THE SUPERINTENDENT

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1. INTRODUCTION

This paper deals with the role of the Superintendent under a traditional construction contract.

The Superintendent is not a party to the contract; he is a person named in the contract by the two parties to the contract (the Proprietor and the Contractor) and given certain functions under that contract by those two parties.

The role of the Superintendent would usually include:-

- assessment of progress claims and issue of progress certificates;
- assessment of claims for extra payment for variations to the contract;
- assessment of claims for extension of time;
- assessment of quality of materials and workmanship in accordance with the contract documents; and
- assessment of claims for extra payment (such as claims under the latent conditions provisions) under the contract.

Accordingly, though the Superintendent is usually appointed by and paid by the Proprietor (and may sometimes be the Proprietor's original design consultant), the Superintendent's role is principally to decide major issues of potential dispute under the contract between the Proprietor and the Contractor.

In such contracts there is (at least) an implied term that the Superintendent will act fairly. There is a strong contractual argument that if the Superintendent does not act fairly towards the Contractor, this constitutes a breach of contract by the Proprietor.

(Interestingly, in AS2124-1992, following on from AS2124-1986, clause 23 expressly provides that the Proprietor is to ensure that the Superintendent acts fairly at all times.)

The dual role of the Superintendent (on one hand he is retained and paid by the Proprietor, yet on the other hand he has a quasi-certifier role between the two parties to the contract) has been the subject of judicial comment.

The Institution of Engineers Australia Code of Ethics requires, in clause 5 (b):-

> *"....in our capacity as Superintendent administering a Contract, we must be impartial in our interpretation of the Contract..."*

The role of the Superintendent is complex. It requires substantial engineering skills, a sound understanding of the law of contract, and in particular the provisions of the particular project documents.

This paper is directed to those issues.

2. DUAL ROLE OF THE SUPERINTENDENT

The Superintendent has two distinct roles under a traditional form of construction contract.

On one hand he has a number of functions in which he acts, either expressly or impliedly, as the agent of the Proprietor. On the other hand, the two parties to the contract agree, at the time of entering into the contract, that the Superintendent is to perform certain assessment/certifier functions under the contract. Those functions are quite district.

In most instances, the Superintendent will be either an employee of the Principal (typically on major public sector contracts the Superintendent is a senior person from that public sector organisation) or a paid consultant of the Proprietor (usually, a senior engineer from a private engineering consulting firm). Accordingly, where there is a dispute under the Contract, the Contractor, if dissatisfied with the decision of the Superintendent, will **usually** assert that the Superintendent is biased in favour of the Proprietor.

The **dual** role of the Superintendent under such construction contracts has been recognised by the Courts. The leading case in this area is a decision of the New South Wales Supreme Court (Macfarlan J) in **Perini Corporation v. Commonwealth of Australia** [1969] 2 NSWR 530.

In the **Perini** case, Perini Corporation had contracted with the Department of the Postmaster-General to construct the Redfern Mail Exchange. During the project, the Contractor claimed a number of extensions of time, some of which were granted, some of which were refused, and some of which were granted but not to the full extent claimed. As was common at the time, the work was undertaken on behalf of the Commonwealth of Australia by the Department of Works. The Superintendent under the contract was the Director of Works.

The Court had to consider the role of the Superintendent.

It was asserted by the Contractor that the Director of Works was obliged to exercise his own discretion in considering whether there was an entitlement to an extension of time and that, in fact, the Director had been guided by "Departmental policies". Effectively, the Contractor was saying that the Director of Works had acted as a rubber stamp of the Proprietor.

The Court made the following observations in relation to the role of the Director of Works:-

> "The second matter on which I will speak generally concerns the position of the Director of Works. This gentleman is undoubtedly an important officer in the Commonwealth Public Service. Unlike other senior Commonwealth public servants, there is not any provision made by statute for his appointment or duties. However, his position appears to be fairly clear. At the head of the permanent administrative staff of the Department of Works is the Director-General of Works who is charged with the general supervision of the Department and its activities throughout the

> Commonwealth. In each State there is a Director of Works who, in relation to the State for which he is appointed, discharges the same general duties as the Director-General does for the Commonwealth...
>
> The fundamental basis upon which the plaintiff sought to litigate its case against the defendant was that the defendant was in breach of certain terms implied in the agreement... the plaintiff's argument was that in the discharge of the duties imposed upon him by clause 35, the Director of Works, with the encouragement and support of the defendant, acted in a manner that was outside his mandate."

