PROFESSIONAL LIABILITIES OF ARCHITECTS

ONG YU SHIN

INTRODUCTION

The FIRST part of this session will look at the present position in Malaysia on the Laws of negligence against professionals and situational case examples.

The SECOND part of this session will cover something totally different, but equally practical for you to take home, which are recent case examples on professional fee claims against your clients.

ARCOVER

Professional Indemnity for Architects

FAQ Version 1-110322 © 2022

ARcover is a Professional Indemnity policy customised for architects in Malaysia

“IS PROFESSIONAL INDEMINITY INSURANCE (PII) IMPORTANT FOR ARCHITECTS?"

Yes, PII is important for architects. It protects you and your firm against any allegations or claims of negligence arising from professional work, e.g., advice, service, design, supervision etc. These allegations and claims can occur even when you may not be at fault

"WHAT IS FULL RETROACTIVE COVER?"

Full retroactive cover means you have protection for ALL work done by your/your firm from the date of incorporation. This is important as a claim can arise years after completion of a project/work.

"WHAT IS A CLAIMS MADE POLICY?"

A claims made policy simply means you must notify a claim or circumstance as soon as you are aware of it and within the policy period.

It is important for architects to have a continuous PII cover in place NOT just at the time of performing the project/work as a claim can arise years after completion.

"WHY IS “CRIMINAL PROSECUTION” COVER IMPORTANT?"

In some circumstances, criminal charges may arise against the architect. This cover pays for the legal fees to defend the prosecution.

This is an added feature of ARcover.

"WHO IS PROTECTED UNDER MY ARCOVER POLICY?"

This policy protects

➢ The professionals in your firm

➢ The firm itself (including past, present, or future) employees, partners, and directors

➢ You/your firm against any claims arising from acts by consultants, sub-consultants, contractors, sub-contractors appointed by your firm

Every person on Earth could face a lawsuit for negligence under the law of Tort.

More so a professional, such as yourselves.

Tort comes from the old French word torquere, which means twisted or crooked. Tort law concerns a LIABILITY which occurs by breach of the duty of care OWED by you to another.

NEGLIGENCE

In Malaysia, for a person to sue you and win in a negligence claim, the Law is presently captured in ***Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd & Another*** *[2018] 6 CLJ 683 (or known as the '****Batu Kemas****' case).*

Broadly speaking, the way I understand it, for one to satisfy a negligence claim, or considerations that you must ask yourselves when facing such claim, are:-

- *Damage*
- *Duty of care*
- *Breach of duty*
- *Causation of damage*

DAMAGE

1. There must be DAMAGE.

Cases today show that when a subject claim is still being arbitrated between Contractor and Developer, no action can lie against the Architect.

YES?

YES?

YES?

DUTY OF CARE

2. You must have owed a DUTY OF CARE.

Owing, is to the person suing. Here lies the more complex question in Malaysia of ‘proximity’ in relationship and public policy consideration to an expectation of ‘proximity’.

YES?

YES?

YES?

BREACH OF DUTY

3. You must have BREACHED THE DUTY.

This may be something which you have done (for example, issuing a CNC when the Works were completed) or you have not done (for example, failing to check on the building material used for construction when signing of the G Forms). The breach must be one that no reasonable person professing your skill would have done/not done.

YES?

YES?

YES?

CAUSATION OF DAMAGE

4. The breach must have CAUSED DAMAGE

If your act did not cause a damage, even if damage is proven and duty of care is proven, then there cannot be a claim in negligence. There must be a causal link or a bridge, even between a breach and a damage.

YES?

