



Is there a case for mandatory independence of contract administrators?

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Abstract

Whether they be called Architects, Engineers or Administrators to the contract¹, the dual role of being an agent of the Principal/Employer² and swapping hats to a quasi-judicial role has a long and sometimes fraught history. As far back as Isambard Kingdom Brunel and *Ranger v Great Western Railway Company*, the tension occasioned by the Administrator being closely associated with the Principal has caused mistrust and costly litigation.

The modern move away from an employee of the Principal to utilising the services of a key member of the project consultant's firm prima facie appears to create a far healthier degree of separation, but in practice this is not always so. Is there a case for all standard form contracts, and professional bodies' codes of conduct, to require that Administrators must have no past or future role on the project other than as Administrator?

This paper will examine the history of the Administrator, with a distinct New Zealand bias, and the move from employee to consultant. With additional perspectives from the United Kingdom and Canada it will then examine whether this has improved the perceived independence of the Administrator. Finally, and assuming it has not, how can this be addressed and are moves afoot in New Zealand a positive step forward?

¹ 'Administrator' and 'Engineer' are used interchangeably given the latter is adopted in New Zealand.

² 'Principal' and 'Employer' are used interchangeably given the former is adopted in New Zealand.

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PART A: The History of the Administrator from a Kiwi perspective (Stuart Robertson)

Engineering as a profession

- 1 The English/European medieval and early modern world recognised three professions – medicine, the clergy, and the law. Since the late 18th century we now recognise engineering to be a profession, with all the usual hallmarks, such as self-regulation, national associations, and importantly, a code of ethics. Indeed, it would seem foreign to us today to consider there had never been a separate recognised profession of engineering.
- 2 The world's first self-proclaimed 'Civil Engineer' was a man born in England in 1724, by the name of John Smeaton³, and not Isambard Kingdom Brunel⁴, for whom most would recognise. Though Smeaton started his career as a lawyer, he came to follow his passion for mechanics and mathematics.
- 3 In 1771 Smeaton founded the Society of Civil Engineers (now known as the Smeatonian Society of Civil Engineers) and it remains the first such society and the oldest still in existence. However, by 1818 the Institute of Civil Engineers (ICE) was established as the first professional body for civil engineering and has taken over from where Smeaton began.⁵ As is well known, the ICE still exists today. In countries all around the world there are a multitude of professional bodies bringing together many engineering disciplines. In New Zealand such organisations include Engineering New Zealand (formerly IPENZ), ACENZ, IPWEA, and more specialised organisations such as NZIA, NZIQS and so on.⁶

³ Smeaton (1724 – 1792).

⁴ Brunel (1806 – 1859).

⁵ The Smeatonian Society of Civil Engineers is now largely a social forum for engineers.

⁶ Association of Consulting and Engineering NZ; Institute of Public Works Engineering Australasia; NZ Institute of Architects, and NZ Institute of Quantity Surveyors.

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- 4 Many of these organisations have produced self-titled standard form construction contracts similar to NZS 3910,⁷ under which it anticipates its members to play the role of administrator to the contract (Engineer, Architect, etc.).
- 5 Smeaton was concerned with large public infrastructure projects, such as canals, tunnels, seawalls and harbours. The practice was called ‘civil engineering’, as this distinguished it from military engineering. Smeaton was an engineer in the usual sense of the word - a person who applied technical and mechanical knowledge to solve problems and build infrastructure. However, he was also involved in tasks associated with modern contract administrators – i.e. procurement, contractor management, payment, and importantly, dispute resolution – no doubt borne out of his background training as a lawyer.
- 6 But Smeaton was not alone. Other notable English engineers such as Telford and Rennie⁸ were also instrumental in developing contractual systems that still appear today in our modern standard form contracts.
- 7 Most civil (public and private) works of the early 18th century were carried out by local builders, rather than what we are used to today – specialist civil contractors. Such works included public drainage and roading, but also private developments in transportation. This initially involved canal building, but the real advancement in procurement and contracting came on the back of the boom in railway construction in the early to mid-1800’s.⁹
- 8 The engineer’s role involved feasibility studies, preparation of plans, procurement of local builders, supervision of the works and lastly administration of the contracts. The engineer was master of all facets of a project which led to some perverse results. This is nowhere more illustrated than with Brunel’s involvement in the construction of a section of railway line for the Great Western Railway Company, in the mid-1830’s.

⁷ Standards New Zealand NZS 3910: 2013 Conditions of Contract for Building and Civil Engineering Construction.

⁸ Thomas Telford (1757 – 1834), a Scottish civil engineer, architect and stonemason. In 1820 Telford was appointed the first President of the ICE.; John Rennie (1761 – 1821), also a Scottish civil engineer.

⁹ The boom years were 1830 and 1845-47 where the English Parliament authorised 8,000 miles of new rail line construction at a projected cost of £200 million (equivalent to the then annual GDP).

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9 Brunel was the engineer to this contract (Administrator). He imposed his own interpretations on the wording of the contract, always to the detriment of the contractor. He insisted on quality far in excess of what the contract required. He failed to make the site available on time. He withheld payments to the contractor on numerous occasions on a variety of pretexts. His decision on all matters (price, scope, quality, etc.) was final and not subject to appeal.¹⁰ Finally, Brunel was a shareholder of the Employer.

10 The aggrieved contractor, Ranger, took its case to the courts. But having filed its 'bill' in 1838, the contractor's appeal was not heard, in the House Lords and judgement given, dismissing all of the claims, until 1854, some 16 years later. Of note is the following passage in Lord Cranworth L.C's decision:¹¹

But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent between the parties. When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is in fact a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting however, as from the nature of things it must act, by an agent, and that agent was for this purpose the engineer. His decisions were, in fact, their decisions. The contract did not hold out or pretend to hold out to the appellant that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts for many purposes as equivalent, or rather identical.

11 However, there is a glimmer of things to come, salted with an interesting observation, in this later passage dealing with the engineer's obligations in valuing the contract works:

It does not, however, appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. I think it is quite enough if they were made bona fide, and with the intention of acting according to the exigency of the terms of the contract. The company expressly stipulated that,

¹⁰ That said, the contract provided that on completion of the works it was open to the contractor to refer a remeasure of the entire works to an arbitrator.

¹¹ *Ranger v Great Western Railway Company* [1843-1860] All ER 321 at 326H. The bench also included Lord Brougham, who agreed with Lord Cranworth L.C.

