

It is impossible for a superintendent to comply with clause 23(a) and (c) of AS2124-1992 where he/she is an employee of the Principal. Discuss by reference to Australian authorities on the role of the superintendent.

I. Introduction

The position of superintendent in construction projects is one that is fraught with inherent conflict between the opposing interests of the principal and the contractor. The primary role of the superintendent is to provide determinations in respect to the variable factors involved in a construction project while having regard to the rights of the parties dependent on such determinations.¹ The superintendent's relationship to the principal is fundamentally closer than their relationship with the contractor as the superintendent receives its financial income from the principal and does not wish to jeopardize its relationship with its client. Such a relationship infers that the contractual obligations evinced under Clause 23 of the Australian Standards Contract 2124-1992 are burdensome as the superintendent must ensure that their actions towards the contractor remain 'honest, fair and reasonable'. Relevantly, the superintendent's natural allegiance to the principal must be abstracted and they must form their opinions and determinations according to the predefined contractual terms or by legal constructs which clearly provide authority for such decisions. Of course, such a process of abstraction is inherently more difficult when the superintendent is an employee of the principal and has distinct contractual obligations in such a capacity as an employee.

Clause 2 of Australian Standards Contract 2124-1992 ('**AS2124**') defines the 'superintendent' as the 'the person stated in the Annexure as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent'. While such a definition does not indicate the definitive function of the superintendent, the words 'appointed in writing by the Principal' do indicate that the superintendent has a positive obligation – at the very least – to ensure that the principal is adequately informed and maintains a sufficient degree of satisfaction. If such a notion was not true, then a superintendent would risk future employment with the principal and the economic benefit this provides. Relevantly, this relationship must be juxtaposed against the obligations under Clause 23 which expressly state that, despite the apparent closer relationship to the principal, the Superintendent must utilize their discretion with regard to the contractual obligations of the engaging parties. Such discretion must be in a manner which is impartial, without bias and is facilitative of both the principal and the contractor to ensure that the project is ultimately completed within the stipulated time frame.²

In this regard, it is fundamentally difficult for a superintendent to act, or been seen to act, as an independent, objective and impartial party when they are an employee of the principal. This primarily stems from a contractor viewing such a relationship as an advantageous one which relevantly favours the principal in any decisions made. In this regard, this paper intends to analyze the role of the superintendent in respect to clause 23 of AS2124 and review the relevant obligations that a superintendent has to act impartially. It will seek to review the Australian judicial commentary in respect to the superintendent's function and the relevant issues that arise in respect to a superintendent acting 'honestly, fairly and reasonably'. It will also seek to consider the relationship between the principal, superintendent and contractor when the former

¹ Tyrill, John, *Role of the Superintendent*, Building & Construction Law Journal, Vol. 2, Issue 4, 1986 at 317.

² Bailey, Ian H, *Construction Law in Australia*, 2nd Edition, LBC Information Services, 1998 at pg. 110-111.

two are in a relationship of employment and how such a relationship is rationalized in light of the obligations and duties owed. It will then conclude with an analysis of the arguments presented in the paper and attempt to ascertain the current position in Australia regarding a principal and superintendent who are in an relationship of employment and determine whether it is 'impossible' for a superintendent to comply with clause 23 of AS2124 as a result.

II. Superintendent Impartiality

In modern construction contracts, the superintendent can often be an employee of the client organization and such a relationship is evidently entrenched in conflict – particularly when a decision is provided in favour of a contractor which is against the will of the employer. The relationship of employee and employer was characterized by the High Court in *Hollis v Vabu Pty Ltd*³ in which the High Court considered it a multi-faceted test incorporating an assessment of control.⁴ Evidently, such a test is at odds with clause 23 of AS2124 and the concepts of 'impartiality' and 'independent decision making' on behalf of a superintendent who is issuing determinations in respect to both their employer and a building contractor. In *Perini Corporation v Commonwealth of Australia* ('*Perini*')⁵ the superintendent was an employee of the principal and in this regard, *Perini* represents a significant authority on the nature of such a relationship. The contractor of the project in this case had made many applications for extensions of time ('EOTs') which were rejected by the superintendent on the grounds of the principal's departmental policy. The contractor contended the superintendent was under a duty to act impartially and that an implied term of contract existed which required the principal to ensure that the superintendent did so.⁶

The Court held that a superintendent had discretion in relation to their decision making and they could rely upon others to supply them with information necessary for exercising such discretion. However, the Court was of the opinion that such information could only be relied upon if it was not overtly controlling and allowed the superintendent to make an unbiased decision within a reasonable time. The evident difficulty in this regard, is the rationalization of how an employee can be provided with information by their employer but not be controlled by it when this is inherent aspect of the employee-employer relationship. McFarlane J commented on such a conflict by noting that

'the agreement of the parties is that they have referred the decision of these matters to a person who by reason of his employment and who by reason of his other duties in supervising the execution of the contract is a person who has both bias and partiality. It is now in my opinion too late to hold that an appointment of this kind is not one for which the parties to a contract cannot provide.'⁷

³ *Hollis v Vabu Pty Ltd* [2001] HCA 44.

