Role of the Superintendent In Contract Administration

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INTRODUCTION

THE SUPERINTENDENT IS an unusual creature. It is paid by its master, must do its master's bidding, and yet, at other times, is required to act independently of its master, and, possibly, contrary to its master's wishes. Yes, the traditional role of the superintendent can require the superintendent to bite the hand that feeds it.

There is a wealth of articles written on the role of the superintendent. The aim of this paper is to provide a brief synopsis of the current state of the law in relation to the superintendent, whilst considering some new or growing risks, and to express some ideas about future responsibilities and the changing face of the superintendent's role.

In doing so, the paper examines some of the more recent standard form building contracts available, including AS 4000-1997 general conditions of contract, CIC-1 construction industry contract, PC-1 1998 project contract and C21 construction contract conditions.

Defining the Role

2.1 Dual roles

Traditionally, the principal and the contractor will enter a construction contract where they agree that the principal will engage a superintendent:

- to issue directions to the contractor on behalf of the principal, as its agent, as permitted under the head construction contract
- to carry out the tasks of certification, assessment and valuation under the construction contract independent of the principal and the contractor.

The superintendent is not a party to the construction contract. The consultancy agreement between the superintendent and the principal will specify that the superintendent has agreed to administer the construction contract. The construction contract itself will define the parameters of the superintendent's role in administering that contract.

The duty of both principal and contractor is *'to do all co-operative acts necessary to bring about the contractual result'*, and that includes not interfering with the superintendent's role as certifier, assessor and valuer (*refer Perini Corporation v Commonwealth of Australia* [1969] 2 NSWLR 530 at 545).

2.2 Standard forms - AS 4000 and CIC-1

Recent standard form building contracts have moved away from the *'punch list'* approach in the JCC standard form contracts, where the certification role and the role as agent are separately dealt with in exhaustive lists of administrative tasks (clauses 5.02.01 and 5.02.02).

Clause 20 of AS 4000 imposes upon the principal a specific obligation to ensure that the superintendent fulfils all aspects of its role and functions *'reasonably and in good faith'*. This is not dissimilar to its predecessor, AS 2124, which required the superintendent to act *'honestly and fairly'* (clause 23).

Accordingly, AS 4000 would require the superintendent to act reasonably and in good faith, even when acting as the principal's agent. This would seem to harness the principal's ability to issue directions through its agent, the superintendent. The principal could be in breach of the construction contract if the principal required the superintendent to issue a direction to the contractor which was not reasonable or made in good faith.

CIC-1 (now in its second edition) is more explicit. Clause A3 provides that the superintendent (referred to as the *'architect'*):

- ▶ is the owner's agent for giving instructions to the contractor
- ▶ is required to act independently and *'not as the agent of the owner'* when acting as assessor, valuer or certifier.

CIC-1 imposes upon the principal an obligation to ensure that, in assessing, valuing or certifying, the superintendent *'acts fairly and impartially, having regard to the interests of both the owner and the contractor'*. It is a breach of the contract for the owner to compromise such independence.

2.3 Standard forms - PC-1 and C21

By sharp contrast, under both PC-1 and C21 the superintendent (the *'Contract Administrator'* under PC-1, and the *'Principal's Representative'* under C21) acts exclusively as agent of the principal. Clause 3.1 of PC-1 and clause 3.4 of C21 specifically state that the superintendent does not act as an independent certifier, assessor or valuer, but as an agent of the principal. Even so, C21 does provide for a *'Valuer'*, jointly engaged by the principal and contractor, to resolve valuation of variations where the parties cannot agree (Clauses 41 and 71).

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PC-1 and C21, issued by the Property Council of Australia and the New South Wales Government respectively, indicate a move away from standard form contracts developed by consensus of industry groups. In an article on PC-1, the Property Council stated:

Unashamedly, the Project Contract has a client focus and is intended to produce greater project efficiency and more predictable outcomes than existing standard forms. It is based on the proposition that those initiating and paying for building and construction projects are entitled to set the agenda, commercially determine risk allocation and control certain risks (refer 'Property Council of Australia Project Contract', Issue 59 *Australian Construction Law Newsletter* April/May 1998, p23-26 at 23*).*

There is no provision in these two contracts requiring the principal or the superintendent to act fairly, reasonably or in good faith. Clause 3.3 of PC-1 and clause 4.1 of C21 simply require the parties to *'cooperate'* with each other.

This paper looks at the traditional position where the superintendent acts as agent, except when required to act independently as assessor, valuer or certifier. The term 'certifier' is used to refer to the second role.

