

Sometimes in construction contracts, the superintendent is stated to be the agent of the principal exclusively or solely (as stated in GC21) or “at all times”. This is in contrast to the traditional “dual role” of the superintendent, where the superintendent acts as agent of the principal for administrative purposes, but impartially when performing the role of certifier, assessor and valuer.

Where the contract states that the superintendent is exclusively, solely or at all times the agent of the principal and yet, the superintendent has a certifying, valuing or assessing role, this creates considerable uncertainty in the superintendent’s function.

Clear drafting should avoid or mitigate such conflicting or uncertain outcomes.

Traditional Role

The principal and contractor under a traditional construction contract will usually agree to engage a superintendent who will both:

- a. Issue directions and instructions, as well as perform other administrative functions on behalf of the principal
- b. Carry out certification, assessment and valuation tasks as and when they arise

A superintendent acts as agent of the principal in the superintendent’s administrative role, but does not act as an agent of the principal when exercising the functions of a certifier. When acting as a certifier, the superintendent is under a duty to act honestly and impartially (and the principal is under an obligation to ensure the superintendent does so) – therefore, in carrying out this function, the superintendent cannot simultaneously act as the principal’s agent.¹

Unconventional Role as Agent for All Purposes

Sometimes, construction contracts contain provisions under which the superintendent must act as agent of the principal exclusively, solely or at all times. For instance, the GC21 standard form of contract is structured differently from other standard forms, and provides for a principal’s representative who acts exclusively or solely as an agent of the principal.

Those contracts typically do not contain any provision requiring the principal’s representative to act honestly, fairly, reasonably or in good faith when exercising any aspect of their role. In fact, GC21 expressly provides that the principal’s representative does not act as an independent certifier, valuer or assessor. Under such contracts, it is the principal who is obliged to assess claims, value work and certify completion, and all acts of the principal’s representative are deemed to be acts of the principal.

Where such a contract, properly interpreted, imports a duty to act fairly or reasonably in making certifications, valuations or assessments under the contract, breach of the duty would be directly actionable against the principal. This is in contrast to an action against the principal for its derivative liability arising from failure to meet its obligation to ensure the superintendent performs its role properly, which would apply under the traditional “dual role” forms of contract.

However, the position becomes uncertain where, under the contract, the superintendent must also act solely, exclusively or “at all times” as agent for the principal and also has the role of a certifier, valuer or assessor. Ordinarily, the common law would imply a duty on the superintendent to act impartially, honestly and fairly in performing the role of certifier, valuer or assessor, and an obligation on the principal to ensure this occurs. However, the term of the contract that limits the role of the superintendent to agent of the principal for universal purposes may conflict with the requirement of impartiality (and perhaps fairness). This is because an agent generally, under the laws of agency, has fiduciary duties and, arguably, is bound to act in accordance with the instructions of the principal and not act contrary to the interests of the principal.

In those circumstances, it may be unclear whether the agency takes precedence or the usual contractual duty of impartiality and fairness supersedes this. It may also be uncertain whether the scope of the agency or the agent’s duties are impliedly modified.

The position would not be clarified by an additional contractual provision to the effect that the principal is obliged to ensure the superintendent (or principal’s representative) is obliged to act fairly when performing the certification, valuation or assessment role. This is because such a provision may import a duty on the superintendent (or principal’s representative) to act fairly, which may be in conflict with the usual duties of an agent.

¹ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 53;
Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211.

Recommended Steps

In order to prevent any ambiguity in relation to the superintendent's role and duties, we recommend parties draft clear and unambiguous provisions that distinguish between, and clarify the extent of the superintendent's agency role and duties, as well as the superintendent's other roles and duties.

Additional consideration should be given to the following:

- The precedence to be given where these are conflicting or inconsistent obligations of the superintendent
- Specification of a clear process for the resolution of conflicting or inconsistent obligations of the superintendent which may arise

Contacts

Greg Steinepreis

Partner, Perth

T +61 8 9429 7505

E greg.steinepreis@squirepb.com

Arohi Kaila

Associate, Perth

T +61 8 9429 7421

E arohi.kaila@squirepb.com