NEGLIGENCE BY ARCHITECTS: POSSIBLE PITS AND AVOIDANCE, A PERSONAL VIEW

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23RD June 2018,

'Professional Negligence is an emerging phenomena. It may sound astonishing, even ridiculous, but it is true. It may happen anytime, anywhere and everywhere, significantly affecting our lives and business relationships. The emergence of various professional and quasi-professional categories populating the corridors of our markets and industries is a defining characteristic of modern day development, The proliferation of information-based and advised-based relationship is yet another significant scenario in our business world.'

Prof. Dato' Dr Hussin Ab. Rahman

Architects provide professional service to the public at large, either in a contractual or non contractual capacity.

Non-contractual capacity includes:

- Rendering advise
- Expert advise
- Expert opinion
- Services
- Findings
- Certifications
- Etc…

Should be for the benefit, information and advantage to those solicit the directly or indirectly.

Contractual Duties

1. Contract between Architect and Client
2. Contract between Client and Contractor
3. Contract between Contractor and Sub-Contractors (NSC and Domestic)
    - Bear in mind express and implied terms
    - Implied terms are presumed by law, custom or conduct

What is professional negligence? What are the obligations of construction professionals in contract and in tort? In what circumstances might the difference between the obligations be important?

What is Professional Negligence?

Negligence is the failure to act as a reasonable person would be expected to act in similar circumstances. The standard of care which an architect must uphold is “reasonable care and skill” which is usually established by reference to the general practice of the building profession. A feature of the building profession is the large number of codes of practice relating to the manner of construction. However a professional is not entitled to blindly follow the provisions of a code of conduct without considering the precise relevance to the project at hand. The knowledge required of an architect will generally be judged by the standard of the ordinary competent architect. However if an architect carries out the job of quantity surveyor he or she will be judged by the standards of a reasonably competent quantity surveyor.

The Statutes we are obliged to follow:

- The architects Act
- The Road, Drainage and Building Act
- The Uniform Building By-Law
- The Contract Act
- The Town and Country Planning Act
- The National Land Code
- The Housing Development Act
- The Strata Title Act

Architects Primary Duties

1. As described in Architects rules and condition of engagement
2. As required in the HDA
3. As required in building contracts
4. As required in UBBL and any other statutes

Common Areas of Negligence

The list of potential negligence claims against any professional, including architects, is wide and varied. Some of the more common pitfalls which architects should pay particular attention to in order to avoid claims include:-

- **Inadequate examination of sites**
  The architect should examine the site properly before or during the building of a structure. Architects should not rely on information supplied by a third party and should always make their own enquiries.

- **Errors in design**
  Whilst the legal standard commonly applied to architects in designing is that of reasonable care**,** there may be circumstances were special steps need to be taken to fulfil that standard. There may even be a duty to ensure that the design is reasonably fit for its intended purpose. When a design is experimental an architect is under a continuing duty to inspect his design. Special enquiries should be made if novel materials are being used.

- **Providing a misleading estimate**
  Before embarking on a building project a client will commonly ask an architect or quantity surveyor for an estimate of cost. Reasonable skill and care must be exercised when providing an estimate.

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- **Errors in preparation of bill of quantities**
  Preparing bills of quantities is usually the function of a quantity surveyor. When the task is undertaken by an architect the same standards will be required as if carried out by a quantity surveyor. The architect should consider consulting a quantity surveyor if he or she is not suitably proficient or experienced in this area or the project is particularly complex.

- **Failing to take reasonable steps in selecting contractors**
  An architect must make reasonable enquiries as to the solvency and capabilities of contractors. When examining quotations he must not accept rates which are unreasonable in the circumstances.

- **Insufficient knowledge of, and non-compliance with legislation, planning and building control requirements and codes of practice**
  An architect is not expected to have a detailed knowledge of the law but rather such knowledge as is expected of the reasonably competent practitioner.
  However architects do need to pay particular attention to certain documents such as certificates of compliance and collateral warranties.
  When an architect is asked to sign an Architect Certificate of Compliance with Building Regulations, it is particularly important that the signing architect can “stand over” the certificate. On signing collateral warranties, architects should again be vigilant and should ensure that such warranties limit their liability.