The Contractor argued that the Departmental was liable for damage suffered by it, in consequence of the error of the Director of Works, on three different bases:-

(i) the Department was **vicariously liable** for anything that the Director did wrongly;

(ii) the Director of Works, in relation to his functions under clause 35 was a **certifier** and, as such, the Department was obliged under the contract to ensure that the Director performed his role as a certifier properly or, at least, was required to refrain from taking any action or course of conduct which would oblige or influence the Director to act otherwise than in accordance with his duties as certifier; and/or

(iii) the Director of Works was an **arbitrator** and, accordingly, was obliged to act judicially.

The Court concluded (without much trouble) that there was no basis for interpreting that the Director of Works was to act as an arbitrator (this was not pressed in the trial).

The Court then considered the issue of vicarious liability and, in particular, the position of the Director of Works having regard to his public service obligations. In this respect the Court said, at page 536:-

> "In my opinion the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the government or semi-government body, 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. The essence of such a relationship in my opinion 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 or certificate on the matters which he is required to decide... ".

The Court then went on to consider the particular duties of the Director of Works, at page 536:-

> "It is now necessary to consider the duties of the Director of Works. He, of course, has not bound himself by contract with either the plaintiff or the defendant. The plaintiff and the defendant are the only parties to the agreement but in it they have agreed that the Director of Works shall have the powers and duties stated in it. Many of these powers and duties are administrative and supervisory in their character and are performed by the Director of Works as a servant and agent of the Commonwealth. I have already expressed the opinion that in respect of the duties imposed upon him by clause 35 of the general conditions that he is a certifier. The word "certifier" does

> not have an exact meaning but is used to describe a function which is somewhere between those of a servant and those of an arbitrator."

The Court then concluded that in the present case the terms of the contract required the Director of Works to exercise his own discretion in relation to certain functions. At page 538, the Court said:-

> "On behalf of the plaintiff it was said that if a decision with respect to a particular application were decided by reference to "Departmental policy" that indicated that the Director was not making a personal decision but was bowing to the established policy of the Department. A similar criticism to the one I have just mentioned was that the Director was not entitled, if he were to make a proper decision, simply to "rubber stamp" the opinion of another officer, or even to adopt the recommendations of a subordinate. This, it was argued was to surrender his duty to somebody else and he was not permitted to do it....

I have formed the opinion that subclause (2) does confer a discretion upon the Director. The operation of subclauses (1) and (2) in my opinion is that if there shall be a delay "in the execution of the works" and that delay has been caused by some relevant factor, then sub-clause (2) confers a discretion upon the Director to say whether the cause is sufficient or not to justify an extension of time. Considerable discussion occurred during argument about the true limits of this discretion and learned counsel for the defendant submitted that the limits were confined within a range of matters that were relevant to the interest of both parties under the contract. In a sense I am of the opinion that this is correct but that the interest to which the Director must pay attention is not simply a desire by the plaintiff for financial convenience or reasons of its own, to have an extension or, on the other hand, desire by the defendant to have the building completed within the time originally specified in the contract, or in an ulterior sense, the desire of those representing the Postmaster General to be given occupation at the earliest possible date. The kind of interest which must govern the exercise of the Director's discretion is the interest of each party as it appears from all the provisions of the agreement."

In summary, the Court concluded:-

1. the Director of Works was a certifier under the Contract and as such had certain duties imposed on him by the Contract;

2. the Director of Works had a discretion as to whether or not he would grant an extension of time;

3. in making his decision, the Director was entitled to consider departmental policy but would be acting wrongfully if he were to consider himself as controlled by departmental policy;

4. there was an implied term in the Contract that the Commonwealth would not interfere with the Director of Works' duties as certifier; and

5. there was an implied term of the contract that the Commonwealth would ensure that the Director of Works properly performed his duty as certifier.

This, it is suggested, is the current law on the status of the dual role of the Superintendent under a traditional form of construction contract.

Finally, it may be convenient to briefly mention clause 23 of AS2124-1992. That clause provides, so far as relevant, as follows:-

> "The Principal **shall ensure** that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent -
>
> (a) acts honestly and fairly;
>
> (b) acts within the time prescribed under the Contract or when no time is prescribed, within a reasonable time; and
>
> (c) arrives at a reasonable measure of value of work, quantities or time."

