

The Contractual and Tortious Liabilities in Employer-Consultant Agency Relationship in Construction Contracts in Nigeria

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Abstract

The purpose of this paper is to analyze the liabilities of construction professionals who through discharge of their obligations as agents of employers in construction contract have assumed contractual and tortious liabilities. This paper proposes that the construction consultants are agents of construction employer and should so act with certain limited circumstances. Applying and focusing upon the principles of law of agency, the paper adopts a black-letter law approach, using extant provisions of Nigerian Conditions of Engagement and Consultancy Service Agreement (CECSA) terms and conditions, comparative review of some standard forms of contract, Nigerian and English case laws and literature. It analyses of cases supported by literature against unethical practices of consultants as recently reported by contract audit inquiries in public construction contracts in Nigeria, at both pre and post contract stage of project procurement management, within Nigerian legal jurisdiction similar to and as adopted from English common law jurisdiction and other jurisdictions. The paper finds the arguments advanced against unethical practices of consultants now have universal judicial agreement that the liability of a professional person to their employer arises both in contract and in tortious negligence. The study may show that the arguments against unethical practices are significant, though limited to Nigerian legal jurisdiction, but with wider implications in similar common law jurisdictions. This paper will be instructive to employers, construction professionals, academics and students in the field of construction contract management and other parties to contracts. The paper contributes to advancing the course of acts in ensuring duty of care, and that professional ethic will play a proper running and well being of the construction process at every stage while reducing disputes and achieve project objectives.

Keywords: Agency, Construction Contract, Consultant, Employer, Liability, Nigeria.

1. Introduction

In the construction industry, there are different procurement systems in use (Masterman, 2002) through which the client creates the pre-conditions for the successful achievement of project objectives –time, cost and quality. In carrying out these responsibilities, the clients (described as Employer or Owner in most Standard Contract Forms) often engage the services of competent construction professionals (described as employer’s representative or consultant(s)) as individuals or corporate entities, using suitable procedures Ojo *et al* (2011). Such construction project professionals include Land surveyor, Urban Planner, Quantity Surveyor, Architect, Engineers making up the project (pre contract) design team while the construction (post contract) team comprise of Quantity Surveyor, Architect, Builder and Engineers (and other professionals depending on the type of project). However, the composition of the consultants’ team is a function of the nature, stage, type and expectation of the project Aqua Group (2007).

One of the major obligations of the consultant team in construction projects, apart from to execute their services according to the terms of the contract of service engagement, is to create contractual relationship between the employer and the contractor. Hence, in the face of the law, has created a Principal- Agent contractual relationship between the employer and the consultants. This supports the common law maxim; ‘*qui facit per alium, facit per se*’, i.e. ‘the one who acts through another, acts in his or her own interests’. Construction contract being also commercial/business agreement by its nature, is enforceable at law (Ojo and Akinradewo, 2011), hence the limitations, responsibilities, liabilities etc are appearance having in view the Principal- Agent contractual relationship

and especially as elucidated in common law and in most standard conditions of contract like *Federation Internationale des Ingenieurs- Conseils (FIDIC)* and Standard Form of Building Contract of Nigeria (SFBN) 1990 etc. These standard conditions of Contract are commonly used in construction contract procurement in Nigeria. However, the positions of the court, case laws and spirit of the standard forms of contract in the relationship, suggest there is a parallel concept to vicarious liabilities in which one person is held liable contractually or in tort for the acts or omissions of another.

In Nigeria, recent events and reports of contract audit committees and panels of injuries on public construction contracts at both federal and state government levels are quite sordid. Ojo and Gbadebo(2011) remarked that consultants and public client in-house professionals have enmeshed themselves in unlawful and unethical acts to the detriment of government. Employers (government) have suffered severely due to consultants' negligence and unethical practices including cover up of poor quality work for a price (Abdul-Rahman et al, 2010); undesirable variations orders to increase contract price especially in earthwork and substructure parts of road work and building projects respectively etc. These are forms of economic sabotage which has led to project failures, cost overrun, building collapse and project abandonment Ogunsemi and Aje (2006). Besides, Abidin(2007) reported that most construction disputes are those between employer and main contractor on issues relating to payment, maladministration of conditions of contract etc mostly at construction stage orchestrated by consultants actions and inactions. Explicitly, consultants services have been found culpable in consequential negligence as noticed in scope definition, cost management and administration of project, i.e. incomplete design, inaccurate bill of quantities and specifications; inappropriate contract type and method; poor communications of project information, discrepancies in contract documents etc leading to time and cost overrun, uncertainty in quality of work, several building collapse and road failures, delays and overpayment on valuation and certificate etc.