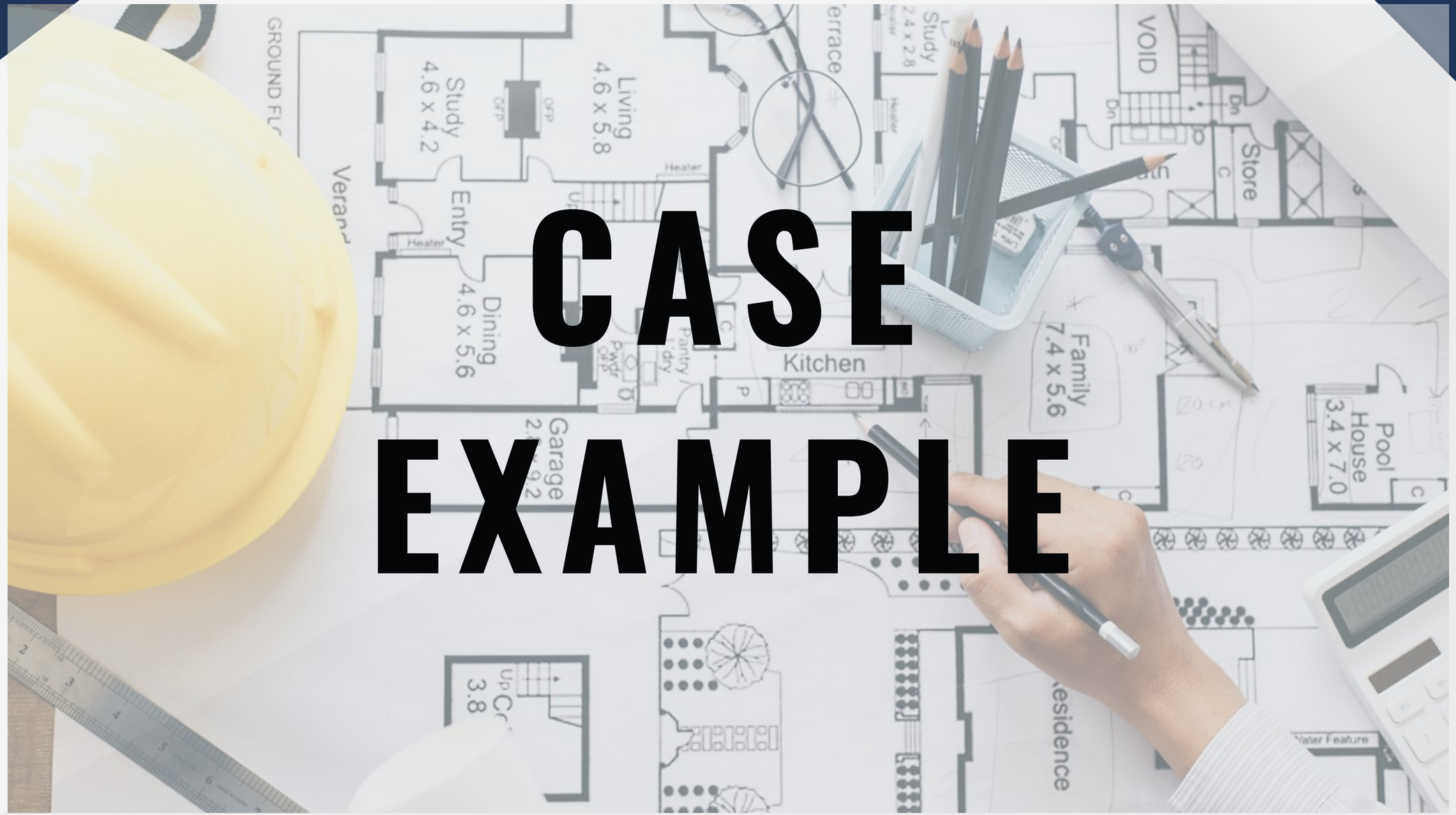
YES?

YES?

Go back to the start.

There must a causal link between your ‘breach’ and the effect of ‘damage’.

No Actual Loss — No Suit



CASE EXAMPLE

L3 ARCHITECTS SDN BHD v. PCP CONSTRUCTION SDN BHD [2019] 1 LNS 1321 (In the High Court)

The Court of Appeal in Appeal No. W-04(C)(W)-347-06/2019 upheld the High Court's decision.