[emphasis added].

Clause 23, in the 1992 edition and in the 1986 edition, imposes a **direct contractual obligation** on the Principal to **ensure** that the Superintendent acts in a manner consistent with honesty, fairness and reasonableness. (It also imposes a contractual warranty on the Prinicipal that the Superintendent's measure of work, quantities or time is, itself, reasonable.)

This, to my knowledge, is the first such express provision to appear in a commonly used standard form of contract.

3. FUNCTIONS OF THE SUPERINTENDENT

3.1 Assessment/Certification

The Superintendent is appointed by both parties to the Contract to perform certain functions.

Those functions will include, principally:-

- certification of progress claims;
- assessment of variations;
- assessment of extensions of time;
- assessment of quality of workmanship and materials; and
- assessment of claims under the contract (for example, latent conditions claims).

There has been a great deal of judicial consideration (including **Perini**) of the role of the Superintendent in these functions.

We have seen, from **Perini**, that there is some debate as to the exact nature of the role of the Superintendent when certifying or assessing matters under the contract.

In Victoria, perhaps, we might start with a passage from **Brooking on Building Contracts** at page 161, where the author (a Senior Judge of the Supreme Court of Victoria), says:

> "The architect has a dual role. On the one hand, he is the agent of the Proprietor and under a contractual obligation to him. **He is also often a certifier, or "preventer of disputes", as a person in such a position has been termed.**"
>
> [emphasis added]

The critical considerations, therefore, from the cases referred to in Brooking on Building Contracts, and from Perini, seem to be as follows:-

1. in his role as a certifier/assessor, the Superintendent has a duty to act fairly/impartially;

2. the Superintendent must exercise **this** role independently; and

3. the precise nature of this role will vary from case to case depending on the terms of the Contract.

With this background, we now turn to the primary functions of the Superintendent in his certifier/assessor role:-

3.1.1 Progress Claims

In all traditional standard form contracts, the Contractor is required to periodically deliver, to the Superintendent, progress claims for payment under the contract.

The Superintendent is usually required to assess those progress claims (by reference to the degree of completeness **and** the quality of the materials and workmanship).

For example, in AS2124-1986, clause 42.1 provides, in part, as follows:-

> "42.1 Payment Claims, Certificates and Time for Payment.
>
> At the times for payment claims stated in the Annexure...the Contractor shall deliver to the Superintendent claims for payments supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. **Claims for payment shall include all amounts then due to the Contractor under the Contract or for breach thereof**"
> [emphasis added]

Accordingly the Superintendent must calculate the amount due, at that time, having regard to:-

(i) work carried out by the Contractor in performance of the contract; and
(ii) claims for breach of contract.

This is a complex calculation.

It might be said that the value of works to be assessed in relation to paragraph (i) could be performed by a quantity surveyor. (In fact, on a number of major projects in the late 1980's, project financiers often preferred quantity surveyors, rather than engineers/architects/superintendents, to assess progress claims...this, possibly, was a preference of project financiers rather than Proprietors.) The difficulty with this type of assessment, however, is that it is necessarily linked to an assessment of quality of materials and workmanship. It is necessary to ensure that the works as completed are in accordance with the technical requirements of the drawings and specifications, and are free of defects. This assessment, in itself, may ultimately become the subject of technical debate.

But perhaps the more complex area is the assessment of payment claims for "breach" of contract.

Claims for breach of contract might include, for example:-

- additional payment to the Contractor for latent conditions;
- claims for delay costs arising out of extensions of time which were the fault of the Proprietor;
- claims for variations which arose out of the Proprietor's failure to give access to the site, or additional work caused by faulty design documentation;
- claims for variations arising out of directions by the Superintendent relating to works not included in the contract/tender documents.

In addition, in recent times, the Superintendent might expect from time to time to receive even more complex claims, such as:-

- restitution/quantum meruit claims (where the works as constructed are so different from that tendered on, that the contract sum is no longer applicable);
- claims for negligence (for example, for additional works caused by negligent preparation of the design drawings specifications);
- claims under the Trade Practices Act and/or Fair Trading Act.

