and was motivated by his great desire to get the job moving as he put it, and regardless of the legal position of the plaintiffs under their contract. It was an action which led to the plaintiffs doing something different from that which they were obliged to do under their contract, and it was an action which involved the defendants in responsibility for the extra expense which it entailed.*" One way of avoiding such a problem is to add to the instruction words to the effect "provided this is at no extra cost".

²⁸ John Uff, Construction Law, (1991), 5th Edition, pg. 182

2.3.1.7 Professional Conduct

An architect who provides architectural services must have direct knowledge and supervisory control of such work. An architect must not offer or provide any gift of nominal value (including entertainment and hospitality), with the intent of influencing the judgment of an existing or prospective client in connection with a project in which the architect is interested. An architect must not engage in conduct involving fraud or wanton disregard of the rights of others.

a. Fraud

Liability for fraud is however, a liability in tort, and an architect guilty of fraud in the discharge of his duties will be liable, apart from contract, to either party to the building contract if they have suffered damage. An architect will be liable to the contractor if he acts fraudulently to his prejudice whether in collusion with the employer or not. This could extend to unfair arbitration of the contract if the contractor could prove a case of fraud. However, a contractor has no ground of action against the architect so long as he acts within the scope of his authority as agent for the building owner.

It is no defence for fraud that the architect may have been acting as agent. According to Lord West Westbury in *Cullen v Thompson Trustees (1862) 4 Macq. (H.L. Sc) 424 at pg 432 -433*, “All person directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the servant of another, and the reason is plain – for this contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of a fraud”

In the case of *Leicester Board of Guardians v. Trollape (1911) 75 J.P 197*, a clerk of works fraudulently permitted a floor to be laid differently from the method specified, and without the precaution against damp provided for in the contract, and as a result dry rot set in. The architect admitted that he had not personally checked whether his detail design had been adhered to, but had relied on the clerk of works to do this. The architect was held responsible.

b. Secret Commission

If an architect receives any benefit of any kind, whether it to be cash consideration or otherwise, from a third party, in consideration or even an expectation of an ultimate benefit from the principal for whom the architect is agent, he will be liable at criminal law as well as common law.

c. Competence

When practicing architecture, an architect must act with reasonable care and competence, and must apply the technical knowledge and skill which is ordinary applied by architects of good standing, practicing in the same locality. It is clear that incompetence will be disciplined and where appropriate will result in revocation of the registration of an architect. The performance of the architect will be judge. Courts have stated that an architect has implied warrants that his /her design is fit for its intended use.

When designing a project, an architect must take into consideration all applicable state and municipal building bye laws and regulations. An architect may rely on the advice of other professionals (eg: attorneys, engineers and other qualified persons) as to the intent and meaning of such regulations. An architect must not knowingly design a project in violation of such laws and regulations. It may be negligent to the architect if fails to take into consideration all the imposed laws and regulations being set by government or local authority.

An architect must also perform professional services only when the architect together with those whom the architect may engage as consultants, are qualified by education, training and experience in the specific technical areas involved. This means that where architect lacks of experience, he can engage other consultant to consult him on the related issue.

d. Conflict of Interest

An architect must not accept compensation for services from more than one party on a project unless the circumstances are fully disclosed and agreed to in writing by all interested party.

The architect must fully disclose in writing to the client or employer the nature of any business association or direct or indirect financial interest which is substantial enough to influence the architect's judgment in connection with the performance of professional services. If the client or employer objects to such association or financial interest the architect will either terminate such association or interest or offer to give up the commission or employment. Therefore architect is required to disclosure any interest that would affect the architect's performance. An architect must not solicit or accept compensation from material or equipment suppliers in return for specifying or endorsing their products.

When acting as the interpreter of building contract documents and the judge of contract performance, an architect must render decisions impartially, favoring neither party to the contract. This means that is not an inevitable role and that there may be circumstances in which the architect may appropriately decline to act in those two rules. Architect is required to act impartially.

e. Full Disclosure

An architect must disclose any compensation received for making public statements on architectural questions. He must accurately represent qualifications and scope of responsibility to prospective or existing clients or employers for work for which the architect is claiming credit.

In the course of work on a project, if an architect becomes aware of a decision made by the employer or client, against the architect's advice, which violates applicable state or municipal building laws and regulations and which will, in the architect judgment, materially and adversely affect the safety to the public of the finished project, the architect must

1. Report the decision to the local building inspector or other public official charged with the enforcement of the applicable state or municipal building laws and regulations,
2. Refuse to consent to the decision, and
3. Terminate the services on the project when the architect reasonably believes that decisions will be made against the architect's objection.

In the case of termination in accordance with item 3, the architect shall have no liability to the client or employer because of such termination.

An architect must not deliberately make a materially false statement or deliberately fail to disclose a material fact in connection with the application for registration or renewal

f. Compliance with Laws

An architect must not in the conduct or architectural practice, knowingly violate any state or federal criminal law. He must offer or make any payment or gift to government official (whether elected or appointed) with the intent of influencing the official's judgment in connection with a prospective or existing project in which the architect is interested. An architect must comply with the registration laws and regulations governing his or her professional practice.

2.3.2 Tort of Negligence

A tort is a breach of a legal duty owed by one person to another. This is independent of any contractual liability, and the remedy for it is the recovery of damages. If such person suffers injury, damage or loss because of defective or dangerous building work, it follows that any claim which they make must lie in tort which, in practice usually means the tort of negligence.

An architect's liability for professional negligence may arise in different ways that is through defective or improper plans, drawings and specifications, or through their not being supplied to the contractor in proper time. In all such matters, want of care and skill constitutes a breach of duty owed to the employer and if damage results from the breach there is liability. In *Columbus Co., Ltd v. Clowes (1908) 1 K.B. 244* is a good illustration of an architect's negligence in preparing defective plans and designs. In *Dalghiesh v. Bromley Corporation(1953)C.P.L. 411:160 E.G. 134*, the architect not only loss their fees but also paid damages for negligence for preparing plans so negligently that they became useless. The Bromley Corporation employed the architects to prepare

plans in connection with a scheme for the erection of a four storey buildings flats and maisonettes. The plans were approved by council who instructed building contractors to erect the flats. Subsequently, suspecting that the ground was made up ground, the architects ordered bore holes to be made, engaged consultants to advise them, incurring additional costs, and advised the council that it would be necessary to re-site two of the blocks and have concrete pile foundations. The result of all this was that the council had to abandon the scheme totally. In an action by the architects for fees due to for the preparations of the plans and the work done, they were counter-claimed for the loss and damage suffered as a result of the architect's negligence. Lord Goddard, C.J., upheld the award of arbitrator that the council had been provided with useless plans and awarded them by way of damages that amount of expense they had incurred, and dismissed the claim of the architects.

In the Australian case of *Voli v Inglewood Shire Council*,²⁹ concerning an architect who had designed a public hall. When the stage collapsed during a meeting due to design fault, the architect was held liable in negligence to a person who was injured.

2.3.3 Liability under Statute

Person who are members of the profession of architects are expected to have a practical working knowledge of the law relating to their respective professions sufficient to enable them to discharge their duty adequately. Professional Architect should have knowledge of the Acts, regulations and bye law affecting buildings and other structures, the requirements of local authorities and others matters.

²⁹ John Murdoch & Will Hughes, *Construction Contracts (Law and Management)*, E & FN Spon (1993), Reprinted first Edition, pg. 45

According to Victoria Russell (2006), a professional should clearly enquire of the employer whether there a restriction affecting the land to be built on or it's use for the purpose of the proposed building or work and should consider and advise the employer as to any interference with right to light and air and party wall matters. If they design or construct work without proper reference to the rights of adjoining owners, they will inculcitably render themselves liable for negligence. However the obligations of a construction professional as to legal knowledge will not be of the same standards as those of a legal adviser and will be correspondingly diluted or removed if the employer takes legal advice or has legal adviser available in relation to contemplated projects.³⁰

Lord Wilberforce in **Anns v. Merton LBC (1978) A.C. 728** said that even if the building regulations do apply to designers, it is by no means sure that a civil action may be brought for their breach. His suggestion has been applied in at least one subsequent case it has more commonly been rejected by the courts.