This paper therefore intend to investigate the nature and impact of consultants obligations, as agent of the employer(Principal), and its inherent liabilities in construction project contract with a comparative review of provisions conditions of engagement, some standard forms of contract and case laws. This will go a long way in provoking consciousness of inherent liability in consultants' services and help ameliorate unethical services and achieve project objectives.

2.0. Overview of Law of Agency.

All commercial transactions are rooted in contract. The Nigerian commercial law, like all other laws, was developed from mostly what obtained in England. The reason for this was because of the colonial relationship between Nigeria and that country. By extension, it is understandable that Interpretation Act (1964) section 45 imports into the Nigerian Legal System all English Statutes of General Application in force as on 1st January, 1900 and they are applicable in Nigeria, subject to local circumstances. Such Statutes include the Statute of Frauds(1677), English doctrines of Common Law and Equity, Conveyance Act(1881), to mention only a few. Though some of these common law positions have been altered in emerging Nigeria legal environment.

Therefore, the law of agency is an area of commercial law dealing with a contractual or quasi-contractual or non-contractual set of relationships where a person, called the agent, is authorized to act on behalf of another (called the principal) to create a legal relationship with a third party Fridman (1990). This indicates that agency is a strong product of agreement between two parties, which is contractual. In a Nigeria case, *Ayua V Adasu & Ors (1992)*¹, *Akanbi, JCA* restated this position thus;

"In the ordinary law of Agency, the paradigm is that in which the agent and the principal agree that one should act for the other. And the term "agency" is assigned to this basic principle which involves consent of both parties. It is therefore trite law that agency arises mainly from a contract or agreement between the parties express or implied".

Similarly, in *James V Midmotors (Nig) Ltd. (1978)*², the Nigeria Supreme Court, considering the phenomenon in relation to the definition of agency observed as follows:

¹ , *Ayua V Adasu (1992)2N.W.L.R. 598, dictum of the learned jurist raises fundamental issues of what amounts to consent and that consent is fundamental where relationship was established by agreement and contract.*

² *James V Midmotors (Nig) Ltd. (1978)11-12 SC.21*

“..... it necessary to explain the term agency.. In law the word agency is used to connote the relationship which exists when one person has an authority or capacity to create legal relations between a person occupying the position of principal and third party, and the relation also arises when one person called the agent has the authority to act on behalf of another called the principal and consents (expressly or by implication) so to act”.

In view of the foregoing, the true law of agency applies only when the act of the presumed agent produces legal consequences viz; contract, agreement, capacity and authority.

In construction project procurement, the consultant Architect or Engineer, as an agent may be a person or body corporate who is contractually authorized to act on behalf of the employer to create a legal relationship with the contractor, subcontractors or suppliers. In fact, FIDIC (1999) Red Book in clause 3(1) provided thus; *“Whenever carrying out duties or exercising authority, specified in or implied by the contract, the engineer shall deemed to act for the employer”*. An agent acquires authority to act on behalf on the bases of the agreement with the principal.

However, establishing the consultants’ capacity as an agent is premised on many prerequisites. For example, under the Council of Registered Engineers of Nigeria (COREN) law³, practicing engineer must be a registered engineer, implying that he/she is expected to display a usual degree of skill and expertise habitual to the average person practicing that field of engineering, failure of which criteria, render the professional liable for breach of contract or Tort of negligence Anago (2004). This captures the obligations or functions of the Engineer to include giving his decision, opinion or consent, expressing his satisfaction or approval, determining value or otherwise taking action, upon which the employer can rely on, in his contractual rights and obligations with the Contractor.

Also, In *Bamgboye V University Of Ilorin & Ors (1991)*⁴ the Nigeria Court of Appeal held, *inter alia*, that agency, in law, exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. Therefore, it is an essential characteristic of agency relationship that the agent is not only possessing skillful capacity but vested with legal authority or power to act on behalf of the principal. It is on this bases that a third party (usually the Contractor in construction project contract) may rely in good faith on the representation by the consultant- acting within the scope of authority conferred, as an agent for an employer. Thus, in holding the principal bound by an act of the agent, it must be established that such an act was legally authorized from express instructions given or implied from the words or conduct of the principal.