⁴ *Ibid* at [24].

⁵ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530.

⁶ Tyrril, John, *Role of the Superintendent*, Building & Construction Law Journal, Vol. 2, Issue 4, 1986 at 319.

⁷ *Ibid* 5 at 536.

On this basis, McFarlane J subsequently held that there was an implied term which existed in the contract that directed a principal would not interfere with a superintendent's duties and that a principal owed a further obligation to ensure that the superintendent performed their duties appropriately. His Honour stated a duty to not interfere with a supervisor can only be imposed by an implication arising from the contract such that the contracting parties

‘[h]ave impliedly bound themselves, one to the other, that they would not do anything that would prevent [the superintendent] from a proper discharge of the mandate which contractually they had granted to him’⁸

such that the superintendent ‘was to act independently and in the proper exercise of his determinations’.⁹ Relevantly, any imposition by a party which consequently renders the superintendent unable to perform their functions under the contract is an imposition which has interfered with their contractual obligations and removed their ability to act as an independent body. In this regard, the difficulty for a principal and superintendent who are in a relationship of employment primarily relates to the constant distrust by the contractor that a superintendent is favoring the principal.

Evidently, such a notion infers that any relationship of employment between a principal and superintendent will lead a contractor to more closely scrutinize any superintendent determinations as a corollary of the superintendent being employed by the principal. In light of *Perini*, it is clear that the principal – in their capacity as the employer of the superintendent – consequently owes both a positive implied obligation to ensure that the superintendent is adequately performing their role and a negative implied duty to ensure they do not interfere with it.¹⁰ A byproduct of such dual obligations may be that superintendents are more frequently adverse in their determinations in respect to the principal in order to manifestly ensure that they are acting impartially. In this regard, McFarlane J observed that

‘[t]he [Superintendent] remains an employee of the [Employer] ... [but] that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract.’¹¹

Accordingly, it is evidenced that clause 23 of AS2124 attempts to reflect the comments of McFarlane J in *Perini* in that it endeavors to provide that a superintendent must remain independent regardless of the employment relationship with the principal. The practical reality of such a direction is one which is still heavily burdened with conflict as a principal often attempts to interfere with the superintendents determinations. To avoid this, the correct approach would seemingly be to introduce the word ‘independent’ into clause 23 which would provide an express obligation on both the principal and contractor to ensure that the superintendent is contractually free of external pressures and is able to make impartial determinations without interference. Additionally, it is contended that another practical approach may be to ensure that the all parties in a construction project are adequately informed of the superintendent's role, their relationship with other parties and the extent of their determination powers from the outset. This would

⁸ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530 at 542.

⁹ *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174 at [92].

¹⁰ *Ibid* 8 at [536].

¹¹ *Ibid* 8 at [537].

ensure that the contractor is expressly armed to establish breaches of clause 23 and provides them, from the outset, with the requisite limitations of the superintendent's powers expressly within the contract.¹² The introduction of such express language would reduce the contractor's ability to claim that the appointment of a superintendent, who is an employee principal, was an appointment which was expressly prohibited under the contract as the contractor would have had the opportunity to contest such an appointment in pre-contractual negotiations.

III. Honest, Fair & Reasonable

While the introduction of express language in AS2124 may assist in clarification of the superintendents role – as detailed in part II of this paper – a consideration of AS2124 clause 23 in its unaltered form directs that a superintendent must act 'honestly, fairly and reasonably' in the discharge of their duties under a contract. It is argued that for a person to be 'reasonable' they must be at least 'honest and fair' and in this regard clause 23(c) is an ancillary consideration to the question of 'honesty and fairness' in clause 23(a). Relevantly, the nature of being 'honest and fair' was given significant attention by Warren CJ in *Kane Constructions Pty Ltd v Sopov* ('**Kane Constructions**').¹³ In this case, Warren CJ considered the decision in *Perini* and provided that the expression 'honestly and fairly ... does not appear to have been judicially considered'.¹⁴ In this regard, Her Honour analyzed the decisions in *Storey v National Companies and Securities Commission*¹⁵ and *RJ Elrington Nominees Pty Ltd v Corporate Affairs Commissions (SA)*¹⁶ which considered the meaning of the terms 'honestly' and 'fairly' respectively. Her Honour was of the view that the words, construed in respect to clause 23 of AS2124, meant