2.4 Conflicts of interest

As alluded to earlier, the superintendent suffers from a number of conflicts of interest. It is an old adage that justice must not only be done, but must be seen to be done. The superintendent has a difficult job, particularly where relations between principal and contractor have soured, to show the necessary professionalism required in order to maintain the confidence of both parties when carrying out its role as certifier.

Traditionally, the superintendent's role has been undertaken by those involved in the design process – the architect, engineer or quantity surveyor. Needless to say, when assessing the contractor's work, the superintendent can be faced with the dilemma of determining whether the superintendent's own design-related work may have contained inconsistencies, ambiguities or real errors, or may have been delivered in such an untimely manner as to have affected the contractor's ability to achieve practical completion within the contractual time frame. Naturally, the superintendent may find it difficult to carry out an objective scrutiny of the superintendent's own work.

Irrespective of whether the superintendent is also the designer, the fact that the superintendent is paid by the principal may create pressure upon the superintendent when trying to act independently of the principal and the contractor. Naturally, the superintendent does not want to offend its client. The superintendent's promise of future work will no doubt come from pleasing the client/principal. Offence may be inevitable when issuing, say, a final certificate in the face of continuing complaints of defects made by the principal.

The relationship is even closer where the superintendent is actually an employee of

the principal. For example, in government projects, the superintendent is likely to be an employee of the relevant government department.

The fact that the superintendent is employed by the principal and not the contractor may render the superintendent anxious to the threat of suit by the principal. Under JCC, such threat of action by the contractor is not a worry (*refer John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd* (1996) 13 BCL 235).

Contractors will often see the relationship between principal and superintendent as too close; that the superintendent appears to be conspiring with the principal to thwart the contractor's legitimate claims for payment. Paradoxically, principals can be drawn to a belief that, in granting variation claims and awarding delay costs, the superintendent may be conspiring with the contractor, especially where the superintendent's remuneration is a percentage of the contract sum.

Of course, potential conflicts of interest confront all professionals; for example, where the superintendent might have a financial interest in either the principal or the contractor. If the superintendent is a member of a professional body, or a registered building practitioner under the *Building Act* 1993 (Vic), then he or she may be subject to disciplinary action. Those superintendents who fall outside those bounds, such as project managers, do not face such controls.

Scope of Duties

3.1 Engagement of the superintendent

In the past, superintendents were often engaged through simple letters of engagement or standard form industry agreements, such as the RAIA Client/Architect Agreement, or the ACEA Terms of Agreement for Client and Consulting Engineer.

More recently, particularly in major commercial and infrastructure work, very detailed consultancy agreements are being submitted to superintendents which effectively codify the services to be provided.

Consistency between consultancy agreement and construction contract

It is often said that a contractor must ensure that the terms of the head building contract are mirrored in the terms of all subcontracts for the project. Otherwise, the contractor faces the risk of failing to pass the obligations it owes to the principal onto the appropriate parties who are ultimately responsible and should accept that risk.

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With the trend for principals to impose detailed prescriptive consultancy agreements upon superintendents, similar attention should be paid by superintendents to ensuring that the services which they are required to provide are consistent with the terms and conditions of the construction contract which they are engaged to administer.

There is a risk of confusion and uncertainty where the responsibilities of the superintendent under the construction contract differ from the obligations specified under the consultancy agreement by which the superintendent is engaged. For example, the superintendent may agree to act at all times as agent of the principal. This would be inconsistent with most standard form construction contracts which require that the superintendent not act as agent when acting as certifier. A safeguard would be, in the consultancy agreement, to give precedence to the obligation to administer the construction contract over any other obligation, to the extent of any inconsistency.

Prior to engagement, the superintendent should determine whether it has sufficient resources to provide the level of contract administration services specified in the consultancy agreement. An example of this would be where, under a design and construct contract, the superintendent is obliged to certify that work has achieved a certain standard. Differing levels and types of resources will be required depending upon whether the standard is set, for example, by reference to a similar building or buildings

situated nearby, interstate, or overseas. Most demanding would be where (for example, in constructing a pharmaceutical factory) the standard required is world's best practice.

Design and construct contracts

These days, superintendents are expected to carry, or have access to, sufficient technical support in order to carry out their role in administering the construction contract. Access to such technical support, on the principal's side, may be absent in a design and construct contract where the design team is novated to the contractor. In these cases, the superintendent must ensure either that the head construction contract provides the superintendent with sufficient access to the contractor's design team and the team's documents, or, alternatively, the superintendent must make an allowance, in being engaged, for the cost of accessing such technical support itself either in-house or through separate engagement. It appears to be increasingly common, especially on major infrastructure projects, for the superintendent to be a team of specialists, rather than an individual.