In Nigeria, the agency position of the consultant is usually authorized by agreement between the employer and consultant as stated in the Condition of Engagement and Consultancy Service Agreement (CECSA) (1996) with the terms and conditions. Anago,(2004) stated that like every other contract, CECSA(1996) specifies and limits contractual benefits and burdens-scope of service, remuneration payable and payment method, time of performance, duty of skill, care and diligence etc- usually outlined in the Memorandum of Agreement which may include broad classes of agency and also confers on the consultant an authority to act. From the provisions of the CECSA, appears to categories the consultant as general agent of the employer, who is authorized to act for and on his behalf in all his affairs in connection with the construction project and in particular kind and skill of his profession.

The reciprocal obligations and liabilities between a principal and an agent reflect commercial and legal realities. Unless modified by contract, Kelly, et al (2005) agents generally owe the following duties to their principals:

- a. To undertake and obey instructions provided by the principal;
- b. To exercise and act with skill and duty of care;
- c. To account for and be express loyalty;
- d. protect and yet give confidential information;
- e. Not to make secret profit at the detriment of the principal.
- f. To avoid conflict of interest between the interests of the principal and his own.

³ Section 6 of Council of Registered Engineers of Nigeria (COREN) Law of Federation of Nigeria (2004)

⁴ *Bamgboye V University Of Ilorin & Ors (1991)*8 N.W.L.R 129,

In construction business, while the consultant may represent the interests of more than one employer, but must not accept any obligations that are inconsistent with the duties owed to the employer Nigerian Institute of Quantity Surveyors' (NIQS) Code of Conduct, (1990). Consultant also must not be engaged in self-dealing, or otherwise unduly enrich himself from the agency by usurping an opportunity from the employer- taking it for himself or passing it on to the contractor.

2.1. Laws of Tort and Contract with Standard Duty of Care in Construction Contract.

Tort is a French word meaning “a wrong”. In English, the word has a purely technical legal meaning – a legal wrong with a lawful remedy. Applied into law therefore, Tort has been defined as a branch of law that deals with civil wrong Duncan -Wallace, (1986). A civil wrong involves a breach of duty fixed by the law owed to persons generally. From this position, tort is a civil wrong which emanated from breach of civil duty, and have legally inflicted injury on another party in contract or not. Where a breach of the civil duty arises without contract between parties, it results to tortious liability and redressable primarily by an action for unliquidated damages or other civil remedies. Such civil wrong may include negligence, vicarious liability, injurious falsehood, interference with contract, trespass, loss etc. And In Nigeria, law of torts remains a creature of judicial precedent modified by statutes. Following, the legality of tortious injury like negligence of a party (usually the defendant) and establishes a breach of a legal duty of care as instituted rule in these legal *classicus Donoghue vs Stevenson (1932)*⁵. Hence, as established in *Osemobor v. Niger Biscuit Co. Ltd (1973)*⁶, a duty of care is actually a legal obligation imposed on an individual requiring that they adhere to a standard reasonable care while performing any acts that could foreseeably harm others.

A contract is a binding agreement between two or more persons (Kingsley, 1993) and in common law, depicts a *consensus ad idem* i.e agreement of minds. It is assumed that each party in contract had read and consent in approval to the agreement and its obligations. This is because in the process of formation of a contract there are terms and conditions usually inserted into the body of the contract documents by the parties to the contract which creates contractual obligations or duties, a breach of which attracts remedies including damages, injunctions, quantum merit etc. In Nigeria and as related to construction contract, CECSA(1996) expressly state and elucidate contractual obligations or duties including outlines of the scope of service, remuneration payable and payment method, time of performance, duty of skill, care and diligence.

Against this backdrop, the main distinction between tort and contract is that, tortious duties are created by operation of law independently of the consent of the parties and contractual duties arise from agreement between the parties. Also, parties to a contract are also subject to those underlying rules and principles of contract which the law imposes on them. This established principles as applied in construction contract e.g. tort of negligence, in the consultant employment become apparent when his omission to do, in course of his authorized duties (under the contractual agency duties), something which a reasonable professional would do. In instituting a tortious negligence therefore, the agency position of the consultant is usually authorized by agreement with the employer as stated CECSA (1996). Several Nigerian cases including (*Osemobor v Niger biscuit (1973)*; *Nigeria Bottling Co. v. Constant Ngonadi (1985)*⁷ and as applied in the English case of *Watteau v Fenwick (1893)*⁸ the court held that the principal is liable for all the acts of the agent, which are within the authority confided to an agent of that character, notwithstanding limitations, put upon that authority. Often, the court gives damages and injunction only as the main remedy against tortious liability in terms of the compensation in damages or money, while contractual liability, the remedies include specific performance, injunction, reimbursement and restitution.

