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### An Architect for All Seasons? The Dual Role and Duties of Architects in Building Contracts

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The functions that an Architect must perform in a major building project are many and varied, but to what extent is an Architect an ‘agent’ of an Owner, and to what extent must they act fairly and impartially when dealing with the interests of Builder and Owner? And to what extent can the Architect cop blame when it all ‘falls apart’ and construction goes pear shaped?

The duties of an Architect and the role they must perform for an Owner, are usually set out in the agreement by which the Architect is engaged. For instance, a typical RAIA Client and Architect Agreement. Such an Agreement sets out the phases of the

Architect’s functions, such as sketch design, detail design, documentation and contract administration. The last phase includes the 3 sub categories of tendering, administration and post-construction. Terms in the building contract will determine the role that the Architect must perform, however the Architect is not a party to the building contract itself.

An example of a building contract defining the role of the Architect is clause 23 of an AS2124 contract, that says the Principal must ensure that the “Superintendent” (often an Architect):

- Acts honestly and fairly;
- Acts within the prescribed time;
- Makes a reasonable measure or value of work, quantities or time.

However, there is no contractual relationship between the Architect / Superintendent and the Builder or Contractor, and the duty in the AS2124 is expressed as an obligation of the Owner to the Builder. Because of the lack of a contractual relationship between Architect and Builder, it is difficult for a Builder to bring a legal claim against the Architect directly, and relying on a claim in negligence is difficult.

## A Dual Role

A 'preventer of disputes' is one description that has been applied to Architects in the courts, and this relates to the certification function of contract administration, where the Architect is expected to act in an independent and impartial manner. Indeed some standard building contracts make it a breach by an Owner to unduly influence an Architect in their certification function. In exercising the certification function, the Architect will not be acting merely as the Owner's agent, and interestingly, some cases even go so far as to suggest the Architect may owe a Builder a duty of care to act reasonably and impartially in administering a contract. Alternatively, the Owner may be in breach of the contract for failing to ensure the Architect acts honestly or fairly, or the Owner could be liable to the Builder for the negligence of the Architect.

At the same time, the Architect must act as an agent of the Owner or Proprietor, and is under a contractual duty to the Owner. This relates to the additional functions outside of certification, for example, where defective works have been constructed and the Architect must issue directions to the Builder to correct the defective work, or provide options to the Owner about what steps should be taken under the contract.

## The Limits of Impartiality

The reality is that, even when acting as a certifier of values for work, the Architect is engaged by only one party to the building contract. Several Australian states have legislated for adjudication in building disputes, that allows for decision making by an independent adjudicator after payment claims and payment certificates have been exchanged. This seems to recognise that the parties should not have to place too much stock in the supposed neutrality of an Architect or Superintendent. Although the certification function is performed by a supposed 'middle man' Architect, the law recognises that it is implicit that this is performed on behalf of the Owner.

The Architect acting as certifier still owes a contractual duty of care to the Owner who engaged him or her, and a duty of care not to act negligently. What standard does this imply? Like any professional acting with a special skill for a 'lay person' client, the Architect must act as expected of an ordinary skilled person that has that specific skill of an Architect administering a building contract. Whether this has been breached will depend on the facts of any given case. Yet it will remain much easier for an Owner to bring a legal claim against an Architect than the Builder.



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## The Extent of Duties

A duty to an Owner can be breached where an Architect provides an erroneous estimate of the cost of a building to be constructed. Where the Architect has designed the building, he or she must take reasonable care to ensure that the estimate of the cost is reasonably accurate. This will involve the Architect having to make allowance for any increases in cost over time, given the time it will take for a building to be constructed.

Should a negligent estimate be provided, it may be an Owner will become entitled to damages to be put back in the position they would have been had this not occurred, and in extreme circumstances the Architect may not be entitled to his or her fees.

When *supervising* building works, how far can an Architect be placed in the firing line for defective or incorrect works by a Builder? Generally, the Architect is not responsible for the quality of work; it is the Builder who is on site continuously whereas the Architect is not. However, note the wording of clause 3.5 of the RAIA Client and Architect Agreement, that provides as follows in regard to contract administration:

*“[The Architect shall] undertake periodic site inspections, check work in progress regarding design quality control, materials selection and performance as described in the contract documents.”*



When providing tender reports to Owners, and evaluating tenders, the Architect should consider any time lag between acceptance of a tender and the actual start of construction. In some circumstances, this may mean asking the Builder to provide an updated tender, rather than run the risk that a Builder has under quoted and may be cutting corners.

There is case law examining the duty of Architects to be present, or to inspect, during important stages of the works. In one case, liability attached to an Architect who did not inspect the correct placing of concrete reinforcement, before the concrete for the apron of a swimming pool was poured. That case is *Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 588*.

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In *Florida Hotels*, the Court said it was not sufficient to merely rely on the word of the workmen whose work it was the Architect's duty to supervise. There was a duty of the Architect to remain informed of the progress of the work, and that may include putting in place reasonable arrangements to be kept informed. For example, giving clear instructions to a foreman that specific work must not be covered up until an Architect had been able to inspect it.

Generally, whether or not an Architect has breached a duty of care may be answered by asking:

*“Did the Architect act as would an ordinary skilled person exercising and professing to have that special skill (ie as an Architect?)”*

The fact an Architect has followed the general practice of the profession may not be enough to answer a charge of negligence in every case, although it may assist to exculpate the Architect.

If you are in any doubt at all about your role as an Architect in a building contract, or are concerned about possible exposure in construction works that are encountering difficulties, you should seek legal advice at the earliest opportunity. It is always easiest to use prevention rather than having an ambulance at the bottom of the cliff.

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