General obligations

In general terms, the superintendent is expected to check that the contractors' workmanship and materials comply with the construction contract. It would not be required to inspect every aspect of the works, but would be required to scrutinise crucial points in construction, such as the laying of footings; and would not be required to instruct the contractor on the means and methods of construction (*refer Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588).

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The superintendent has a general duty to protect the financial interests of the principal (but not the principal's tenants) by warning of defective works. The superintendent also has a general duty to the public to warn of defective works which give rise to a threat to health and safety.

3.2 Common law duties of care

Fundamentally, the superintendent owes the principal those obligations laid down in the superintendent's terms of engagement. They can range from implied obligations to act professionally, with due care, skill, and diligence expected of a reasonably competent superintendent in administering the construction contract, through to the detailed, sophisticated agreements which are becoming increasingly prevalent (*refer Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84).

The manner in which the superintendent exercises its dual functions as agent and independent certifier can, of course, be capable of causing financial loss (without causing physical injury) to the principal, the contractor and, possibly, others. This is described as 'pure' or 'mere' economic loss.

Pure economic loss includes situations where there may be physical damage to a building and the principal incurs the financial burden of rectifying the damage or, alternatively, facing the diminution in value of that property (*refer Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503-505). The superintendent's conduct may, conceivably, have precluded the principal from a right of recovery against the contractor who had been directly responsible for such damage.

In Australia, the courts will allow recovery of pure economic loss caused by negligence in specific and discrete circumstances: *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* ([1976] 136 CLR 529). To avoid potential liability for '*an indeterminate amount to an indeterminate class*', the courts have limited liability by, effectively, creating certain categories of cases which are exceptions to the basic rule that pure economic loss is not recoverable in negligence (*refer Cardozo J. in Ultramares Corporation v Touche* (1922) 253 NY 170).

Until recently, Australian courts have limited liability by holding that not only must it have been reasonably foreseeable that the plaintiff might suffer damage as a result of the defendant's conduct, but that there must also exist a relationship of proximity between plaintiff and defendant in

order to found a duty of care. The usual components are *'some element of known reliance (or dependence) or the assumption of responsibility or a combination of the two' (refer Bryan v Maloney* (1995) 182 CLR 609 at 618-19).

In *Perre & Ors v Apand Pty Ltd* [1999] HCA 36 a majority of the High Court of Australia took the view that proximity is not a useful criterion in determining whether a duty of care is owed in claims for pure economic loss (*applied* in *Bailey v Redebi Pty Ltd t/as PR Design Co* [1999] NSWSC 919). The courts must now address two policy issues: the need to avoid indeterminable liability, referred to above, and the need to avoid interfering with legitimate commercial activity. Furthermore, having held that the damage suffered was foreseeable, the court must engage in a balancing exercise between a number of 'salient features':

- the defendant's knowledge of the magnitude of the risk of causing loss;
- the degree of control over the circumstances exercised by the defendant;
- the vulnerability of the plaintiff;
- the reliance by the plaintiff on the defendant;
- any assumption of responsibility by the defendant.

3.3 Duty to the principal when acting as certifier

Until *Sutcliffe v Thackrah* [1974] AC 727, superintendents were considered to be carrying out a quasi-judicial role when acting as certifier. Accordingly, they enjoyed immunity from liability in negligence. In *Sutcliffe*, the House of Lords rejected that notion, finding that, when acting as certifier, the architect owes a duty to exercise care and skill, and reach its decisions in a fair and unbiased way. As such, the superintendent could be held liable to the principal in negligence. The superintendent is simply acting as a professional, and is not carrying out a judicial function (*refer also Perini Corporation v Commonwealth of Australia* [1969] 2 NSWR 530). In *Sutcliffe*, the court specifically chose not to consider whether such a duty of care was also owed to the contractor.

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The usual components are *'some element of known reliance (or dependence) or the assumption of responsibility or a combination of the two'.*

Accordingly, whether acting as certifier or as principal's agent, the superintendent owes a duty to take care to the appropriate standard.

Where the superintendent promises to carry out supervision, this would include a continuing duty, from commencement to completion of the works, to inspect certain aspects of the works, such as footings, to check that they have been constructed in accordance with the design (*refer Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588 and *Sheldon v McBeath* (1993) ATR 81-209; in both these cases the architect did undertake to 'supervise' as distinct from undertaking 'contract administration').

