NEGLIGENCE BY ARCHITECTS: POSSIBLE PITS AND AVOIDANCE, A PERSONAL VIEW

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'Professional Negligence is an emerging phenomena. It may sound astonishing, even ridiculous, but it is true. It may happen anytime, anywhere and everywhere, significantly affecting our lives and business relationships. The emergence of various professional and quasi-professional categories populating the corridors of our markets and industries is a defining characteristic of modern day development, The proliferation of information-based and advised-based relationship is yet another significant scenario in our business world.'

Prof. Dato' Dr Hussin Ab. Rahman

Architects provide professional service to the public at large, either in a contractual or non contractual capacity.

Non-contractual capacity includes:

- Rendering advise
- Expert advise
- Expert opinion
- Services
- Findings
- Certifications*
- Etc…

Should be for the benefit, information and advantage to those who solicit directly or indirectly.

Contractual Duties

1. Contract between Architect and Client
2. Contract between Client and Contractor
3. Contract between Contractor and Sub-Contractors (NSC and Domestic)
    - Bear in mind express and implied terms
    - Implied terms are presumed by law, custom or conduct

The Architect

An “Architect” is: “one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works.

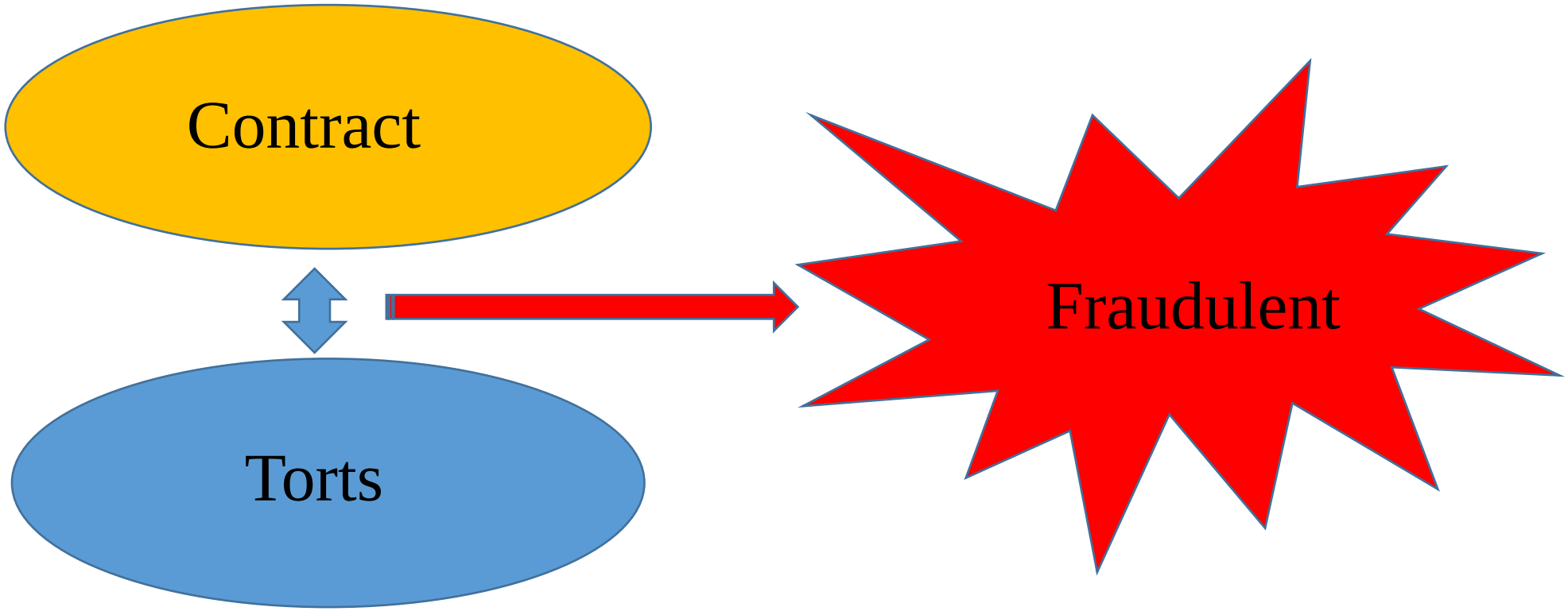
The Architect, in Malaysia, is controlled by legislation – Architect’s Act

What is professional negligence? What are the obligations of construction professionals in contract and in tort? In what circumstances might the difference between the obligations be important?