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during the progress of the work, the decision of the engineer as to the value of the work from time to time executed should be final. If the appellant thought this a harsh or oppressive clause, he ought not to have agreed to it.

...

It would never do for persons in the situation of these respondents to put themselves in a position in which a question might be raised with them adversely every fortnight as to the extent of their immediate liability to their contractors. If, indeed, there was anything like fraud or unfairness in the case, different considerations might arise, but the evidence wholly fails to establish anything of the sort.

(Emphasis added)

- 12 Unfortunately for Ranger, the case and Brunel's withholding of payment resulted in his bankruptcy, but not before he successfully obtained a discovery order in 1859.¹² Mackintosh was the contractor who took over several of William Ranger's contracts, but feared little better at the hands of Brunel. Mackintosh's own case dragged through the courts for over 20 years. It was not finally resolved until 1864 with the House of Lords awarding Mackintosh £100,000 plus 20 years interest and costs.¹³

New Zealand's role in the development of the common law

- 13 The first New Zealand standard form of construction contract appears to have been NZSS 623. It was first published in November 1949, being declared by the Minister of Industries and Commerce to be '*a standard specification pursuant to the Standards Act 1941.*' NZSS 623:1964 was based largely on the Fourth Edition of the English ICE General Conditions, published in 1955, and the FIDIC form, published in 1957.¹⁴
- 14 The Foreword to Smellie's commentary to NZSS 623:1964 was provided by the late I.N. Duncan Wallace QC and he makes this observation:

Perhaps unlike some writers of some Forewords, I have read the manuscript of this book from cover to cover. Obviously it will not be expected that I should agree with Robert Smellie on every point —what two lawyers ever do? Nor is this to be

¹² *Ranger v Great Western Railway Company* (1859) 45 E.R. 29.

¹³ *Mackintosh v The Great Western Railway Company* [1864-8165] 66 ER 881; Dr Donald Charrett, *The Engineer is dead. Long live the Engineer!*, Australian Construction Law Newsletter #134 September/October 2010; Steven Brindle, *Brunel the man who built the world* (Orion Publishing CO., UK,2005) pp237-238.

¹⁴ A Commentary on Standard Conditions of Contract NZSS 623:1964, Smellie, R.P, Butterworths, Wellington, 1983.

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wondered at, since it should be appreciated, as Mr Smellie certainly appreciates, that the draftsmanship of this contract (as of its closely related UK ancestor and descendant contracts) is extraordinarily lacking in precision in vitally important commercial areas — one is tempted to believe deliberately so, in view of the long pedigree of unaltered wording and the known need for agreement before change can be made.

15 And one of the curious features of NZSS 623, in light of the history of the role of Administrators, and given what many of us are accustomed to, is that it does not define the duties or role of the Engineer, at least not in a single clause.

16 The Engineer is referred to as:

...the Engineer whose name shall from time to time be notified in writing to the Contractor by the Principal to act as Engineer for the purposes of the contract.

17 However, the Engineer's Representative does have specific provisions within the standard.¹⁵

18 To decipher the role of the Engineer it is necessary to review all of NZSS 623 and the relevant case law. This was by no means an easy task. For a start there are over 240 references to 'Engineer' in the standard; access to caselaw was limited; publications such as the Building Law Reports were only started in 1976, and personal computers (let alone the www) were still some way off.

19 Nevertheless, shortly after the *Ranger v Great Western Railway* decision, the English courts were expanding on the principles of bona fides and fairness in the Administrator's discharge of their duties. In the New Zealand case of *Brown & Doherty Ltd v Whangarei County Council*¹⁶ Justice Smellie referred to the English case of *Jackson v Barry Railway Company* (from 1893)¹⁷, quoting with approval from page 247:

To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of

¹⁵ Part 6: Engineer's Representative.

¹⁶ *Brown & Doherty Ltd v Whangarei County Council*, unreported, CP 3/86, Auckland, Smellie J, 13 February 1987, at page 20.

¹⁷ *Jackson v Barry Railway Company* (1893) 1 Ch 238, Bowen L.J., at pages 246-247.

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all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard. The question in the present appeal is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind.

20 As can be seen, the rules of natural justice are gaining traction.

21 Notwithstanding the common law developments in this area, NZSS 623 did not define the Engineer as being under a duty to act fairly, impartially or independently of the Principal. For this we return to the case law.

22 Justice Smellie goes on in *Brown & Doherty* to summarise the judicial development in New Zealand, at page 21:

The emphasis which the Courts were prepared to place on the quasi-judicial or arbitral aspect of the Engineer's position has been modified and refined more recently. In New Zealand, principally through the Court of Appeal decisions in N.C. Construction & Co v Hatrick Ltd (supra) and Canterbury Pipelines v C.D.B. (supra) the position has evolved to a requirement of fairness involving impartiality and independence.¹⁸

23 On the question of the discharge of the duty of fairness and impartiality by the Administrator, His Honour held:¹⁹

I commence this section of the judgment by emphasising that no criticism is intended of the personal subjective honesty of either Mr Beck or Mr Brennan. Both struck me as competent Engineers, honest and reasonable men, who sought to discharge their duties under this contract in a proper and fair manner. But as the

¹⁸ The decisions referred to are: *N.C. Construction & Co v Hatrick Ltd* [1965] NZLR 144 and *Canterbury Pipelines v C.D.B.* [1979] 2 NZLR 347.

¹⁹ *Brown & Doherty Ltd v Whangarei County Council*, unreported, CP 3/86, Auckland, Smellie J, 13 February 1987, at page 30.

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cases I have quoted emphasise it is not a matter of subjective fairness. Rather it is a matter of looking at the whole situation objectively from the point of view of a reasonable contractor and asking whether what occurred appears to be fair and whether, in carrying out his duties, the Engineer appeared to act with independence and impartiality. To borrow words from the judgment of Woodhouse and Cooke JJ in the Canterbury Pipe Lines case I have reached the conclusion that "both as to a matter of fact and degree" it cannot be said objectively that Mr Beck's conduct in this case was fair and impartial in the sense that is required by the law.

- 24 The decision in *Brown & Doherty* was delivered on 13 February 1987 and as prefaced by Justice Smellie in his commentary on NZSS 623:1964, by year's end the New Zealand Standards Council had approved and published NZS 3910:1987 Conditions of Contract for Building and Civil Engineering Construction.²⁰ It had been more than 20 years since NZSS 623:1964 was published and well overdue for major revision. Standards New Zealand received some 1,500 comments to the draft new standard form (DZ 623) resulting in the first NZS 3910.