3.4 Duty to the contractor when acting as certifier

A common question in disputes is whether a contractor has a right of action against the superintendent in negligence. The issue is particularly important where the principal is insolvent.

The leading Victorian case in determining this issue is *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd* (1997) 13 BCL 235 at 240 (*'Majorca'*) in which Mr Justice Byrne considered, among others, the English decision of *Pacific Associates v Baxter* [1990] 1 QB 993, in determining that the architect, Henderson, did not owe a duty of care to the contractor, John Holland, in relation to the certification of progress claims under the JCC form of construction contract. His Honour stated that it was not appropriate for him:

'to seek to engraft upon the contractual background [between principal and contractor] a tortious obligation . . . There is in this case no room for any duty of care owed by the Architect to the Builder the relevant content of which was to act fairly and impartially in carrying out its functions [as specified in the construction contract]' (*Majorca* at 247).

In coming to his decision, Mr

Justice Byrne considered the High Court of Australia's decision in *Bryan v Maloney* (1995) 182 CLR 609 which provides that, where there is no clear precedent, the court's task in determining whether there exists the necessary relationship of proximity in negligence claims for pure economic loss is to consider such factors as: the circumstances surrounding the relationship between the parties; elements of known reliance; elements of assumption of responsibility; and policy considerations. These factors are similar to the 'salient features' referred to by the High Court in *Perre v Apand* as relevant in establishing whether a duty of care is owed.

'The primary risk to a superintendent would probably be in respect of claims of misleading and deceptive conduct while engaged in trade or commerce under s.52 and, possibly, unconscionable conduct under s.51AC of the *Trade Practices Act*'.

Fundamentally, Mr Justice Byrne did not hold that, in general, superintendents owe no duty of care to contractors. His Honour stated that, in order to establish whether the certifier's duty to act fairly and impartially gives rise to a duty in negligence, one must address whether the contractor relied upon the superintendent, or the superintendent assumed a legal responsibility to the contractor. To do this, an examination of the construction contract in question is necessary.

In the *Majorca* case, both contractor and principal were entitled to review the superintendent's decision through arbitration; the architect acted as the principal's agent except when acting as certifier; and the principal was liable to the contractor for acts of the superintendent. The construction contract was found to have taken into account and dealt with circumstances where the superintendent might cause the contractor to suffer loss. The court felt it inappropriate to incorporate rights in negligence by the contractor against the superintendent, in a case where the principal and contractor had dealt with the issue in their contract.

In the face of the decision in *Majorca*, some contractors have tried to establish a right of action directly against the superintendent by requiring it to enter into a deed which confirms that, as certifier, the superintendent owes a duty to the contractor. It would be surprising if a superintendent would execute such a document, absent of some extra remuneration or other ulterior reason. The execution of such a 'Certifier's Deed' would probably constitute a material change in the superintendent's risk of liability. As such, the superintendent would be prudent to advise its professional indemnity insurer before signing.

3.5 Negligent misstatement

In considering duties of care which may be owed by a superintendent, one must always be mindful that the superintendent, like any other professional, can assume duties of care which would otherwise not have existed, by making statements upon which another party might reasonably rely to its detriment. There is a long line of case law on this point since *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 was decided. Irrespective of whether the superintendent might otherwise owe a duty of care to a contractor, if the superintendent gives advice to the contractor within the province of its expertise, and the contractor reasonably acts in reliance upon that advice, the superintendent may be exposed to liability.

Recently, the High Court in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241 reiterated the limited circumstances where a duty may be owed in the context of pure economic loss caused by negligent misstatement:

- in response to a particular request for information
- where the defendant knew or ought reasonably to have known that the advice would be passed on to the plaintiff (individually or as a member of a class) and used for a particular purpose
- where there is an assumption of responsibility to the plaintiff for the information
- where there is an intention to induce the plaintiff (or a class to which the plaintiff belongs) to act or rely on the information.

These High Court decisions clarify the extent to which a superintendent might be exposed to claims in negligence from third

parties (depending upon the nature of the construction contract, this could include the head contractor) in relation to reports and other similar documents produced by the superintendent for the project. Superintendents may be exposed to liability, for instance, to financiers, where reports are produced by the superintendent and the above criteria are satisfied.

3.6 Misleading and deceptive conduct and unconscionable conduct – *Trade Practices Act*

In addition to contractual and tortious liability, construction professionals, including superintendents, can also be liable under the *Trade Practices Act* 1974 (Cth) (which applies to superintendents carrying on business as a corporation) and its state equivalents, including the *Fair Trading Act* 1999 (Vic), (which includes individuals as well).