What is Professional Negligence?

Negligence is the failure to act as a reasonable person would be expected to act in similar circumstances. The standard of care which an architect must uphold is "reasonable care and skill" which is usually established by reference to the general practice of the building profession. A feature of the building profession is the large number of codes of practice relating to the manner of construction. However a professional is not entitled to blindly follow the provisions of a code of conduct without considering the precise relevance to the project at hand. The knowledge required of an architect will generally be judged by the standard of the ordinary competent architect. However if an architect carries out the job of quantity surveyor he or she will be judged by the standards of a reasonably competent quantity surveyor.


THE RIGHT BRAIN
"HEY, WAIT A MINUTE! I GUESS IT DOES SAY 'REFLECTED CEILING PLAN'"


Contract
Torts
Fraudulent

TORTS

Tort is conduct that harms other people or their property. It is a private wrong against a person for which the injured person may recover damages, i.e. monetary compensation. The injured party may sue the wrongdoer (tortfeasor) to recover damages to compensate for the harm or loss incurred. The conduct that is a tort may also be a crime. Some torts require intent before there will be liability and some torts require no intent. In other words, in some cases, there is liability for a tort even though the person committing the tort did not have any intent to do wrong. Types of Torts There are basically three types of torts: intentional torts, torts based on negligence and strict liability torts.

Torts involve duties created by law. Just because someone is hurt does not mean that someone else must pay for the harm. There must have been a duty which has been breached. A plaintiff will not be allowed to recover from a defendant if the defendant did not breach a duty that was owed to the plaintiff.

An **intentional tort** is a civil wrong that occurs when the wrongdoer engages in intentional conduct that results in damage to another

A **negligent tort**, in which the tortfeasor violated the duty that every member of society has to exercise reasonable care in their actions with others. The distinction between an intentional tort and a negligent tort is important for several reasons. First, if an individual wants to sue for an intentional tort, he must prove that the tortfeasor acted with "intent."

Strict liability, sometimes called absolute liability, is the legal responsibility for damage, or injury, even if the person found strictly liable was not at fault or negligent – the injured party is not required to prove fault – liability is strict

*A crime is a wrong arising from a violation of a public duty. A tort is a wrong arising from the violation of a private duty. Again, however, a crime can also constitute a tort.

The Statutes we are obliged to follow:

- The architects Act
- The Road, Drainage and Building Act
- The Uniform Building By-Law
- The Contract Act
- The Town and Country Planning Act
- The National Land Code
- The Housing Development Act
- The Strata Title Act

Architects Primary Duties

1. As described in Architects rules and condition of engagement
2. As required in the HDA
3. As required in building contracts
4. As required in UBBL and any other statutes

Common Areas of Negligence

The list of potential negligence claims against any professional, including architects, is wide and varied. Some of the more common pitfalls which architects should pay particular attention to in order to avoid claims include:-

- **Inadequate examination of sites**
  The architect should examine the site properly before or during the building of a structure. Architects should not rely on information supplied by a third party and should always make their own enquiries.
- **Errors in design**
  Whilst the legal standard commonly applied to architects in designing is that of reasonable care**,** there may be circumstances were special steps need to be taken to fulfill that standard. There may even be a duty to ensure that the design is reasonably fit for its intended purpose. When a design is experimental an architect is under a continuing duty to inspect his design. Special enquiries should be made if novel materials are being used.
- **Providing a misleading estimate**
  Before embarking on a building project a client will commonly ask an architect or quantity surveyor for an estimate of cost. Reasonable skill and care must be exercised when providing an estimate.
- **Errors in preparation of bill of quantities**
  Preparing bills of quantities is usually the function of a quantity surveyor. When the task is undertaken by an architect the same standards will be required as if carried out by a quantity surveyor. The architect should consider consulting a quantity surveyor if he or she is not suitably proficient or experienced in this area or the project is particularly complex.
-