The modern Engineer under NZS 3910

- 25 NZS 3910:1987 was a substantial change to the previous standard form, although there is a clear lineage to its predecessor. For our purposes it is worth noting two new sub-sections with Section 6 dealing with the role of the Engineer and the appointment process. These provisions remain largely unchanged through to NZS 3910:2013, other than the sub-section numbering.²¹

- 26 The NZS 3910:2013 (contract) states:²²

The Principal shall ensure at all times there is an Engineer, and that the Engineer fulfils all aspects of the role and functions reasonably and in good faith.

²⁰ NZS3910: 1987, Foreword, p 4, Standards Association of New Zealand, Wellington, 1987.

²¹ For convenience, reference to 'NZS 3910' in the balance of this paper will refer to NZS 3910:2013.

²² Clause 6.1.1.

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The Principal shall ensure at all times there is an Engineer...

- 27 The Engineer is not a party to the contract. He or she is a person *appointed* by the Principal *under* the contract. This is a unilateral decision made by the Principal, determined at the time the parties enter into the contract.²³
- 28 In the ordinary course of tendering, the identity of the Engineer should be evident from the Special Conditions attached to the invitation to tender. In any event, the name of the Engineer must appear in the Special Conditions that form part of the contract to be signed by the parties.²⁴
- 29 The contractual relationship between the Principal and the Engineer, however, is found in a separate agreement to that which the Principal enters into with the contractor. This is often in the form of a Consultancy Services Agreement. But this is not always the case. In too many instances the Principal does not clearly set out the duties and obligations of the Engineer. In many cases the Engineer is an employee of a consultant engaged by the Principal to develop and/or design the project.
- 30 While the Principal and contractor can be a natural person or a body corporate,²⁵ NZS 3910 is clear that the Engineer must be a single, natural person, not a body corporate or a firm.²⁶ This is important, in the context of managing and resolving disputes, as it is the personal and technical attributes of the Engineer that can make for a successful project, or not.
- 31 Many of the Engineer's decisions have potentially serious consequences for the contractor. Accordingly, contractors have always seen it as being vital for a particular individual to be named and therefore to be personally accountable—rather than the accountability of the decision-maker being dissipated within, and be able to 'hide behind' the relative anonymity afforded by, the corporate entity.
- 32 I am not sure that I agree. It is more important, in the context of managing and resolving disputes, to appoint an individual with the necessary personal and technical

²³ This is a common feature of many standard form contracts, including: NZIA Standard Construction Contract, SCC 2016; FIDIC Red Book 1999; NEC4 Engineering and construction contract; AMIA (American Institute of Architects) A201 – 2007 General Conditions of the Contract for Construction, and AS 4000 – 1997 General Conditions of Contract.

²⁴ Clause 6.1.3.

²⁵ Most commonly a company under the Companies Act 1991, but also, for a Principal, a body corporate under the Unit Titles Act 2010.

²⁶ Clause 6.1.4.

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attributes. With it difficult for a contractor to sue an Engineer, for losses arising from the decisions made by the Engineer under the contract, and having a company as Engineer (with its own professional indemnity (PI) insurance) does not improve the contractor's position.

- 33 Appointing an individual is not a universal approach, as such restrictions are not necessarily found in other, similar standard form contracts.²⁷ It has been speculated that the drafters of the standard form contracts overseas have perceived that it is no longer possible for one individual to satisfactorily discharge the responsibilities of the independent Engineer.²⁸
- 34 The guidance notes for NZS 3910 suggest that there are no specific professional or technical qualifications necessary for the Engineer, but that it is desirable that the Engineer has an understanding of the technologies upon which the contract Works are based, experience of the business processes of construction contracting, and skills in contract management. Unfortunately, the guidance notes lost their contractual status in the 2013 edition.

...and that the Engineer fulfils all aspects of the role and functions...

- 35 Since 1987 the Engineer's express role has been a 'dual role':²⁹

- (a) As expert advisor to and representative of the Principal, giving directions to the Contractor on behalf of the Principal, and acting as agent of the Principal in receiving payment claims and providing Payment Schedules on behalf of the Principal; and

²⁷ For example:

- NZIA, SCC 2016, clauses 1.4 and 19.1 – 'Architect' means the architect practice' and is not limited to an individual.
- FIDIC Red Book 1999, clauses 3.1 and 3.2 envisages an individual, but who employs professional staff.
- FIDIC Red Book 2017, clause 3.1 allows for both an individual and a 'legal entity'. If the latter, a natural person employed by the legal entity shall be appointed and authorized to act on behalf of the Engineer
- NEC4, clause 10 and Contract Data clause 1. But neither clarify whether the *Project Manager* or *Supervisor* are an individual or company. It would appear from the guidance note to clause 1, in NEC4 User Guide, Vol 2, that both are to be individuals.
- AIA A201 – 2007, clause 4.1.1 – the 'Architect' can be an individual or 'entity lawfully practicing architecture...'
- AS 4000 – 1997, clause 20, '*Superintendent* means a person', but here is no definition if 'person'. Ordinarily that term includes individuals and corporate entities. The definition of *Superintendent's Representative* 'means an individual...' and with that term omitted it suggests a '*Superintendent* can be a firm or company.

²⁸ *The Engineer is dead. Long live the Engineer!* Dr Donald Charrett, Australian Construction Law Newsletter #134 September/October 2010, page 20.

²⁹ Clause 6.2.1.

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(b) Independently of either contracting party, to fairly and impartially make the decisions entrusted to him or her under the Contract, to value the work, and to issue certificates.

36 The functions of the Engineer circle back to one of these two roles.

'Agent of the Principal'

37 The first limb of the dual role refers to a relationship of 'agency' between the Engineer and the Principal. However, that overlooks, as many Parties do, that within the first leg are two sub-roles.

38 The first is as 'expert advisor to...the Principal'. It is often the case that contractors, even substantial international companies, confuse the Engineer's actions in providing advice in his or her area of specialist expertise (a geotechnical engineer, a hydraulics engineer, etc.) with a lack of impartiality. When the Engineer is not making decisions under the contract they are expected to be providing expert advice to their employer, the Principal.

39 The second sub-role is one of agency. This refers to a relationship whereby one person is authorised to act for another, and involves the granting of authority in that person to create legally binding relationships between the grantor and a third party.³⁰ This means that whatever the Engineer does, provided it is within his or her scope of authority from the Principal, will be binding upon the Principal.

