

# Can You Trust the Third Umpire? The Dual Roles of Architects in Contract Administration

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The profession of an Architect is an honourable one and key to both the design component and contract administration across both commercial and high end domestic construction.

To that end we find the Architect governed by duties to both the client who retains him/her, for example the Principal or Developer, AND also under an obligation to act fairly and impartially in carrying out assessment of a Builder's claims regarding payment and time.

It is a dual role – while not forgetting the 'fiduciary' or agency duty the Architect owes the Owner/Principal, when looking at the project as a whole the Architect is wearing a Boston Rex Sox cap on some

occasions, and a Yankees cap on others.

Throughout 2012 we have been involved in building disputation involving high end or luxury residential construction, comprising building contracts similar to the ABIC Simple Works Contract. This building agreement involves the administration of the building contract by an Architect appointed by the Owner.

Some of the complaints have centred around faulty design work by the architect in regard to certain components of the works, for example air conditioning or acoustics, but have also had an element of disputation over contract administration.

You would think that there is a danger for the Builder/Contractor that the Architect will not truly act *'fairly and impartially'* as an assessor, valuer or certifier of payment and extension of time claims. In fact, this is not always the problem. There have been occasions when the Architect has had prior dealings with the Builder, and 'lo and behold' the particular Builder is recommended for the contract as part of the tender process that the Architect is also administering.

Typically, an architectural retainer for these high end projects will encompass various phases: the design phase, the planning and building permit process, the tender process, then contract administration through to completion and the 'final certificate' as to payment owing.

The Architect of course is not the building surveyor and there will be an "RBS", either a Council or private building surveyor responsible for issuing the building permit, the necessary inspections and the final approval by way of a certificate of inspection or occupancy certificate. This is only an approval as to general compliance with the building code and fitness for occupation, it is the Architect that must administer lists of contract building defects and issue directions to ensure rectification.

In the ABIC Simple Works contract, clause A6 sets out the general scope of the Architect's role, and illustrates the dual function. Subclause A6.3 for instance reads: *"The architect is the owner's agent for giving instructions to the contractor. However, in acting as assessor, valuer or certifier, the architect acts independently and not as the agent of the owner."*

Further to this, subclause A6.4 specifies: *"The owner must ensure that the architect, in acting as assessor, valuer or certifier, complies with this contract and acts fairly and impartially, having regard to the interests of both the owner*

*and the contractor. The owner must not compromise the architect's independence in acting as assessor, valuer or certifier."*

Quite simply, this places a positive contractual duty on the Owner to ensure that they do not unduly influence the Architect's role in assessing or valuing such claims by the Builder as payment claims, variation approvals or extension of time requests.

Nevertheless the Architect still is *"appointed to administer this contract on behalf of the Owner"* (subclause A6.1) and as discussed above is the Owner's "agent" for giving instructions to the Builder. This would include instructions to rectify defects, failing which the Owner can potentially serve a default notice or have another contractor rectify the faults.

Both contracting parties being the Owner and the Builder can dispute an Architect's certificate, written decision or failure to act pursuant to clause A8 of the contract. This then envisages the Architect in some form of middle man or umpiring position, and reinforced by the words "fairly" and "impartially" where used in clause A6.

Responsibilities and duties of an Architect are set out in more detail in the Regulations under the *Architects Act*, in addition to the architectural retainer agreement with the client Owner. A formula to achieve compliance with the Regulations is included in Practice Notes published by the Australian Institute of Architects.

The Architects Regulations 2004 Part 2 Professional Conduct includes these clauses:

#### **6. Standard of Practice**

An Architect must perform his or her work as an architect in a competent manner and to a professional standard

#### **7. Duties**

An architect must-

- a. Act in the interest of his or her client or prospective client; and
- b. Not favour his or her own interest over that of his or her client or prospective client

#### **10 Administering contract conditions**

An architect who is commissioned to administer conditions of contract must do so impartially between the parties of that contract.

Finally, it is interesting to note that historically Architects have not been part of the disciplinary procedures set up for other construction practitioners at the Victorian Building Commission. Whereas builders and building surveyors for example have been investigated regularly at the Building Practitioners Board, Architects are instead governed by the Architects Registration Board (ARB) and complaints about them have been sent there.

With the news that the Victorian Building Authority is to replace the 'embattled' Building Commission in Victoria, comes the announcement that Architects are also to come within the umbrella of the VBA and will be subject to the same new disciplinary or misconduct processes as other construction practitioners. This has caused some angst in the last month, with some strident criticism of this change coming from both the ARB and the Australian Institute of Architects.

For more advice on your rights and responsibilities in this area of law, or if you are perchance in a dispute yourself, do not hesitate to take prompt legal advice now.

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