'In the light of *Bryan v Maloney*, one must question whether the Scottish case *Strathford East Kilbride Ltd v HLM Design Ltd* might have been decided differently in Australia, at least if the case had involved a home rather than commercial premises'.

Relevant to superintendents would be those provisions relating to: unconscionable conduct; misleading and deceptive conduct; false and misleading representations; misleading conduct in relation to services; and false representations or other misleading or offensive conduct in relation to land (sections 51AC, 52, 53, 53A and 55A). Implied warranties under s.74(1) that services will be rendered with due care and skill will also apply to superintendents.

Of these provisions, the primary risk to a superintendent would probably be in respect of claims of misleading and deceptive conduct while engaged in trade or commerce under s.52 and, possibly, unconscionable conduct under s.51AC.

In *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215, French J held that, where a professional provides services for reward, that would constitute conduct which is *'in trade and commerce'*.

In *Western Mail Securities Pty Ltd v Forrest Plaza Developments Pty Ltd* (1987) ATPR 40-765, French J held that the issue of a certificate of practical completion, which certified the premises fit for use and occupation, could be considered to be conduct which might be in breach of s.52 of the *Trade Practices Act* 1974 (Cth). In that case, His Honour *'glossed over the difficulties that arise where sec. 52 conduct is said to be constituted by what is evaluative judgment on facts which are plain for all to see'* (at 48, 283).

What His Honour was referring to was that the courts will not characterise a professional's opinion, as such, as constituting conduct which could mislead or deceive (*refer Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82). Where an expression of an opinion implies certain facts, and those facts are misleading or deceptive, then the professional may be exposed to liability; for example, where a superintendent indicates that its opinion is based upon substantive research, when that is not, in fact, the case.

As happened in *Western Mail Securities Pty Ltd v Forrest Plaza Developments*, a plaintiff will often face difficulties in proving that such misleading conduct caused the plaintiff to suffer the loss claimed. In the context of a construction contract, where the contractor might claim to have suffered loss arising from certification by the superintendent, it may, in fact, be the case that such loss resulted from the failure by the contractor to review such certification through arbitration, expert determination or other dispute resolution procedures as agreed upon between the parties and specified in the construction contract.

Section 51AC of the *Trade Practices Act* 1974 (Cth) prohibits unconscionable conduct *'in trade and commerce'* in the supply of goods and services, where the price was $1million or less. In a similar vein to the

High Court's focus on vulnerability and control in *Perre v Apand*, the Federal Parliament introduced s.51AC in 1998 in order to prevent parties in a dominant bargaining position from taking advantage of weaker parties (*refer* P. Merity, 'The Return of Conscience: Section 51AC of the *Trade Practices Act* 1974' (1999) 15 BCL 304).

The courts have broad powers to deal with unconscionable conduct, including awarding damages, restraining such conduct, or striking out or varying contracts (ss.80 and 87 of the *Trade Practices Act* 1974 (Cth)).

When acting as agent for a principal, it is conceivable that a superintendent could expose a principal to liability arising from the superintendent's treatment of a contractor.

Similarly, superintendents may have rights against principals who use their stronger bargaining position to gain an unfair advantage in negotiating the superintendent's retainer.

3.7 Duty to subsequent purchasers and others

The High Court's decision in *Bryan v Maloney* has probably raised more questions than it has answered in relation to liability in negligence for latent defects. In that case, a builder was held to owe a duty of care to a subsequent purchaser of a home in relation to latent defects which had caused economic loss to the subsequent purchaser; namely, the diminution in value of her property. One question is whether *Bryan v Maloney* applies not only to contractors, but also to superintendents and design professionals.

In that case, the court held that the special circumstances which gave rise to a relationship of proximity between contractor and subsequent purchaser, necessary in claims for pure economic loss, were that:

▶ the house itself was the connecting factor between builder and subsequent purchaser

▶ the house was a permanent structure to be used indefinitely, and was one of the most, if not the most, significant investments made by the subsequent purchaser

▶ there was no intervening negligence or other interruption to the causal connection between the builder's conduct and the plaintiff's loss. (This is to be compared with the New South Wales Court of Appeal decision in *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 in which the court applied *Bryan v Maloney* in holding that the assurance by the local council that it would certify that the subject house complied with relevant building regulations and with the approved plans and specifications constituted intervening negligence, which militated against a finding of proximity between builder and subsequent purchaser. The Court questioned the High Court's logic in *Bryan v Maloney* in holding that the liability of a builder might depend upon whether someone else might also be liable for causing that loss.)