40 This agency role has long been confirmed in the English common law. What is beyond the Engineer's agency is to purport to amend the contract. This, in the absence of express written authority from the Principal, is a matter solely for the Principal and the contractor.

41 The Engineer can issue 'proper instructions' in relation to the contract³¹ and make Variation/Change orders to the scope of work to be performed.³² In doing so, the Engineer binds the Principal to meet the cost of that Variation and to allow any relevant time extension.

³⁰ As defined in the New Zealand Law Dictionary, 8th ed. LexisNexis, Wellington, 2015.

³¹ Clause 5.1.2.

³² Clause 9.1.1.

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42 The Engineer necessarily does this as agent of the Principal. Without a relationship of agency, the contractor would have no certainty that the Principal was bound to the instructions of the Engineer.

43 The Engineer has often been referred to as the Principal's 'mailbox', due to his/her role in receiving and delivering notices under the contract. And while this has a ring of truth to it, there are certain powers and duties reserved solely to the Principal. For example, deducting liquidated damages (clause 10.5.3) and issuing a notice of default (clause 14.2.1).

'Independent decision maker/certifier'

44 Under the second limb the Engineer is no longer acting as expert advisor or as the agent of the Principal. The Engineer is acting in a quasi-judicial role. This was confirmed in *Bowen & Doherty* in the learned judge adopting the findings of the New Zealand Court of Appeal (*Woodhouse and Cooke JJ*):³³

In our opinion it should be held in the light of these authorities that in certifying or acting under cl 13 here the engineer, though not bound to act judicially in the ordinary sense, was bound to act fairly and impartially. Duties expressed in terms of fairness are being recognised in other fields of law also, such as immigration. Fairness is a broad and even elastic concept, but it is not altogether the worse for that. In relation to persons bound to act judicially fairness requires compliance with the rules of natural justice. In other cases this is not necessarily so. But we do not think that it can be confined to procedure. Its use in the authorities in combination with "impartiality" suggests that it is not meant to be a narrow concept.

45 The Engineer must consider in an independent and impartial manner all matters empower to them for their decision. There are numerous examples throughout NZS 3910: 2013 where the Engineer is to exercise his or her power independently, fairly and impartially.³⁴

³³ *Canterbury Pipelines v Canterbury Drainage Board* [1979] 2 NZLR 347 at 357.

³⁴ Scheduled amounts, cl 12.2.2; Variations, 9.1; valuation of Variations, 9.3, extensions of time, 10.3.4 and 10.3.5; time related costs, 10.3.7; certification of default, 14.2.1(c); Engineer's review and formal decision, 13.2.1 and 13.2.4;

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46 The guidance notes to NZS 3910:2013 confirm that the requirement to act fairly and impartially is to give effect to one of the objectives, this being to minimise disputes.³⁵ Even in the absence of such clause, the courts have regularly implied, in the absence of an express term to the contrary, a term into a construction contract:³⁶

... that whenever the contract requires the professional to exercise professional judgment on a matter affecting the rights of the parties under the construction contract the professional will, notwithstanding that he or she is the employer's agent, act fairly and impartially as between the employer and the contractor.

.. *reasonably and in good faith.*

47 In finding against the Engineer in *Canterbury Pipe Lines v Christchurch Drainage Board*, Cooke P articulated the key principles around the standard to which Engineers are to be held.³⁷

48 In *Canterbury Pipe Lines*, the general conditions to the contract stated that no sum should be considered due to the contractor until the Board's engineer had given a certificate. When the Engineer failed to do so within the specified timeframe, the Court said this was a breach of the standard to which the Engineer was to perform his role. This failure to certify was attributed to more than a mere incorrect understanding of the contract.

49 The Engineer also made assumptions regarding the sufficiency and generosity of some tendered rates. The Court found that the Engineer's failure to verify these assumptions amounted to more than merely taking an illogical approach. The Court was satisfied that the Engineer ought to have taken positive steps to check the value of items in the schedule of prices, as it ought to have been obvious they were incorrect had the Engineer thought about the question fairly and impartially. The Judge did not consider the Engineer to be acting dishonestly, nor did the Engineer act deliberately unfairly.

³⁵ Guidance note G 6.2.1.

³⁶ *Kennedy-Grant and Weatherall on Construction Law*, Lexis Nexis, Chapter 20, [280: 310]. In particular note the cases referenced at footnote 1.

³⁷ *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 358.

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50 The question is whether the effect of the Engineer's conduct is unfair on the parties, on a test of objective conduct.³⁸

So who is the Engineer?

51 There are generally three key types of people whom Principals engage to act as Engineer - employees, consultants and designers.

Employee

52 Historically all New Zealand Government works involved contracts with the Ministry of Works as Principal and administered by a senior employee of the Ministry. In the 1987 edition of NZS 3910, the following additional words were in both the definition clause and in clause 6.2.1:

It shall be sufficient if the Engineer is named as being the holder for the time being of a specific office.

53 So the Engineer may have been the Commissioner of Works, or some other designated officer of the Ministry. Prior to NZS 3910 (so under NZSS 623) disputes referred to the Engineer were in fact referred to the Commissioner of Works who, despite being an officer of the Ministry, anecdotally, usually gave fair decisions, often ruling in favour of the contractor.

54 The employee-Engineer could also be a local authority's (Council's) relevant head engineer (roading, drainage, water) for its infrastructure projects.

55 It is not hard to imagine the huge capacity for the employee-Engineer to feel conflicted in his or her role, as they would have wanted to retain their position, and pension. The employee-Engineer may feel pressured to deliver a financially successful project (even at the expense of the contractor's fair entitlements) as almost all decisions which favour the contractor will be directly hurting the pocket of the Principal. Despite these conflicts, the fact that the Engineer and the Principal are effectively the same 'person' does not lessen the Engineer's duty to act fairly and impartially to both parties to the contract.³⁹ This includes not allowing the internal

³⁸ [1979] 2 NZLR 347 at page 358.

³⁹ *Canterbury Pipe Lines v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA); *Kell & Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777, where the NSW Supreme Court was required to consider whether an Engineer, an employee of the Principal, acted outside of his powers his powers in issuing a

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policies of the Principal to control the employee-Engineer's decision (although internal policies may be considered).⁴⁰ If a decision was found to be made unfairly, it will be held to be invalid.

56 Contractors will soon be frustrated with an Engineer who fails to take off the 'agent and advisor' hat and put on the 'impartial and independent' one. Even if an employee-Engineer does manage to navigate the inherent conflicts and pressures of this role, the *perception* of partiality towards the Principal will always be hard to overcome.