Interestingly, this type of claim has traditionally, at least under AS2124-1986, not been required to be assessed by the Superintendent in assessing a progress claim. However, under AS2124-1992, this provision was amended to expand the nature of claims which were to be assessed by the Superintendent. The provision now reads as follows:-

> "Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time **together with all amounts then due to the Contractor arising out of or in connection with the Contract** or for any alleged breach thereof".

[emphasis added]

The additional words (highlighted) seem to include the negligence/quantum meruit/TPA type claims.

In every case, the ambit of the Superintendent's assessment of progress claims will depend on the language of the Contract.

On its widest view, however, the Superintendent has to make more than a complex technical assessment. He is also be required to make a legal assessment of complex legal causes of action upon which a Contractor might base a claim for additional payment.

Good luck.

3.1.2 Variation

The usual area in which the Superintendent is required to regularly exercise legal judgments under the Contract is in the authorisation and valuation of variations.

These are two separate issues.

The Contractor may assert from time to time that particular works which he has been required to perform (either in accordance with the contract documents, or alternatively pursuant to a direction of the Superintendent) constitute a Variation. The test applied by the Courts is, in substance, that particular work constitutes a variation if it is work outside the works upon which the Contractor tendered/contracted, having regard to the terms of the Contract. (A full discussion of what constitutes a variation is beyond the scope of this paper.)

A number of issues regularly arise in relation to whether or not work constitutes a variation, including:-

- whether work subsequently performed by the Contractor is or is not included in the contract documents;
- whether particular work to be performed by the Contractor is, in accordance with the terms of the Contract, to be inferred from the contract documents; and
- whether the circumstances in which work properly described in the contract documents is to be performed are different from the circumstances described in the tender/contract documents.

These types of variations differ from the easy to understand type of variation, namely where the Proprietor wishes to change the work described in the original contract documents and seeks a quotation from the Contractor prior to that work being performed, which quotation the Proprietor then accepts and orders the variation or not.

The Superintendent's assessment of whether or not work constitutes a variation is more than a technical assessment. It requires skills in interpreting contract documents, a judicial impartiality in listening to the views of the Proprietor and the Contractor, and an ability to interpret documents which often are non-specific in relation to the subject matter of the asserted variation.

As was the case in relation to the assessment of complex claims under the contract in certification of progress claims, the Superintendent is appointed by both parties to the contract to make this assessment. The choice of the Superintendent is, in theory, a matter for the parties at the time of entering into the contract, but is, in practice, a matter which is usually decided solely by the Proprietor.

The second complex area of assessment for the Superintendent in relation to variations is in the **valuation of variations.**

The common contract regime for valuing variations is, generally, as follows:-

1. the Proprietor (usually through the Superintendent acting as agent of the Proprietor) and the Contractor attempt to agree on the value of the approved variation;

2. failing such agreement, the Superintendent assesses the value of the variation in accordance with any pre-agreed (at the time of entering into the contract) rates which may be applicable for such variations;

3. where there is no such applicable pre-agreement, the Superintendent determines a "reasonable sum", including an amount for the builders oncosts and profit (but, depending in all circumstances, on the express language of the contract).

This regime cannot be avoided.

Effectively, the Superintendent is being asked to put a valuation on works which, by definition, was not agreed between the parties at the time of entering into the contract. It is work which the Contractor is obliged to perform (the Contractor bound himself to do this by entering into a contract which included a variation clause). The parties did not agree, at the time of entering into the contract, on how much the Contractor would be paid for such work. They merely agreed on the valuation regime.

It is a contractual term, therefore, between the parties, decided upon at the time of entering into the contract, that the Superintendent is to have the last word on the valuation of variations.

3.1.3 Extension of Time

The assessment of claims for extension of time is extremely complex.

Typically, under a traditional form of construction contract, the Contractor would be entitled to extensions of time in the following circumstances:-

1. where delays are caused by the Proprietor (for example, if the Proprietor fails to deliver the site on the agreed date, or the design drawings/specifications are wrong requiring further work to remedy the error);

2. where delays are caused through events beyond the parties' control (for example, inclement weather or industrial strife).

There are contractual reasons why the Contractor should **always** be entitled to an extension of time in relation to delays caused by the Proprietor (in the absence of such a contractual mechanism, the

Contractor will have remedies for breach of contract, the ambit of which is beyond the scope of this paper).

