

# ARCHITECT'S APPOINTMENT WHICH RELATIONSHIP?

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*This paper was originally published in the New Zealand Institute of Architect's Journal, Cross Section*

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*An Architect is one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (sic) (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such building or other works calling for skill and design in planning as he might, in the course of his business, reasonably be asked to carry out in or in respect of which he offers his services as a specialist.<sup>1</sup>*

A few years ago, I decided to fulfil a lifelong dream to build a home for myself. What my friends referred to as, somewhat disparagingly, a delayed nesting instinct.

Setting aside the pessimistic but certain belief of what would go wrong, acquired through years of legal practice, I found a site and got an architect friend to do some concepts for me. Interestingly, with hindsight, I did not enter into a formal appointment with my architect friend. One stage in the project just blurred into the next, and he remained my most trusted adviser.

In the absence of a formal appointment, the courts would infer a list of duties suggested by an architect and practising lawyer by the name of Hudson:

- (1) advise the owner on constraints on the use of the land
- (2) examine the site, subsoil and surroundings
- (3) consult with and advise the owner on the proposed work
- (4) prepare sketch plans and specification for the owner, with an estimate of probable cost
- (5) further define the drawings and specifications, as instructed
- (6) consult with and advise on obtaining tenders
- (7) supply the builder with drawings and specification, and such further drawings and instructions as necessary, supervise the work and advise the owner if the builder commits a serious breach
- (8) perform the duties to the owner as defined by the terms of appointment and by the terms of the contract between the owner and the builder, and generally

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<sup>1</sup> Test applied by the UK Architect's Registration Tribunal in 1938, cited with approval in *R. v Architect's Registration Tribunal, ex p. Jaggar* [1945] 1 All E.R. 1331 at 134

to act as the owner's agent, except where otherwise prescribed by the contract with the builder, eg when determining disputes under the contract<sup>2</sup>

Looking at the relationships involved, like Lord Denning's mythical reasonable man on the Clapham Omnibus, one could be forgiven for thinking that our ideal architect should have a cape, wear underwear on the outside of bright coloured tights with a large S emblazoned on the chest.

Consider the various roles implicit in that list of responsibilities:

- As designer, the architect is specialist. The designs are used for consenting, costing and contracting. Any design error is covered by professional indemnity insurance.
- As supervisor, the architect monitors performance under the contract and issues instructions and variations and approves costs.
- As the first stage in the disputes process, the architect is the independent professional.

The relationships arising from these roles will often give rise to unmanageable conflicts of interest. While balancing acting as the owner's agent, the architect must protect the integrity of the design and keep in context relationships with contractors and subcontractors, with whom there is probably a longer term relationship, if not stronger, than with the owner.

In post World Trade Centre (9/11) times, the terms of professional indemnity cover, and its cost and availability, makes retaining the sense of professional independence envisioned by Hudson in 1926 all the more difficult. One would be forgiven for thinking that, for some professionals, the relationship they cherish and would most like to protect in the hope that it would be a long one is with its indemnifiers.

In larger projects, the tendency over the years has been for the owner to appoint the architect to do designs to a tender stage, then novate the appointment to the Contractor and award the contract on a design and construct basis. While understandable, in terms of cost control, this approach rather blurs relationships and loyalties. It certainly does not realise the potential that all parties have to bring to a project.

Some engineers have responded to this trend by abandoning the traditional independent professional role and taking equity stakes in projects, and joining forces with the contractors at the outset. Time will tell if risk allocation and capitalisation will favour such an approach for engineers.

With the size of projects, and the risks inherent in them, growing with each passing year, a reassessment of the role of the architect is inevitable. For myself, I would prefer to see the relationship with the owner, as designer, agent and closest adviser, retained, perhaps at the cost of other roles. However, to protect this position, standard appointments need to establish a different set of responsibilities, the approach to costing needs to be more refined and limits on liability to keep insurance costs under control.

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<sup>2</sup> paraphrasing Hudson's Building Contracts at p. 9 of the 7th edition.

In terms of my little project, variations were minimal, some owner instructed changes were made (mostly to fittings and finishes which reflected the extravagance of the Owner), and true to my friends' dire predictions, work was late and ran over budget. My architect friend remains my friend. That I have since sold the house is no reflection on him or the house, but results from the arrival of children.

Perhaps my nesting instinct was premature after all!