2.3.4 Other Liability

The duties of architects to the building owner arise by virtue of their employment under contract. Acts performed for or on behalf of the employer may, however at the same time give rise to duties and liabilities to other persons. This may arise by virtue of the position as an agent for the employer, when there may be personal liability on a contract or liability for acting without authority. Architect owes a duty to any present or future owner of a dwelling, to see that their work is done in a professional manner. Thus where an architect failed to examine a dangerous wall and allowed it to remain in the belief that it was safe, it was held that he was liable in negligence to a workman who was

³⁰ Victoria Russell, Duties & Liabilities of Construction Professionals, paper present on 7 Nov. 2006

injured when the wall collapsed; the contractor who employed the man and the demolition contractor were also liable. In the case of *Clay v. Crump (1963)*,³¹ Ormerod L.J in the Court of Appeal held: *“it may be there was negligence in some degree on the part both of the demolition contractors and builders. If there was such negligence, it may be that it was a contributory cause of the accident. It cannot however, in my judgment absolve the architect from a share in the blame. To hold otherwise would be to hold that an architect, or indeed anyone in a similar position, could behave negligently by delegating to others duties he was under an obligation to perform and escape liability by the plea that the injuries caused were caused by the negligence of that other person and not of himself. I do not accept that as being the true position in law”*

A more recent and disturbing case concerning tortious liability is *Eckersley and Others v. Binnie & Partners (1988)*,³² Owing to the undetected presence of methane gas in an underground pump house, an explosion occurred, killing and injuring many visitors who had been invited to a view by the Water Authority. The trial judge found fault on behalf of the designer (Binnie), the contractor and the authority, but by a majority held Binnie alone liable. The trial judge suggested that the designer might be under a continuing duty, after completion of the project, to advise on new information which might indicate a danger. Bingham L.J., while not prepared to rule out any possibility of such a continuing duty said: *“What is plain is that if any such duty at all is to be imposed, the nature, scope and limits of such a duty require to be very carefully and cautiously defined. The development of the law on this point, if it ever occurs, will be gradual and analogical. But this is not a suitable case in which to launch or embark on the process of development because no facts have been found to support a conclusion that ordinarily competent engineers in the position of (Binnie) would Have been alerted to any risk of which they were reasonably unaware at the time of handover.”*

³¹ John Uff, Construction Law, (1991), 5th Edition, pg. 183

³² John Uff, Construction Law, (1991), 5th Edition, pg. 184

2.4 DUTIES OF CLIENTS

According to Architect Rules 1996, Conditions of Engagement of Professional Architect, client's duties are specified under Rule 11 to Rule 15. Clients are obliged to perform his duties as specified under the agreements.

2.4.1 Payment of Fees

Client is under the obligations to pay sum due to the Professional Architect in accordance with the terms of Memorandum of Agreement, unless disputed by the client. Payment of fees is to be paid within the time stated in the Memorandum of Agreement.

2.4.2 Client to Provide all Information

It's the client obligation to provide information on legal, survey, particulars of existing structures & features, sub surface conditions, adjoining site, land title upon request by the Professional Architect. All information needed must be given within reasonable time without charging to the Professional Architect. All the data given shall not relieve the Professional Architects of his obligations under the Agreement. The Professional Architect can use and interpreted the same, and it shall be entirely at his own risk and shall not constitute a breach of obligation on the client.

2.4.3 Client's Authorized Representatives

Client shall appoint or authorized a person who is authorized to act on his behalf in respect of the project.

2.4.4 Client to gives Instructions to Contractor

Client shall issue instruction to the Contractor only through the Professional Architect where such instruction pertain to the scope of the Professional Architects service or where the instructions pertain to the scope of the professional services of other consultants who are directly engaged by the Consulting Architect for the purpose of the Project.

2.4.5 Client to give Prompt Decision

The client shall give decisions within the reasonable time on matters submitted by the Professional Architect so as not to delay the Professionals Architects.

2.4.6 Client to Submission Fees and Charges for Approval

Client is under obligations to pay all fees or charges in connection with submissions for approval for town planning, conversions of land title, building or other statutory approvals required by the relevant authorities and shall do so within reasonable time so as not to delay the progress of the project.

2.5 AGREEMENT OF PROFESSIONAL ARCHITECTURAL SERVICES

The Professional Architect is not a party to the main contract nor to any sub-contract, but is engaged under his own contract with the employer. According to Eggleston “The practicing architect” (1955 Edition), “the prospective building owner is frequently in an unfamiliar situation when he employs an architect. He has been accustomed to studying his purchase, and of being assured of its quality and its price, before deciding to buy. In this case however, his future building is visible to the eye of faith alone, and then only through a series of mysterious drawings. He can’t walk around the building and inspect it, and its ultimate cost will be unknown until it is completed.

According to Architects Act 1967 (Act 117), Part III (Registration of Architects), Section 9 “*Every Professional Architect, Graduate Architect, and architectural consultancy practice shall be subject to this Act*”

Professional architect normally work under a contract incorporating standard ‘terms of engagement’ setting out the scope of their duties and any limitation of their liability. A written contract of engagement should be clearly define the responsibilities undertaken by the architect and their timing, his fees and when are they are to be paid, and the extent to which he is to be responsible for design, specification, supervision or other activities which may be taken by others.

Architects Rules 1996 (incorporating amendments up to December 2005), Part IV under Rule 29 (1) provide a rule for Conditions of Engagement of a Professional Architects *“Except with the prior approval of the Board given for special reasons, a Professional Architect shall only enter into an agreement for architectural consultancy services according to the Architects (Scale of Minimum Fees) Rules 1986, the Conditions of Engagement in Part One of the Third Schedule and the Memorandum of Agreement in the Fourth Schedule”*

Generally the agreement comprising of three main items:

- a) Memorandum of Agreement
- b) Conditions of Engagement
- c) Architects (Scale of Minimum Fees) Rules 1986.

2.4.1 Memorandum of Agreement

Memorandum of Agreement is to be signed by both parties which are between the client and the architect. And it will refer to and expressly incorporates the Conditions of Engagement. Guidelines for Memorandum of Agreement between the client and the

Architect for professional services is stated in Fourth Schedule [*subrule 29(1)*] under Architect Rules 1996 (incorporating amendments up to December 2005)

Date of agreement, Parties in the contract, name of the Architect, and Project description and signature by both parties must be stated in the Memorandum Agreement. Under this agreement term and conditions is stated and must be agreed by both parties.

Memorandum of Agreement highlight about client desirous of appointing the Architects to provide professional architectural services for the Project. It also mentioned the appointment of the Architects is subject to and in accordance with the Conditions of Engagement of a Professional Architect as prescribed in the Architects Rules 1996 and the Architect must accepts the appointment for the purpose of providing the professional services for the same subject in accordance with Conditions of Engagement for Professional Architect.

Memorandum of Agreement, the Conditions of Engagement and the architects (Scale of Minimum Fees) Rules 1986 are constitutes as an agreement between the client and the Architect. Method of payment and limitation of variation order works are also described.

2.4.2 Conditions of Engagement of an Architect

According to John Murdoch and Will Hughes in “Construction Contracts – Law and Management” (1993 – Reprinted 1st Edition), Conditions of Engagement serve various purposes.

First they form the details of a contract between two parties. In this, they are convenient to use because appointments can be made on the standard conditions simply by referring to them. There is no need to draft a specific appointment agreement. Further, so long as there is scope for amending them, they can also provide a useful starting point for negotiations about duties for a particular project. From the point view of the professional institutions, standard conditions of engagement provide a framework for identifying the duties of the professional. This will prevent the unscrupulous practitioner from offering second hand rate services.

Another function which conditions of engagement fulfill is that of attributing fees to various aspects of the work. By listing the activities to be done sequentially, those activities can be grouped together such that parts of the fee can be paid at each of the major steps in the consultant involvement.

Conditions of Engagement are contracts and thus it is subject to the rules of law. The terms within them relate to the obligations of the parties, and detail the services to be carried out and the payments to make for them.

Under Architect Rules 1996 (incorporating amendments up to December 2005), the Conditions of Engagement of an Professional Architect is covered under Third Schedule [Rule29], Part One [Subrule 29(1)]. There are 25 conditions expressly explain under this Rules.

This condition expressly mentioned that architect services shall be referred to Architects (Scale of minimum Fees) Rules 1986. And he is under obligation to complete the design from inception to final completion of the project. This condition sets out the

limits of the architect's authority, emphasizing that the architect is acting on behalf of the client and will do nothing without first seeking the client's authority.

Architect duty is not only to complete the design; he is also required to advise the client on the appointment or engagement of other consultant. He will be liable on the performance, acts or omissions of consultant engaged by him. Coordination of work between consultants shall be conducted by the Architect to ensure the project schedule is followed and completed on time.

Under these conditions, Architect shall have authority to issue instructions or variation orders including changes in design, without the prior approval of the client. However this authority is limited to the following situation

1. Such instructions or variations orders are statutory requirements necessitated for safety reasons.
2. The client is informed in writing of the action taken as soon as practicable and:
3. The amount in respect of the variation works is within an amount that has been pre-agreed between the client and the Professional Architect and is specified in the Memorandum Agreement or any amendments to such agreement.

Architect is also under obligations to inspect the works periodic intervals as required under paragraph 5(4) (iv) of part II of the Architects (Scale of Minimum Fee) Rules 1986 and more frequently if he found necessary. Under Conditions of Engagement, client is also under obligations to provide information and decision when required by the Architect, to pay submission fees and charges for approval and to pay architect fees when the architect deliver his services by stages or by interval payments as agreed under Memorandum of Agreement (Between the client and the Architect for Professional Services)

Where the Architect has rendered services up to and including the Contract Documentation Phase and has received his due fees, the client shall be entitled to reproduce the design by implementing the project provided it is on the site on which the design was originally prepared. This entitlement to utilize the original design shall be applicable to maintenance, repair, renewal, reinstatement or modification of the works. Pursuant to Section 14 of the Copyright Act 1987, copyright in all documents and drawings prepared by the architect and including any works executed from those documents and drawings shall remain the property of the Architects, unless otherwise transferred to the client upon such terms and consideration as may be agreed between the architect and the client.

Issue on Termination, Appointment of another Architect, Disputes and Arbitration are also included in the Conditions of Engagement for Professional Architect. The agreement between Architect and the client may be terminated at any time by either party giving to other party sixty days notice or shorter period as may be agreed by both parties. Upon termination, client is under obligation to pay balance of fees for services rendered up to the stage of termination together with all reimbursable charges. After received payment due, Architect shall issue a letter of release to the client and the client shall be entitled to appoint another architect to continue with project. If disputes arise, the matter should be referred to arbitration. The procedure to appoint arbitrator and mediator are also stated in the Conditions of Engagement. In the event of death or incapacity of the Architect, the Architect's engagement shall be regarded as terminated.