Consultants and designers

57 To overcome these issues, whether voluntarily or due to other factors,⁴¹ over the last 20 years there has been a significant movement towards engaging a third party to perform the role of the Engineer. This person is commonly an employee of the engineering consultancy or architectural practice providing advice to the Principal in the early days of the project.

58 NZS 3910 is a 'build-only' contract. The contractor does not hold design responsibility, the design is to be provided by the Principal. Similarly with geotechnical, structural and other engineering disciplines.

59 It, accordingly, makes practical and economic sense for the Principal to engage a person not only with the required skills, but also holding direct knowledge of the complexities of the project. It has therefore become common practice for the engineering or architectural consultancy on the project to also put forward a member of its staff as the Engineer.

60 But has the perception of bias from the employment relationship of the employee-Engineer, been exchanged for the need of the consultancy firm to continue to win new work? A more direct and concerning consequence of engaging a person linked to the design of the project is that firm's covenants to its PI insurer. Every policy of

variation instruction, or whether he acted unfairly or unconscionably while issuing that instruction and a certificate of practical completion.

⁴⁰ *Perini Corporate v Commonwealth of Australia* [1969] 2 NSW 530.

⁴¹ For example, the Ministry of Works (established as the Dept. of Public Works, in 1876) was privatised in 1988. In 1996 its two main subsidiaries (Works Consultancy Services and Works Civil Construction) were sold and became, ultimately, WSP Opus and Downer Construction.

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insurance, PI or otherwise, has an express obligation on the insured not to admit liability. To do so will void cover.

- 61 For example, the Engineer is asked to determine a claim of unforeseen physical condition (clause 9.5) (UPC), but the Engineer is an employee of the firm of geotechnical engineers who assessed and approved the site for the development. The UPC claim is warranted, but if the Engineer determines in the contractor's favour two problems arise: first, it is expressly or impliedly an admission of liability; second, the Principal will seek compensation from the Engineer's employer (the consultancy firm) for the error in the original site investigations.

Can the Principal appoint itself?

- 62 Clauses 6.1 and 6.2 do not prohibit the Principal appointing him or herself (assuming the Principal is a natural person), or its employee, as the Engineer. It is only market pressures and the developing case law that the overwhelming majority of Engineers are no longer employee-Engineers. But in the UK they have gone a step further.
- 63 In the 2006 England and Wales High Court decision of *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*, it was held that the Engineer must be a separate entity to the Principal, such as an outside organisation, director or employee, as the Engineer must be able to carry out its secondary function independently and impartially.⁴²
- 64 In coming to this conclusion, the Court found that having the same entity carry out both roles would distort the operation of the dispute resolution procedures which require a right to challenge decisions; the Principal by definition will be in agreement with its own decisions and therefore cannot challenge them. It would also be issuing certificates to itself, among other functions which make little sense with the Principal appointed as the Engineer. In the case where the Principal is a corporate entity, the Court was of the opinion that it is more difficult for its employee to make an independent decision against the Principal's own interests than someone who is a senior and professional person, who can conscientiously put the Principal's interests to one side when making a decision.⁴³

⁴² *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] BLR 113.

⁴³ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] BLR 113 at 127, paragraph [45] onwards.

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65 This is another marked step in the evolution of the role of the Engineer, but one that has not reached New Zealand.

66 If a Principal does not wish to administer its contracts through an Engineer, there is the alternative standard form, NZS 3915:2005, which is an equivalent to NZS 3910, sans Engineer. The pretence, if one exists, of an employee of the Principal being an independent Engineer is removed. But simply adopting NZS 3915 does not change the perception of bias when the decisions do not favour the contractor.

67 In the Western Australian Supreme Court case of *WMC Resources Ltd v Leighton Contractors Pty Ltd* the court held in relation to a contract in which there was no provision for an Engineer, that the power of the Principal to value Variations ‘in its sole discretion’ was nevertheless to be undertaken ‘honestly, bona fide, and reasonably.’⁴⁴

Claims against the Engineer

68 Engineers generally owe no contractual duty to the contractor as there is no contractual link between the parties, so any claim must be in tort, typically for pure economic loss.⁴⁵ However, the authors of *Hudson’s* set out ‘powerful’ factors against imposing a duty:

- a The Engineer is employed, to the knowledge of the contractor, to protect the Employer’s interest, not to protect the contractor.
- b The Principal in a standard construction contract does not warrant the Engineer’s competence, only the Engineer’s fairness or honesty.
- c It would be strange to impose a duty of care when a remedy against the Principal is available under the contract.
- d The liability of the Engineer to be ‘shot at by both sides; would increase the cost of hiring Engineers through higher insurance premiums.

⁴⁴ *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; (2000) 16 BCL 53 at 62 per Ipp J.

⁴⁵ *Hudson’s Building and Engineering Contracts*, Robert Clay and Nicholas Denny, QC (eds) (14th ed, Thomson Reuters, London, 2020) at [2-081], page 325.

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- e It would introduce a clear conflict of interest between those of the Principal and those of the contractor for those duties that the Engineer currently acts as agent of the Principal.
- f The contractor would be free to re-litigate any claims relating to an Engineer's decision against the Engineer itself, after failing against the Principal in the first instance.

69 In examining whether a duty exists, the Courts will look at the contractual structure. In New Zealand this is not limited to the single contract in question, but the broader contractual matrix employed by the various parties to a project.⁴⁶ On this basis, previous attempts by contractors to claim against Engineers under standard form construction contracts have been almost entirely unsuccessful. This remains the case if it were foreseeable the contractor is likely to suffer pure economic loss from the Administrator's failure to exercise reasonable skill and care.⁴⁷

70 However, there is no rule of law that a contract administrator does not or cannot owe a duty of care to a contractor in respect of pure economic loss that the contractor may suffer should the administrator not exercise reasonable skill and care. *Bailey* goes on to state:⁴⁸

Nevertheless, there are no cases of authority, in England, Australia, Hong Kong or Singapore where a contract administrator has been held liable to a contractor in negligence for pure economic loss suffered by the contractor as a consequence of the contract administrator having acted carelessly.⁵⁸¹ What this suggests is that it would take exceptional facts before a duty of care will be found, and that usually no duty of care is owed by a contract administrator to a contractor.⁵⁸²

⁴⁶ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2004] NZCA 97, [2005] 1 NZLR 324 and *RM Turton & Co Ltd (in liq) v Kerslake & Partners* [2000] 3 NZLR 406 (CA).

