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# The Quantity Surveyor and the Law



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### Introduction:

Quantity Surveyor (QS) in practice deals with his/her employer, the employer's clients, and different parties when performing his/her duties. His/her involvement for the project may vary from the concept design stage by preparing conceptual cost estimate to the settlement of disputes of the project. This includes preparing of preliminary cost plan, Bills of Quantities, tender evaluation, project financial and contractual administration, disputes resolution etc. When proceeding in the above long and complicated processes, QS would have to make many important decisions and measures in terms of commercial, financial, or contractual nature and that affects many other parties in their business. This perhaps could decide whether a party wins or loses a project, and also it may affect the party's existence in the business or its exit! It is therefore, very important that the Quantity Surveyor must always be without prejudice, be knowledgeable and be up dated with all aspects of modern practice in the profession regularly and apply this knowledge in his regular practice; act impartially, and his decisions must be neutral, fair and reasonable always to both the parties in the contract. It is obvious that there is a party who pays for the QS for his/her service. However; he/she should not act in an unfavorable and un-lawful manner towards the pay master who will be influenced similarly in return. It is also very important for the QS to maintain integrity at any cost. Therefore, it is very important to understand how the law affects the QS in practice. Quantity Surveyors very often deal in the following areas.

### Contract/Employment agreement:

Professionals may some times find themselves in difficulty by undertaking or assigning work to others by means of verbal/gentlemen agreements, or upon incomplete

written agreements. If the agreement or the contract is not a clearly worded document, or contains ambiguities, the parties will be in a situation that would lead to disputes in a future day when the agreement or the contract is in process or after the completion of the process. Thus, it is very important first of all, to have a properly and specifically worded agreement in place. Appointment of the QS is normally made directly by the employer or on the advice of the architect or by any other agent with the knowledge of the principles. It was held in *Waghorn vs. Wimbledon Local Board* that the architect was instructed by the client to call for tenders; however, without having quantities it was not possible for the architect to call tenders and accordingly, the architect was advised to appoint a QS under the standard terms of the RICS (since this is mentioned for the first time, it's better to spell it out.).

There is no legal requirement to have a written agreement between the QS and his/her employer. However, in the event of a dispute, the relationship between the parties has to be established for the litigation and it is very important for the courts to understand the clear intention of the worrying parties where, written agreement or recorded contemporaries bring a strong impact on the case. The nature and the existence of the agreement has to be established by using standard form of appointment, form of agreement, terms and conditions of appointment etc, that are published by the Royal Institute of Chartered Surveyors (RICS) or any other standard methods which are in practice today. Whatever the way we contracted, the important thing is to ensure that a valid, comprehensive and adequately evidenced contract must exist between the parties. This is very important as many people are regretting that their verbal and even written agreements not having an opportunity to revert once agreed and

many gentle agreements are breached by not delivering as promised. When professional services are provided, the intention is clear that the professional body or the person must be paid for the service provided. In the example, *H. M. Key & Partners vs. M. S. Gourgey and others* (1984) in the UK, it was said: “the ordinary presumption is that a professional man does not expect to work unpaid for his services”. Given that all relevant terms are settled and agreed, incorporated in a formal contract, the intention of the parties may still be frustrated by a failure to express the terms clearly.

Who are the parties a QS is involved with when performing his/her routine duties? The first party is the employer or the paymaster of the QS, with whom he is having an agreement of employment and who assigns duties to him. His duties and responsibilities must comply with the terms and conditions of the employment agreement, codes and conducts of the organization, moral and cultural understandings of the organization and fellow co-workers etc. Then the QS deals with the employers, contractors, sub contractors, consultants, local authorities, insurance agents, banks, material suppliers etc. at the work place and with relevant professional institutions and their ethics, professional codes and conducts. The following (figure 1) illustrates patterns of contractual relationships and links existing between various parties of design and procurement teams.