2.4.3 Scale of Professional Fees and Charges

Architect Rule 1996 (incorporating amendments up to December 2005), under Conditions and Engagement of a Professional Architect, Rule 7 (1), “*A Professional Architect shall obtain the written agreement of the client in respect of his remuneration for architectural consultancy services to be provided by him pursuant to subparagraph 1(1) within sixty days from the date the notification regarding such remuneration is duly served on the client.*” Rule 7 (2), “*Notwithstanding subparagraph (1), where the client’s agreement in writing is not obtained within the period as stipulated in the subparagraph (1) but the client agrees by his conduct to the conditions of engagement and the scale of professional fees and charges, the client shall for the purposes of subparagraph (1) be considered to have agreed to such conditions of engagement and scale of professional fees and charges.*”

The above rule clearly mentioned that it is the obligation of the client to pay the Professional Architect when they have rendered their services as agreed in the Conditions of Engagement. The professional fees and charges should be based on Architects (Scale of Minimum Fees) Rules 1986.

Upon Completion of Each Phase	% Fees for Phase	Cum. % Fee For Phase
Schematic Design Phase	15%	15%
Design Development Phase	30%	45%
Contract Documentation Phase	25%	70%
Contract Administration and Supervision Phase	30%	100%

FIGURE 3 : SCHEDULE OF MODE AND TIME OF PAYMENT FOR
BASIC SERVICES

CHAPTER 3

TERMINATION OF ARCHITECT'S ENGAGEMENT

3.1 INTRODUCTION

Architect is one of the design professional who has an obligation to protect the interests of a larger segment of society than that made up of his clients. In addition to his duty to use his technical skill and judgment to protect his client from the consequences of the client lack of building knowledge, he must be guided by an inflexible sense of fairness in his relationships with buildings which are safe and stable. In the preparation of his plans and specification and in the construction administration of the job as well, if either professional has the requisite skill and does not use it, he is chargeable with negligence and if he does not possess the requisite standard of skill, he is liable because of the lack of it. The law requires only the exercise of ordinary skill and care in the light of present –day knowledge. Architect may be charged with the consequences of error only where such errors have occurred for want of reasonable skill or reasonable diligence.

Termination of Professional Architect Engagement is interrelated with termination of agency. As explained in chapter 2, architect is an agent to the client,

Duties and Liabilities of Professional Architect is the same as duties and liabilities of an agent to the client. Therefore this chapter will focus on Termination of Agency, Termination of architect's engagement, Breach and Remedies, Termination Procedure, Analysis on Termination Cases in Malaysia and Singapore and Letter of Release.

3.2 TERMINATION OF AGENCY

Contracts Act 1950 (Act 136), section 154 to 163 provide a provision with the manner in which an agent's authority may be terminated. An agency may be terminated in the following manner:

- a. By the act of the parties
- b. By Operation of Law

3.2.1 By the Act of the Parties.

An agency contract may be terminated by mutual consent or by unilateral revocation by the principal or unilateral renunciation by the agent at any time by giving notice.³³ Section 154, Contract Act 1950 (Act 136), "*An agency is terminated by principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by the principal or agent dying or*

³³ Beatrix Vohrah & Wu Min Aun, *The Commercial Law of Malaysia* (Pearson Malaysia Sdn. Bhd, 2006-2nd Edition), pg 413

*becoming of unsound mind; or by the principal being adjudicated or declared bankrupt or insolvent”.*³⁴

Revocation and renunciation may be expressed or implied in the conduct of the parties. Reasonable notice must be given in either revocation or renunciation. Otherwise, the damage thereby resulting to the principal or the agent, as the case may be, must be made good by the party in breach to others. This is as per requirement of section 159, Contract Act 1950 (Act 136), *“Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other”.*³⁵

Under section 157, Contract Act 1950 (Act 136), the principal cannot revoke the agent’s authority after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency. Consequently, if the agent has already incurred personal liability as a result of carrying out the principal’s instructions, the principal cannot revoke his agency to avoid indemnifying him.³⁶ Section 161, Contract Act 1950 (Act 136) provide the time in which termination takes effect.

Where an agency is expressed to be for a fixed period or implied in a contract but it is sooner revoked without lawful justification, the principal is required to make compensation to the agents. An agent may renounce the agency but where the agency is for an indefinite duration, reasonable notice must be given. Otherwise the agent is liable for any damages suffered by the principal resulting from the renunciations. Where the agency is for a fixed period, the agent is liable to compensate the principal for premature

³⁴ Contract Act 1950 (Act 136), Section 135 (International Law Book Services, 2007), pg 58

³⁵ Contract Act 1950 (Act 136), Section 135 (International Law Book Services, 2007), pg 59

³⁶ Beatrix Vohrah & Wu Min Aun, The Commercial Law of Malaysia (Pearson Malaysia Sdn. Bhd, 2006-2nd Edition), pg 415

renunciation without sufficient cause.³⁷ According to Lee Mei Pheng (2005), If reasonable notice is given, the agent will no longer be liable to the principal and he can claim reimbursement for all his services and expenses up to the date of the termination of his agency. Where the agency is for a definite or fixed period of time, the agent cannot terminate the agency before the expiry of that period without just cause. Otherwise, he will be liable to the principal for damages for any loss caused by the premature termination of agency. However, the court will not order specific performance of the contract of agency.

³⁸ This is covered under section 158 and 159 under Contract Act 1950 (Act 136).

3.2.2 By Operation of Law

According to Beatrix Vohrah and Wu Min Aun (2006), the agency may be terminated by operation of law. This may occur in the following circumstances:

- a. By the performance of the contract of agency, that is, the transaction which has 'been undertaken is performed. Section 154, Contract Act 1950 (Act 136) states that "An agency is terminated ... by the business of the agency being completed'
- b. By the expiration of the period fixed or implied in the contract of agency. Where the duration of the agency is expressly fixed or may be implied in the contract or trade, the agency is terminated when the period for which it was created to endure has expired, even if the business has not been completed, unless there are other terms in the contrary.
- c. By death of either the principal or agent. Section 154 states the general rule that "An agency is terminated By either the principal or agent is dying....". This is because the relationship between the principal and agent

³⁷ Beatrix Vohrah & Wu Min Aun, *The Commercial Law of Malaysia* (Pearson Malaysia Sdn. Bhd, 2006-2nd Edition), pg 416

³⁸ Lee Mei Pheng, *General Principles of Malaysia Law* (Oxford Fajar Sdn. Bhd, 2005-5th Edition), pg.477

is confidential and personal. However where the agent has an interest in the property which forms the subject matter of the agency, the agency is not terminated on death of either party. On the death of the principal the agent may continue to exercise his authority and if the agent dies, his authority is exercisable by his personal representatives.

- d. By subsequent insanity of either the principal or agent as per mentioned in Section 151, Contract Act 1950 (Act 136). Insanity of either party terminates the agency as a person of unsound mind cannot validly contract to appoint or act as an agent. As I termination upon death on termination due to the insanity of the principal, the agent is bound to take all reasonable steps to protect and preserve his principal's interest.
- e. By the bankruptcy or insolvency of the principal as per section 154 under Contract Act 1950 (Act 136), On a principal being declared bankrupt, his rights and liabilities are vested in the official assignee. There is no specific statutory provision in respect of the bankruptcy of an agent and its effect on the agency. Under the general law, whether the bankruptcy of the agent terminates the agency depends on the agreement between the parties and the circumstances of the case. In the absence of specific term in the contract of agency it would seem the bankruptcy of the agent also brings the agency to an end.
- f. By the happening of an event which renders the agency unlawful. This falls within the doctrine of frustration applying to contract generally. In respect of agency contracts, there are examples of termination when the principal becomes an enemy alien owing to an outbreak of war or where the subject matter is lost, destroyed or expropriated or where a change in the law renders the object of the agency unlawful.

By section 163, Contract Act 1950 (Act 136), the termination of an agents authority also ends the authority of all sub –agents appointed by the agent. When an agency is brought to an end either by the acts of the parties or by operation of law, the

agent cannot bind the principal in transaction that he may have entered into with third parties. He will be personally liable to third parties for the contract or be liable for breach of warranty of authority if he contracted as agent.³⁹

3.3 TERMINATION OF ARCHITECT'S ENGAGEMENT

Professional Architect may terminate his employment under the Agreement if the client fails to comply with any of its fundamental obligations under the Memorandum of Agreement or if there is any situation or of the occurrence of any event, beyond the reasonable control of the Professional Architect which makes it impossible for the Professional Architect to carry out his obligations under the Memorandum Agreement Architects Rules 1996 (incorporating amendments up to December 2005), Part IV under Rule 28 and 29 provide a rule for Code of Professional Conduct and Conditions of Engagement.