The entitlement of a Contractor to an extension of time for delays of the type referred to in paragraph 2 above is a matter for contractual negotiation between the parties. The parties could agree that the Contractor is to be entitled to an extension of time in such circumstances (in which case one would expect the Contractor to reduce his tender price), or the parties could agree that the Contractor is not to be entitled to an extension of time in those circumstances (in which case one expect the Contractor to increase his tender price). It is a matter of allocation of risk under the contract.

The first task of the Superintendent in assessing claims for extension of time by the Contractor is to determine whether, having regard to the express terms of the contract, the Contractor is entitled to an extension of time at all.

This analysis is potentially complicated by factors such as:-

- some delays which may not be expressly referred to in the contract are difficult to classify (for example, failures of sub-contractors, suppliers....clearly beyond the control of the Contractor, but perhaps within the contractual risks to be borne by the Contractor?);

- some delays are caused by a combination of causes (for example, the Contractor may have equipment breakages, during a period of inclement weather, and several other factors may impinge on the progress of work at the same time); and

- some delays will occur which are better described as a slowing of progress of the works rather than a complete stoppage (for example, Separate Contractors of the Proprietor may impede the progress of the Contractor).

In each case, it will be a complex analysis for the Superintendent to determine whether an extension of time is due to the Contractor at all.

The more complex calculation, however, comes in relation to the quantification of extensions of time. A delay might occur because of two days rain....but the effect of the two days rain may be to delay work commencing on the site for a further three days. Alternatively, a delay may occur to one part of the works which is non-critical to practical completion of the total project.

(A full discussion of the quantification of claims for extension of time is beyond scope of this paper.) For present purposes, it is enough to note, again, the Superintendent has a complex task to perform. The only saving grace for the Superintendent in coming to this complex task is the knowledge that the two parties to the contract appointed him, for better or for worse, to make that assessment.

3.1.4 Quality

The parties define the works to be performed under the contract, in the contract documents.

Those documents consist, typically, of the drawings and specifications, but may also include, in certain circumstances, post-tender correspondence, and other technical descriptions of the proposed works.

The parties, at the time of entering into the contract, appoint the Superintendent to check the quality of materials and workmanship against the contract documents and to take such steps as are set out in the contract to effect the requisite quality standards.

There are a number of misconceptions, it seems to me, by Superintendents as to what they are required to do under traditional standard form contracts in relation to quality.

They are not, in any circumstance, required by the parties to direct the Contractor as to methods of work. This is a contractual risk borne by the Contractor, upon which he has priced his tender.

The Superintendent's role is, traditionally, to watch over the works, to give directions to remedy work which is not in accordance with the provisions of the contract, and where that direction is not complied with, to take the steps provided in the Contract to remove part of the work from the Contractor and to have that work remedied by others at the cost of the Contractor.

Contractual difficulties may arise where a Superintendent is too helpful. The Contractor may subsequently say that it is entitled to a variation because the Superintendent directed it to do work other than that which was described in the contract documents, or in a manner other than was permitted under the contract documents.

The Superintendent may have simply intended to compel the Contractor to complete the works in accordance with the contract documents. The difficulty, however, is that it is a contractual right of the Contractor as to how those works are performed.

Accordingly, where the Superintendent is dissatisfied with the quality of workmanship and/or materials, the usual steps which should be taken by the Superintendent are as follows:-

1. a written notice should be given to the Contractor informing the Contractor that the works are not in accordance with the contract, setting out the nature of that non-conformance, and directing the Contractor to remedy the works to conform with the contract documents within a specified time;

2. where the Contractor fails to comply with the first notice the Superintendent should deliver, a further notice, giving the Contractor a period within which to bring the works into conformance, failing which that part of the works will be taken out of the Contractor's hands and completed by others, the cost of that completion being deducted from monies otherwise due to the Contractor under the contract (this further notice must be strictly in accordance with the terms of the contract, otherwise there is a risk that the Contractor might be entitled to treat such a notice as a repudiation of the contract);

3. in extreme circumstances the failure of a Contractor to perform the works in accordance with the Contract may entitle the Proprietor to take steps to terminate the contract (again it is critical that these steps be strictly in accordance with the terms of the Contract).

In addition, a failure to execute the works in accordance with the contract documents should be reflected in the progress certificates. Progress certificates should take into account the cost of, if necessary, remedying the works if the Proprietor is subsequently to do this himself.

This is a convenient moment to note, in passing that the introduction of quality assurance systems has, to date, been intended to supplement, or hopefully replace, the subjective assessment of Superintendents.