'The High Court of Australia appears now to have supplanted the concept of proximity with a balancing exercise of *'salient features'* under *Perre & Ors v Apand Pty Ltd.*'

▶ the policy consideration – to avoid liability of '*an indeterminate amount to an indeterminate class*' – had been assuaged because foreseeable economic loss caused by the builder was limited to the initial and subsequent owners of the property. (One wonders whether tenants, occupiers, and others who have an interest in the property, particularly those who might treat the property as their home, might also have rights.)

▶ the relationship between the builder and the subsequent purchaser is the same as that between the architect and injured plaintiff in *Voli v Inglewood Shire Council* (1963) 110 CLR 74, a case dealing with personal injury sustained when a stage collapsed

▶ this was a particular kind of pure economic loss – the diminution in value of a house because of the discovery of latent defects – where the distinction between such economic loss and physical damage to the property was essentially technical. The Court could see no distinction between a builder's liability for physical loss if the

house had collapsed, and economic loss being the cost of rectifying defects and avoiding such damage.

Given that the High Court specifically found no distinction, in practical terms, between a claim against an architect for personal injury (in *Voli v Inglewood Shire Council*), and a claim against a builder for economic loss (in *Bryan v Maloney*), each relating to defects in a building, there appears to be no reason why design professionals or superintendents might not be similarly exposed to claims by subsequent purchasers of properties, provided that the above criteria, laid down by the High Court, are satisfied. (For discussion of perceived problems with *Bryan v Maloney* refer *Woollahra Municipal Council v Sved* (referred to above) and *Zumpagno v Montagnese* [1997] 2 VR 525).

In a recent Scottish case, it was held that an architect did not owe a duty of care to tenants of the architect's client (*refer Strathford East Kilbride Ltd v HLM Design Ltd* [1997] SCLR 877). The plaintiffs had leased a Ford dealership. Structural defects had become apparent after they had taken possession. They claimed damages arising from disruption and restrictions to their business during rectifications. The plaintiffs alleged that the architect owed them a duty of care as they were persons for whom the dealership was constructed and, secondly, they had a direct interest in the property as operators or as tenants. They argued that Scots law was not bound by English law, and they could rely instead upon Commonwealth law such as *Bryan v Maloney*.

Lord MacLean held that Scots law and English law were aligned in this field. He held that no duty was owed by the architect to the tenant, in part on the basis that the plaintiffs were strangers to the contract by which the architect was engaged, and by which the architect's duties were founded; the plaintiffs were '*in a similar position legally to a derivative acquirer, successor or possessor*' who would only be entitled to sue where there was physical injury or damage.

In light of *Bryan v Maloney*, one must question whether the Scottish case might have been decided differently in Australia, at least if the case had involved a home rather than commercial premises.

Bryan v Maloney based its decision on the notion that a relationship of proximity, together with reasonable foreseeability, gives rise to a duty of care. Although the High Court of Australia appears now to have supplanted the concept of proximity with a balancing exercise of 'salient features' under *Perre v Apand*, it seems unlikely that the findings of the Court in *Bryan v Maloney* would be different if heard today.

3.8 Concurrent liability in contract and in tort

Courts have found concurrent liability to exist for architects (*Voli v Inglewood Shire Council*), and engineers (*Brickhill v Cooke* [1984] 3 NSWLR 396; and *Pullen v Gutteridge Haskins & Davey* [1993] 1 VR 27).

In *Bryan v Maloney*, the High Court held that the existence of a contract between parties can either constitute a factor which supports the view that there exists a relationship of proximity between them, or can militate against a finding of proximity (*Bryan v Maloney* at 621). Rights in negligence will not be available when the relevant contract has specifically excluded liability for the conduct which is the subject of the claim.

In general, and subject to the terms of agreement between them, a principal would be entitled to claim damages against its negligent superintendent both for breach of contract and in negligence (*refer* P. Mead, 'The Impact of Contract upon Tortious Liability of Construction Professionals', *The Arbitrator*, May 1998, p.5).

This year, in a radical change of direction, the High Court in *Astley v Austrust Ltd* [1999] HCA 6 held that a defendant cannot claim contributory negligence in an action for breach of contract. Therefore, a plaintiff can sue a superintendent in contract for breach of retainer and in negligence, and avoid a reduction in the judgment amount by reason of contributory negligence by electing at hearing to pursue the breach of contract claim.

This means that a superintendent may wear 100% liability to the principal for negligent contract administration even though (especially in respect of an informed experienced principal) the principal contributed to the problems.