⁴⁷ *Construction Law*, Julian Bailey, (3rd ed, London Publishing Partnership, London, 2020.) at 5.178, page 426.

⁴⁸ *Construction Law*, Julian Bailey, (3rd ed, London Publishing Partnership, London, 2020.) at 5.179, page 427 and to the wealth of material in the footnotes.

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Conclusions

71 The common law and construction sector have come a long way from the times of Smeaton and Brunel. There is little doubt that a truly independent Administrator would not worsen the situation, with the hope that it could, possibly, significantly improve both the trust between Principal and contractor and reduce the overall costs of a project. Risk is priced into every contract, including the risk of partial decisions of the Administrator/Engineer.

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PART B: United Kingdom (Kirsti Olson)⁴⁹

The development of the law relating to the roles and duties of certifiers and decision makers

Introduction

72 In the various legal jurisdictions that make up the United Kingdom, the “*the duties of certifiers and others with decision-making functions under construction contracts have been the subject of much authority*⁵⁰”. It has long been the position, however, that a contract administrator (who may be an architect, an engineer or a surveyor) performs a dual function under a construction contract. In certain matters (such as issuing instructions to vary the scope of the works) he acts as the agent for his employer. However, when dealing with other specific matters (such as certification and payment) he must act independently of the employer.

73 Decisions made by the contract administrator on certification and payment can have a substantial impact on a contractor's cash flow and thereby on the success of the project. Given that the contract administrator is engaged by (and paid by) the employer, allegations by the contractor of decision-making bias are not particularly unusual. The principles of law that apply in that situation are now relatively settled. Actually proving a lack of independence (or that there has been positive interference by the employer in a decision) can, however, still be rather difficult.

Background and development of the law in this area

74 The 2006 England and Wales High Court decision of *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* contains a helpful summary of how the law has developed in this area in more recent times.

75 In *Frederick Leyland & Co. Ltd. v. Compania Panamena Europea Navigacion Limitada* [1943] 76 Ll.L.Rep. 113,⁵¹ the plaintiffs were claiming payment, for the repair of a ship, from its owners. The contract for repair works provided for the issue of certificates for completion and for payments that became due. The first of the two

⁴⁹ Mention must also be made and credit given to Gurbinder Grewal, Partner, Dentons London, who embarked on the preparation of this paper but unfortunately had to relinquish authorship before its completion.

⁵⁰ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] BLR 113.

⁵¹ *Frederick Leyland & Co. Ltd. v. Compania Panamena Europea Navigacion Limitada* [1943] 76 Ll.L.Rep. 113.

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certificates was to be issued by the shipowners' surveyor, he also happened to be the president of the defendant. He refused to issue the completion certificate because the repairer had failed to provide all the information he had requested. The Court of Appeal held that he had misinterpreted his role under the repair contract and that he did not in fact need the information in question.

76 The House of Lords endorsed⁵² the Court of Appeal's judgment. Lord Thankerton highlighted the dual role of the surveyor to the contract stating:

There can be no doubt that the owner's surveyor is employed in different capacities under clauses 6 and 7. Under clause 6 he is the employee of the appellants employed to carry out the necessary surveillance and inspection on their behalf and to report to them, advise them and consult with them. There may be other minor duties. In all these matters the decisive opinion is that of the appellants. The position under clause 7 is different, as the decisive opinion is that of the surveyor himself, and that opinion should be an independent one. For these reasons I do not think that the use of such expressions as 'quasi arbitrator' or 'merely an expert' are really helpful. By entering into the contract the respondents agreed that the appellants' surveyor should discharge both these duties and therefore they cannot claim that the appellants' surveyor must be in the position of an independent arbitrator, who has no other duty which involves acting in the interests of one of the parties.

77 Clearly in the *Frederick Leyland* case, the owner's surveyor was not an independent person (he was the president of the defendant). However, the court was satisfied that on the question of certification his duty was to act in an independent manner.

78 In *London Borough of Hounslow v. Twickenham Garden Developments Ltd.* [1971]⁵³ it was argued that a notice issued by an architect determining a contractor's employment was void as it was given in breach of the principles of natural justice. Mr Justice Megarry was of the view that the principles of natural justice did not apply (in his view, those principles should be "*confined within proper limits and not allowed to run wild*"⁵⁴). On the subject of the duties of certifiers under building contracts, at pp. 259 to 260, he said this:

It seems to me that under a building contract the architect has to discharge a large number of functions, both great and small, which call for the exercise of his skilled professional

⁵² *Panamena Europea Navigacion Compania Limitada v. Frederick Leyland & Co.* [1947] A.C. 428.

⁵³ *London Borough of Hounslow v. Twickenham Garden Developments Ltd* [1971] 1 Ch. 233.

⁵⁴ *London Borough of Hounslow v. Twickenham Garden Developments Ltd.* [1971] 1 Ch. 233 at page 259.

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judgment. He must throughout retain his independence in exercising that judgment: but provided he does this I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice, giving due notice of all complaints and affording both parties a hearing. His position as an expert and the wide range of matters that he has to decide point against any such requirement: and an attempt to divide the trivial from the important, with natural justice applying only to the latter, would be of almost insuperable difficulty. It is the position of independence and skill that affords the parties the proper safeguards and not the imposition of rules requiring something in the nature of a hearing.

79 The House of Lords decision in *Sutcliffe v. Thackrah* [1974] A.C. 727⁵⁵ concerned a project where the contractor's employment was determined. The contractor later became insolvent. The employer claimed damages for negligence and breach of duty from the architect on the grounds that there had been negligent over-certification. In the course of his judgment (in which the architect was found liable), Lord Reid (at page 737) commented on the duties of an architect when acting as certifier or decision-maker, stating:

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 client's instructions whether he agrees with them or not, but in many other matters requiring professional skill he must form and act on his own opinion. Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the RIBA contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance), or clause 34 (antiquities), whether he should be allowed extra time (clause 23) or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect. 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.

80 Some time later in *Beaufort Developments Ltd. v. Gilbert Ash NI Ltd* [1999] AC 266⁵⁶ the House of Lords famously decided that the Court had the power to open up, review

⁵⁵ *Sutcliffe v. Thackrah* [1974] 55 A.C. 727.

⁵⁶ *Beaufort Developments Ltd. v. Gilbert Ash NI Ltd* [1999] AC 266.