To date, however, quality assurance systems, at least in Australia, do not seem to have had this effect. In AS2124-1992, for example, clause 30 expressly refers to quality assurance systems but says no more than that the parties shall comply with a system where a program is included in the contract documents. Clause 30 further describes such programs as an "aid only" to achieving quality auditing under the Contract.

Compliance with the Superintendent's subjective assessment is still the prime contractual requirement.

Disputes As to The Superintendent's Decisions

The parties, at the time of entering the contract, appointed the Superintendent to perform these functions (and many others).

The Superintendent, in practice, is usually a senior engineer or architect with some experience in relation to such projects. Alternatively, he is often a senior public sector employee, again usually with some experience in relation to such projects. However, even the most experienced Superintendent will not usually be able to follow completely the evolving methods of assessing/quantifying the types of claim which he is requested to determine under traditional construction contracts in 1994.

Disputes occur.

Some Superintendents apply their own best judgment (as, in fact, was intended by the parties at the time of entering the Contract). Others enlist the assistance of professional consultants (and/or lawyers) to perform their functions (again, the parties usually intended that this would be so, particularly where the Superintendent is the head of a large private engineering organisation, with a substantial staff at his disposal, or alternatively where the Superintendent is a senior public sector employee with a large department at his disposal).

Contractors, however, despite this, regularly dispute the decision of the Superintendent.

In those circumstances, the Contract usually expressly provides a procedure for determining such disputes, including, typically, resort to arbitration or litigation. In such claims the Contractor will, despite everything that has been said before in this paper, usually rely on 2 main assertions, namely:-

(i) the Superintendent was biased in favour of the Proprietor; and/or

(ii) the Superintendent was in error in making his technical/contractual judgment.

The mere fact of an assertion of bias should not concern the Superintendent. The dual role of Superintendents will encourage the allegation of bias wherever a dispute arises. (On the other hand, it is likely that, on some occasions, even subconsciously, the Superintendent may in fact have a natural bias towards the interest of the Proprietor rather than the Contractor).

The mere fact that the Contractor is dissatisfied with the decision of the Superintendent, combined with the problem that such assessments often require extremely complex technical/contractual analysis, will per se encourage the allegation of technical error.

The fundamental advice which should be given to Superintendents in respect of this part of their role under construction contracts is to understand their dual role.

Superintendents should be aware which role they are performing in making decisions, have regard to the strict terms of their particular contract, allow both parties to express their views in relation to such decisions, and then decide according to their best judgment. If, at the end of this, one or other of the parties still wishes to dispute the Superintendent's assessment (in practice this will usually be the Contractor rather than the Proprietor) then the Contract provides such the procedure to resolve that dispute. The Superintendent should simply allow the contract to take its course.

3.2 Acting as Agent of the Proprietor

The Superintendent has a dual role. This paper has discussed, above, some of the instances where the Superintendent is required to act as a certifier/assessor. In performing that role there is, clearly emerging from the cases, an obligation to act fairly, impartially and not at the direction of one or other of the parties (usually the Proprietor.

The other part of the Superintendent's role, however is completely different.

The Superintendent is also required to act as the agent/adviser of the principal in respect of certain other functions.

I have always admired a brief description of this role prepared by Ben Fink, a former chairman of Gutteridge, Haskins and Davey in a paper delivered to a V-Line seminar on contract administration in Melbourne on 5 July 1988. Mr Fink described this role as:-

> "The responsibility to the Principal is to act in all professional matters as faithful adviser to the Principal, whose interests he must watch with skill and care, and to keep the Principal fully informed on all relevant matters relating to the cost, progress and variations of the contract".

There are a number of functions which the Superintendent will be likely to be required to perform in this role (again, I am indebted to Mr Fink for the following listing):-

- notification of successful and unsuccessful tenderers;
- arrangements for execution of contract documents;
- vetting of Contractors' insurances;
- vetting of security deposits;
- approvals and clearances by statutory authorities;
- advice on rate of progress and expenditure;
- recommendations on contractual actions to be taken by the Proprietor; and

- management of site staff.

