

Paper 1: LAM as Stakeholders for Architect's Fees

Report on presentation by: Ar. Chan Seong Aun

1.0 Introduction

Architects and engineers are the backbone of the construction industry. It is their work that determines the landscape of the towns and cities across the nation, ensuring the development of the economy, which in turns forms one of the basis of what outsiders consider a country as “developed”¹ or otherwise. It is quite unfortunate therefore, to hear of grouses among the profession regarding the payment of their fee. Depression of fees, late payment, and sometimes even non-payment are not unheard of. Architects ensure that the buildings they design are not only aesthetically pleasing but also contain important elements of safety and livability to its occupants. In performing their duties as the professional in servicing the nation, architects are bound by the laws, regulations and their own code of professional ethics. Ethical and moral conventions² require for the professionals to ensure public safety as uppermost in their actions and decisions. At the same time, the accepted concept of *division of labor* acknowledges that people in society are allocated based on merit and rewarded accordingly³.

A lot seem to be expected of the professionals but what are their rights as professionals when compensation for their services is being compromised? A very interesting paper⁴ highlights that indeed, the “rights of professionals” are seldom discussed. The author wrote,

“Whereas ethical codes unequivocally instruct professionals in what they should or should not do, nothing is said about those things to which they are entitled as professionals. One comes away with the impression that professional ethics is concerned simply with prohibitions and obligations, and not with anything positive, such as what professionals are justified in doing without interference or jeopardy because it is their *professional right*.”

Thus, when architects, as professionals, feel that their right to claim the appropriate fee is in jeopardy, then it is justifiable that such a discussion and proposed solution was highlighted in the recent Professional Practice Forum by the current PAM President, Ar. Chan Seong Aun.

¹ Definitions of ‘developed country’ by the World Bank, International Monetary Fund, and United Nations all include a strong economy as one of the elements of being in a developed state

² Durkheim, Emile. (2002). *Professional ethics and civic morals*: Psychology Press.

³ Durkheim, E., & Lukes, S. (2014). *The Division of Labor in Society*. Free Press.

⁴ Flores, Albert. (1983). On the Rights of Professionals. In W. Robison, M. Pritchard & J. Ellin (Eds.), *Profits and Professions* (pp. 305-315): Humana Press.

2.0 Architects Payment Problem: Entitlement to Payment Not Covered under Existing Law

In general, the entitlement to payment is only by means of the contract between clients and the architect. The terms of contract must be definite and certain without vague terms so that equity can be exactly determined when remedy is sought. Unfortunately that is not always the case as contract terms can and indeed, often interpreted in different ways, depending on how good your lawyer is. For the majority of practicing architecture firms in Malaysia, mostly small partnerships, the legal might of corporate developers is just not worth the time and money to start a legal battle. Thus they are the most vulnerable to unequitable administration of contract. In fact, there is sufficient case load related to the legal disputes in the construction industry which justifies the formation of a specialized construction industry court⁵. Elsewhere for example in Singapore, payment claims can be made under the Building and Construction Industry Security of Payment Act 2005.

In the United States, under Lien Law, state statutes grant lien rights by way of a mechanic's lien or a design professional lien to 'registered architect or corporation registered to practice architecture' who does work directly connected with the erection or repair of any building or other improvement upon land "under or by virtue of any contract with the owner or lessee thereof, or such owner's or lessee's agent, trustee, contractor or subcontractor".⁶

A lien is a form of security interest to secure payment of a debt or performance of other obligation granted over an item of property⁷. American Institute of Architects California Council defines design professional lien as "a claim against the real property on which the claimant has bestowed labor or furnished material for the value of the labor done or materials furnished". Previously the US lien law holds that architects have no lien rights if their plans are not constructed, but a 1997 amendment has allowed for architects to file a lien "whether or not actual construction of the planned work or improvement has commenced" subject to the conditions that there is a direct contract with the owner or agent of owner and that this contract has to be in writing⁶. Canada also has a lien law in the form of the Construction Lien Act but the increasing complexity of construction projects has necessitated a new development in the form of prompt payment legislation known as Bill 69, which just passed its second reading and well on its way to become a law^{8,9}.