PAM 1998 Contract between Developer and Main Con. They got into dispute in regard to certain interim certificates. Such dispute was subject to CIPAA proceedings and the ensuing Arbitration proceedings between the Developer & Main Con.

Amongst the grounds of dispute was a Set-Off Notice issued by the Architect's under the PAM COC provisions, which favoured the Developer.

The Main Con sued the Architect for negligently issuing the Set-Off Notice.

FACTS

L3 ARCHITECTS SDN BHD v. PCP CONSTRUCTION SDN BHD [2019] 1 LNS 1321 (In the High Court)

The Court of Appeal in Appeal No. W-04(C)(W)-347-06/2019 upheld the High Court's decision.

1. The PAM COC establishes a mechanism for dispute resolution between the Developer and Main Con.

2. Such dispute (the said Set-Off Notice's validity) has yet to be decided at Arbitration.

Hence, the Main Con had suffered no actual economic loss. Thus, the Suit failed.

DECISION

DUTY OF CARE & BREACH OF DUTY OF CARE

Usually, both these elements are considered together, along a 3-level test. The Batu Kemas case did not depart from the earlier Federal Court position in a case very known to all of you, the **LOK KOK BENG & ORS v. LOH CHIAK EONG [2015] 7 CLJ 1008** (of known as the 'Loh & Loh Architect' case).

DUTY OF CARE & BREACH OF DUTY OF CARE

THE TEST:

1. There was reasonable foreseeability in your actions to the fate of the claimant.

2. There existed a relationship of ‘proximity’ between you and the claimant.

3. It is fair, just, and reasonable for the Law to assume such proximity and impose such duty upon you.

‘LOH & LOH ARCHITECT’ CASE

FACTS:

Purchasers sued a Developer and Architect for delay in VP. The High Court apportioned 50% liability of the delay on the Architect, for their action in the amended Original Layout Plan and delay in obtaining the CFO.

DECISION:

Architects do not owe a duty of care to Purchasers thus not liable to Purchasers.

NOT ALL ACTIONS ARE BLANKETLY IMMUNE FROM LEGAL LIABILITY.

THE LOH & LOH CASE WAS FACTUALLY SITUATIONAL, AND THIS IS SEEN IN THE COURT'S OBSERVATION IN PARAGRAPH 40 & 41 OF THE JUDGMENT:

[40] We do not agree with the above finding of the Court of Appeal. We are of the view that the requirement of reasonable foreseeability has not been satisfied. As the architects for the project, the layout plan was prepared and submitted in accordance with the instructions received by the respondents from the developer. The respondents were mainly responsible for the design and safety of the industrial buildings and compliance of the relevant laws. In the **circumstances** it would not be reasonable to impose a duty on the respondents **to go into a detailed inquiry of the developer's obligations; for these are matters which are exclusively within the developer's scope of duty.** This argument is further strengthened where section 2.01 of the SPAs provides that reasonable amendments to the building plan may from time to time be made by the developer or the respondents with the approval of the appropriate authorities. In this case, the issue of consent of the neighbouring landowners which triggered the delay, was well within the scope of the developer's duty.

NOT ALL ACTIONS ARE BLANKETLY IMMUNE FROM LEGAL LIABILITY.

THE LOH & LOH CASE WAS FACTUALLY SITUATIONAL, AND THIS IS SEEN IN THE COURT'S OBSERVATION IN PARAGRAPH 40 & 41 OF THE JUDGMENT:

[41] Thus applying the standards of the reasonable man, it is our view that the respondents could not have foreseen any liability for consequential financial loss to the appellants arising from their action in submitting the original layout plan and amending the same leading to the undue delay in completing the building and the issuance of the CFO. **For this reason alone**, the appellants' claim against the respondents for pure economic loss on the grounds of late delivery of vacant possession of their building units must fail.

NOT ALL ACTIONS ARE BLANKETLY IMMUNE FROM LEGAL LIABILITY.