⁵ *Donoghue vs Stevenson (1932) AC 562; 1932 SC (HL)* where the court held that the plaintiff does not have contractual relationship with the manufacturer of the defective beer take by the plaintiff but the plaintiff nonetheless is entitled to an action in tort because his action was not based on contract.

⁶ *Osemobor v. Niger Biscuit Co. Ltd (1973) NCLR, 382* where the plaintiff bought a packet of biscuit and discovered a decayed tooth in her mouth when chewing, and fell ill the court held that it behooves a manufacturer who produced goods for consumption to take reasonable care when producing such goods so that they can be used for the purpose or manner intended without causing harm to the user

⁷ (*Osemobor v Niger biscuit (1973) 1 cchc j at 71.*; *Nigeria bottling co. v. constant Ngonadi (1985) 1 nwlr 739 sc*). Court held that the plaintiffs' action alleging negligence on the part of the defendant and

⁸ *Watteau v Fenwick (1893)1 QB 346*

2.2 Law of Vicarious Liability and the Consultants.

A person who holds himself out as having a certain skill or knowledge in an art either in relation to the general public or in relation to a person for whom he performs a service (e.g. a car driver, medical doctor, Architect) is expected to show reasonable amount of competence normally possessed by person doing that kind of work and become liable in negligence, if he falls short of such standard Anago, (2004). However, the professional person not necessarily be a genius or infallible in the skill, but able to take reasonable care in the discharge of his service to the employer (with whom in contract) and or having in contemplation the incidence of his service not to inflict injury even to the third party(to whom not necessarily in contract). This position is better reinforced by the dictum of court in *Lanphier V Phipos (1838)*⁹ thus:

*“Every person who enters a learned profession undertakes to bring to the exercise of it,
a reasonable degree of care and skill”.*

It is not only sufficient for the claimant to established breach of a duty of care, but must have a loss or injury to recover against the defendant in particular circumstances e.g. negligence of particular defendant in such service. In construction contract and services, consultants (who are professional persons) become vicariously liable in the event of breach of duty of care in the discharge of his agency service to the employer. However, for a plaintiff employer to claim in Tort of Negligence, for example, the court held in the case of *Nigerian Airways Ltd V. Abe (1988)*¹⁰ that:

*“The most fundamental ingredient of the tort of negligence is the breach of the duty of care
which must be actionable in law and not a moral liability. And until a plaintiff can prove
by evidence the actual breach of the duty of care against the defendant, the action must fail.*

This position was reinforced by the Nigerian Supreme Court in *Universal Trust Bank of Nigeria V Fidelity Ozoemena (2001)*¹¹ per Kalgo Umaru JSC that;

*‘For a plaintiff to succeed in an action for negligence, he or she must plead all the particulars
in sufficient detail of the negligence alleged and the duty of care owed by the defendant and
all these must be supported by credible evidence at the trial’*

Hence, vicarious liabilities of consultant become due and claimable where reasonable proof is established by the employer in the three elements i.e. (a) the existence of a duty to take care owing to the complainant by the defendant. (b) Failure to attain the standard of care prescribed by the law, thus committing a breach of the duty of care prescribed by the law, thus committing a breach of the duty of care, and (c) damage suffered by the complainant which is casually connected with the breach of duty to take care. A mere request to act in relation to a project, without specifying at the outset the services required, will inevitably lead to doubt or dispute as to what are the respective rights and duties of the parties.

2.3. Service Procurement and Contractual framework in Nigeria.

Nigerian Public Procurement Act (PPA) (2007) outlines the legal framework for the engagement or procurement of service contract in public sector. In Nigeria, discharging these obligations on behalf of the employer, in a building and engineering procurement contract, Onuckube (2004) they are guided by the condition of engagement, consultancy service agreement, conditions of contract and other contract documents. It is therefore essential, particularly when more than one type of consultants is used on the same project, that the purpose and extent of the respective appointments should be made absolutely clear Anago (2004). However, (Ojo 2011; Aqua Group, 2007) standard contract conditions have been developed by various bodies like Joint Contract Board (JCT), *Federation Internationale des Ingenieurs- Conseils* (FIDIC), Standard Form of Building Contract of Nigeria (SFBCN) in their various versions commonly used and particularly in Nigeria. A condition of contract provides the rights, liabilities, obligations, procedures and relationship between the employer, his agents (consultants-Architect, Engineer, Project