⁵ Based on Malaysian Bar Council survey in 2008, there are in excess of 1,000 construction related cases, as appeared in The Star 5 Oct 2012 "Proposal for a specialist court for the construction industry" by Wong Wei-Shen

⁶ In article from the American Institute of Architects Kansas City chapter website

⁷ Source: Wikipedia.org

⁸ Based on article by Howard Krupat of Davis LLP Canada

<http://www.davis.ca/en/entry/canadian-construction-law/proposed-prompt-payment-legislation-in-ontario-for-construction-projects/>

⁹ <http://www.constructioncanada.net/web-exclusive/1065-if-the-prompt-payment-act-passes-will-you-be-ready>

Australia is also making a similar move where New South Wales parliament is close to passing its Building and Construction Industry Security of Payment Amendment Bill 2013¹⁰.

On the home front, a near solution is in sight with the forthcoming Construction Industry Payment and Adjudication Act or CIPAA 2012. It is a near solution because CIPAA 2012 does not provide the same legal rights to collect payments as with a Security Payment Act or a Prompt Pay Act. CIPAA 2012 merely offers a speedier dispute resolution process via adjudication¹². The catch is, it is still awaiting enforcement. CIPAA 2012 received royal assent and passed as a law in June 2012 however the date that it shall be enforced, to be decided by the Minister or Works, is still pending¹¹. CIPAA 2012 is applicable to all *written* construction contracts made in Malaysia including government contracts except those by individual owner of residential buildings less than 4 storeys wholly intended for self-occupation¹². Under CIPAA 2012, the adjudicator decision shall be made within 45 days but only payment disputes for work done and services rendered under the express terms of a construction contract may be referred and be subjected to adjudication under CIPAA 2012.

3.0 LAM as Stakeholder

Architects' Scale of Minimum Fees was introduced as an approach to solve the problem of fee collections and inconsistency in fee charges, unfortunately, the scale was not adhered to within the profession itself as was highlighted within the profession¹³. Apart from adherence to the scale of minimum fees, LAM is proposing the deposit of architect's professional fees to LAM, as a stakeholder. Payment of fees via stakeholder is nothing new in Malaysia. Board of Land Surveyor Malaysia has been practicing collecting fee deposit from the service getter prior to commencement of land surveying service provide by its members.

In Ar. Chan Seong Aun's presentation, payment of professional fees via stakeholder forms the basis of a more equitable payment contract which does not undermine the self-respect of architects and the respect for others such as clients and contractors. The win-win situation can be achieved when architects receive the prescribed remuneration as per the scale of fees and consequently be able to provide full service to clients.

¹⁰ Original article from Australian Competition Consumer and Contract Law Tracker which appear on CCH Wolter Kluwer website <http://www.cch.com.au/au/News/ShowNews.aspx?PageTitle=NSW--Prompt-payments-for-contractors-under-construction-contracts&ID=40539&Type=F&TopicIDNews=7>

¹¹ Based on article by Chang Wei-Mun, partner, Raja, Darryl & Loh, Malaysian law firm. <http://www.rajadarryloh.com/images/pdf/CIPAA%20Write%20Up%20Final%20Version.pdf>

¹² Information from KL Regional Center for Arbitration (KLRCA) website

3.1 Effects of the Proposal

The deposit of fees with LAM may also solve other problems such as to ease the monitoring of architects imposing low professional fees, the issue of ‘franchising’ of architectural services or of non-professionals offering architectural services. It also deters payment delays by making ‘pay-when-paid’ contracts inoperable. Payment shall instead be disbursed following completion of each stage of the architect’s work. From the developers’ perspective, this method should not create a cash flow issue as the professional fees are drawn from the Housing Developer’s Account. The execution of this has also been covered on legal grounds as the Architects Act 1967 has made such a provision in Clause 4(1)(ea), which is similar to BEM’s legal provision, and Clause 35.