Failing to take reasonable steps in selecting contractors

An architect must make reasonable enquiries as to the solvency and capabilities of contractors. When examining quotations he must not accept rates which are unreasonable in the circumstances.

- **Insufficient knowledge of, and non-compliance with legislation, planning and building control requirements and codes of practice**

An architect or quantity surveyor is not expected to have a detailed knowledge of the law but rather such knowledge as is expected of the reasonably competent practitioner.

However architects do need to pay particular attention to certain documents such as certificates of compliance and collateral warranties.

When an architect is asked to sign an Architect Certificate of Compliance with Planning Permission and/or Certificate of Compliance with Building Regulations, it is particularly important that the signing architect can "stand over" the certificate. The certificates of compliance should be limited in certain circumstances, for example a Certificate of Compliance with Planning Permission should exclude all references to financial conditions contained in said planning unless the architect has specific knowledge that these conditions have been complied with in full. Similarly, a Certificate of Compliance with Building Regulations should be limited to a "visual inspection" of the building where the architect did not in fact supervise the foundations of the structure.

On signing collateral warranties, architects should again be vigilant and should ensure that such warranties limit their liability. While the standard RIAI warranties have a time limit of twelve years, it would be prudent to limit exposure to six years and also to cap liability by providing that liability shall be no greater than the architect's level of professional indemnity insurance cover.

Inadequate supervision

Employers are entitled to expect architects to administer and supervise work to ensure that the quality of work matches the standard contemplated.

- **Incorrect certification**

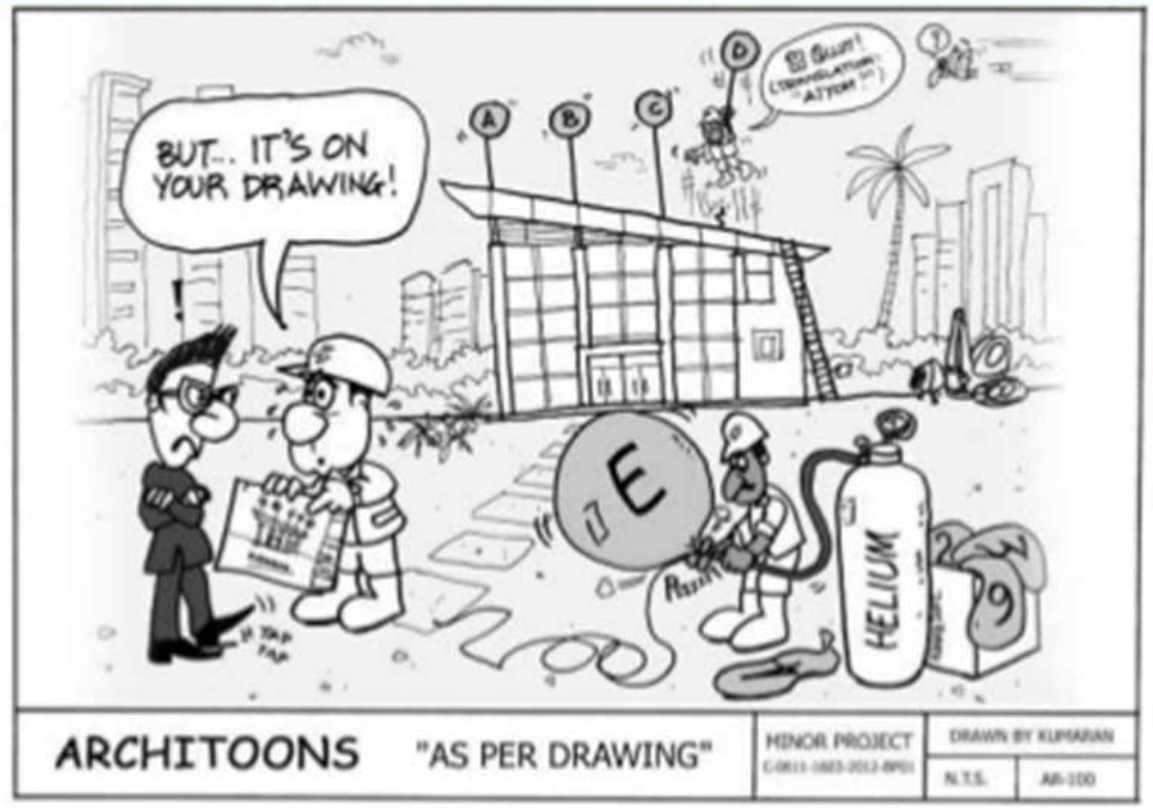
In issuing interim and final certificates an architect will generally not be immune from liability in negligence to the employer.