According to rule 28(1) *“A Professional Architect shall in the exercise of his profession, observe and be guided by the provisions of the Code of Professional conduct for Professional Architects in Part One of the Second Schedule”*⁴⁰

According to rule 28(2) *“A registered Architect shall in the exercise of his profession, observe and be guided by the provisions in paragraph 1, paragraph 4 except subparagraphs 4(7), 4(9), and 4(17), subparagraphs 2(4), 2(5), 2(7), 3(1), 3(3), 5(3) and*

³⁹ Beatrix Vohrah & Wu Min Aun, *The Commercial Law of Malaysia* (Pearson Malaysia Sdn. Bhd, 2006-2nd Edition), pg 418

⁴⁰ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 14

5(4) and subparagraphs 3(5)(b), (c), and (d) of the Code of Professional Conduct for Professional Architects in Part One of the Second Schedule, and references to a 'Professional Architect' shall be construed as references to a 'registered Architect'.⁴¹

Rule 29 (1) provide a rule for Conditions of Engagement of a Professional Architects “*Except with the prior approval of the Board given for special reasons, a Professional Architect shall only enter into an agreement for architectural consultancy services according to the Architects (Scale of Minimum Fees) Rules 1986, the Conditions of Engagement in Part One of the Third Schedule and the Memorandum of Agreement in the Fourth Schedule*”⁴²

According to Justin Sweet in his book “Legal Aspects of Architecture, Engineering and the Construction Process”, Contracts frequently contain provisions under which one or both parties can terminate their contractual obligations to perform. Termination does not necessarily nor usually extinguish any claim either party may have for the other’s failure to perform. Some provide that one party can terminate if the other commits a serious breach of the contract. Some allow termination powers for any breach, a method intended to foreclose any inquiry into the seriousness of the breach.⁴³

According to John Uff ‘Construction Law’ A contract of agency may be brought to an end by the parties themselves, or by operation of law. Architects are normally employed, expressly or impliedly, until the completion of the works, although such an appointment may be limited to separate stages of the work. An agency may at any time be terminated by agreement and there is frequently a provision for termination upon reasonable notice. A contract of agency may be terminated automatically by the death of

⁴¹ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 14

⁴² Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 15

⁴³ Justin Sweet, Legal Aspects of Architecture, Engineering and the Construction Process, (Brooks/Cole Publishing Company, 1999- Sixth Edition), pg 202

parties (not being a corporate body) or by the bankruptcy of the principal. It may also be terminated by frustration, such as by destruction of the subject matter or by contract becoming illegal”

Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects provide a rule or guideline for termination procedure.

Clause 17 (1), *“The Memorandum of Agreement between the Professional Architect and the client may be terminated at any time by either party serving upon the other party a written notice of termination, where such termination shall take effect after a period of sixty days from the date of the written notice, or such shorter period as may be agreed upon between the Professional Architect and the Client”*⁴⁴

Clause 17 (2), *“Notwithstanding the service of the notice of termination under subparagraph (1), the Professional Architect shall continue to provide architectural consultancy services until the date of termination of the Memorandum of Agreement.”*⁴⁵

The above two clauses in the Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects provide a procedure for termination of engagement of the Architect. It’s clearly mentioned that the agreement between the Professional Architect and the client can be terminated by giving a written notice to other party which is in contract. The validity of the written notice is sixty days (60) from the date of written notice. Expiry of the sixty days (60), the termination will be take effect. However the

⁴⁴ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 71

⁴⁵ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 72

period of validity can be shorten as agreed by both party. According to Justin Sweet, although it is clear that termination does not actually become effective until expiration of the notice period, it is not always clear what the rights and duties of the contracting parties are during the period between receipt of notice and the effective date of termination.⁴⁶

The notice period as specify in the above paragraph can enable the client to obtain a successor Professional Architect while retaining the original Professional Architect. Each party should be able to continue performing during the notice period.

Professional Architect is required to comply with clause 18 in the Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, *“The Professional Architect shall submit his accounts to the client for the balance of fees due together with any other outstanding claims for reimbursable charger not later than thirty days from the date of termination of the Memorandum of Agreement”*.⁴⁷ Clause 22 under the Architects Rules mentioned about delivery of documents upon termination, *“Upon the termination of the Memorandum of Agreement between the Professional Architect and the client and the full settlement of all dues or upon receipt of an acceptable guarantee of payment, the Professional Architect shall deliver to the client copies of drawings, specifications and other documents relating to the project that are in the possession of the Professional Architect”*.⁴⁸

In the event of the termination of agreement between Professional Architect and Client (unless such termination due to default of the Professional Architect) or the

⁴⁶ Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, (Brooks/Cole Publishing Company, 1999- Sixth Edition), pg 203

⁴⁷ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 72

⁴⁸ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 73

suspension of the project by the Client the Professional Architect shall be paid based on the following:

- a. a sum deductible from the percentage of the Project completed up till the time of termination or suspension
- b. any amount due to the Professional Architect under the agreement.

Provided that the Professional Architect shall accept the said payments by the client as full and complete settlement of all his claim for payment or arising out from the Agreement.

In the case of project has been abandoned, the right to receive payment of fees in respect of professional work done appears to depend on the reason for the abandonment. If it was because the professional service rendered was so inadequate as to confer no benefit on the client, then payment of fees may not be enforceable.

3.4 DEATH OR INCAPACITY OF PROFESSIONAL ARCHITECT

Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architect, Clause 25 (1), *“In the event of the death or incapacity of the Professional Architect who is a sole proprietor, the Professional Architect’s engagement shall be regarded as terminated”*. Clause 25(2), *“The client may, on payment of all outstanding fees and other dues in respect of the engagement of the Professional Architect, make use of all drawings and documents prepared by the Professional Architect, provided that they are only for*

*the purpose of implementing the project on site on which the design was originally prepared”.*⁴⁹

3.5 BREACH AND REMEDIES

In principle, once a party enters into a contract, he must perform his obligations in accordance with the terms of the contract. A breach of contract essentially a less than a complete performance of a contractual obligation in a situation for which no legal excuse for the non performance exists.⁵⁰ Breach of conditions entitles the other party to treat the contract as at an end and to claim damages. Breach of warranties entitles the other party damages only. Any breach of contract gives the aggrieved party a common law right to damages unless it has been expressed agreed otherwise.⁵¹ Under contract of agency, the innocent party is entitled for damages for any loss caused by the premature termination of agency. However court will not order specific performance of the contract of agency. It can be concluded that remedies which is entitled under this contract are as follows

- a. General damages such as in respect of physical damage, disturbance, loss of amenity, loss of enjoyment, pain and suffering, finance charges, loss of profits and loss of opportunity.
- b. Loss of profit arising from disruption or prolongation of the contract
- c. Quantum Meruit is claimable where work has been done, but where the contract is silent as to the terms of payment for it.
- d. Action for agreed sum representing the quantum of damage suffered has been agreed by the parties.

⁴⁹ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 74-75

⁵⁰ Chow Kok Fong, Law and Practice of Construction Contracts (Sweet & Maxwell Asia, 2004 0 3rd Edition), pg.115

⁵¹ Nigel M. Robinson & Anthony P. Lavers, Construction Law in Singapore and Malaysia, Butterworth & Co Asia Pte Ltd, (1988), pg.88

- e. Rescission is a remedy available to one party in respects of the other's default, by which performance is terminated and damages sought if necessary in recompense for a breach.
- f. Repudiation by one party entitles the other to terminate his own performance (rescission) without liability to the repudiating party and to seek damages for the breach or alternatively to continue his performance and to seek his contractual recompense. Repudiation or abandonment of performance under an entire contract implies forfeiture of any right to payment for the work done up to the date of termination but this is not necessary so under a contract that is not entire.

Breach of the architect's duties to the employer may consist in misconduct in his position as an agent or in failure to exercise the requisite skill of an architect. Either breach, if so serious as to go to the root of his contract with employer, renders him liable to be dismissed, and he may not be able to recover his fees if his work is useless or results in a loss to the employer. He will be liable in an action for damages for loss suffered. In some cases damages may greatly exceed the claim of fees. The employer may either bring a separate action or counterclaim to the architect's action for fees. As with any breach of contract the employer must act reasonably and keep his loss resulting from the architect's breach of duty to the minimum.⁵²

Breach by an architect of his duty of personal performance does not of itself amount to a total failure of consideration so as to entitle the employer to the return of fees paid for work carried out. Damages, other than nominal are only recoverable to the extent that actual loss is proved. If the architect is a person of fame such loss may, it is submitted, be capable of proof. Further, if the unauthorized subcontracting is discovered, the employer can, it is submitted, require the architect to resume personal performance

⁵² Donald Keating, *Keating on Building Contracts* (London Sweet & Maxwell, 1995 – 6th Edition), pg. 355

and failure to do so may well, it is thought amount to repudiation by the architect of his contract of employment with the employer rendering him liable to dismissal.⁵³

⁵³ Donald Keating, *Keating on Building Contracts* (London Sweet & Maxwell, 1995 – 6th Edition), pg. 356