Under the English law, it should be noted that only the parties in the main contract, namely the employer and the contractor might be sued. According to the JCT-1998 form of contract, the contracts between the employer and professional services are based on standard professional agreements formed by respective institutions. However, there should be collateral warranty, which would permit the employer to sue a subcontractor or a supplier directly. Notwithstanding the absence of a contractual link, the employer’s professional advisers could become liable to the contractor in tort. Therefore, if the architect was to exceed the limitations of his authority without the knowledge of the contractor, the contractor could recover any loss suffered as a result of the actions of the architect.

In terms of negligence, similar to the many other professionals, Quantity Surveyor too has responsibilities and duty of care towards his/her client to carry out his work with due diligent, proper care and skill as per signed agreement. Where the law is concerned, negligence usually consists either of a careless course of conduct or such conduct coupled with further circumstances, sufficient to transform it into the tort of negligence itself.

In the English law, this requirement is clearly interpreted under Supply of Goods and Services act 1982. Accordingly, if a QS fails to fulfill his/her duties deliberately or due to negligence, the liabilities come into effect and he must

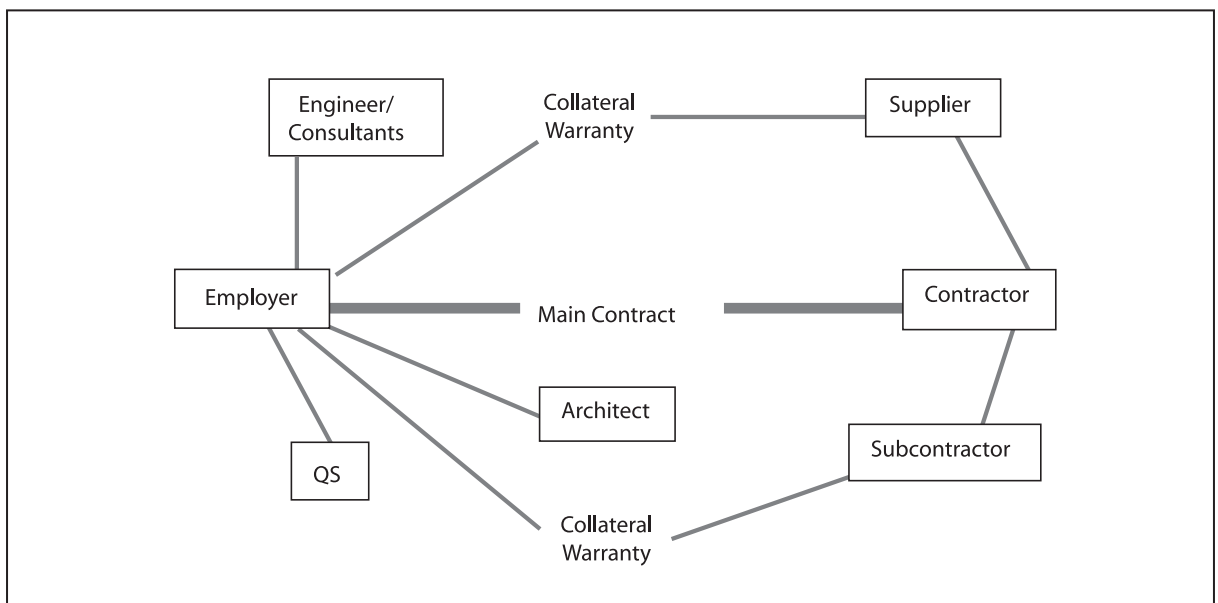


Figure 1- Contractual relationship of the QS

pay the damages. As discussed above, Quantity Surveyor's duties and responsibilities as well as the liabilities and consequences in the event of the failure, must be stated as a part of their service agreement. In the case of lack of care in delivering or discharging his contractual duties the QS can always be held responsible and is in breach of contract as per the 1982 act. For this reason, it is very important for the QS to perform with diligence and due care. For further protection however, it is advisable to have a Professional Indemnity Insurance Policy (PI) in place to cover any negligence.

What is the indemnity policy and its coverage? Professionals are advised to have some method to cover the liabilities for loss or damage in the event of any negligence caused by them. PI has become more popular in these days than before, as it can share the liabilities for possible losses. Such a policy will provide an indemnity in respect of legal liability for errors and omissions done or committed by professionals. PI is compulsory in many professional organizations; the RICS has introduced a compulsory PI to be effective for its members since January 1986. However, freedom of choice is with the members, and where to place such insurance remains open. Generally, all professionals must seriously consider the importance of this in today's complicated market conditions, and in particularly to those who are willing to start their own businesses.