⁹ *Lanphier V Phipos (1838) WLR, 582.*

¹⁰ *Nigerian Airways Ltd V. Abe (1988) 4 NWLR (pt. 90) 524.*

¹¹ *Universal Trust Bank of Nigeria V Fidelity Ozoemena (2001) SC. 129 breach of warranty of fitness for the purpose and use under the Sales of Goods Law was a cause of action in tort.*

Manager, Quantity Surveyor etc and the Contractor. Onuckube, (2004) asserted that other contract documents may include; Article of agreement, Specifications, Contract Drawings, Bills of Quantities and other documents requested as part of the project like scheduled of work plan, manpower plan, quality plan, execution plan, and health, safety and environment plan, risk register etc.

3.0. Consultants Liabilities at Pre Contract and Post Contract Stages of Procurement of Construction Projects.

Under the Nigerian Public Procurement Act (PPA) (2007), the pre contract stage is denoted by 'Procurement Proceeding' and defined as 'Initiation of the process of effecting procurement up to award of a procurement contract'. This stage involves processes and activities, in sequential order, leading to and including selection of suitable contractor and award of contract. Conversely, post contract stage describes the functions and those activities that take place after contract award (Sherman, 1996) and can encompass a plethora of activities ranging from ensuring enforcement of the contract terms and conditions, giving attention to the achievement of the stated output and outcome of the contract to dispute management which may range from a routine to unusual events on any construction project. In construction project procurement, (Jadid, 2009; Ojo and Gbadebo, 2011) contended that the competency of consultants are apparent, distinctive and exigent at pre and post contract stages to ensure the attainment of project objectives - cost, time, and quality.

Against this background, (Hudson, 2007) opined that generally, an employer under a building or engineering contract will have four main interests upon which he employs his professional adviser(s) -Consultants- to secure, namely(i) a design which is skilful and effective to meet his requirements, and at reasonable cost and any financial limitations impose now or make known in future; (ii) placing of the contract accordingly and obtained a competitive price for the work from a competent contractor on terms which afford reasonable protection to the employer both in regard to price and the quality of the work; (iii) efficient supervision to ensure that the works as carried out conform in detail to the design and the specification, and (iv) Efficient administration of the contract so as to achieve speedy and economical completion of the project. These obligations cut across consultants' services and apparent at pre and post contract management stages. Therefore, the employer is not only entitled to a professional standard of skill in the discharge of all the duties but necessarily a duty of care until the purpose of the appointment has been achieved.

3.1. Pre Contract Stages.

In normal circumstances, the conditions of contract give the Architects/Engineers (A/E) omnibus obligation/responsibilities that match their prime fees scales. These big obligations have also attracted equivalent liabilities. Hence, (Victoria, 2006) in the discharge of the obligations, there is also now universal judicial agreement that the liability of a professional person to their client arises both in tort and in contract. Therefore A/E will not automatically be relieved from liability for their drawings or designs by obtaining their Employer's approval of them, if the design results in defect of construction or of a technical character. This was the position of the court in *Sutcliffe v Thackrah and Others* (1974)¹² that;

"an Architect engaged by an Employer acts as his agent and owes him the contractual and often tortious duties to carry out his work with the reasonable skill and care to be expected of a competent Architect. He will also owe a duty when issuing certificates to act fairly as between the Employer and the Contractor".

Succinctly, under contract, A/E is liable to exercise required degree of professional skill and in Tort, or may incur liability or become liable for breach of duty of care. By extension, to the third part(ies), A/E may be liable in tort of negligence rather than in contract who is adversely affected by his acts *Donoghue v. Stevenson (1932)* supra. Similarly, while it is common provisions in conditions of contract for Contractor's Design, e.g. FIDIC clause 4, however, where an A/E delegates design work to others in areas which A/Es either traditionally design and charge, or which is in any case comprehended within the design fees charged, then he will not escape liability if he chooses for his own purposes to delegate design services to another designer, and in particular to contractors or subcontractors, if they are negligently carried out; that is, he will be warranting due care by that other designer

¹² *Sutcliffe vs Thackrah and Others [1974] AC 727*)

Olumide (2011)¹³. However, this latter position seemed undermined in a commercial case by the Nigerian Supreme Court in a lead judgment per Musdapher, JSC in *Samuel Osigwe vs. Privatization Share Purchase Loan Scheme Management Consortium Ltd & Ors (2009)*¹⁴ who concluded the non-liability, and reiterated that the agent of a disclosed principal cannot be liable in so far as the principal was disclosed. However, with due respect to His Lordship, the agent of disclosure defendant principal, in construction contract, should be tortuously liability in discharge of service due to warranting duty of care being a professional person.