3.7 ANALISIS ON CASES FOR TERMINATION OF ARCHITECT'S ENGAGEMENT IN MALAYSIA AND SINGAPORE

ITEM	CASES	ANALYSIS
<p>Case 1:</p>	<p>Hamzah, TR and Yeang Sdn Bhd. v Lazar Sdn. Bhd. (1985) 2 MLJ 45 (Malaysia)</p> <p>The respondent employer, Lazar, retained the firm of Hamzah and Yeang as architects for the design and construction of a 27-storey office building at Jalan Ampang, Kuala Lumpur, on the usual terms of engagement of the PAM. While approval of the plans by the planning authority was still pending, the architects sued for their outstanding by professional fees of RM 514,000.00 and refused to give a letter of release permitting another architect to take over their plans. The respondent applied for an order that the architects must issue letter of release. This was granted by high court. The architects appealed</p> <p><u>Federal Court held:</u> the architects services were not terminated by the client. Neither was the the project abandoned. The architect just left and claimed his fees ... We do not think in the circumstances the court would allow the architect to hold letter of release. To do so would in the words of Widgery CJ in Blair v Osborne and Tomkins 1971, mean “that the architect can hold the client to ransom”. The appeal dismissed.</p>	<p>Architect terminated his services after sued the employer. Breach of Contract by the Architect because under the agreement of professional services they are obliged to deliver the service until completion. (Scale of Minimum Fees). This can be referred to Clause 1 (1), (2) and (3) under Conditions of Engagement of a Professional Architect. (Architect Rules 1996)</p>

ITEM	CASES	ANALYSIS
Case 2:	<p>Lim, KC and Associates Sdn. Bhd. v Pembinaan Udarama Sdn. Bhd. (1980) 2 MLJ 26 (Malaysia)</p> <p>The appellant architects carried out preliminary cost planning and feasibility study for the respondent developers on a mixed commercial / residential development in Kuala Lumpur. The developers subsequently abandoned the scheme but refused to pay the architects for their work and that of their quantity surveyors, on the ground that it was because of their gross under estimate of the cost of the scheme that it had to be abandoned. Architect appealed to the Federal Court.</p> <p><u>Federal Court held:</u> While it was settled law that where a party undertakes a work of skill and labour and fails in his object so that his employer derives no benefit from the work, he is not entitled to recover anything', yet in this case there was no evidence beyond the opinion of another surveyor that there had been such a gross under estimate. The evidence of a tender exercise would have established this beyond argument. But this acid test was not taken. The developers terminated the employment of the architects without instructing them to proceed to...call for tenders. It was held that the respondents had not thus shown want of skill to enable them to substantiate a defence, and the architects' appeal succeeded.</p>	<p>Architect employment was terminated because the project was abandoned.</p> <p>Issue was brought to the court because of the developer refused to pay architect fees. Its client obligation to pay when service rendered by the architect. This can be referred to Architects (Scale of Minimum Fees) Rules 1986, Clause 3 and Clause 10.</p>

ITEM	CASES	ANALYSIS
<p>Case 3:</p>	<p>Soon Nam Co Ltd v Archynamics Architects (1979)1 MLJ 212 (Singapore)</p> <p>The plaintiff architects claimed from their client fees of \$152,000.00 for work done prior to the termination of their appointment. They had prepared and submitted plans which had been returned with no decision made on them. D’Cotta J in the High Court found in favour of the architects and his decision was affirmed by the Court of Appeal.</p> <p><u>Court of Appeal held:</u> Since the agreement for a professional services had incorporated the Singapore Institute of Architects Conditions of Engagement, fees for partial services were still payable, in such case ‘whether or not the work done by the architect is useful or beneficial to other party has no bearing on the questions of payment for the services rendered by the architects. The client’s appeal was dismissed.</p>	<p>Architect is breach of contract by terminating his services and he also failed to give reasonable written notice. If it is referred to the agreement of professional services they are obliged to deliver the service until completion. (Scale of Minimum Fees). This can be referred to Clause 1 (1), (2) and (3) under Conditions of Engagement of a Professional Architect. (Architect Rules 1996). Therefore client are entitled to claim damages under the common law.</p>

ITEM	CASES	ANALYSIS
<p>Case 4:</p>	<p>Akitek Tenggara Sdn. Bhd. v. Mid Valley City Sdn. Bhd. (1999) 2 MLJ 625 (Malaysia)</p> <p>The plaintiff architect was discharge as the architect of the project by the employer because he wants to utilize the services of its own architect. The employer also wrote to the plaintiff stating that the plaintiff's services as the architect for the project unequivocally and irrevocably terminated on the ground that the project had been aborted. Plaintiff argued that his services cannot be terminated unless there was a breach of the terms of the agreement and will liable for damages.</p> <p><u>Federal Court held:</u> The termination of the agreement is unlawful. Since it had been admitted that the plaintiff's services were terminated not because the project was aborted, but because the client wanted to use its own architect. Therefore plaintiff was entitled to sue for all sums due at the time of the breach and for the loss of profits on the work lost by reasons of the breach.</p>	<p>Client is breach of contract by terminating architect services. Therefore architect were entitled to claim any sum due at the time of the breach and to claim damages.</p>

ITEM	CASES	ANALYSIS
<p>Case 5:</p>	<p>Hock Seng Lee Realty Sdn. Bhd. v. Teo Ah King @ Teo Cho Teck and Others (2006) MLJU 455 (Malaysia)</p> <p>The plaintiff, developer vide a summons in Chamber applying order that the architect within seven days if the date of order furnish him letter stating that the architect is no longer plaintiffs architect, the architect has no claim in respect thereof than the counterclaim for RM 79,475.60 and the architect has no objection to the plaintiff's appointment for a new architect thereon (letter of release). The defendants said the application is premature because no evidence of termination and the dispute is not referred to the Board of Architects Malaysia.</p> <p><u>High Court held:</u> The Plaintiff summons in Chamber is dismissed because the plaintiff is ought to referred the matter to the Board of Architects in the first instance and by making this application it has acted prematurely.</p>	<p>There was dispute arise in this case however there is no termination letter issued by either party. Therefore court held that the procedure set by the Board of Architect must be followed.</p>

ITEM	CASES	ANALYSIS
<p>Case 6:</p>	<p>BEP Akitek (PTE) v Pontiac Land Pte Ltd (1992)I SLR 251 (Singapore)</p> <p>The plaintiff, a company with unlimited liability incorporation took over the architectural practice of the partnership firm of BEP Akitek which has been engaged by defendant (property developer). BEP Akitek (Pte) informed the defendant of its taking over the practice of BEP Akitek which is agreed by defendant. The project was later cancelled by the employers and the plaintiffs at the request of defendants agreed to accept \$100,000.00 in full settlement of fees amounting \$316,318.00 due to them. The defendants subsequently discharged the plaintiffs as architects for their projects. The plaintiff claims \$946,668.00 being loss of expected profits due to the unlawful termination by the defendants.</p> <p><u>High Court held:</u> Dismissing the plaintiff claim because the plaintiff is not registered architect and the plaintiffs claim was unenforceable under the Architects Act1976 in force at the material time. The plaintiff have also not suffered any loss due to the premature termination as they were fully occupied with other project.</p>	<p>Lawful termination because the architect is not a registered company architect under the act.</p>

ITEM	CASES	ANALYSIS
<p>Case 7:</p>	<p>Chan Ming Kong (Akitera Konsult) v. Sunyap Development Sdn. Bhd.</p> <p>The plaintiff, took out the present writ against Sunyap Development Sdn. Bhd. for fees rendered as the prime consultant. Issue rise was whether the plaintiff is the member of PAM, whether the plaintiff practiced under the style of Akitera Konsult, no privity of contract since no consideration passed from the plaintiff, whether defendant should pay the plaintiff on the fees claim, whether plaintiff have done is job , whether the claim is the PAM fees or a reasonable fees whether defendant were breach of the letter of appointment by appointing another architect</p> <p><u>High Court held:</u> the plaintiff is given RM 1.00 as a nominal damages since there is no claim on the damages bay the plaintiff. Defendant were in breach of the letter forfailing to obtain letter of release from the plaintiff before appointing another firm of architect.</p>	<p>Defendants were in breach in contract and plaintiff is entitled to claim damages. Because defendant failed to obtain letter of release from the plaintiff.</p>

3.8 LETTER OF RELEASE

Letter can be identified as a mark or character used as the representative of a sound, or of an articulation of the human organs of speech; a first element of written language. It also can be defined as a written or printed communication; a message expressed in intelligible characters on something adapted to conveyance, as paper, parchment, etc...⁵⁴

Release can be identified as give up, discharge, or abandon a right of action. Such as convey a man's interest or right to another, who has possession of it, or some estate in the same. A release is the giving or discharging of a right of action which a man has or many claim against another, o that which is his.⁵⁵

Letter of Release will comes to the picture when it involves termination of engagement of Professional Architect. Based on the analysis on cases of termination, 5 cases were involved with issuance of Letter of Release.

1. Hamzah, TR and Yeang Sdn Bhd v. Lazar Sdn. Bhd. (1985) 2 MLJ 45
2. Akitek Tenggara Sdn. Bhd. v. Mid Valley City Sdn. Bhd. (1999) 2 MLJ 625
3. Hock Seng Lee Realty Sdn. Bhd. v. Teo Ah King @ Teo Cho Teck ad others (2006) MLJU 455
4. BEP Akitek (PTE) v. Pontiac Land Pte Ltd (1992) 1 SLR 251
5. Chan Ming Kong (Akitera Konsult) v. Sunyap Development Sdn. Bhd.

⁵⁴ <http://define.com/letter>

⁵⁵ <http://www.lectlaw.com/def2/q130.htm>

According to Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, Rule 19 *“In the event that the Memorandum of Agreement between the Professional Architect and the client is terminated for a reason not due to the fault of either party, the Professional Architect shall, subject to the rights of either party in respect of antecedent breaches of the Memorandum of Agreement between the two parties, charge the balance of fees for architectural consultancy services rendered up to the stage of termination together with all reimbursable charges, and after the full settlement of all fees and charges due from the client, the Professional Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Professional Architect to continue with the project.”*⁵⁶

Board of Architect Malaysia has issued General Circular No. 2/2007⁵⁷ on the guidelines on Letter of Release which take effect from 21st May 2007. This General Circular replaces the current General circular No. 1/1998.