*Supervision or Inspection of Works?

The RIBA agreement requires the Architect to make ‘the appropriate number of visits to the site’ for inspection generally of work as may be specified and quality, and that work is generally completed to his satisfaction as a contract administrator.

“…it was held that the Architect was only obliged to inspect the works but was nevertheless in breach of duty because he had failed to carry out an inspection at a critical time, namely, the laying of the damp proof membrane…”

“…the architect’s monthly inspections were too infrequent and represented too rigid a programme, since the timing of the inspection was not sensitive to the progress of the works…”


BUT... IT'S ON YOUR DRAWING!
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ARCHITOONS
"AS PER DRAWING"
MINOR PROJECT
DRAWN BY KUMARAN
N.T.S.
AR-100

Do architects owe a duty of care in tort to subsequent occupiers for latent defects in a building, built to their design, even though they have no contract with the occupier?

Architects' duties to inspect the works

Ian McGlinn v Waltham Contractors Limited and others [2007] EWHC 149 (TCC)
The employer was a multi-millionaire who engaged a contractor and professional team to design and construct a house in Jersey. Preferring to keep things "informal and fluid", no formal contract was ever entered into by the employer with either the contractor or the architect. Delays occurred in the construction of the house and the construction cost soared over the original budget. The contractor walked off site and subsequently went into administration. The employer chose to demolish the property in view of the alleged defects and then brought proceedings against various parties, including the architect.

One of the breaches of contract claimed against the architect related to its failure to inspect the works. Under the "Architect's Appointment" document, the architect's obligation was to visit the site as appropriate to inspect generally the progress and quality of the work.

Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465 (HL) Case Synopsis. Claiming Economic Loss Againsts Experts.

A negligent misstatement may give rise to an action for damages for economic loss. When a party seeking information or advice from another - possessing a special skill - and trusts him to exercise due care, and that party knew or ought to have known that the first party was relying on his skill and judgment, then a duty of care will be implied.

Hedley Byrne were advertising agents placing contracts on behalf of a client on credit terms. Hedley Byrne would be personally liable should the client default.

The court found that H&P's disclaimer was sufficient to protect them from liability and Hedley Byrne's claim failed. However, the House of Lords ruled that damage for pure economic loss could arise in situations where the following four conditions were met:

1.(a) a fiduciary relationship of trust & confidence arises/exists between the parties;
2.(b) the party preparing the advice/information has voluntarily assumed the risk;
3.(c) there has been reliance on the advice/info by the other party, and
4.(d) such reliance was reasonable in the circumstances.

In conclusion

Hedley Byrne opened up a cause of action outside the law of contract for loss based on reliance on a statement. There have been considerable fluctuations in its application in the fifty years since the decision, but it has opened the door to liability for negligent statements made by those in a 'trust' capacity and beyond into the wider area of professional services.