Inadequate supervision

Employers are entitled to expect architects to administer and supervise work to ensure that the quality of work matches the standard contemplated.

- **Incorrect certification**

In issuing interim and final certificates an architect will generally not be immune from liability in negligence to the employer.

Architect Act 1967 (Act 117) & Rules.

- Your position and status upon your appointment
- Part IV Code of Conduct and conditions of engagement
- Part V Registration
- Second Schedule [Rule 28] Part One: Code of Conduct for Architects
- Third Schedule [Rule 29] Part One: Conditions of Engagement of an Architect
- Fourth Schedule Part One: Memorandum of Agreement and Architects (Scale of minimum fees)

Uniform Building By-Law 1983 [Act 133] & Street, Drainage and Building Act 1974 (Act 133)

SDB

- Part V - Building
- Part VII – By-Laws

UBBL

- Almost everything in there!

Housing Development Act 1966 (Act 118).

- Sales and Purchase agreement
  - Position and area of the Lot
  - Schedule of Payment
  - Materials and workmanship to conform to description
  - Restriction against variation
  - Vendor to obtain CCC
  - First Schedule (Copy of Approved Layout Plan Attached)
  - Second Schedule (Copy of Approved Building Plan Attached)
  - Third Schedule: Schedule of Payment
  - Building Description

Building Contracts and Contract Act

- Part III, Of Contracts, Voidable Contracts and Void Agreements
  - Undue influence
  - Fraud
  - Misrepresentation
  - Time and p
  - Place for Performance
- Part VII, Of the Consequences of Breach of Contract
  - Compensation

Building Contracts

- Certificates
- Tender documentations
- Inspections

Examples of Cases


Thank You!

Do architects owe a duty of care in tort to subsequent occupiers for latent defects in a building, built to their design, even though they have no contract with the occupier?

More recently, in Bellefield Computer Services Ltd v E Turner & Sons Ltd (judgment 9.11.01), the Technical and Construction Court UK considered architects' liability for damage caused by a fire at a commercial dairy. The defendant contractor had, contrary to the usual practice, itself engaged architect HD Watkins and Associates to provide partial architectural services. After the fire it was discovered that the compartment walls and adjacent fire lining of the first floor had not been constructed in accordance with the specification. Importantly, the fire lining had not been taken up to the underside of the metal roof sheets, but only to the roof 's polystyrene insulation.

The judge, adopting the decision in Baxall Securities, found that the architect did owe a duty of care to a subsequent owner for damage caused by these defects, which the owner would not have been able to discover.

In this case, however, the judge rejected the contractor's claim that the scope of the architect's duty extended to designing a two-hour fire rated compartment wall. He said the architect's position was an unusual one in that it was subcontracted to provide partial architectural services to the contractor, who in turn had agreed to carry out some design work. Thus the architect had not produced a detailed design for the construction of the fire-resistance detailing. As it had not agreed to provide a complete design for the contractor, it could not owe such a duty to the owner. The contractor's claim failed.

So, in the light of these authorities, the answer to the opening question is now 'maybe‘ but, happily for the architects, 'not in this case'.

Architects' duties to inspect the works

Ian McGlinn v Waltham Contractors Limited and others [2007] EWHC 149 (TCC)
The employer was a multi-millionaire who engaged a contractor and professional team to design and construct a house in Jersey. Preferring to keep things "informal and fluid", no formal contract was ever entered into by the employer with either the contractor or the architect. Delays occurred in the construction of the house and the construction cost soared over the original budget. The contractor walked off site and subsequently went into administration. The employer chose to demolish the property in view of the alleged defects and then brought proceedings against various parties, including the architect.