Related thereto is the A/E negligence as the nature site condition. Borrowing from another jurisdiction, in *Condon-Cunningham, Inc. v. Day, (1969)*¹⁵, the Cuyahoga County Court of Common, an American state of Ohio court, held that a contractor could recover, from the employer, costs incurred because the subsurface conditions at the site were materially different from those represented in the drawings and specifications. A/E or QS duties to specify design, material, workmanship requirements, and (Scope of work), disputes tend to focus on the cause of the extra work and whether the work exceeds the scope of the contract. Dispute related to the extra work, reworked such related to, are often recurrence in Nigeria public sector construction contract (Ojo and Gbadebo, 2011) largely due to poor design or specification by consultants on which government (the employer) compensate the contractor.

Anago(2004) opined that the Quantity Surveyor(QS) occupies a central role of interacting with other members of the design and construction team. By this opinion, their service engagement/appointment being include in the overall Architectural services(as mostly practiced in Nigeria) in Building contract, immune them from liabilities may not hold water. Regardless of the terms of the appointment, the QS still owe the employer a duty of care being a professional- often expressed as a duty of reasonable skill and care and the standard expected is that of the ordinary skilled man exercising and professing to have that special skill of quantity surveying as in the case of *Bolam v Friern Barnet Hospital Management Committee (1957)*¹⁶.

Again, one important duty of the QS is in the procurement proceeding is the prequalification and evaluation of bids to identify and determine those bidders who are interested and capable of undertaking the contract. Though (Ojo *et al*, 2011) described it as a daunting task, yet the professional QS holds a duty of care before recommending any contractor to the employer especially where open tendering is used. This principle was the court position in the case of *Pratt v George Hill & Associates (1987)*¹⁷, where two firms of tendering contractors were recommended as “very reliable” for award to the employer. However, the employer chose one but found wholly not only unreliable (having abandoned the work at a stage) but went insolvent while the employer had paid some amount on interim certificates and subsequently incurred other costs. The court found that the Architect/QS had been in breach of their duty of care to their employer. Moreover, this may have been based on *Hedley Byrne v Heller (1964)*¹⁸.

Provisional Sum (PS) is an amount allowed in the bill for work which extent cannot be determined at the commencement of work contract. In Nigeria, some QS or engineers are found of excessive use of PS in bills of quantities especially on highway projects and building services work elements. This could be susceptible to serious claims on the employer. A recent English court case in *Plymouth & South West Co-operative Society Limited v Architecture, Structure & Management Limited(2006)*¹⁹ where a redevelopment project was successfully

¹³ Olumide K. O. (2011). *A Review Of The Evolving Nigerian Principal—Agency Rules, In The Context Of Two Landmark Cases: Ukpanah V. Ayaya (2011) 1 NWLR [Part 1227] 61 And Samuel Osigwe Vs. Privatization Share Purchase Loan Scheme Management Consortium Ltd & Ors (2009) 3 Nwlr (Pt. 1128) 378 Proshareng.Com/Articles/2 Monday, October 17*

¹⁴ *Samuel Osigwe Vs. Privatization Share Purchase Loan Scheme Management Consortium Ltd & Ors (2009) 3 Nwlr (Pt. 1128) 378*

¹⁵ *Condon-Cunningham, Inc. v. Day, (1969).22 Ohio Misc. 71,258 N.E.2d 264*

¹⁶ *Bolam v Friern Barnet Hospital Management Committee (1957) 1 WLR 583 an English tort law case that lays down the typical rule for assessing the appropriate standard of reasonable care in negligence cases involving skilled professionals (e.g. doctors).*

¹⁷ *Pratt vs George Hill & Associates (1987) 38 BLR 25*

¹⁸ *Hedley Byrne v Heller [1964] AC 465. where misstatements of the QS before Contractor enters building contract with employer and upon which the employer express reliance and acted, turns out to be negligent misstatement.*

¹⁹ *Plymouth & South West Co-operative Society Limited v Architecture, Structure & Management Limited (2006) All ER (D)*

completed, but at an overspend of approximately £2 million, in which the architect made little or no design progress and nearly 90% of the works remained as undefined provisional cost sums may underscore this. The developer sought to recover much of the alleged overspend from the design team (who in fact was to design, oversee implement and report upon tenders, contract procurement, cost control and certification procedures and general liaison with the contractor on programming and cost planning matters), on the basis that most of them would have been avoided had the architect performed its services with reasonable skill and care.