3.2 Procedure of the Proposal (Deposit of Fees with LAM)

The initiation of the procedure shall be by LAM circular informing the fee deposit which shall be mandatory and applicable to all projects under the Housing Development Act 1966. Henceforth, client-architect appointment letters shall contain a clause reflecting the deposit of fees and shall also contain an empowerment clause for LAM to act as stakeholder. Based on the fee particulars and schedule of payment provided to LAM, LAM shall then notify the Client to submit the security deposit, proposed at 10% of the total architect fee. Architect shall commence work only upon notification by LAM that the deposit has been submitted by Client.

Architects submit payment claims to Client upon completion at each stage as agreed with Client or as per quantum or works in accordance with the Architects Rule 1996, with copy to LAM. Payment by Client shall be made out to LAM within 28 days of the notice and LAM shall subsequently release payment to Architects within 14 days. For payment made, architects proceed with works to the next stage until completion and issuance of CCC.

In case of non-payment by Client within the 28 days, LAM shall then notify Architect of the non-payment, after which the Architect can then decide to proceed under Rule 16 or 17 in the Third Schedule of Architects Rule 1996. However termination of services does not address the work and effort already put into the projects and eventually, the losing party would be the architects themselves. This is especially true for smaller architecture firms whose projects may not be as numerous as the bigger firms. The injustice of the situation is exacerbated by Rule 21(1) which entitles the client to use the architect’s design for implementation of the project. To address this, Ar. Chan Seong Aun proposed the inclusion of empowering clauses in future amendments of the Architects Act 1967 which shall make the deposit of fees to LAM as mandatory under the law.

¹³ PAM Professional Practice Forum December 2012 as presented by Ar. David Teh: “Scale of Fees: What Do We Do?”

On default by the Client, the Architect may draw down the security deposit from LAM. The levy imposed by LAM as stakeholder will also be drawn from this security deposit. In the event the payment is eventually made by Client i.e. rectification of Client's default, the security deposit shall be topped up.

4.0 Conclusion

The proposal to deposit fees with LAM as a stakeholder is expected to be the solution to address the mounting payment problems faced by architects. Authority is needed for LAM to enforce compulsory fee deposit, without it, the payment of deposit to LAM as stakeholder may suffer the same fate as the scale of fees; it is there, but not followed. By and large, the best solution would be to have legal provision in terms of the right to collect fees and to expand the scope of coverage to include government contracts. As was the case of Canada, even with currently existing lien law, a prompt payment act is still deemed necessary.

The mechanism to have LAM act as a stakeholder to deposit fees of architects may draw critique as to the efficacy of LAM in ensuring a smooth process flow. This is because there are instances in the procedure where LAM action determines the actions of Clients and Architects such as the notification to submit the security deposit to Client and the notification for Architects to start work. Any failure on LAM's part to carry out the tasks efficiently would be cause for delay.

Another point to ponder would be the levy imposed by LAM for being the stakeholder since 1) it is unclear which party bears the levy cost and 2) the quantum for the levy was not mentioned. From the presentation, the levy will be taken from the security deposit amount which is the source of funding to be recovered by Architects in the event of payment default by Client.

Nevertheless, a remedy is urgently needed not just to facilitate architects in collecting their fee, but more importantly it is to protect the public interest. By implementation of fee deposit with stakeholder, architects can be rest assured that their fee will be paid. Furthermore, clients will not be able to use fee payment as a ransom to force the architect to deceptively certify the works by contractors or developers.

Should LAM be able to include in the Architects Act an empowerment clause to collect fee deposit from clients, that would be a triumph for the architects but if something akin to a Prompt Payment Act is realised, it would be a coup not just for architects but for all professional in the service industry.