A Professional Architect on being approached or instructed to proceed with professional work for which he knows or can ascertain by making reasonable enquiries that another Professional Architect has been engaged by the registered proprietor and/or his bona –fide agent of the site or part of the site concerned to provide the full basic services or any part thereof as provided in the Architects (Scale of Minimum Fees) 1986 shall, before proceeding with such work, communicate in writing with that Professional Architect and obtain a letter of release from him or obtain such letter through his prospective client, provided that this requirement may be waived at the discretion of the Board.

⁵⁶ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Arkitek Malaysia, pg 72

⁵⁷ Lembaga Arkitek Malaysia, General Circular No. 2/2007

Registered Proprietor means individuals, group of individuals, trustees, agencies, statutory organizations, corporations or any other legal entities whose names and/or legal identities are endorsed on the title of the land or any other instruments which provide legal ownership of the land. Where as bona-fide agent means individuals, group of individuals, trustees, agencies, statutory organizations, corporations or any other legal entities who have been empowered by the ‘registered proprietor’ to present him in relation to the development of the land.

The word ‘another Professional Architect has been engaged by the registered proprietor and/or his bona –fide agent’ is defined under Clause 7 (1) and 7(2) of Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, “*A Professional Architect shall obtain the written agreement of the client in respect of his remuneration for architectural consultancy services to be provided by him pursuant to subparagraph 1(1) within sixty days from the date the notification regarding such remuneration is duly served on the client*”.

*“Notwithstanding subparagraph (1), where the client’s agreement in writing is not obtained within the period as stipulated in subparagraph (1) but the client agrees by his conduct to the conditions of engagement and the scale of professional fees and charges, the client shall for the purposes of subparagraph (1) be considered to have agreed to such conditions of engagement and scale of professional fees and charges”.*⁵⁸

Clause 1 (1) stated, “*A Professional Architect who carries on business as an architectural consultancy practice shall provide architectural consultancy services as described in the cope of services incorporated in the Memorandum of Agreement between the Professional Architect and the Client*”.⁵⁹

⁵⁸ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 69

⁵⁹ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 67

Letter of Release is very important to Architect profession. It gives a right to client to appoint another Professional Architect to continue with the project if another Professional Architect which has been engaged is terminated by the client or terminate his employment under the agreement during pre-contract or post contract stage.

However there are certain circumstances when a Letter of Release is not required. First, when a Professional Architect is approached by either the purchaser or lessee of a building where a Certificate of Fitness for Occupation or Certificate of Completion and Compliance has already been issued. Second, when the registered proprietor engages a Professional Architect for a mixed development as the overall planner only and the development would be implemented in phases where the registered proprietor wishes to engage other Professional Architects for the various phases. In this case the Professional Architect should clarify his appointment at the inception stage to avoid disputes with the registered proprietor.

However there are circumstances where the Board of Architect may use its discretion to waive the requirement for a Letter of Release. Listed below are the circumstances under which the Board of architect may exercise such discretion:

- a. When the first Professional Architect refuses to issue a Letter of release after his engagement has been terminated by the client and all outstanding fees and disbursement settled in full.
 - b. When there is a dispute on the quantum of fees and disbursement payable to the Professional Architect and such disputes has been submitted for determination by mediation, arbitration or other means dispute resolution. This has been clearly
-

mentioned under Section 4, Architects Act 1967 (Act 117) (incorporating amendments up to April 2007, paragraph (ea), “*to act as a stake holder in a contract for architectural and interior design consultancy services, when requested*”.⁶⁰ Board of Architect may act as a stakeholder for fees in dispute to be deposited with it until the award of the mediation, arbitration or any dispute resolution is made. The Board of Architect shall determine the quantum of fees to be deposited based on the documents submitted by both parties. Any benefits accrued from such deposit shall e retained by the Board of Architect.

- c. When the first Professional Architect has commenced legal proceedings for the recovery of his fees or to contest the termination
- d. When the party who has commissioned the Professional Architect for a project refuses the Professional Architect’s claim for fees in the event of termination and decided to proceed with legal action instead of mediation or arbitration and counterclaim against the Professional Architect.
- e. When a Professional Architect has been appointed to only provide advisory services for the development of a site even when other Professional Architects may also have been appointed to provide similar services
- f. When the party who has commissioned the Professional Architect for a project has been declared insolvent by the court and placed under receivership. However this excludes projects that are completed under any form of rescue arrangements as may be arranged with approval of Bank Negara for which a Letter of Release will still be necessary.
- g. When the Professional Architect has been engaged by the registered to provide basic services and turnkey contractors are invited to submit tenders for design and

⁶⁰ Architects Act 1967 (Act 177) (incorporating amendments up to April 2007) , Lembaga Arkitek Malaysia, pg. 13

- build including financing where several Professional Architects were engaged by the respective tenderers provided the first Professional Architects services have been terminated and his fees fully paid.
- h. When there is a change in ownership of the site or part of the site with a transfer of liability to the new registered proprietor.
 - i. When a Professional Architect engaged on a project has either been suspended or had his name removed from the Register of Professional Architects by the Board for any reason whatsoever. Provided always that the fees and other disbursement that are due to the Professional Architect in respect of the project concerned, up to the time of his suspension or the removal of his name from the Register of Professional Architects, have been paid to the Professional Architect. In the event of a dispute arising on either the quantum or validity of the Professional Architect's claim, the matter shall be submitted to the Board for determination by mediation, arbitration or other means of dispute resolution.
 - j. When the Professional Architect has terminated his appointment with the client after construction work on the project has already started, has notified the approving authority and received the approving authority's agreement to his withdrawal as the submitting person.
 - k. When the Professional Architect dies or is incapacitated and his architectural consultancy practice has no legal capacity to carry out his services and responsibility.

Therefore is very important for the Professional Architect shall be required to take the initiative to write to the first Professional Architect to enquire if his services have been properly terminated and all outstanding fees settled. If this has been completed, the first Professional Architect shall be obliged to issue a Letter of Release to enable the second

Professional Architect to accept the commission. The first Professional Architect, upon receipt from the second Professional Architect, shall ensure that a reply be given promptly and in any case within (14) days of the date of receipt of the second Professional Architect's letter. The first Professional Architect shall not unreasonably withhold the issuance of the letter of release. In the event the first Professional Architect claims that there are outstanding fees due to him, he must reply to the enquiry within fourteen (14) days of receipt of the letter, which shall be sent either by registered post or recorded delivery, and to advise the second Professional Architect on the position of his claims. Upon receiving the first Professional Architect's reply, the second Professional Architect must advise the client on the relevant provisions of the Code of Professional Conduct and Conditions of Engagement as provided under the Second and Third Schedules of the Architects Rules 19996 respectively. In the event a reply is not received by the second Professional Architect within the time limit provided in the above, the matter may be referred to the Board who shall have the sole discretion of waiving the necessity for a Letter of Release or stipulating conditions to be fulfilled prior to the waiver being granted.

In circumstances where a Professional Architect, having accepted a commission in good faith and without knowing before hand that another Professional Architect had been involved in the Project and when subsequently the involvement of another Professional Architect was made known to him, shall take the following steps:

- a. Immediately notify his client in writing of the situation and of his obligations under the act and rules.
- b. To comply with procedure as stipulated as the above paragraph.

CHAPTER 4

ANALYSIS OF RESEARCH

4.1 INTRODUCTION

The previous chapter have explained clearly about how important role of Professional Architect as an agent to the client, as independent certifier and his duties as a Contract Administrator which has been discussed in Chapter 2. Issue on termination, termination procedure, letter of release is also discussed in detail in Chapter 3. This chapter will concentrate on findings on research issue “Architect with hold the Letter of Release.

Analysis of research will be divided into 3 sections. First section is analysis on previous cases. Second section will based on opinion and view from interview with Professional Architect, Developer and Lawyers. And the last section will concentrate on provision under Architect Act 1967 and Architect Rule 1996.

4.2 CASE STUDIES

Three (3) cases related to issuance of letter of release were chosen and discussed in detail. Even it is similar in nature (letter of release), however it involved a different situation. All the cases chosen are in Malaysia. Therefore it will reflect the reality happen in our construction industries regarding letter of release. The following are the cases:

- a. TR Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. (1985)2 MLJ 45
- b. Akitek Tenggara Sdn. Bhd. v. Mid Valley City Sdn. Bhd. (1999) 2 MLJ 625
- c. Hock Seng Lee Realty Sdn. Bhd. v. Teo Ah King @ Teo Cho Teck and Others (2006) MLJU 4

4.2.1 TR Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. (1985) 2 MLJ 45

In this case the respondent employed the appellant, a firm of architects to build 27 storey office building at Jalan Ampang on the usual terms as defined by the Pertubuhan Arkitek Malaysia (P.A.M) conditions of engagement. The overall fee agreed was 4% of the total contract cost of the project. While approval of the plans still under consideration by the relevant authority, the appellant sued the respondent for balance of the professional fees of RM 514,000.00. The respondent denied the claim and counterclaimed for breach of contract. Subsequently the appellant terminated its services as architects on the ground of failure of payment of fees. The respondent requested that the dispute be referred to the P.A.M for decision and pending reference that the appellant should issue a letter of release to enable them to engage another architect to continue with the work. The appellant denied the request and said until all the fees were paid they would not issue a

letter of release. The respondent applied by summons in chambers for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the proposed construction of the building. The learned Judge of the High Court made an order in terms. The appellant appealed.