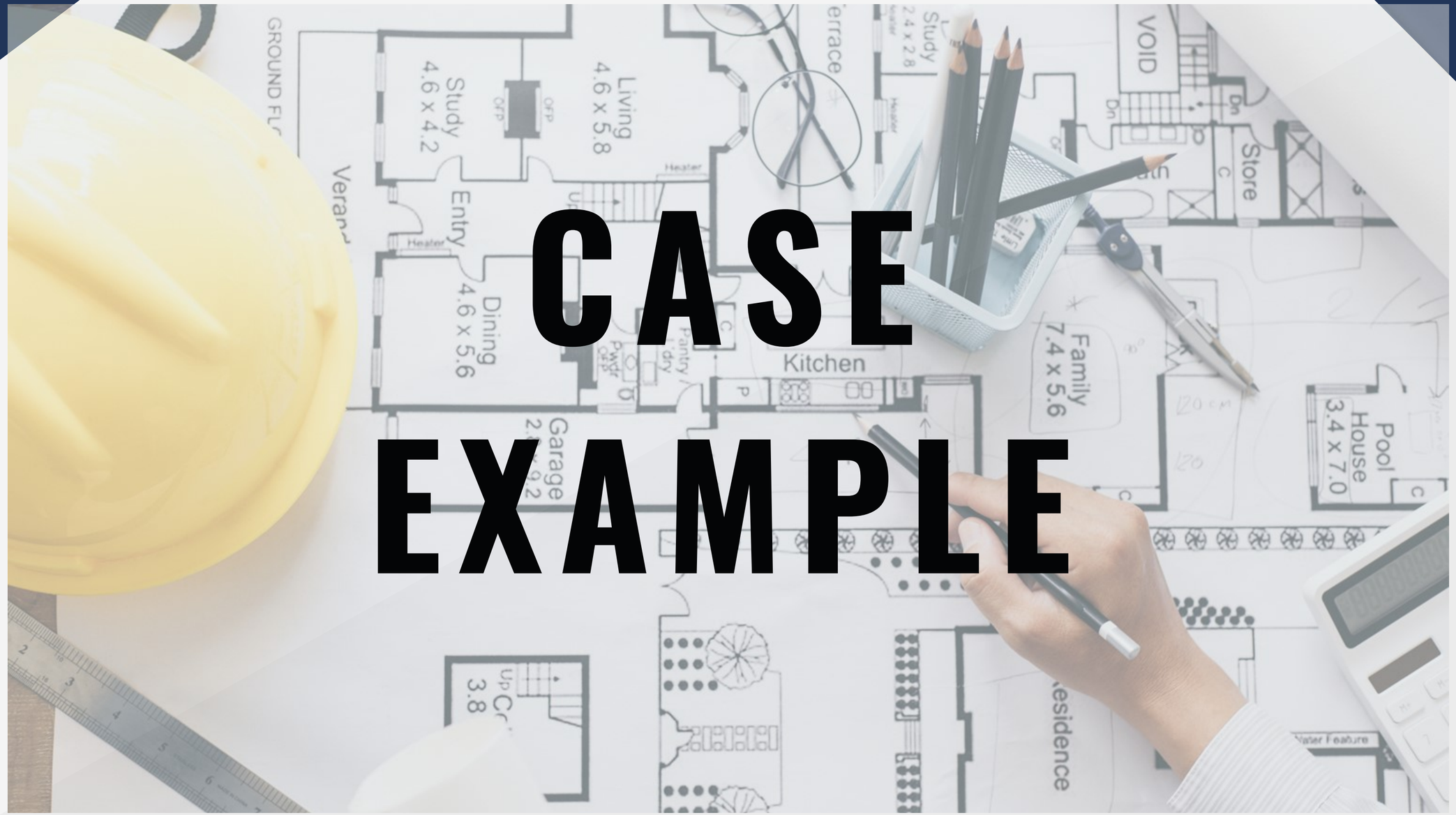
ALSO SEE PARAGRAPH 82 OF THE JUDGMENT WHICH SAYS:-

[82] In other words, the imposition of policy considerations require some measure of public policy to be infused in the establishment of a duty of care. In the present appeal, we agree with the Court of Appeal that the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties and their relative bargaining positions. There can be no action against the architects if the remedy asked for is specifically provided for in the contract. Otherwise, it has the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. **Nevertheless, we must reiterate that a claim for negligence must be brought within the scope of duty of care. The recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases.** Some measure of public policy must be considered though it should not be the sole determinant of liability.