Where the limitation period has expired for suing the superintendent for breach of contract, but the principal remains entitled to sue the superintendent in negligence, a

defence of contributory negligence will be available.

There appear to be two methods of avoiding the effect of *Astley's* case:

▶ by including in the superintendent's retainer a provision which allows the superintendent to limit liability for breach of the retainer to the extent that the principal caused or contributed to the loss. Such clauses are yet to be tested by the courts.

▶ by issuing a counterclaim against the principal for breach of contract, alleging that the principal breached its implied duty to *'do all cooperative acts necessary to bring about the contractual result' (refer Perini Corporation v Commonwealth of Australia* at 545*)*. In other words, the success of the contract relied on the superintendent's care, skill and diligence, but also the timely and accurate provision of instructions by the principal. Accordingly, the superintendent may seek to set off its liability to the principal to the extent that the principal also breached the retainer. This approach is yet to be tested by the courts.

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3.9 Standard of care

It appears to be settled law that the standard of care imposed upon professionals is:

' . . . to exercise due care, skill and diligence. [The professional] is not required to have an extraordinary degree of skill or the highest professional attainment. But he must bring to the task he undertakes the competence and skill that is usual among [professionals] practising in their profession' (refer Voli v Inglewood Shire Council at 83 per Windeyer J).

' . . . the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill' (refer Rogers v Whitaker (1992) 175 CLR 479 at 487*)*.

As a professional, the superintendent would owe such a standard of care.

It is not uncommon in a range of consultancy agreements for the principal (and its lawyers) to impose upon the superintendent a higher standard, requiring the superintendent to exercise the skill of the *'highest standard'* or apply the *'utmost skill'*. If that is the commitment in the consultancy agreement made by the superintendent, then the superintendent will be liable in contract for falling below that standard. It is unclear whether (unless the insurer is specifically advised at the policy inception) liability under the consultancy agreement for failing to provide its service at the highest level will be covered under the superintendent's professional indemnity policy, which will normally only cover the superintendent to the common law standard of care.

Similarly, common law duties do not extend to guaranteeing, or *'ensuring'* that outcomes are achieved in a construction project, only to apply due care and skill in trying to achieve those outcomes. Accordingly, by committing itself to warranties, and providing indemnities, in its terms of engagement, the superintendent may be committing itself to obligations which, because they extend beyond the common law standard of care owed to the principal, will not be covered by professional indemnity cover.

When considering the standard of care owed by a superintendent, the obvious question is to what extent a superintendent should be cognisant of legal concepts, given that it is administering a legal agreement between principal and contractor. In *West Faulkner & Associates v The London Borough of Newham* (1993) 61 BLR 81, the court approved the following commentary from Keating on Building Contracts:

An architect must have sufficient knowledge of those principles of law relevant to his professional practice in order reasonably to protect his client from damage and loss. This may mean that in particular cases he should advise his client that he knows little or nothing of the relevant law and that the client should obtain legal advice . . . The architect should . . . have a general knowledge of the law as applied to the more important clauses, at least, of standard forms of building contracts, particularly if he is to act as architect under such a contract.

It would be expected that such knowl-

edge would extend not only to a familiarity with building regulations and codes, but also to occupational health and safety and disability discrimination legislation.

Of some comfort to superintendents is the finding by Mr Justice Byrne in *Majorca*. Although the case was decided on the basis that no duty of care was owed by the superintending architect to the builder when acting as certifier, His Honour then considered whether, in any event, Henderson had breached any duty of care if such a duty existed.

In finding that the architect did not breach any duty of care, His Honour addressed a number of matters relevant to specific clauses of the JCC standard form contract in question. In doing so, he held that, although His Honour disagreed with the architect's interpretation of the contract (regarding identification of dates for assessing liquidated damages) this did not mean that the architect had been negligent, the architect having established that it had acted reasonably and competently in coming to an albeit incorrect conclusion.

'It is not uncommon in a range of consultancy agreements for the principal to impose upon the superintendent a higher standard of care, requiring the superintendent to exercise skill of the *'highest standard'* or *'utmost skill'*.'

It is of comfort to all professionals – many of whom are cynical about whether the courts, in fact, expect them to be perfect in their judgment – that in *Majorca* the court effectively held that a professional may make a mistake, but not necessarily be held liable in negligence.

'It is of comfort to all professionals – many of whom are cynical about whether the courts expect them to be perfect in their judgment – that the court held in *Majorca* that a professional may make a mistake, but not necessarily be held liable in negligence'.