As discussed and shown in figure 1 above, the contractual link is very important and effects for claims or suing against negligence. Liability is considered independently. If there is no contractual link between the parties, a third party can sue only in the tort of negligence. However, plaintiff suing in negligence has to show that:

- The defendant had a duty of care to the plaintiff
- The defendant was in breach of that duty
- The plaintiff suffered damage due to the breach of that duty and kind which is recoverable

In line with the above, in the case *Junior Books Ltd vs. The Veitchi Co. Ltd* (1982), the House of Lords held that a specialist flooring subcontractor was liable in negligence for defective flooring to the employer with whom a subcontractor had no contractual link or relationship. There are not much cases of law concerned with the negligence of Quantity Surveyors. However, it is advisable to have a PI cover which may limit the risk involved. According to the RICS code of conduct, a surveyor should never accept

work on ad hoc basis, but should always seek to formalize the process in some way.

For a QS, it is very important to identify and have a thorough knowledge of the contract documents. The contract should very clearly, unambiguously state and include which documents are forming a part of the contract. In construction industry, this may include the following among others:

- The Contract Agreement (if completed)
- The Letter of Acceptance
- The Tender
- Conditions of Contract
- The Specifications
- Contract Drawings
- Bill of Quantities (BOQ)
- Any other document forming part

It is important to state the language or languages, in which the contract documents are written. In the event of more than one language is used in the contract document, the "ruling language" and who is interpreting etc, must be stated. Further, there are several documents in the forming part of the contract, and it is inevitable to have ambiguities because of different documents and accordingly, the priority order for documents (which shall take precedence) shall be given unless stated otherwise. Following cases illustrates how important the contract documents are in a construction contract:

In a lump sum contract the contractor is liable to complete the project complying with drawings and specifications. In *Williams vs. Fitzmaurice* (1858), a lump sum contract to build a house was awarded to the contractor and he agreed to complete the works with supplying all materials as necessary. However, it was found later that flooring was omitted in the specification and accordingly, the contractor has demanded additional payment to do the flooring. It was held that the flooring was necessary to complete the work despite mentioning it or not in the specification.

In *Davis Contractors vs. Fareham UDC* (1956), the contractor had signed the agreement to built 78 houses in eight (8) months for a fixed price, subject to the adequate supply of labour in the market. However, this qualification was in a separate letter, which was not forming a part of the agreement. In the process of the work, there was an unexpected labour shortage in the market and delayed the project causing an additional cost of £ 17,000.00

to the contractor for the prolonged period. It was held that the contractor himself should absorb this additional cost because the aforesaid letter of qualification was not forming a part of the agreement.

Quantifying of project scope is a fundamental duty of QS and therefore, a measurement of work is very important and this is to be done in accordance with Standard Methods of Measurements published by widely accepted international professional institutions like Royal Institute of Chartered Surveyors. When following an internationally accepted (standard) method by all parties, it is acceptable and clear to all users how and what work has been measured as parties are talking in the same language. Therefore, a professional QS must follow these standard methods of measurements in practice. Following are widely accepted methods currently in use:

- SMM 7 -Standard Method of Measurements by RICS
- POMI -Principles of Measurements (International) by RICS
- CESMM 3 – Civil Engineering Standard Method of Measurements by Institute of Civil Engineering UK

**Bill of Quantities (BoQ)** is another standard and important document that is used in the industry, and this provides a basis for estimating, price comparison, budget control, and contract administration guides. This is a very important and useful controlling tool at the tender stage as it provides uniformity for quantities for all tendering parties. In measured (re-measurable) contract (JCT 05, ICE 7), quantities are considered as approximate and shall be measured at the completion of the works, whilst JCT standard is for quantities, not required to re-measure. In a lump sum contract, quantities are not subject to be changed under normal circumstance and rates given in the BOQ are used to assess the progress of work for payment and pricing of variations.