In other words, whilst the law says that foreseeability alone cannot give rise to a duty of care to a 3rd party, if your action is directly proximate to the injury, it is my view that Loh & Loh Architect's case may be distinguished.

FOR EXAMPLE:-

If one were to sign of a G Form certifying that a Wall was made of Concrete per the Approved Building Plan. The Wall was however made of wood, for example. Can the Purchaser sue the Architect, in spite of Loh & Loh? I think yes.



CASE EXAMPLE

DATUK SU GEOK YIAM & ANOR v. GLOBEMAX CORPORATION SDN BHD & ORS [2020] MLJU 1599

The Court observed negligence at Paragraph 22 that ‘in law where the negligence is a failure by an architect/engineer to supervise construction works, the damage occurs (and cause of action arises) at the time when the works concerned were improperly built by the contractor’. This case was however dismissed due to a separate issue of the time-period under the Limitation Act.

MRCB BUILDERS SDN BHD v. LIANG UNITED ENGINEERING STUDIO [2023] 3 CLJ 258

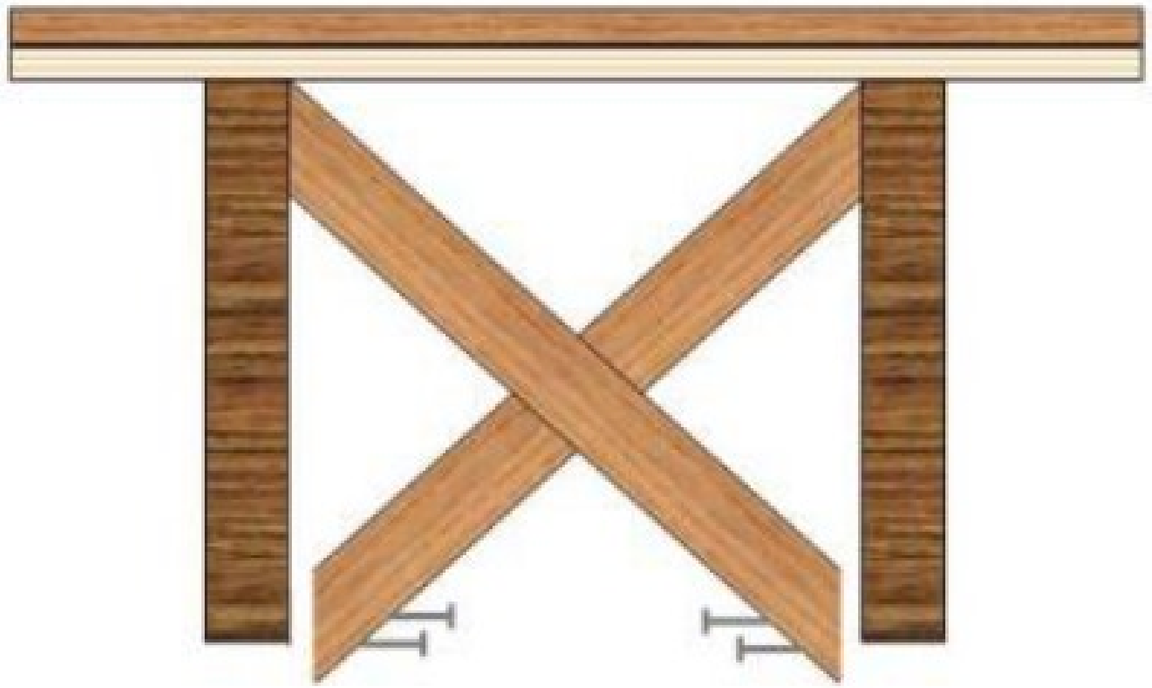
FACTS:

Main Con sued the Sub-Con's Engineering Consultant for negligence in design.