In addition to the above, the JCC Standard Form Contracts set out, in clause 5.02, a listing of functions of the Architect when acting as the agent of the Proprietor (in addition to a similar listing of functions when acting as an assessor, valuer or certifier). That list of functions in which the Architect is to act as the agent of the Proprietor sets out the matters in relation to which the Architect should issue instructions, to the Contractor, principally:-

- performance of the works;
- variations;
- site conditions;
- nominated sub-contractors and suppliers;
- substitution of materials and workmanship;
- postponement of work;
- making good of defects in the works; and
- the removal, re-execution, replacement of works executed by the Contractor.

Each of these functions (the list is far more extensive than the items referred to above), are examples of the types of function upon which the Proprietor usually relies on its professional advisers for advice, before, during and after the performance of the works by the Contractor under the contract.

In relation to this role, the Superintendent must:-

(i) comply with the instructions of the Proprietor (irrespective of whether those instructions are reasonable, fair or contrary to the interests of the Contractor); and

(ii) the Superintendent owes a duty of care to the Proprietor in the performance of those functions.

If the Superintendent fails to perform those functions in accordance with paragraphs (i) and (ii) above, the Superintendent may be liable to the Proprietor for breach of contract **and/or** in negligence.

4. LIABILITY OF SUPERINTENDENT

4.1 Liability to the Proprietor

The Superintendent is in a contractual relationship with the Proprietor to perform his functions (all of his functions whether as agent of the Proprietor or as an assessor/certifier under the construction contract).

This liability will arise, potentially, both in contract and in tort. (See **Brickhill v. Cooke** [1984] 6 BCLRS 47 in which the New South Wales Supreme Court, Court of Appeal, held that a client could sue an engineer in tort as well as in contract.)

The engagement of the Superintendent by the Proprietor may be in writing, oral, and/or implied.

In many instances, there will be a written contract between the Proprietor and the Superintendent. Those terms of engagement may or may not include provisions relating to the services to be performed, the payment to be made in respect of those services, and, possibly, limitation of liability and extent of professional indemnity insurance cover.

In other cases, there may be no written engagement. In that case the contractual obligation arises through the conduct of the parties in the Proprietor requesting the Superintendent to do certain work and the Superintendent being entitled to be paid a party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interest of the two parties, the third party is immune from an action for negligence in respect of anything done in that role"

(This decision was later overturned on appeal by the House of Lords; see A**renson v. Casson Deckman Rotley & Co** [1977] AC 405, following the early House of Lords determination in **Sutcliffe v. Thackrah** [1974] 1 All ER 859 below.)

In **Sutcliffe v. Thackrah**, the House of Lords considered the earlier cases, including **Arenson v. Arenson**, and held that there was no such immunity. At page 862, Lord Reid said:-

> "I think that the immunity of arbitrators from liability for negligence must be based on the belief - probably well-founded - that without such immunity arbitrators would be harassed by actions which would have a very little chance of success. And it may have also been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other, or that in some way the immunity put him in a more independent position to reach the decision which he thought right.
>
> But whatever be the grounds of public policy which have given rise to this immunity of persons acting in a judicial capacity, I do not think that they have anything like the same force when applied to professional men when they are not fulfilling a judicial function.
>
> ...it has often been said, I think rightly, that the Architect has two, different types of function to perform. In many matters he is bound to act on his clients instructions, whether he agrees with them or not; but in any other matters requiring professional skill he must form and act on his own opinion...
>
> The building owner and the Contractor make their contract on the understanding that in all such matters the Architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the Architect that he shall not only exercise due care and skill but also reach such decisions fairly holding the balance between his client and the Contractor. For some reason not clear to me a theory has developed and is reflected in many decided cases to the effect that where the Architect has agreed or is required to act fairly he becomes what has often been

> called a quasi-arbitrator. And then it is said that he is entitled to an arbitrator's immunity from actions for negligence. Others of your Lordships have dealt with the older authorities and I shall not say more about them than that they are difficult to reconcile and often unconvincing...
>
> I can see no good grounds for this view. If there is any validity in my conjecture as to the reason of public policy giving rise to the immunity of arbitrators, those reasons do not apply to this situation."

The House of Lords, soon after, overturned **Arenson v. Arenson**, and this is the position today, namely that there is no immunity for superintendents in the performance of their assessor/certifier functions.

The Superintendent, therefore, in the performance of his functions under the contract, both as agent of the Proprietor, and as an assessor/certifier under the contract, is potentially liable to the Proprietor if he fails to perform the obligations either in accordance with the terms of his contract with the Proprietor, or alternatively, if he fails to perform his task to the requisite standard of care.