**Standard forms of contract** are general and very important for all types of projects and parties use them very familiarly with the contents of the form of contract; by using widely used standard contract conditions, the contractor and the employer are aware of their common obligations and responsibilities towards the contract from the initial stage to the settlement of final accounts. The contract administration is the core function of the QS, where he/she has to apply internationally accepted contract conditions; RIBA, JCT, NEC, GC/wks/1, FIDIC etc, are some of

them. However, some countries and different authorities perhaps in the same country follow their own contract conditions. Most of them had modified standard contract conditions to suit their local/domestic requirements e.g. ICTAD in Sri Lanka. Dubai Municipality, Dubai Civil Aviations, Dubai Properties, Nakheel etc, in the UAE, are having their own contract conditions and thus heading to a complicated situation according to the writer's personal view. Therefore, it is very important for professionals in practice to follow standard contract conditions not only to mitigate or/and resolve disputes but also to keep the profession in a greater position. Notwithstanding different forms of contract being used amongst many, there are some common clauses experienced day to day in the construction industry, particularly by Quantity Surveyors:

- Performance Security Bond - If the employer requires, the contractor shall provide a valid performance bond by using standard formats within an agreed period (as per FIDIC, this is 28 days after receipt of the Letter of Acceptance), in order to assure the proper and timely performance of the contract scope. This is for the employer to allow recovery of monies from the contractor in the event of breaching the contract by contractor. It is worth to read the following two cases to understand how effectively the law is playing in two different ways for two similar incidents.

Case-1: *Trafalgar House vs. General Surety (1995)*, the House of Lords reversed an unwelcome decision of the Court of Appeal that a conditional bond was to be treated as an on-demand bond. Default by the contractor has to be demonstrated. However, in *Perar vs. General Surety (1994)* the Court of Appeal came to another surprising decision. The defendant had provided a bond by which they agreed to pay damages in case of contractors default. The contractor went into administrative receivership, and his employment was automatically determined. The Court held that 'default' meant breach of contract and that insolvency did not constitute as default. Therefore, bond provided no protection in precisely the circumstances in which it was needed.

Case-2: *De Vere Hotels Ltd vs. Aegon Insurance Co Ltd (1998)* is an attempt by a contractor to escape from his liabilities; the bond in that case stated that the contractor was to be released from his liability on issue of certificate of completion. However, before completing the work,

- contractor who provided the bond became insolvent and his employment was terminated automatically. Prior to issuing the certificate of completion, the employer had brought in another party to complete the work and the certificate of completion was issued after that. The plaintiffs made a claim on the bond, but the defendants refused to pay on the basis that their liability ceased on issue of the certificate. The intention had been that the bond should remain in force to protect the employer until the original contractor had completed the work. This had not happened because of its insolvency. The purpose of the bond was precisely to guard against such an event. The court therefore held that the bondsman is liable and the contractor could not escape from paying the damage to the employer.
- Programme - For the execution of the work, the contractor must give a programme using standard forms, and the method he proposes to adopt to execute the work. The contractor has to comply with the programme and he is liable for any failure in completing the programme due to reasons within the limits of his control. In such a situation the contractor has to pay liquidated damages and other consequences associated.
  - Possession – The date or dates (if more than one) by which the contractor is to be given possession of the site enabling him to commence the work; liabilities and consequences are given for either party in the event of failure to give or take the possession.
  - Completion and delay – In the Appendix to the tender, a particular time for completion of the work is to be stated for whole or parts of the work as appropriate and this may be extended by the contract administrator/ employer under certain acceptable circumstances. In the event that the contractor fails to complete the work by this date (original or extended completion date), the contractor has to pay compensation for liquidated damage to the employer and if there is a delay from the employer's part requiring an extension of time, the costs are to be awarded to the contractor by employer.
  - Liquidated damages (LD) - This must represent a genuine pre-estimated value of the losses that will be suffered by the employer due to the non-completion of the work by the contractor on time. Courts usually do not uphold this pre-estimated figure of LD.
  - Defects Liability - Defects for which the contractor is liable under the terms of the contract to be rectified by the contractor. Failure to do so will result the employer in bringing a third party to complete the work and the cost to be deducted from the monies due to the contractor. However, the employer should not prevent the contractor from rectifying the defects for unfair advantages or benefits because then his rights to recover the costs from the contractor under the contract may cease.
  - Variations – This could be any addition or omission to the contract scope, or changing of quality, changing of levels perhaps, or this could even be changes to time. All the variation to the contract must be authorized by the contract administrator/employer prior to the contractor commencing the varied works; otherwise the contractor shall be at a risk for the entitlement of payment for varied work. Most contracts state that variations must be in writing. Whilst some forms of contracts do not permit verbal instructions for variations, some are permitted subject to confirmation in writing within a certain period of time. Under the common law of contract the contractor is still entitled for payment for varied works even if the employer argued on the pretext that there is no written instruction. This is because there is an implied promise to pay for varied works, as illustrated in *Molloy vs. Leibe* (1910). However, the situation is different, if it is an express term of the contract which says that, precedent to payment for extra work an instruction in writing is a condition. There is no payment due without having a written instruction (*Nixon vs. Taff Railway* – 1848).
  - Payment – Progress of the work must be paid usually by monthly installments on the basis if the contract will take more than 44 days to complete( unclear-rephrase); if this is less than that period, payment will be given upon completion of the whole work. Employer is liable to pay the contractor on time as per contract under normal circumstances. Delaying of payment by the employer shall face consequences and perhaps the contractor may terminate the contract and leaving the project. An employer's contract administrator (QS) has no contract with the contractor and it is impossible for contractor to sue the QS under the contract but the employer. Additionally, as he does not owe a duty of care, under the tort law it is also not possible to sue the QS (*Leon Engineering and Construction Co.*