DECISION:

1. A Sub-Con's Consultant has no legal proximity with the Main Con. Therefore, no duty of care is owed
2. It is not reasonably foreseeable that the Main Con will suffer damages due to the Consultant's actions as the said Consultant did not voluntarily assume responsibility towards the Main Con.
3. If any, the Main Con relies on the Sub-Con and not the Sub-Con's designer; i.e sue the wrong person.

CAUSATION OF DAMAGE



KOPERASI PERMODALAN FELDA MALAYSIA BHD v. ICON CITY DEVELOPMENT SDN BHD & ANOR [2023] 2 MLJ 338

HDA Sales & Purchase Agreement. Purchasers sued Developer and Architect. Particularly the Architect for breach of duties in granting Extensions of Time to the Developer which subsequently resulted in late deliver of VP. The Purchasers claimed a conspiracy between Developer and Architect

FACTS

KOPERASI PERMODALAN FELDA MALAYSIA BHD v. ICON CITY DEVELOPMENT SDN BHD & ANOR [2023] 2 MLJ 338

1. Developer liable for delay. However, Architect not liable. The letter issued by the Architect does not amount to an EOT

2. In any event, by merely granting the extension of time to the Developer, the Architect was merely carrying out his contractual duty. The performance of the contractual duty as the project architect cannot amount to an overt act in furtherance of a conspiracy.

DECISION

The word *proximity* and *foreseeability* are <u>not found</u> anywhere in the Judgment of the Court of Appeal. Whilst the claim against the Architect was thrown out, the Court did not make a finding on the Architect's defence that they do not owe a duty of care to Purchasers.

CAUTION!

Could it be said that in HDA Contracts, as the Architect's supervisory and statutory roles are stated in the SPA, an Architect may be found to have reasonable proximity with the purchasers?

I think yes.

CLAIM OF PROFESSIONAL FEES

2nd Part

CLAIM OF PROFESSIONAL FEES

RULE 29, ARCHITECTS RULES 1 996

(1) Except with the prior approval of the Board given for special reasons, an Architect shall only enter into an agreement for architectural consultancy services according to—

(a) the Architects (Scale of Minimum Fees) Rules 2010;

(b) the Conditions of Engagement in Part One of the Third Schedule; and

(c) the Memorandum of Agreement in:
(i) Form A, Part One of the Fourth Schedule; or
(ii) Form B, Part One of the Fourth Schedule.

CLAIM OF PROFESSIONAL FEES

SECTION 7A ARCHITECTS ACT 1 967

(1) An Architect shall not, unless registered as a sole proprietorship, a partnership or a body corporate and has been issued with a certificate of registration-