'in the present context ... that a superintendent would act "honestly and fairly" when that individual is not dishonest, is just and impartial and conducts himself or herself in a reasonable manner.'¹⁷

Importantly, Her Honour cited a number of authorities¹⁸ and provided a series of circumstances which depicted relevant '[i]nterferences which could lead to impartiality'¹⁹ in the making of determinations by a superintendent. Her Honour stated that these included

- i) 'when the superintendent allows judgment to be influenced;
- ii) when the superintendent is in a position whereby the certificate is deprived of value;
- iii) when the superintendent acts in the interests of one of the parties and by their direction;
- iv) when the position is misconceived and the superintendent acts as mediator;
- v) when there is not sufficient firmness in order to decide questions based on his or her own opinion;

¹² Tyrrel, John, *Role of the Superintendent*, Building & Construction Law Journal, Vol. 2, Issue 4, 1986 at 320.

¹³ *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237.

¹⁴ *Ibid* at [614].

¹⁵ *Storey v National Companies and Securities Commission* [1988] 13 NSWLR 661.

¹⁶ *RJ Elrington Nominees Pty Ltd v Corporate Affairs Commissions (SA)* [1989] 1 ACSCR 93.

¹⁷ *Ibid* 13 at [617].

¹⁸ *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* [1996] 13 BCL 235; *Hickman v Roberts* [1913] AC 229; *Multiplex Constructions v SOR Pty Ltd* [2001] 17 BCL 174; *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174.

¹⁹ *Ibid* 13 at [623].

- vi) where the superintendent's judgment and conduct are controlled by the principal; and
- vii) where the superintendent considers the assent of the principal to be necessary, has ceased to be a free agent and does not give full disclosure of every communication between the superintendent and the principal.²⁰

Her Honour also provided that a superintendent can lose independence 'without actually intending to do so or even without the knowledge they have done so'.²¹ In this regard, Her Honour was clear that interference by the principal will arise 'where there is an attempt to lead the superintendent astray in the interests of the principal'.²² Her Honour also noted that interfering conduct incorporates conduct which involves 'correspondence and communication of an improper character between the principal and the superintendent'.²³ The exact requirements of what can 'lead the superintendent astray'²⁴ incorporates the set of indicia of interference listed above and primarily rests on conduct which adversely affects a superintendents judgment such that it is no longer impartial. Relevantly, when the superintendent is employed by the principal, the ability of the principal to 'lead the superintendent astray'²⁵ is highly probable given the organic nature of the relationship between the parties. That is, the sheer nature of the relationship places the superintendent in a position where they are influenced as a natural facet of their role.

In this regard, it is arguable that a superintendent who is an employee of a principal is never entirely free of influence and therefore always falls inside Warren CJ's test of interference – making such a relationship impossible to co-exist with any concept of impartiality. Conversely, it could be contended that the extent to which a principal mitigates an inherent position of interference is reflective of the degree of interference exercised over the superintendent. For example, it would be difficult for a contractor to contend that a principal has exerted a degree of interference over a superintendent if the principal ensures that a superintendent cannot make decisions outside of the express powers conferred on them by the contract. The contract could provide that if a determination was required which was not incorporated within the superintendents express powers – then it could be referred to a special counsel for determination. Such an example would remove the facilitate function of the superintendent when they are in a relationship of employment and would ensure that an external body could make such determinations which were not expressly accounted for in the contract.

Arguably, such a notion would destroy the core role of the superintendent as an enabling force in the making of project determinations. Perhaps, as Her Honour suggests, a better test should focus on whether the principal and the superintendent were intent on ensuring that the contractor '[h]ad no knowledge of the interfering conduct so as to prevent the builder raising the point'.²⁶ The adoption of such a test would then impose an implicit term of 'disclosure' on principals and superintendents such that any 'correspondence or communication' which was directed from the principal to the superintendent without the contractor's knowledge would be conduct of an interfering nature unless it was disclosed. Such a notion would uphold McFarlane J comments in *Perini* by ensuring that the principal and contractor 'are bound to do all co-operative acts

²⁰ *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 at [623] (bullet points added).

²¹ *Ibid* at [623].

²² *Ibid* at [624].

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid* at [625].

²⁶ *Ibid* at [624].

necessary to bring about the contractual result²⁷ and would ensure that the superintendent is acting ‘honestly, fairly and reasonably’ in all their determinations.