3.2. Post Contract Stage.

Common to post contract management in Nigeria is claims especially variation and fluctuation claims (Ojo and Arowolo, 2011) However, such claims are seldom inevitable due to changes in specification, design, quality of material, economic situation on prices of material etc on which contractors/employer sort compensation for additional expense, losses incurred. However, it is naturally difficult to part with money (Mbaya, 2008) so is the dilemma of either the employer or the contractor where the claim event is not in their favour. In compensating for approved variation claim therefore, FIDIC similar to SFBN(1990) state that 'variation may be initiated by the engineer...' and '...the contractor shall execute and be bound by ..'it '...unless with a prompt notice to the engineer (with supporting particular)'. Hence, the approval of the engineer is sacrosanct.

This sweet authorizing/certifying power of the engineer turned sour in *Tharsis Sulphur & Copper Co v M'Elroy* (1878)²⁰ decision of House of Lords', where the respondents were employed to erect a bridge structure including cast-iron trough girders. They attempted to cast the girders in accordance with the specified dimensions, but found that the girders were liable to warp and crack at that thickness. They therefore proposed that they would cast the girders with increased thickness to overcome the problem. The Appellants consented, but did not order the change or agree to pay any increased price. On completion of the work, the Respondent contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied. The claim was rejected.

However, Rosenberg (2007) opine that agency principle as to whether a variation order made by the A/E is valid, can be eroded by the fact that, only the employer has the power to issue a variation order, stressing that only variation orders deriving from that authority are valid. Generally, if the A/E orders a variation to the work with the actual, apparent, or implied authority of the employer, that order is valid. This position seems to enjoy the provision of SFBCN (1990) in clause 11.

Administration of Contract in terms of time and precision documentation requires tact and should be exhaustive agreed. A/E is not also immune in case of any negligence. For example, in *Temloc V Errill (1988)*²¹ where Errill claim for Liquidated Damages (clause 24 of the contract which entry in the appendix contained an insertion "£NIL") suffered on Appeal, due to Architect's review of the contractor's claims for extension of time and certified a revised completion date of 14th November 1984 in lieu of 28th September 1984 contract completion date stated in the appendix but practical completion was not certified until 20th December 1984. The Court of Appeal as per Nourse L.J. stated:

I think it clear, both as a matter of construction and as one of common sense, that if (1) clause 24 is incorporated in the contract and (2) the parties complete the relevant part of the appendix, either by stating a rate at which the sum is to be calculated or, as here, by stating that the sum is to be nil, then that constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of his failure to complete the works on time.

The Employer (Errill) was not entitled to any relief because Clause 24 was exhaustive. Conversely, Donohoe and Coggins (2011) comparative review of Errill's case and a similar recent Australian case in *Baese Pty Ltd v RA Bracken Building Pty Ltd (1990)*²² found a difference in the *ratio* for court decisions.

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²⁰ *Tharsis Sulphur & Copper Co vs M'Elroy (1878) 3 App Cas 1040*

²¹ *Temloc Limited v Errill Properties Limited (1988) 39 BLR 30,*

²² *Baese Pty Ltd v RA Bracken Building Pty Ltd (1990) 6 BCL 137. The Australian courts are now prepared to uphold such a right to ULD where the particular context in a case justifies such interpretation (in a \$nil LD) and*

Payment certificate is not only essential but conditionally required by the A/E to be issued as at agreed time and manner. However, an Architect was found liable in Tort of Negligence in the case of *Lubenham Co.Ltd. vs Sounth Perbrokesshire District Council and Others (1986)*²³ as reported in Knowles(1987) for defective interim certificate and unilateral deduction on Liquidated Damage, which is the reserved right of the Employer.