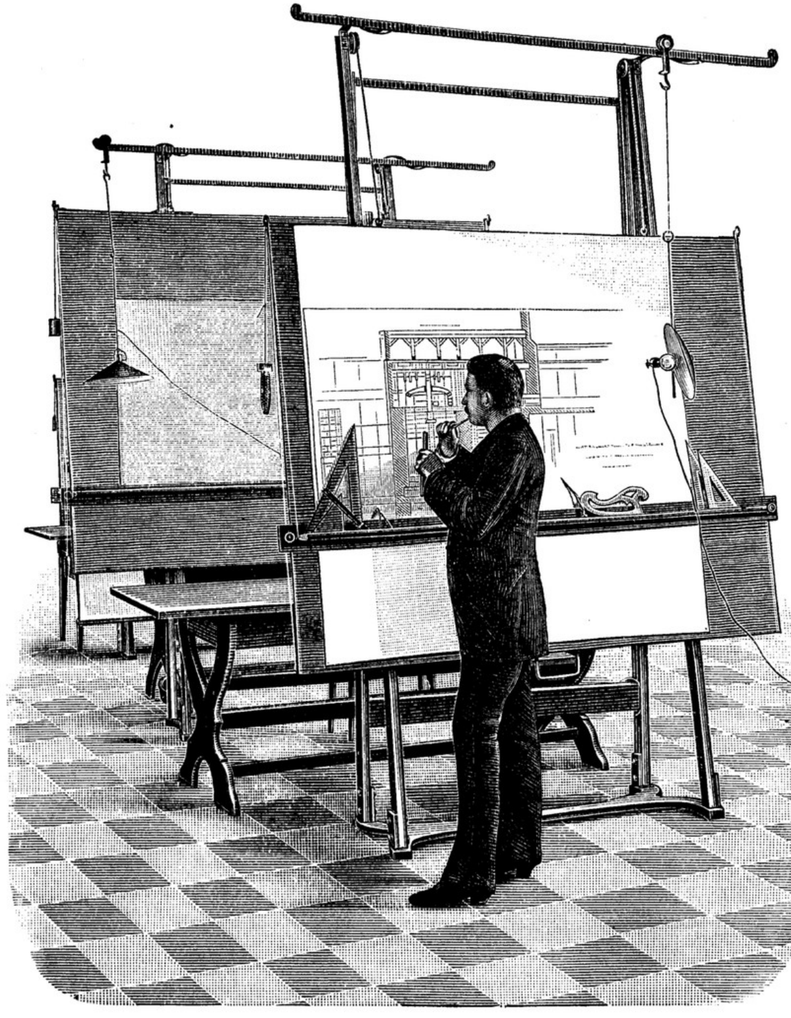
(a) be entitled to set up an architectural consultancy practice to render architectural consultancy services; and

(b) recover in any court any fee, charge, remuneration or other form of consideration for architectural consultancy services rendered as an architectural consultancy practice.

SEE ALSO:

- LEMBAGA ARKITEK MALAYSIA GENERAL SCIRCULAR NO. 1/2017 AND GENERAL CIRCULAR NO. 5/2017 TO REMIND ALL ARCHITECTS THAT IT IS MANDATORY TO CHARGE THE MINIMUM SCALE FEES BASED ON THE SAID RULE 29

- PERTUBUHAN ARKITEK MALAYSIA PRACTICE NOTE 1/2021



ACTS & EFFECTS

ACTS

- Contracts not following Standard Form of Engagement
- Discount giving

EFFECTS

- Fees may be challenged and unpaid if Rule 29 not followed
- Illegal contracts may be raised against Contracts not in accordance with Rule 29

POSITION OF LAW:

Generally lean towards recognising a contractual bargain.

Even if there was a breach of the PAM Rules.

MATRIX CONCEPTS (CENTRAL) SDN BHD v. AR LIM YOKE TIANG [201 8] 1 LNS 1 628

[128] Professional bodies would have the interest of the profession to protect and rightly so. However the Architects Act 1967 and the Rules made thereunder are not binding on the client though they may seek protection under them. There is thus no sanction for the client to agree on a lower scale of fees but should the Architect concerned flout the Architects (Scale of Minimum Fees) Rules 2010 that may be a misconduct that the Board is entitled to require the Architect to show cause as to why disciplinary action should not be taken against him.

MATRIX CONCEPTS (CENTRAL) SDN BHD v. AR LIM YOKE TIANG [201 8] 1 LNS 1 628

[129] To say that any contract on professional fees of an Architect which is lower than the prescribed fees under the Architects (Scale of Minimum Fees) Rules 2010 would be null and void and unenforceable would be to throw the baby out together with the bath water! Whether or not a contract not in accordance with any professional rules is null and void under section 24 of the Contracts Act 1950 would depend on the words employed in the relevant rules.

MAPLE AMALGAMATED SDN BHD & ANOR v. BANK PERTANIAN MALAYSIA BERHAD[2021] 8 CLJ 409

[82] Suffice to say, the law in this country has always recognised and more so now with the growing advent of commercial transactions, that the courts should move slowly to strike down agreements for illegality. This approach must necessarily be factored into the initial assessment as to whether the agreement in question in the first place contravenes the statute in question. And, even if the agreement is illegal, the courts must be slow to conclude that the agreement is automatically void. In avoiding this result, Parliament may or may not intervene.