IV. Duties owed

A consideration of the nature of the employee relationship and the duties owed in respect to whether a superintendent acts as an agent or the extent to which a superintendent is in a fiduciary relationship with the principal or the contractor is an important one in respect to clause 23 of AS2124. In *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (*‘Abigroup’*),²⁸ the New South Wales Court of Appeal considered this question in relation to a principal which had engaged a superintendent to act as its agent. Hodgson JA rejected this contention and held that

‘the better view ... is that the Superintendent is the owner’s agent in all matters only in a very loose sense, and that, when exercising certifying functions in respect of which the Superintendent must act honestly and impartially, the Superintendent is not acting as the owner’s agent in the strict legal sense.’²⁹

In His Honours opinion, such a notion was confirmed by the fact that a principal is not bound by the determinations made by the superintendent to any degree except by that which is stipulated in the contract. Consequently, His Honour was of the view that it is this notion which extinguishes the contention that a superintendent acts as the ‘strict legal agent’ of the principal, as if

‘[t]he superintendent was acting as the owners agent in a strict sense, the issue of the [determinations] would be an act done by the owner through its agent, which the owner could not then challenge.’³⁰

In this regard, the role of superintendent remains as an impartial one bound by the agreed terms of the contract – regardless of the core principles of agency – which must direct the superintendent to act impartially towards both parties to the contract. Importantly, as discussed by Daubney J in *JM Kelly (Project Builders) Pty Ltd v Toga Development Pty Ltd*,³¹ such a concept is also true for fiduciary relationships. Daubney J provided that *Perini*

‘[d]id not, and did not attempt too, identify a relationship between the [superintendent] and the [contractor] in that case which could in any way be described as a fiduciary relationship ... to say that fiduciary duties are owed by one party to another presupposes the existence of a fiduciary relationship between those parties ...’³²

inferring that no fiduciary relationship is created between a contractor and a superintendent in any manner.

²⁷ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530 at [545].

²⁸ *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211.

²⁹ *Ibid* at [50].

³⁰ *Ibid* at [50].

³¹ *JM Kelly (Project Builders) Pty Ltd v Toga Development Pty Ltd & Anor* [2008] QSC 311.

³² *Ibid* at [55]-[56].

Accordingly, His Honour was of the view³³ that while a fiduciary relationship does exist between an employer and employee, its relevance extends only so far as to

‘accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be imposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.’³⁴

In this regard, the nature of a fiduciary relationship between the principal and the superintendent does not so adversely impose itself on the contract that it would require the superintendent to favour the principal over the contractor as a facet of their relationship of employment. Such an act would strike against the superintendent’s duty – as an employee – to act with reasonable and appropriate care and skill in their role and would breach the contract itself. Instead, as provided by McFarlane J in *Perini*, the superintendent

‘[c]ontinues as such an employee but he also becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his opinion on the matters which he is required to decide.’³⁵

As a consequence, clause 23 of AS2124 directs that the relationship between the superintendent and the contractor is not one which compels the superintendent to act in the interests of the contractor or the principal. Rather, it is one which obliges the superintendent to act ‘honestly, fairly and reasonably’ and, as stated by Bryne J in *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd*,³⁶ is one which satisfied by the superintendent ‘making decisions which are professional, careful and even-handed and not in the interests of any one party’.³⁷ That is, the superintendent formulates determinations with regard to the stipulated contractual obligations and the interests of both parties in ensuring that the project is completed.

V. Conclusion

It is clear that the relationship of employment between a principal and superintendent is one which intensifies the obligations owed to a contractor and inherently places the principal and superintendent in a greater position of conflict in ensuring they meet the obligations in clause 23 of AS2124. The innate difficulty for the superintendent is the abstraction of their allegiance to the principal and the assurance that their respective determinations are made impartially and on rational grounds.³⁸ It is a natural consequence of the superintendent’s relationship with the principal that a contractor will allege the superintendent has breached clause 23 by acting ‘unfairly and dishonestly’ – evidenced by either an allegation of interference by the principal or through some adverse determination against the contractor. It is in this regard that the

³³ Citing Mason J in *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64.

³⁴ *JM Kelly (Project Builders) Pty Ltd v Toga Development Pty Ltd & Anor* [2008] QSC 311 at [59].

³⁵ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530 at [536].

³⁶ *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* (1997) 13 BCL 235.

³⁷ *Ibid* at 247.