Fosters faces bill of £3.6m after losing hotel case

2017

The planned hotel was never built

A claim was made against the world-renowned architectural practice by four companies owned by businessman John Dhanoa.

He commissioned Foster + Partners to design a hotel on the site of a bowling alley near Heathrow in 2007.

However, it was never built, because Dhanoa said the architect’s design would have cost £195m to build, far exceeding his budget of £70m, later increased to £100m.

- Foster + Partners had failed to establish the project's budget, and had also indicated that the scheme could be value-engineered down to the £100m budget of Dhanoa.

- Judge said it was "blindingly obvious" that this was not possible and that "Fosters had a duty, in my judgement, positively to advise Mr Dhanoa of that fact".

- claimants counsels, said: "This case serves as a warning to designers that they cannot design in a vacuum. Cost and budget is a key constraint and should always be identified and considered when designing any project, even when the provision of cost advice is expressly excluded from the designer's obligations."

- Very interesting and agreeable that “This case serves as a warning to designers that they cannot design in a vacuum. Cost and budget is a key constraint and should always be identified and considered when designing any project, even when the provision of cost advice is expressly excluded from the designer’s obligations.”

- This is an interesting case and a Court decision. It also hinged on common sense application doctrine in law. Projects of whatever size and Complexity should always be constraint by budget and eventual cost and not designed in vacuum. Design cost analysis concept(elemental cost analysis) has been an established phenomenon in the industry for decades, hence value Engineering should start from the design stages and throughout development and construction process and not after and client should be informed accordingly.

Project Management Pictogram

How the customer explained it

How the project leader understood it

How the analyst designed it

How the programmer wrote it

What the beta testers received

How the business consultant described it

What the digg effect can do to your site

The disaster recover plan

The Open Source version

How it performed under load

How patches were applied

How the project was documented

How it was supported

What marketing advertised

When it was delivered

What operations installed

How the customer was billed

What the customer really needed

Certificates

In a decision welcomed by architects, the Court of Appeal has overturned the decision in Hunt v Optima (Cambridge) Ltd. It has rejected claims for negligence in respect of an architect's certificates, since the purchasers were unable to show reliance on the certificates, given they were issued after purchase.

The first instance case

A group of purchasers claimed against the developer of residential flats for various defects in the properties. The claimants also joined the architect to the proceedings relating to his certificates stating that the works had been properly constructed and were in accordance with the relevant Building Regulations. The certificates were issued to the developer, who also paid for them, but were relied on by future purchasers. The purchasers had no direct claim for breach of contract by the architect and therefore needed to establish claims in tort between them and the architect. First it was said that the certificates contained enforceable warranties. Second the certificates were said to amount to negligent misstatements which gave the claimants a cause of action in tort. Third it was said that the architect was negligent in failing to carry out the professional services referred to in the certificates with reasonable skill and care for the purpose of the subsequent production of the certificates.

The judge found that there were clear breaches of duty by the architect in not detecting obvious defects in the works, by failing to re-inspect identified defects and by relying on others to confirm that defective works had been remedied. He found against the architect and awarded the purchasers damages.

The appeal

The Court of Appeal unanimously allowed the architect's appeal on all grounds.
They found that because the certificate was not described as a warranty it could not be construed as such or relied on as if it were a contractual guarantee.
The appeal judges also held that in order to recover for negligent misstatement a claimant must show that they relied on the statement in question. The claimants were aware that they would have a certificate for the property, but committed to purchase prior to receiving the certificate. The statements therefore did not exist at the time of purchase. It was found that, at best, the claimants could have relied on an understanding that they would receive the certificate after completion or that a certificate was already in place. However, this was not enough to establish reliance.
The court concluded that a draft certificate which was as yet unsigned and unissued, and therefore capable of being amended or, possibly, not issued at all, would not incur liability for negligent misstatement. One of the judges, Christopher Clarke LJ, said "*reliance cannot be retrospective. If the representation is the signed certificate it cannot be relied on before it comes into existence. A cause cannot postdate its consequences*".
As to negligence by the architect in his work prior to issue of the certificates, the court would not allow a further duty of care to arise alongside the issue of a certificate. If there was a duty to take care, it was to take care in relation to the statements in the certificate and any failings in those were dealt with by a claim for negligent misstatement. The court did not consider that a separate duty added anything and thus no duty of care was found to have arisen.