Again, though most standard forms make the A/E the *de facto* certifier on payment certificate. However, an English court of appeal in *Sutcliffe v Chippendale and Edmondson (1971)*²⁴ by Judge Stabb QC dictum held that designer/certifier are not required to exercise due care and skill beyond the limits of their own discipline. This because the professional QS often prepares a valuation prior and upon which the certificate is based, therefore the QS may not be immune in the event negligence as a result of his duty. Hence, in *Tryer v District Auditor of Monmouth(1973)*²⁵, the local authority QS was held liable for successful claims including the allegation that the QS had approved excessive quantities of prices and hence over valuation for Architect's certification which led to irrecoverable overpayments to the Contractor; he was surcharge of the excess cost due to his negligence.

Since the position of the court in *Sutcliffe v Chippendale and Edmondson (supra)* suggest and advocate distinctive duty of professionals along their competences, yet in a team on a building or a engineering project. That is, it appears to say that the engineer to work out what the deflections of a floor will be; and for the architect to decide whether the floor with those deflections will be visually or aesthetically satisfactory when the finishes chosen by the architect have been applied, while the for QS is to ensure the cost estimation and control for the structure. This principle is far from what obtains in the Nigeria highway construction project subsector, the engineer solely designs and cost manages projects. This position put the engineers on very high liabilities.

Further on this, the professionals owe his employer duty to observe and or inspect the works with a view to ensuring that they are carried out to the standard contracted for. While the contractor supervises the work, reasonable observation and inspection would enable the A/E to give an honest certificate that the work had been executed according to the contract. To this end, the relationship between the architect/engineer and the quantity surveyor in the preparation of interim valuations and inspections can be considered cordial.

3.3. Consultants Joint and Concurrent Liabilities.

Since it is agreed that professional consultants owes a duty of care in tort to their Employer and generally to the public third party, however, a claim in tort will not usually extend the duties of the professional concurrent with their contractual obligations.

In Nigeria, its not unusual to have a team of professionals jointly commissioned an employer especially in public sector construction projects. In this position, the Nigerian Public Procurement Act (PPA) (2007), express their joint liability thus;
“....suppliers, contractors or service providers acting jointly are jointly and severally liable for all obligations and or responsibility arising from this Act and the non-performance or improper performance of any contract awarded pursuant to this Act.”

Moreover, a team of professionals on a building project, authorized jointly by the employer also have been found several liable in contract and in tort of negligence. The court in *Storey v Charles Church Developments plc(1995)*²⁶ and as argued by (Victoria, 2006) affirmed they can all also be liable jointly to the employer. For instance, if the QS undertake to approve, review, comment on, examine or otherwise check the Contractor's work along with the Architect and Engineer, then the law makes the QS “jointly liable” for that work with the other part (ies) in event of a default. The law then makes “each” person who is “jointly responsible” for that work “100% liable” for the anything wrong with that work, to the employer to whom they owe the duty of responsibility. This further underscore the joint liability of consultants on decisions made at site meetings.

there are no clear words expressing an intention to the contrary.

²³ *Lubenham Co.Ltd. vs Sounth Perbrokesshire District Council and Others (1986) 8 Exch. 341*

²⁴ *Sutcliffe v Chippendale and Edmondson (1971) 18 BLR 149*

²⁵ *Tyler -v- District Auditor of Monmouthshire (1973) 230 EG973*

²⁶ *Storey vs Charles Church Developments Plc (1995) 73 ConLR 1*

Therefore, working the design and construction to devoid liability and meet the employer project objectives, the consultants may discharge their responsibilities thus; while ensuring the quality of the work-design and construction- is always the responsibility of the A/E and never that of the QS, and that work properly executed is the work for which a progress payment is being recommended by the QS, the A/E is duty bound to notify the QS in advance of any work which he, the A/E classifies as not properly executed so as to give the QS the opportunity of excluding it.

4.0. Conclusion and Recommendations.

An assumption of responsibility by the construction professional, employed or commissioned and hence authorized as an agent of the employer, and forthwith in the discharge of his obligations, coupled with the concomitant reliance by the employer, may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties. And, in consequence, unless his contract precludes by some expressed exceptions, the employer, who has available to him concurrent remedies or claims, in contract and tort, may choose that remedy which appears to him to be the most advantageous. This therefore become a caution to consultants not only to be conscious of inherent liability in their services, but to so act in ensuring duty of care, and that professional ethic will play a proper running and well being of the construction process at every stage while reducing disputes and achieve project objectives.

Similarly, consultants- as agents, in bringing their employer into contractual relationship with the third parties, it would be unusual not only to mix up the various professionals' roles but more importantly protecting the various parties to the Contract. Otherwise, if a professional does take on a function that is beyond his contractual remit then he runs the risk that he will not be insured for providing this additional service.

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