Court held that in the circumstances of this case, the court could not allow the architect to withhold the Letter of Release as to so would mean “that the architect can hold the client to ransom’. The contractual obligations to issue a letter of release is not conditional upon the constitution of the form but on whether the dispute is being referred for settlement. A perusal of the Clause shows a clear intention to have disputes resolved expeditiously. Here we have a dispute as to the architect’s remuneration but the architect refused to agree to have it referred for settlement. Instead he took his client to court and claimed that he was not required to issue the letter of release unless he was paid his fees. As the Learned Judge rightly pointed out, the architect’s services were not terminated by the client. Neither was the project abandoned. The architects just left and claimed for his fees. Having taken his client to court he then terminated his services in order to take advantage of certain P.A.M provisions. Clearly he was in breach of his contract. An architect by refusing reference to the Institute for settlement would have a very powerful means of preventing his client from ever getting a letter of release by merely going to court. It must be remembered that the jurisdiction of the court is much wider than any forum which the parties may elect to refer their disputes for settlement. For the reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.⁶¹

⁶¹ Lexis Nexis Asia , Malayan Law Journal ,Federal Court Civil Appeal No. 46 of 1983 (1985) 2 MLJ 45

4.2.2 Akitek Tenggara Sdn. Bhd. v. Mid Valley City Sdn. Bhd. (1999) 2 MLJ 625

In this case the plaintiff, a firm architects was appointed by the defendant under a joint venture agreement to develop a development project. After the commencement of certain works under the project, the defendant purported to discharge the plaintiff as the architect for the project as IGB Corp. Bhd., the majority shareholders of the defendant who had intended to utilize the services of its own architects for the project. The defendant, subsequently, wrote to the plaintiff stating that the plaintiff's services as the architect for the project had been unequivocally and irrevocably terminated on the ground that the project had been aborted. The plaintiff argued that its services cannot be terminated unless there was a breach of the terms of the agreement and for just cause, otherwise the party exercising its right to terminate will do so in breach thereof and will be liable to pay damages. Plaintiff refused to issue a letter of release to IGB Corp. Bhd. to enable IGB to appoint new architects. The defendant pleaded that its right to terminate the services of the plaintiff was implied by law in that plaintiff's services may be terminated if the project was aborted, abandoned or delayed. This case was referred to the Board of Architect Malaysia. On March 14, 1989 Board of Architect Malaysia Practice Committee decided in favour of IGB Corp. Bhd. giving the company the liberty to appoint another architect after waiving the requirement for plaintiff to issue Letter of Release to IGB Corp. Bhd.

High Court allowing the plaintiff claim, the termination of the agreement on the ground that IGB Corp. Bhd. being the majority shareholder, intended to use its own architects was never envisaged or agreed to by the parties when the terms were agreed upon. Thus, such termination was unlawful. Since it had been admitted that the plaintiff services were terminated not because the project was aborted, but because IGB wanted to use its own architects, the defendant had failed to discharge the burden of proving that the project had been abandoned or

aborted. Moreover there was no implied right given to the defendant to terminate the plaintiff's contract if the project was aborted, abandoned or delayed indefinitely. The term relating to this aspect merely states that if this happens, the fees computed to the nearest stage of work is payable. In the circumstances, the termination of the plaintiff by the defendant was indeed unlawful as the plaintiff was not in breach of any of the terms of the contract. Since the project as envisaged in the agreement was still subsisting, the defendant had failed to prove entitlement only under a quantum meruit basis. This was a clear case of wanton cancellation of the contract by the defendant purely on the basis that it wished to utilize its own architect. Therefore the plaintiff was entitled to sue for all sums due at the time of the breach and for the loss of profits on the work lost by reason of the breach.⁶²

This case being brought to Federal Court where it has been held that the High Court Judge had correctly awarded Arkitek Tenggara Sdn. Bhd.⁶³

4.2.3 Hock Seng Lee Realty Sdn. Bhd. v. Teo Ah King @ Teo Cho Teck and Others (2006) MLJU 455

In this case the plaintiff vide a summons in Chambers dated 13/4/2006 is applying for an order that the 3rd defendant shall within seven days of the date of Order furnish the plaintiff a letter stating that the 3rd defendant is no longer the plaintiff's architect for lot 23, section 47, Kuching Town Land District; that the 3rd defendant has no objection to the plaintiff's appointment for anew architect

⁶² Lexis Nexis Asia , Malayan Law Journal ,High Court, (1999) 2 MLJ 625

⁶³ Malaysian National News Agency: BERNAMA, August 29, 2007.

thereon (the Letter of Release), together with such further or other terms that the Court deems fit and just and with costs in the cause of the counterclaim. 3rd defendant opposed the said application. Firstly on the ground it cannot concede to the present application because it would be estopped from taking the stance that the invoices are due and payable by Hock Seng Lee (the 2nd defendant by counterclaim) or the plaintiff, and not just by the plaintiff. The second ground is the said application is premature for two fold reasons namely, there is no evidence of termination despite the dispute, and the other is that the dispute between the parties has not been referred to the Board of Architects.

Court held that plaintiff have to referred the matter to Board of Architects in the first instance and by making this application it has acted prematurely. For the foregoing reasons the Plaintiff's Summons in Chamber dated 13/4/2006 is dismissed with costs to be taxed unless otherwise agreed.⁶⁴

4.2.4 Analysis of Cases

The first case involved an architect who withhold of Letter of Release due to non-payment by the client. Court dismissed his claim because of the following reason:

- a) Architect refused to agree to have it referred for settlement to the Institute
- b) Architect breach of his contract because his services were not terminated neither was the project abandoned.
- c) Architect just left and claimed for his fees.

In this case court held that they cannot allow the architect to withhold the letter of release. To do so would, in the words of Widgery, F.J in Blair v. Osborne & Tomkins

⁶⁴ Lexis Nexis Asia , Malayan Law Journal ,High Court, (2006) MLJU 455

mean “that the architect can hold the client for ransom. Therefore the first case leads to a conclusion that architect cannot withhold the letter of release and it can be avoided if the dispute referred institution for settlement or to the court. Based on circular issued by Board of Architect Malaysia, General Circular No. 2/2007⁶⁵ on the guidelines on Letter of Release which take effect from 21st May 2007, “When there is a dispute on the quantum of fees and disbursement payable to the Professional Architect and such disputes has been submitted for determination by mediation, arbitration or other means dispute resolution”. Therefore in this case if it is being referred to the Board of Architect Malaysia, Letter o Release will be waived by them.

The second case involved an architect who suit against client due to wrongful termination. This case was referred to the Board of Architect Malaysia. On March 14, 1989 Board of Architect Malaysia Practice Committee decided in favour of IGB Corp. Bhd. giving the company the liberty to appoint another architect after waiving the requirement for plaintiff to issue Letter of Release to IGB Corp.Bhd. Court allowing his claim because of the following reason:

- a) The termination of the agreement was unlawful
- b) Architect services were terminated not because the project was aborted but because the client wanted to use its own architect.
- c) Client cancelled the contract on the basis that he wished to utilize its own architect.

In this case, matter already brought to the knowledge of the Board of Architect Malaysia for settlement. Board of Architect Malaysia made a wrong judgment by waiving the issuance of letter of release by the architect. The architect is not satisfied with the judgment and they bring this matter to the court. Therefore this case also leads to a conclusion that architect cannot withhold the letter of release and it can be avoided if the dispute referred institution for settlement or to the court.

⁶⁵ Lembaga Arkitek Malaysia, General Circular No. 2/2007

Third case involved a client who vide a summons against architect due to issuance of letter of release and claim. Court dismissed clients summons in chamber because of the following reason:

- a) This case ought to be referred to the Board of Architects in the first instance.
- b) Client acted prematurely..

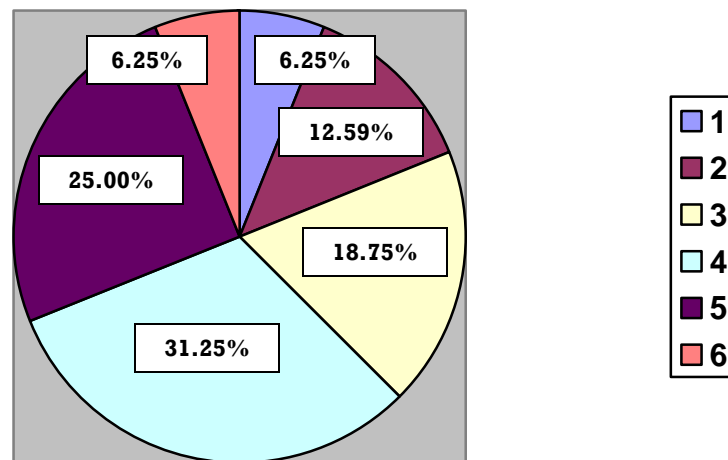
In this case, court dismissed the case with cost to be taxed unless otherwise agreed. The court judgment is correct. According to the Architect Act 1967 (Act 117) and Architect Rules 1996 any dispute arise should be referred to Arbitration or Mediation first. Therefore this case also leads to a conclusion that architect cannot withhold the letter of release and it can be avoided if the dispute referred institution for settlement or to the court.