³⁸ Bailey, Ian H, *Construction Law in Australia*, 2nd Edition, LBC Information Services, 1998 at pg. 304.

superintendent ensures they turn both parties minds back to the fundamental aim of a construction contract which, as stated in *Perini*, must be

‘[t]hat the parties entered into this agreement ... with the intention to achieve something. The definition of what they intended to achieve is to be found in the agreement itself. In my opinion ...the parties are bound by this agreement and are bound to do all co-operative acts necessary to bring about the contractual result.’³⁹

Fashioned in this light, it is the superintendent’s role to ensure that both parties recognize they have contractually agreed to the appointment of the superintendent and that any respective determinations made in this capacity are made impartially and independently. As highlighted in Part II of this paper by Warren CJ in *Kane Constructions*, interferences can easily lead to a breach of clause 23 and the indicia provided by Her Honour in this case was extensive. Relevantly, if the principal elects to appoint a superintendent who is also an employee – the onus rests on them to ensure that the superintendent is equipped to operate objectively, without partiality and is competent to perform the role in the contractually agreed manner. The risk of a damages claim by a contractor is ultimately born by the principal – as the employer of the superintendent – if the superintendent fails to perform their role as contractually agreed. Accordingly, the principal can avoid such action by ensuring that the superintendent recognizes they must operate fairly and reasonably in respect to both parties and must provide quantifiable and rational determinations in respect to ‘valuations, quantities and time’ so as to avoid any claim by the contractor for damages.

In this regard, the contention poised by the question at the beginning of this paper was that it is ‘impossible’ for a superintendent to be in a relationship of employment with the principal and still satisfy the obligations enshrined in clause 23 of AS2124. Such a question must be answered in the negative in that it is definitively ‘possible’ for such a relationship to exist albeit the fact that it is fundamentally a disadvantageous one for the principal. The most recent authorities highlighted in this paper have illustrated that the closer the relationship between the principal and the superintendent, the greater the onus rests on the both parties to prove that such a relationship is not in breach. This stems entirely from the conflicting nature of the appointment and the ease at which a principal can interfere or influence a superintendent’s determination. Of course, such an assertion is overtly framed in a negative context by assuming from the outset that a superintendent – as an employee – is more than likely to engage in such conduct with the principal – a contention which is perhaps too generalized and overarching.

However, construction contracts are ultimately creatures of risk mitigation and it is in this regard that a principal must attempt to address all of the foreseeable risks from the projects outset. The ability for a principal to mitigate such risks is entirely based on the principal’s modification of the contract to expressly detail the permissible limits of the superintendent’s determinative powers and to ensure that the contractor understands the extent of such powers when entering the contract. The relatively small volume of judicial commentary since *Perini* would seemingly indicate that the majority of constructions contracts are now structured to ensure that principals and superintendents do not operate in such close proximity that a contractor could easily establish a breach of clause 23. Alternatively, perhaps this is merely a by-product of the practical manifestation that principals do not engage superintendents who are employees in order to

³⁹ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530 at [536].

mitigate such litigation risk from the outset. Regardless, it is seemingly in the principal's interests to employ an external and impartial superintendent who, by their nature, removes a large degree of contractual risk which would otherwise exist from a relationship of employment between a principal and superintendent.⁴⁰ By alleviating such a risk, the principal is subsequently armed to more adequately focus on the multitude of other risks which exist in construction projects and subsequently enable the contracted superintendent to objectively facilitate their duty to the contract and ensure the project is completed successfully.

Word Count: 3,742

⁴⁰ Dorter, J.B., *The Superintendent*, Building & Construction Law Journal, Vol. 1, Issue 3, 1985 at 243.

Bibliography

Books

Bailey, Ian H, *Construction Law in Australia*, 2nd Edition, LBC Information Services, 1998

Dorter, J.B., *The Superintendent*, Building & Construction Law Journal, Vol. 1, Issue 3, 1985

Journals

Tyrril, John, *Role of the Superintendent*, Building & Construction Law Journal, Vol. 2, Issue 4, 1986

Cases

Boulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 174

Hickman v Roberts [1913] AC 229

Hollis v Vabu Pty Ltd [2001] HCA 44

Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64

JM Kelly (Project Builders) Pty Ltd v Toga Development Pty Ltd & Anor [2008] QSC 311

John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd [1996] 13 BCL 235

Kane Constructions Pty Ltd v Sopov [2005] VSC 237

Multiplex Constructions v SOR Pty Ltd [2001] 17 BCL 174

Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211

Perini Corporation v Commonwealth of Australia [1969] 2 NSW 530

RJ Elrington Nominees Pty Ltd v Corporate Affairs Commissions (SA) [1989] 1 ACSCR 93

Storey v National Companies and Securities Commission [1988] 13 NSWLR 661