Conclusion to the above case

The Court of Appeal judgment is welcome news for architects and other professionals since it confirms that for a negligent misstatement claim to succeed, the claimant must be able to prove their reliance on the statement in question. In addition, the court made it clear that any professional negligence claim arising out of negligent certificates will fail unless based on misstatements in the certificate itself.

Even seemingly small negligent errors or omissions by an architect may result in vast awards of damages if buildings must be reworked and rectified. Accordingly it is vital that architects take care and take particular heed of some of the common pitfalls set out above.

Cases of interest.

Pratt -v- George J. Hall [1987] 37 BLR 145

Architect held liable for failure of a contractor – who was a total disaster – that he had recommended as being “very reliable”. In this case the Claimant was not only able to claim her losses associated with the defective works but also the costs of litigation against the contractor prior to their insolvency.

What if an Employer tells the Architect he does not want a building contract?

- Small job, contractor not interested in formal document
- Usually done on oral agreement or just a quotation
- Suspicious that using a contract will cost more
- Employer cannot understand why a contract is required just because an architect is involved

- A contract protects interest of both parties
- Architects duties depends on what's in the contract
- A contract stipulate the scope, duties, time and payment

If the Employer provides a site investigation report and the ground conditions are found to be different, who pays any extra cost?

- Misrepresentation → Fraudulence, negligent
- A representation followed by a warning that the information given may not be accurate will not usually be sufficient to protect the employer, because it is a clear its an attempt to circumvent. Such statement may convert the representation into a misrepresentation

Is an Architect who fails to secure a performance bond negligence?

If a performance bond is stated in the contract to be required from the contractor, is the Architect responsible for making sure that the bond is provided? What is the position of the architect who, despite reminding the contractor of its responsibilities on a regular basis, failed to succeed ?

- Case by a QS vs Client for non payment of fees
- Client claimed QS was in breach of its duty. Appointment expressly stated: '*prepare contract documentation and arrange for such documents to be executed by the parties thereto*'
- Client argued QS has 'absolute duty' to see that contractor provide a PB which QS agued he did not. QS normal duty includes reasonable skill and care.
- Court agree with QS and said that `*arrange*' do not mean `*ensure*'
- Court decided QS had used reasonable skill and care because it had attended meetings and chase contractor on a regular basis to obtain the PB.

- Architect’s duty will be reasonable skill and care
- Possible for an Architect to assume liability, important to check the wording of terms of engagement especially drafted by client’s solicitor.

Damages

Where a claimant succeeds in a negligence suit, they will usually be awarded damages against the architect. The amount of damages which is recoverable for negligence is determined by the loss resulting from the negligence. The losses which may result from breach of duty by architects cover a wide variety. For example, damages may be awarded to cover the cost of rectification of the building, wasted expenditure costs, excess expenditure costs, damages to cover any liability to third parties or personal injury claims which arise as a result of the architect's negligence and damages for inconvenience, to mention but a few.

ONE MORE MINUTE!

LASTLY

- Do not succumbed to your client’s demand even when they give you carrots
- If it is doubtful don’t do it, benefit of doubt should be yours*
- You are a professional, a problem solver, and not a problem creator
- Put it in writing and if important, confirm that they received it
- Make sure you have options
- If not sure, ask your peers
- Get yourself covered with a Professional Indemnity Insurance
- Lastly, if *tak boleh terima* the terms and conditions of your engagement and the nonsensical pressures, Quit and walk away!

"CAN WE RECESS FOR THE DAY? I HAVE TO RENEW MY LIABILITY COVERAGE."


Thank You!