

HKIA Feature Article

Case Study – Fiduciary Duty on Disclosure of Conflict of Interest

Architects may from time to time encounter different conflict of interest (CoI) situations at work (i.e. when the private interests of an architect compete or conflict with the interests of his/her employers/clients or official duties). As a professional, they should discharge their duties fairly and impartially. CoI is not a wrongdoing *per se*, however, mishandling or abuse of such conflicts could have serious repercussions including criminal liability (e.g. fraud). To help HKIA members avoid falling prey to pitfalls of CoI and raise awareness of their fiduciary duty on disclosure of CoI, the following case study is compiled to illustrate the possible legal consequence of abuse of CoI and best practices of managing CoI declared. Members should read in conjunction with the appropriate provisions of the Institute's Code of Professional Conduct (the Code).

Case in Perspective

Adrian was an architect operating a consulting firm and responsible for, among other duties, recommending contractors to clients. He also invested in a contractor (Company A) providing construction services. In a construction project, Adrian highly recommended Company A to the client which eventually awarded the construction contract to it based on his professional advice. Despite the CoI, Adrian did not declare to the client his interest in Company A with intent to induce the client to award the contract to it. The client later discovered the conflict and noticed that Company A had wholly sublet the construction work to another contractor at a much lower price to pocket the price difference.

Professional Conduct

HKIA has set out the principles and rules of conduct required for its members in the Code. In respect of CoI, an architect should avoid any action or situation likely to raise doubts about his integrity. An architect should not have any financial or personal interest in connection with any business which would or might breach the principle on CoI, unless such interest is fully declared to and accepted by his/her client, contractor and any other parties likely to be affected thereby. Any contravention of the Code could cause the architect liable for disciplinary actions (e.g. reprimand, suspension, or expulsion).

Legal Requirements

In accordance with section 16A(1) of the Theft Ordinance (Cap. 210), it is an offence if:

-  any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either –
- (a) in benefit to any person other than the second-mentioned person; or
 - (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

Any registered architects, if being convicted of any offence in Hong Kong or elsewhere that may bring disrepute to the profession, will be subject to disciplinary actions stipulated in the Architects Registration Ordinance (Cap. 408), including removal from the register, reprimand by the Architects Registration Board, etc.

Integrity Risk Analysis

In the aforementioned case, Adrian, as the consultant architect, owes a fiduciary duty under the consultancy agreement to his client who has reasonable expectation that the consultant would act honestly and in the client's best interest (e.g. recommending contractors which could deliver quality service at reasonable price). Adrian's deliberate concealing his material interest in the contractor could constitute a criminal offence under section 16A of the Theft Ordinance. In addition, he may also be subject to disciplinary actions under the relevant regulations of HKIA and those stipulated in the Architects Registration Ordinance (Cap. 408), if he is convicted.

Dos and Don'ts

As practitioners and professionals, architects should –

- ✓ abide by the Code of Professional Conduct issued by HKIA to handle CoI;
- ✓ strictly observe the CoI requirements set out by the employers and/or clients (including the requirement to declare CoI to parties concerned);
- ✓ be vigilant to the fiduciary duty that they owe to both their employers and clients;
- ✓ avoid CoI as far as practicable, and declare CoI, if unavoidable, to employers and/or clients even if such declaration requirements are not explicitly set out;
- ✓ not misuse their position or abuse the power to make personal gains; and
- ✓ seek the employers' and/or clients' instruction on the follow-up actions to mitigate the declared CoI.

Employers (e.g. architect consulting firm) should –

- ✓ devise a mechanism for handling the declaration and management of CoI from staff, including but not limited to the following –
 - providing work-related examples on and guidelines on managing CoI for reference by staff;
 - issuing a form to facilitate staff to make a written declaration and record the follow-up actions taken, where applicable; and
 - setting out procedures and schedule of authorities for handling the declaration forms and determining the follow-up actions to be taken.
- ✓ ensure staff are well aware of the CoI declaration and management requirements (e.g. enshrining the requirements in a code of conduct or employment contract, circulating the requirements on a regular basis or when there are updates, and conducting periodic training).

- ✓ join the Construction Industry Integrity Charter 2.0 jointly launched by the Independent Commission Against Corruption, the Development Bureau and the Construction Industry Council to promote and encourage the implementation of an Integrity Management System. For details of joining the Charter, please scan –



Further Advice

For any questions related to prevention of corruption, please contact the Corruption Prevention Advisory Service (hotline: 2526 6363; email: cpas@cpd.icac.org.hk), or visit its designated website at <https://cpas.icac.hk> for on-line corruption prevention resources.