The superintendent should try to be transparent in carrying out its functions as certifier. In a recent case, the superintending architect was criticised by the court for discussing his proposed assessment of an extension of time claim with the principal, giving the principal the opportunity to comment, without affording the same opportunity to the contractor (*refer John Barker Construction Ltd v London Portman Hotel Ltd* (1996) UK).

Partial services

The rule of thumb is for the superintendent to provide in the contract of engagement a clear outline of the scope of service to be provided. It is not uncommon for the primary defence of construction professionals alleged to have failed to identify defects to be that they were only engaged to provide partial services. Often, when one looks at the letter of engagement or consultancy agreement, the scope of services is effectively the same as what is normally expected of a superintendent, save that the fees are lower than what would normally have been charged.

Reduced fees are irrelevant in determining the scope of a retainer. As Kennedy J said in *Roberts v J Hampson & Co* [1990] 1 WLR 94 at 101:

> *'It is inherent in any standard fee work that some cases will colloquially be 'winners' and others 'losers' from the professional man's point of view. The fact that in an individual case you may need to spend two to three times as long as you would have expected, or as the fee structure would have contemplated, is something he must accept. His duty to take reasonable care in providing [that particular service] remains the root of his obligations' (refer also Collins v ACT Building Consultants and Managers Pty Ltd* [1996] ANZConvR 88 (ACT Supreme Court, Gallop J).

In *Sheldon v McBeath* the defendant architect argued that his duty to supervise, as expressed in his terms of engagement, was limited to contract administration. The New South Wales Court of Appeal upheld the trial judge's decision that the terms of engagement [*'supervision of the construction from commencement to completion and handover. Contract administration i.e. certifying payments, approving variations'*] exposed the architect to a continuing obligation to inspect the site up to practical completion. The court held that such obligations to inspect remained even though the building contract which the architect was engaged to enforce was

unenforceable at law (under s.45 *Builders Licensing Act* 1971 (NSW)). The scope of the architect's duty was not to be limited because the building contract was unenforceable.

WHERE TO FROM HERE?

So, what are the issues which will confront superintendents in the future?

The introduction of PC-1 by the Property Council of Australia, and C21 by the New South Wales Government, in which superintendents act exclusively as the principal's agent, might lead one to think that the days of the impartial, independent certifier may be numbered. However, this is not necessarily so. While the conflicts of interest that a superintendent faces when trying to act both as the principal's agent and as an independent certifier under a traditional construction contract do raise questions about whether there might be a better way, the elimination of the independent role does not seem to be the answer.

Instead, it is likely that, in projects where there is no independent certifier, the contractor will be more suspicious of the assessment process and more likely to have such assessments reviewed. This appears likely to lead to more disputes.

At times when the economy is booming, and contractors can be more selective about the contracts they accept, no doubt the proposal that certification will be by the principal's agent, upon instruction by the principal, will probably fall out of favour.

As mentioned earlier, a major development in this area has been the increasingly sophisticated contract documentation used in projects today. Superintendents are being required to accept far more detailed and onerous consultancy agreements, and to execute other documents, often with other parties such as financiers, the contractor, or prospective tenants. To carry out the role of superintendent today, especially on larger projects, often requires a team of specialists. Near enough is no longer good enough.

An example of this growing sophistication is evidenced in the way the law now treats the tender process.

Traditionally, a tender for a construction project was simply an invitation for interested contractors to offer to carry out the works. The principal could accept one of the tenders, thereby creating a binding contract. Unless and until the tender is accepted, the prevailing view was that there was no binding contract.

In *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1, Finn J held that there can exist a 'pre-award' or 'process' contract by which the principal promises to adhere to the tender criteria and procedures, in consideration for which the contractor agrees to submit a tender. In *Hughes*, the court held that, by failing to evaluate the tenders in accordance with the procedures it had laid down in the tender documents, the principal breached the pre-award contract between it and the plaintiff, an unsuccessful tenderer. Finn J added to this finding, by stating:

a term should be implied as a matter of law into a tender process contract with a public body (such as this was) that that body will deal fairly with a tenderer in the performance of its contract.

This is illustrative of the fact that superintendents continue to be vulnerable to changes in the law, whether that be the common law (as in *Hughes*), or in legislation, such as changes in disability discrimination legislation.

With the growing sophistication of project delivery techniques, and rapid development of the law, superintendents must:

- keep up to date. To a growing extent, a superintendent must depend upon its professional body to disseminate the latest information,
- be vigilant in maintaining effective risk management strategies in its organisation, and
- rely upon its insurance brokers to ensure that, when all else fails, it is covered by adequate professional indemnity insurance.

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