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and revise certificates issued by the architect under a JCT Standard Form of Building Contract. Lord Hoffman made the point⁵⁷ that the architect is not independent: "*the architect is the agent of the employer. He is a professional man but can hardly be called independent*". However, this is not inconsistent with an obligation to act independently when making certain decisions.

81 In *Amec Civil Engineering Ltd. v. Secretary of State for Transport* [2005]⁵⁸ it was argued that an engineer had to comply with the rules of natural justice when making a decision under clause 66 of the ICE conditions. Following the reasoning of Mr. Justice Megarry in *Hounslow*, the Court was not attracted by the natural justice argument. The Court did accept, however, that there was an obligation on the engineer to act fairly and in an unbiased manner.

82 Turning then to *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*⁵⁹, the case concerned a project for the construction of a residential development on the banks of the River Thames in London. The parties used the construction management method. The employer had entered into a number of trade contracts for the execution of the works. The employer ended the appointment of the existing construction manager on the project (Mace Limited) and appointed itself as the replacement. Having reviewed the relevant case law, Mr Justice Jackson (as he then was) drew the strands of the case law noted above together to derive the propositions set out below⁶⁰:

(1) The precise role and duties of the decision-maker will be determined by the terms of the contract under which he is required to act.

(2) Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

(3) When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer.

⁵⁷ *Beaufort Developments Ltd. v. Gilbert Ash NI Ltd.* [1999] AC 266 at page 276

⁵⁸ In *Amec Civil Engineering Ltd. v. Secretary of State for Transport* [2005] EWCACiv 291; [2005] BLR 227.

⁵⁹ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC).

⁶⁰ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC) at paragraph 35.

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83 The Court in *Scheldebouw*⁶¹ identified 9 reasons why the Employer could not appoint itself as the construction manager in that case, as follows:

- (1) It is unusual for an employer to be the decision maker and this can only be achieved by an express term.
- (2) The whole structure of the trade contract is built upon the premise that the construction manager (certifier) and the employer are separate entities.
- (3) The certifier has a legal duty to perform his decision making role in an independent, impartial, fair and honest manner. He must use his best endeavours to reach the right decision, not simply one that favours the interests of the employer. This task would be difficult for an employer when compared to an independent professional agent.
- (4) Reference in the contract to the fact that "any other person" might be appointed to perform the certifier's role would have to be read subject to some limits, particularly in relation to competency.
- (5) Both the contractor and the employer have an interest in securing that the certifier makes correct decisions and issues correct certificates
- (6) The contractor under a trade contract (and under most standard forms of contract) has two separate protections which reduce the likelihood of under-assessment or under-certification occurring. First, assessment by an identified professional person or firm separate from the employer. Second, the duty on the certifier to act in a manner which is independent, fair and honest. If an employer were to become the certifier, one layer of protection would be lost.
- (7) These protections are not achieved by the involvement of other independent consultants in the decision-making process.
- (8) Research had shown that in every prior authority in which the certifier was a direct employee of the employer, this had been clear and stated at the outset
- (9) If it was right that "any other person" could be appointed to the construction manager role, an employer could conceivably replace the whole of the professional

⁶¹ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC) at paragraph 46

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team and replace them with himself, utterly transforming the contract. Which is why the words "any other person" in the relevant clause should not be construed as meaning literally that.

84 Mr Justice Jackson concluded, in all the circumstances, that it was not open to the employer in this case to appoint itself as the replacement construction manager.

85 The journey ends for these purposes with the case of *Imperial Chemical Industries Limited -v- Merit Merrell Technology Limited* [2017].⁶² The parties contracted using a NEC form of contract. Clause 14.4 of the NEC form states that the employer may replace the project manager (as the contract administrator is called in this form) by notifying the contractor of the name of the replacement.

86 In this case the third party appointed project manager resigned after being given an instruction by the employer that any revisions in the assessments of the project manager's instructions would need to be signed off by the employer before they could be included in a certificate. The project manager, entirely correctly given the authorities above, identified that he was no longer empowered to carry out his responsibilities in terms of the contract and had no option but to resign. This led on to the employer appointing its own employee as the replacement project manager. The court said that this appointment was a breach of contract and ineffective (echoing the 9 reasons given in *Scheldebouw*) concluding⁶³:

It is contrary to the whole way in which the contractual mechanism is structured, and intended to work, to have the employer seek to appoint itself (or one of its employees, or an employee of its parent) as the decision maker.

The statutory right to refer disputes to adjudication

87 An interesting feature of the UK and New Zealand construction industries⁶⁴ is the statutory right to refer disputes to adjudication for prompt interim resolution.

88 The popularity of the adjudication process in the UK since its introduction in 1998 may explain why the previous common arguments about a contract administrator's

⁶² *Imperial Chemical Industries Limited -v- Merit Merrell Technology Limited* [2017] EWHC 1763 (TCC).

⁶³ *Imperial Chemical Industries Limited -v- Merit Merrell Technology Limited* [2017] EWHC 1763(TCC) at paragraph 134.

⁶⁴ And in Australia and some provinces of Canada.

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lack of impartiality or independence no longer occur as frequently. The fact that a contractor can refer any dispute over an interim certificate or decision, such as on an extension of time, to adjudication means that arguments in relation to under-certification or assessment do not fester but are decided promptly. Further, proving a lack of independence or impartiality on the part of the decision maker is difficult. Other than in the most egregious of cases (such as that which prompted the project manager's resignation in *ICI*) or in cases when positive interference on the part of an employer can be established after a document recovery process, such arguments tend to be limited to technical points such as to challenge the status of the decision maker.

89 The interplay between adjudication and the independence of the decision maker was an interesting point raised in *ICI*. Mr Justice Fraser commented at paragraphs 132-133:⁶⁵

Mr Bowdery QC, ...also advances another reason, which is that the contractor has protection from an employer decision-maker in the form of the dispute resolution provisions and the ability to seek a rapid decision in adjudication. The exact way in which he put it in oral submissions in opening is as follows:

An employer can employ his own employee to act as Project Manager, providing he acts impartially and the check and balance to ensure he should act impartially is the fact his decisions, or non-decisions, can be challenged by adjudication.

I do not consider that the existence of adjudication as a dispute resolution process alters the analysis by Jackson LJ (or Jackson J as he then was), and I consider the submissions by ICI on this point to be contrary to authority, at least so far as there is no express term permitting it. Firstly, adjudication was part of the dispute resolution landscape in 2006 when **Scheldebouw** was argued, and even though that particular argument was not advanced before the judge, he could not be thought to have been ignorant of it – he was after all the Judge in charge of the Technology and Construction Court, where such decisions were then enforced, and still are. In any event, such an argument is, with respect, off the point. The identity of the decision maker is central to the operation of the contract; dispute resolution is for when disputes have arisen, and not an answer to the central operation of the contract terms.