vs. Ka Duk Investment Co. Ltd 1989). However, it is the contract administrator's moral duty to recommend correct representation of the work progress in a timely manner for payment to the contractor; remember the employer can take action against the QS for his/her delay in recommending payment on time for the contractor.

- **Retention** – The entire interim amount certified for progress of the work including materials at site is subject to deduct retention by the employer in order to protect himself, if the work is incomplete or defective. The contractor has to rectify his defective or incomplete work in order to get the retention money. Normally, the retention is 10% of the certified value. First half (first moiety) of this will be released with the issuing of completion certificate (or Taking Over Certificate) and the rest will be released after the issuing of Defects Liability Certificate.
- **Determination** - Either party in the contract need to determine their rights under the contract or provide some method to reserve their rights. The contract administrator shall consult the employer and the contractor before determining the amount or time of such a right.
- **Disputes**- Most probably disputes occur when more than one party is involved in a business; in the construction industry also there are many disputes during the progress of the work. Therefore, there must be some methods to resolve these disputes. It may be resolved by Conciliation, Mediation, Adjudication, Amicable settlements, and Arbitration which are some common alternative methods for resolution of disputes over the litigation.

#### **Alternative Methods of Disputes Resolution:**

Disputes occur very commonly when dealing with multi cultural or multi national societies and that will be further fueled by applying of non-standard contract documents in the construction industry. This is further heightened by current recession. The construction industry is heavily affected in numerous ways. Knowledge, ethics, discipline, and different interests of the parties also affect disputes. Standard methods, and accepted norms exist to handle these issues and the QS must be aware of those. In resolving construction related disputes, Quantity Surveyor plays a major role. In most of the cases, the Quantity Surveyors

in different capacities are responsible for activities such as keeping all relevant contemporary records, time and cost related information, identifying the disputes, preparing and presenting the case, acting as adjudicator, arbitrator and representing as members of the tribunal panel of the arbitration etc. This is because, the QS who has the contractual, commercial, constructional and perhaps, legal knowledge of the construction industry is better than the other professionals in the industry in handling such issues. Few alternative methods of dispute resolution are briefly explained below as they are internationally accepted.

**Mediation:** Both the worrying parties come together, select and accept a third party to act as a mediator to resolve their dispute. The mediator has no power to impose a decision but witness the solution agreed by the parties and document it to accept for both the parties.

