

SUPERINTENDENTS— BETWEEN A ROCK AND A HARD PLACE?

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KEY POINTS

- The onus is on the superintendent to properly tread the line between principal and contractor
- General rules and implied undertakings—what do they mean?
- Disputes in relation to the performance of superintendent—what are the options?

The conduct of a superintendent can be a source of protracted and painful conflict for contractors trying to effect project outcomes profitably. Commonly, during the life of a project, contractors raise concerns that the superintendent is failing to comply with express provisions in the contract and is generally being uncooperative and difficult to work with.

Usually, a superintendent has a relationship with the principal which requires him to promote the principal's interest. At the same time, the contract envisages that the superintendent will, as part of his retainer, also perform certain independent functions which define the respective rights and obligations of both the principal and the contractor. The general rule is that a term is to be implied into the contract that these latter functions must be performed fairly, justly and with skill to both parties ('general rule') (*Perini Corp v Commonwealth* [1969] 2 NSW 530).

Commonly, construction contracts will contain an express clause which is consistent with the general rule. For example, clause 23 of AS2124-1992 provides that the owner must ensure that its superintendent, amongst other things, acts honestly and fairly and within a reasonable time.

There is authority that says, by reason of this term, there may also be an implied undertaking that the principal owes to the contractor that, where it knows that the superintendent is going outside the

limits of his functions, it will call him to book and ensure he performs his functions properly ('implied undertaking') (*Leyland & Co v Compania Panamena Europa Navegacion, Limitada* (1943) 76 Lloyd's LR 113).

However, there is also authority for the proposition that no such implied undertaking exists where the contract contains an in-built mechanism, in the form of a dispute resolution clause, by which any failure of a superintendent to exercise his functions properly may be remedied (see *Lubenham Fidelities and Investment Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 46 (CA)).

Most construction contracts contain such dispute resolution clauses.

In those circumstances, although it is certainly possible that the law would apply a different rule in the event of a consistent and serious departure by the superintendent from the scope of his function, generally the remedies available even for serious misconduct by a superintendent would likely be confined to a right to terminate or to damages.

In some cases, a contractor may be able to establish that damages are not an adequate remedy and that a Court should exercise its power to grant an injunction requiring the removal of the superintendent.

The superintendent plays a key role in any project and disputes between contractor and principal often manifest themselves in the conduct of the superintendent. Remedies may be available to replace a superintendent but that is likely only in extreme cases.

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