All three cases shows that Professional Architect tends to with hold letter of release when there was a dispute relating to claim of professional fees. Analysis of each case leads to one answer which is architect cannot withhold letter of release. All three cases have a same solution on how to avoid the withholding of letter of release by the architect, that is referred the matter to the knowledge of Board of Architect Malaysia or to the Court.

4.3 VIEW AND OPINION FROM PROFESSIONALS (PROFESSIONAL ARCHITECT, DEVELOPER AND LAWYERS)

Research issue: 'Architect withhold the letter of release, can it be avoided?' Interviews were made to 3 groups of people. Professional Architect, Developer and Lawyer are the chosen groups. View and opinion from each respondent is recorded and analyzed.

ANALYSES ON RESPONDENTS VIEW AND OPINION REGARDING THE RESEARCH ISSUE



Annotation

- 1- The research issue can be avoided if there is a genuine dispute
- 2- Change the Architect
- 3- Provide provision or conditions in the Memorandum of Agreement of Architect Engagement
- 4- Pay the outstanding payment or fees due to the Architect
- 5- Report / refer to Board of Architect/ Arbitration / Court
- 6- Issue letter of undertakings.

4.3.1 Professional Architect

When the questions “Architect withhold the Letter of Release, Can it be avoided?” being through to the Professional Architect, most of the answer gathered is same. ‘Yes, it can be avoided, subject client pay all the outstanding fees which is in dispute’. Most of them referring back to the Conditions of Engagement between client and Professional Architect, where there is a clause covered for this provision.

According to Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, Clause 19 *“In the event that the Memorandum of Agreement between the Professional Architect and the client is terminated for a reason not due to the fault of either party, the Professional Architect shall, subject to the rights of either party in respect of antecedent breaches of the Memorandum of Agreement between the two parties, charge the balance of fees for architectural consultancy services rendered up to the stage of termination together with all reimbursable charges, and after the full settlement of all fees and charges due from the client, the Professional Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Professional Architect to continue with the project”*.

Most of the Professional Architect in the opinion that Letter of Release is very important to protect their profession from being abused by the client especially on the matter of payment of fees. They are in the opinion that if the dispute is referred to the Board of Architects Malaysia or Arbitration or Mediation, issuance of letter of release can be avoided subject to the decision by the respective bodies.

4.3.2 Developer (Private and Public Agencies)

The same question was given to the developer. Several answers gathered and analyzed. One of the answers from government servant is slightly different compared to others. According to him withholding of letter of release by the architect can be avoided if there is a genuine dispute and it must be refer to Arbitration, Mediation or Court. He also added that withholding of Letter of Release has no implication to the building contract because all the certification and verification comes from the Superintending Officer and not the Professional Architect. According to him just terminate the architect, do not worry about the letter of release and appoint a new architect.

Most of the developers are well verse with the Condition of Engagement of the Professional Architect. They are in the opinion that withholding Letter of Release by the Architect can be avoided if they pay all the outstanding amount of fees or it can be referred to Board of Architect Malaysia.

4.3.3 Lawyers

Different view and opinion given by the lawyers when the same question given. Withholding of Letter of Release can be avoided by inserting a new provision or conditions regarding letter of release in the Memorandum of Agreement for Architect Engagement. However if this matter is not tackle at early stage, client can issue letter of undertaking to pay the outstanding fees once the disputes is brought to arbitration or court. Once letter of undertaking is issued, architect is required to release the letter of

release. They also in the opinion that the matter should brought to the knowledge of Board of Architect Malaysia.

4.3.4 Analysis of View and Opinion.

Interview made with all the respondent also leads to one answer of the research issue. Withholding of letter of release by the architect can be avoided. The most popular answers are as follows:

- a) Pay all the outstanding amount of fees to the architect. Architect cannot withhold the letter of release if payment of fees already made to him.
- b) Refer the matter to Board of Architects Malaysia if there is a genuine dispute. Let the Board decide on the dispute. And the same time letter of release can be issued while waiting the board decision.

4.4 PROVISION UNDER THE ARCHITECT ACT 167 (ACT 117) AND ARCHITECT RULES 1996.

According to Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, Rule 19 *“In the event that the Memorandum of Agreement between the Professional Architect and the client is terminated for a reason not due to the fault of either party, the Professional Architect shall, subject to the rights of either party in*

*respect of antecedent breaches of the Memorandum of Agreement between the two parties, charge the balance of fees for architectural consultancy services rendered up to the stage of termination together with all reimbursable charges, and after the full settlement of all fees and charges due from the client, the Professional Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Professional Architect to continue with the project.*⁶⁶

Architects Act 1967(incorporating amendments up to April 2007), Act 117, Section 4, have mentioned about the functions of the Board of Architect Malaysia.⁶⁷ *“to hear and determine disputes relating to professional conduct or ethics of Professional Architects, Graduate Architects, Interior Designers and Building Draughtsmen and to appoint a committee, arbitrator or arbitrators to hear and determine such disputes.”*

Board of Architect Malaysia has issued General Circular No. 2/2007⁶⁸ on the guidelines on Letter of Release which take effect from 21st May 2007. This General Circular replaces the current General circular No. 1/1998. This circular explained in detail the position of letter of release.

From the above provision and circular it can be analyzed that letter of release play an important role when it involved with ethic between one professional with another professional. It doesn't give right to professional architect to with hold the letter of release especially when there is a dispute. Dispute arise must be referred to arbitration, mediation or court.

⁶⁶ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 72

⁶⁷ Architects Act 1967 (Act 177) (incorporating amendments up to April 2007) , Lembaga Arkitek Malaysia, pg. 13

⁶⁸ Lembaga Arkitek Malaysia, General Circular No. 2/2007

CHAPTER 5

CONCLUSION

Issuance of Certificate of Completion and Compliance in April 2007 has made role of architect in the construction industry more important. Professional Architect is required to be Principal Submitting Person to the local authority. Professional Architect is also required to issue Certificate of Completion and Compliance after getting clearance from the respective local authorities. Therefore termination of architect's engagement especially during construction stage will become a big problem to the construction industries especially to the client.

Termination of architect's engagement may lead to various problems especially when architect withhold the letter of release. No architect will take over from another architect without a letter of release. This letter is a very important document because without it, a builder or an owner of land will have difficulty in employing another architect to replace the one that has left. Besides that, it will affect the building contract especially on supervision of works, instruction to contractor, variation orders, extension of time and others. Building will not complete in time, buyers will suffer especially when it involved with housing development, and developer may face problem of granted extension of time and loss & expenses to the contractor.

Therefore it's very important to the client or potential developer or players in the construction industries in Malaysia to know and understand the duties and liabilities of the Professional Architect. This duties and liabilities of the Professional Architect were discussed in detail in Chapter 2. Discussion on the duties and liabilities of the Professional Architect will lead in understanding how termination of architect's engagement can be done.

Termination of architect's engagement was discussed in Chapter 3. The termination procedure is explained in detail. Breach and remedies due to the termination also discussed in general. Analysis on the termination cases which involved in Malaysia and Singapore was done in this chapter. From the analysis on the termination cases, it can be concluded that most of the cases involved with letter of release. That's why it is very important to understand, the meaning of letter of release, the objective of letter of release and what circumstances that issuance of letter of release is not required.

Chapter 4 is concentrating on the analysis on the case studies, interview from a group of professional people and provisions in the act.

From all the discussion it can be concluded that letter of release is very important especially when it involved with ethic of Professional Architect and claim on professional fees. As has been discuss in detail in Chapter 3, letter of release has only one function, that is, it gives a right to client to appoint another Professional Architect to continue with the project if another Professional Architect which has been engaged is terminated by the client or terminate his employment under the agreement during pre-contract or post contract stage. A Professional Architect can hold letter of release when the developer refuse to pay the professional fess and refuse to refer the dispute to the Arbitration, Mediation or Court. This circumstance may lead to various problems in the construction stage especially when it involves with party which is not in the contract such as buyers,

contractors, supplier and others. According to Architects Rules 1996 (incorporating amendments up to December 2005), Third Schedule [Rule 29] Part One - Conditions of Engagement of a Professional Architects, Clause 19 *“In the event that the Memorandum of Agreement between the Professional Architect and the client is terminated for a reason not due to the fault of either party, the Professional Architect shall, subject to the rights of either party in respect of antecedent breaches of the Memorandum of Agreement between the two parties, charge the balance of fees for architectural consultancy services rendered up to the stage of termination together with all reimbursable charges, and after the full settlement of all fees and charges due from the client, the Professional Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Professional Architect to continue with the project.”*⁶⁹

Letter of Release is also involved with ethic of professional. A Professional Architect is not required to obtain the permission from the Professional Architect previously employed. All that the Professional Architect need to do is to communicate with the Professional Architect previously employed and enquire and ensure that his engagement has been satisfactorily terminated.

However there is also other situation whereby at the discretion of the board the issuance of Letter of Release can be waived by the Board of Architect Malaysia (please referred to Chapter 3).

Client must comply with his obligation under the contract. Failure to pay the professional fees is a breach of contract and may lead to termination of architect's engagement. Letter of release can also be avoided if the client pays accordance with the agreement unless the figure is disputed.

⁶⁹ Architects Rules 1996 (incorporating amendments up to Dec. 2005), Lembaga Akitek Malaysia, pg 72

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