**Conciliation:** This is also almost the same as mediation but the third party (Conciliator), has more power than the Mediator, as he can suggest possible solutions for the parties to agree.

**Ombudsmen:** Large organizations like banks, finance companies, insurance companies etc. apply this method by selecting a neutral person to investigate their complaints. This person (Ombudsman) has to have an independent office for public to bring their complaints about any malpractice of public or private organizations. Most ombudsmen can only recommend solutions; very few can make legally enforceable decisions.

**Arbitration:** Here the parties agree to present their dispute to an independent and well-reputed third party to bring a decision, which can bind the parties. This is a private method for dispute resolution and is widely accepted by many countries with the exception of criminal disputes. Parties can appoint arbitrators. Both litigation and arbitration consume more time and cost, but compared to litigation, the arbitration is better in terms of cost and time. Also arbitration is more flexible compared to litigation. Importantly, as arbitration is not open for public, the parties can avoid unwanted publicity and keep their confidentiality.

As discussed above, there are many reasons behind rises to disputes and it is important to get them resolved in a fair and reasonable manner for the acceptance of all the relevant parties within a reasonable cost and minimum time. Nevertheless, litigation and arbitrations are mostly

accepted methods to resolve disputes; both are very costly and consume lengthy time in an unacceptable manner. Following are important factors to be reviewed prior deciding to go for arbitration:

- Amount disputed will remain unpaid till the dispute is resolved
- Cost of arbitration is very high and that is an additional burden
- Contract perhaps should be completed or abandoned some years before the award
- Interest for the money withheld and losing future opportunities may occur
- This could badly affect the reputation of the company name
- In the worst case, companies may face bankruptcy or declare insolvency prior to the award

Looking at all the given reasons, it is better not to encourage parties to go for above methods but for other alternative methods of dispute resolution. Goodwill of the parties and proper coordination and communication are important at this point to bring the worrying parties for an amicable settlement.

### **Conclusion:**

Quantity Surveyor's role in the construction industry is vital. Starting from preparing of conceptual cost proposals stage to the settlement of final accounts, he plays a major and an invaluable role covering many different and important disciplines. In early seventies, work of the Quantity Surveyor is defined by the Royal Institute of Chartered Surveyors (RICS) as "Ensuring that the resources of the construction industry are utilized to the best advantage of society by providing, Inter alia, the financial management for projects and a cost consultancy service to the client and designer during the whole construction process." However, the above classification and role can't be used as it is today, because the industry and the profession have changed, developed rapidly during the past three decades and are more complicated now. In 1980s, a survey conducted by RICS revealed that the role of Quantity Surveyor has been expanded based on skills, knowledge, expertise provided by the QS and that could be provided both inside and outside of the construction industry based on clients' requirement. The changes we have referred to above have mainly been identified by a survey carried out by Davis Langdon in the year 2000 and that are; changes in market, changes in the construction industry, changes in clients' need, and

changes in the profession in line with globalization. The traditional QS had a very limited scope according to the situation and requirement of the time. However; today this has changed rapidly due to the reasons discussed above and can be classified as follows:

- Investment appraisal
- Advice on cost limits and budgets
- Whole life costing
- Value management
- Risks analysis
- Insolvency services
- Cost engineering services
- Sub contract administration
- Environmental services measurements and costing
- Technical auditing
- Supply chain management
- Products and projects life cycle
- Planning and supervision
- Valuation for insurance purposes
- Project management
- Facilities management
- Time management
- Advice on contractual disputes (Arbitration)
- Planning supervisor
- Employers' agent

These changes should be focused mainly on following areas: business world, customers, projects, skills and information and communication technology (ICT).

In view of the above, isn't it obvious that the Quantity surveying profession is highly innovated, becoming more complicated and competitive? In order to have a smooth flow of function, the profession has to be more standardized and simplified on one hand and in the other hand, Quantity Surveying professionals must be updated to comply with the above requirements. What is the key for simplifying of complicated areas as above? Without doubt, it is the law. Each and every single area of above is linked with the law. Therefore, it is very important for QS to learn the law at least in the area related to the profession in order to succeed in the future; this is a challenge which can be turned into an opportunity.

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