One of the breaches of contract claimed against the architect related to its failure to inspect the works. Under the "Architect's Appointment" document, the architect's obligation was to visit the site as appropriate to inspect generally the progress and quality of the work.

In a decision welcomed by architects, the Court of Appeal has overturned the decision in Hunt v Optima (Cambridge) Ltd. It has rejected claims for negligence in respect of an architect's certificates, since the purchasers were unable to show reliance on the certificates, given they were issued after purchase.

The first instance case

A group of purchasers claimed against the developer of residential flats for various defects in the properties. The claimants also joined the architect to the proceedings relating to his certificates stating that the works had been properly constructed and were in accordance with the relevant Building Regulations. The certificates were issued to the developer, who also paid for them, but were relied on by future purchasers. The purchasers had no direct claim for breach of contract by the architect and therefore needed to establish claims in tort between them and the architect.

First it was said that the certificates contained enforceable warranties. Second the certificates were said to amount to negligent misstatements which gave the claimants a cause of action in tort. Third it was said that the architect was negligent in failing to carry out the professional services referred to in the certificates with reasonable skill and care for the purpose of the subsequent production of the certificates.

The judge found that there were clear breaches of duty by the architect in not detecting obvious defects in the works, by failing to re-inspect identified defects and by relying on others to confirm that defective works had been remedied. He found against the architect and awarded the purchasers damages.

The appeal

The Court of Appeal unanimously allowed the architect's appeal on all grounds.
They found that because the certificate was not described as a warranty it could not be construed as such or relied on as if it were a contractual guarantee.
The appeal judges also held that in order to recover for negligent misstatement a claimant must show that they relied on the statement in question. The claimants were aware that they would have a certificate for the property, but committed to purchase prior to receiving the certificate. The statements therefore did not exist at the time of purchase. It was found that, at best, the claimants could have relied on an understanding that they would receive the certificate after completion or that a certificate was already in place. However, this was not enough to establish reliance.
The court concluded that a draft certificate which was as yet unsigned and unissued, and therefore capable of being amended or, possibly, not issued at all, would not incur liability for negligent misstatement. One of the judges, Christopher Clarke LJ, said "*reliance cannot be retrospective. If the representation is the signed certificate it cannot be relied on before it comes into existence. A cause cannot postdate its consequences*".
As to negligence by the architect in his work prior to issue of the certificates, the court would not allow a further duty of care to arise alongside the issue of a certificate. If there was a duty to take care, it was to take care in relation to the statements in the certificate and any failings in those were dealt with by a claim for negligent misstatement. The court did not consider that a separate duty added anything and thus no duty of care was found to have arisen.

Conclusion

The Court of Appeal judgment is welcome news for architects and other professionals since it confirms that for a negligent misstatement claim to succeed, the claimant must be able to prove their reliance on the statement in question. In addition, the court made it clear that any professional negligence claim arising out of negligent certificates will fail unless based on misstatements in the certificate itself.

Even seemingly small negligent errors or omissions by an architect may result in vast awards of damages if buildings must be reworked and rectified. Accordingly it is vital that architects take care and take particular heed of some of the common pitfalls set out above.

Cases of interest.

Pratt -v- George J. Hall [1987] 37 BLR 145

Architect held liable for failure of a contractor – who was a total disaster – that he had recommended as being "very reliable". In this case the Claimant was not only able to claim her losses associated with the defective works but also the costs of litigation against the contractor prior to their insolvency.

Damages

Where a claimant succeeds in a negligence suit, they will usually be awarded damages against the architect. The amount of damages which is recoverable for negligence is determined by the loss resulting from the negligence. The losses which may result from breach of duty by architects and, to a much lesser extent, quantity surveyors cover a wide variety. For example, damages may be awarded to cover the cost of rectification of the building, wasted expenditure costs, excess expenditure costs, damages to cover any liability to third parties or personal injury claims which arise as a result of the architect's negligence and damages for inconvenience, to mention but a few.


Thank You!