

# Independent and Fair Decision Making

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Isn't it about time that the architect was taken out of the role of independent certifier? This continues to be a rich vein for dispute however it seems to be an area where quick and easy action could be taken to remedy the situation.

The architect's obligations essentially cover two aspects; design of the works and the administration of the contract once works commence on site. Within this latter role he must act as both the employer's agent, acting in the best interests of the employer, and also as independent certifier when certifying matters such as the value of the works or when completion has been achieved.

The case of *Sutcliffe v Thackrah* clarified the role of the certifier:

"The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."

The position at common law is also reflected within many of the major forms of contract such as JCT and ICE, however the situation is an obvious source of dispute.

I have come across a number of instances where the judgement of the architect has been called into question. In refurbishment projects for example, I have frequently heard the argument that the contractor should have known that there would be changes and therefore have allowed for a certain level of change within his contract programme.

Another example concerned a contractor's apparent failure to vet an architect's design and not pick up that the levels for installing a complex roof gutting arrangement were not correct. Apparently the contractor, who did not have any design responsibility, should have carried out a full check and re-

view of the design information prior to carrying out the installation.

Further difficulties exist where the architect is the source of delays in the provision of design information during the construction phase. I have come

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across the situation where a whole floor was missed from the design included in the tender documents. The error was only discovered during an on site walkabout once the contractor arrived on site! This had considerable ramifications on the design of the project affecting amongst other things the location of room layouts, services, and lift installations.

From a contractor's perspective it is not just that a new design has to be issued (although that is bad enough!), it is the subsequent timing of the issue of the revised design information that affects his whole construction programme. What can typically happen is that the design changes are issued piecemeal due to the pressure to reduce delay and get the contractor progressing the works. However this prevents him from working in an effective, logical and cost effective sequence. By the time the majority of the design is received the Contractor has multiple trades on site working in what has now become an overcrowded and congested site, working from hand to mouth on scraps of design information.

In such circumstances will the architect reach his decisions fairly? On past performance it may be unlikely. There can be much muddying of the waters, where the usual arguments come to the fore to avoid issuing an extension of time or paying additional costs; the contractor was behind programme and not ready for the design information, he failed to mitigate the delays, he failed to effectively plan and sequence his works, he failed to work efficiently. In such circumstances it is hardly surprising that the architect's duty to be independent is not top of his list of considerations. More important is saving face, a client relationship and his professional indemnity.

I am also aware of architects who are unhappy with the situation and the undue pressure it can put on them. Even when an architect is acting fairly and reasonably, the relationship he has with his paymaster may still cause the contractor to question his judgement. Disputes have been known to arise simply because of a perceived bias.

Why not take this whole area of potential conflict out of the arena? Utilising a truly independent party to carry out the certification obligations would not be difficult to introduce and would immediately get rid of any perceived bias or self protection that is inherent in the current situation. Parties would be far more willing to accept an independent award, as has been shown when an Adjudicator makes his decision. It would not necessarily cost any more, possibly being paid jointly by the Employer and Contractor. Whatever arrangement is eventually arrived at it surely must be a better arrangement than that which has existed for too long and caused far too many disputes.

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