4.2 Liability to Contractor

The Superintendent has no contractual relationship with the Contractor. Accordingly, to the extent that he may have potential liability to the Contractor at all it will only be in tort.

We have already seen, above, that the Superintendent is not immune in tort in relation to his performance of his role as assessor/certifier.

The Superintendent's potential liability to the Contractor, depends on whether he owes a duty of care to that Contractor in all the circumstances and whether, in the performance of those functions, he has performed those functions to the requisite degree of care and skill.

On first principles, there seems little doubt that the Superintendent and the Contractor are in a sufficiently proximate relationship that the Superintendent ought to owe a duty of care to the Contractor. In an excellent article on the role of the Superintendent, John Tyrill notes that all of the required elements seem to be in place to bring an action in tort for negligence. (The citation for that article is "**The Role of the Superintendent**", [1986] 2 BCL 316, at 329.)

One notes, however, in the final analysis that there have not been many cases (if any) in which a Contractor has succeeded in negligence against the Superintendent in relation to performance of his functions. High in the courts consideration of the sufficiently proximate relationship are issues of assumption of responsibility by the professional and reliance by the party alleging loss. The lack of successful actions by contractors against superintendents, could be related to the lack of reliance by the contractor on the Superintendent.

In **R W Miller v. Krupp**, the main contractor claimed against the project manager in negligence (no contract existed between the two). In arguing sufficient proximity upon which to found the requisite duty of care the contractor said there was known reliance by it and assumption of responsibility by the project manager. The Court saw the contractor as the expert in the work and it was the project manager who had relied on the contractor. There was not the sufficient proximity. The result may have been different if some expert capacity of the project manager had been relied on.

In **Junior Books v. Veitchi** which has been limited to its factual situation (nominated sub-contract heavily relied on for its expertise) the House of Lords concluded that a nominated sub-contractor (no contract with the owner) could owe a duty of care to an owner in relation to the construction of a tiled floor by the nominated subcontract.

It seems, to me, that various parties likely to be involved on construction contracts, albeit that there is no contractual relationship between the particular parties, nevertheless have those other parties in mind when they are performing their particular roles on the project. It seems to me that it would be likely, in 1994, that a Contractor could establish a sufficiently proximate relationship in an action in negligence against the Superintendent.

There are, however, obvious strategic difficulties with bringing such a claim, in particular:-

(i) the Proprietor would usually be a better defendant for the Contractor where the conduct complained of is a failure by the Superintendent to perform his assessor/certifier role. (Although, conceivably, such an action against a Proprietor might be d on a building project). To the extent that the Superintendent failed to require that Contractor to adopt safe practices, he might conceivably be liable to workers/passers by.

    In this type of circumstance, the Superintendent may be liable, in tort, to any person in that sufficiently proximate relationship.

    One would imagine, however, that practical circumstances would limit this potential liability to circumstances in which the Superintendent is acting as the agent/adviser of the principal.

    It is more difficult to imagine many circumstances where the Superintendent might be liable in relation to its assessment/certification functions. One **obvious** possibility, however, is where a financier to the project is detrimentally affected by over-certification.

    If, for example, a Proprietor overpays a Contractor based on a (negligently prepared) certificate of the Superintendent, and, subsequently the Proprietor goes into liquidation, it is conceivable that a financier might look to the Superintendent, in negligence, to recover any losses which it ultimately suffers by reason of that over-certification.

    Again, in every circumstance, such liability will fall to be decided on the usual principles of negligence.

5. SUMMARY

The critical consideration for Superintendents in the performance of their role is to understand their dual functions.

When acting as the agent of the Proprietor, the Superintendent must at all times act as a faithful adviser, living up to the standard of care which is required of any professional person.

When acting as assessor/certifier under the Contract, the Superintendent is obliged as a matter of contract between the Proprietor and the Contractor, to act impartially, fairly and, again, professionally, in the performance of those functions.

The fundamental error often made by Superintendents is in not understanding his dual function, and giving proper effect to both of those functions.

The particular functions which the Superintendent is required to perform, in 1994, especially in relation to his role as assessor/certifier, are continually evolving and becoming more complex.

It is necessary for Superintendents to be attentive to the express terms of their particular contract, to hear out both parties to the contract in relation to particular issues, and to then make their determinations professionally based on all of the competing factors.