HARDIE DEVELOPMENT SDN BHD. v. DAVID SHEN I-TAN [2020] MLJU 1103

Developer applied to set aside an Arbitration Award granted to the Architect on grounds that the Architect charged a lower professional fee than the minimum fees, thus it is an illegal contract which should be void.

FACTS

HARDIE DEVELOPMENT SDN BHD. v. DAVID SHEN I-TAN [2020] MLJU 1103

Court found the Developer to be committing ‘wicked injustice’.

Charging of professional fees by Architect at a rate lesser or lower than the minimum fees as prescribed by and in breach of the Architects (Scale of Minimum Fees) Rules 1986 does NOT render the architect’s service contract or contract of engagement with his/her client void or unenforceable so as to deprive the architect of any right to recover his/her fees or remuneration.

DECISION

HARDIE DEVELOPMENT SDN BHD. v. DAVID SHEN I-TAN [2020] MLJU 1103

Court however observed and commented that :

The Architect can be subject to disciplinary action and criminal prosecution for an offence under the Architect Act, 1967.

Also, Section 15A (2) of the Architect Act, 1967 gives the Disciplinary Committee set up under section 15A (1) the power to reprimand, impose a fine not exceeding one hundred thousand ringgit upon an architect, suspend an architect for a period not exceeding three years, or cancel the registration of an architect.

CAUTION!!!!

ATSA ARCHITECTS SDN BHD v. TEGUH MAJURIA SDN BHD AND ANOTHER CASE [2022] MLJU 3329

Plaintiff lost a CIPAA Adjudication and challeged the said Award by saying that the contract was illegal because the professional fee charged was lower than the minimum requirement. The bigger problem here was that the “architect” was NOT a registered Architect.

FACTS

ATSA ARCHITECTS SDN BHD v. TEGUH MAJURIA SDN BHD AND ANOTHER CASE [2022] MLJU 3329

1. The court followed the decision of Hardie that charging a professional fee lower than the minimum requirement does not render the contract void.

2. The issue of illegal contracts was not to be decided by the Court was this was a challenge against the Adjudication decision only. CIPAA Award was maintained.

DECISION

ATSA ARCHITECTS SDN BHD v. TEGUH MAJURIA SDN BHD AND ANOTHER CASE [2022] MLJU 3329

The Law does not strike down an Architect's engagement for flouting the discount rule.

Traditionally, such an agreement may be challenged as illegal and thus fees cannot be recovered. Now due to the MAPLE AMALGAMATED case, the commercial bargain or objective of parties may still prevail.

In abundance of caution, NOT to engage in bespoke or self-drawn contracts outside the Architect Rules 1 996.

CAUTION!!!!

WESTSTAR CONSTRUCTION SDN BHD v. PRISMA ATHIRA ARCHITECT [2017] MLJU 978

Architect engaged his M&E consultant and claimed the M&E fees from the Developer under the Architect's Invoice.

Can an Architect do so?

FACTS

WESTSTAR CONSTRUCTION SDN BHD v. PRISMA ATHIRA ARCHITECT [2017] MLJU 978

1. Yes he can. The Architect is not taking over the work of the Professional Engineers but merely invoicing on the engineer's behalf the share of his fees.

2. There is no conflict with the Registration of Engineers Act, for an Architectural firm to invoice the Developer on behalf of the Engineering company. The Rule 3, Third Schedule of the Architect Rules 1996 Conditions of Engagement of an Architect itself provides:

'An Architect may be required to engage his own consultants and if the engagement is approved by the client, the fees which would have been payable to such consultants if they were separately engaged shall be paid through the Architect.'

DECISION

THE CHAMBERS OF YU SHIN ONG

THANK YOU

Q

A

ONG YU SHIN

T: 04-226 6203 legal@yushinong.com