⁶⁵ *Imperial Chemical Industries Limited -v- Merit Merrell Technology Limited* [2017] EWHC 1763 (TCC).

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90 Although the fact that an adjudication mechanism existed to correct issues was not found to be relevant to the outcome in this case, the practical reality is that most cases, where there is a question over certification, will be resolved in that manner.

Liability of the non-impartial decision maker

91 The decline of the “not acting impartially” arguments may also be attributable to the difficulty on the part of a contractor to bring a successful claim against a non-impartial decision maker. Typically there is no contractual link between the decision maker and the contractor. Further, the Court of Appeal decided in *Pacific Associates v Baxter* [1988] 44 BLR 33 that an engineer did not owe a contractor a duty of care in negligence when certifying payment (there was held to be no assumption of responsibility and the Court therefore considered that it would not be “just and reasonable” to impose a duty of care). Despite the Court saying that each case turned on its own facts and the role of the contract administrator in a particular project, *Pacific Associates* has been followed in other cases and has not been distinguished as first expected.

92 Given a contractor’s claim against a certifier or decision maker will almost certainly relate to payment, it is likely its claim will be for pure economic loss and irrecoverable.

Conclusions

93 Although it is now clear from the case law that in matters of certification a contract administrator must act impartially, the benefit of taking such an approach in a live dispute situation will be limited. First, a contractor has the ability to secure swift redress of any lack of impartiality in an adjudication with an adjudicator able to open up, review and revise any erroneous certificate. Second, the utility in demonstrating a lack of independence would not in itself secure the contractor the ability to claim against another defendant due to *Pacific Associates*. Third, proving a lack of impartiality on the part of a decision maker is very difficult to do, in the absence of clear information which shows that there has been positive interference by the employer in a decision that has been made.

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94 That said, in our experience, employers in construction projects do frequently have to be reminded of the contract administrator's independent role and it is a matter of surprise to many of them that they cannot control the certification process. It may be that, despite the difficulties of making a challenge, the grounds for doing so may be there if the contractor simply pursues the issue hard enough.

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PART C: The History of the Design Professional as the construction administrator from a Canadian Perspective (Karen Groulx)

- 95 It is said that in the post-war period, Canadian governments explicitly used architecture as a tool of country-building.⁶⁶ Along with the changing man-made structures occupying Canada's landscape, and the evolving design, construction methodology, and technologies occurring over the years, the role of the design professional has continued to evolve to cover an expanding array of tasks and responsibilities associated with the design and construction of various types of projects, including the use of new technologies such as 3D modelling or Building Information Modelling ("BIM") to streamline the design development process.
- 96 The principal role of the architect, as the design professional is usually to act as the primary professional design service provider, including coordinating the various specialized engineering disciplines (such as electrical, mechanical, building information and other specialized systems), and overseeing the construction to ensure that it complies with the design requirements.⁶⁷ Added to the role of being the design professional, is the role of the contract administrator, with its ancillary decision-making function, which, as highlighted below, gives rise to different, and often conflicting obligations and duties on the part of the design professional, whether they be an engineer or an architect.
- 97 The Ontario Association of Architects ("OAA"), a self-regulating organization governed by the *Architects Act*⁶⁸, that is responsible for licensing, regulating and education of architects in Ontario, recognizes the inherent conflict of interest of the architect who provides construction services, in addition to architectural services in respect of the same project. Section 43 (1) of Regulation 27 of the *Architects Act*, expressly provides that a member has a conflict of interest where the member has a direct or indirect interest in an entity that is, among other things, the design-builder of the project with respect to which the member provides architectural services. The

⁶⁶ A history of modern Canadian architecture, from the ambitious 1960s and 1970s to the current era of ruthless efficiency, by Alex Bozickovic, published November 24, 2019, available at <<https://www.theglobeandmail.com/authors/alex-bozickovic/>>

⁶⁷ Chapter 1.1: The Role of the Architect, Royal Architectural Institute of Canada, available online at <<https://chop.raic.ca/chapter-1.1.>>

⁶⁸ R.S.O. 1990, c. A.26.

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OAA has published on its website a “Conflict of Interest Guideline – Provision of Architectural Services and Construction Services”, which provides that:

It is the position of the OAA that a conflict of interest exists where the architect is engaged to provide both architectural and construction services on a project. It is extremely difficult to be impartial in such circumstances. As the architect’s duties often include responsibility for certifying the value of work and advising the owner on the quality of work of a constructor, it creates a “conflict of interest” to act in both capacities.⁶⁹

98 Not surprisingly, the “inherent conflict” of the architect has given rise to numerous disputes. Many of these disputes have ended up before the courts, and as such, Canadian jurisprudence provides some guidance about the duties of the architect arising from the various roles being assumed under any given contract, including their duties to the owner, as the owner’s agent, and the duties to the contracting parties, namely, the owner and contractor, to act as an impartial decision-maker with respect to its role as a contract administrator. The recognition that disputes will continue to arise in the context of the traditional contract models or “opposition-risk allocation model” where disputes stem from the distinct roles, responsibilities and liabilities of each of the players in the construction pyramid, has led to the realization that a more cooperative model or collaborative approach to contracting may result in a “win-win” situation for owners, contractors and designers alike, with projects being completed on time and on budget, with fewer or no formal disputes, whether by means of litigation or arbitration.

99 The areas of concern that arise from the changing role of consultants under the various alternative project delivery methods can be examined with the assistance of the cases grappling with the inherent conflict of the consultant being the “interpreter” and “quasi-judicial decision-maker” of its own drawings and specifications, including those cases decided under the more traditional design-bid-build model.

⁶⁹ Ontario Association of Architects: Conflict of interest Guideline – Provision of Architectural Services and Construction Services, available at <https://oaa.on.ca/Assets/Common/Shared_Documents/Practice%20Tips/PT.26_V02.1_ConflictOfInterestGuideline_20110107.pdf>.

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Engineering and Architecture as a profession

- 100 Prior to the late 18th century, design and construction was handled by one entity, commonly known as the “Master Builder”⁷⁰. Architecture emerged as a distinct profession of its own thereafter, separate and apart from construction.
- 101 An architect is generally understood to be a duly licensed and qualified professional who is qualified to design structures, produce cost estimates, working drawings and specifications, and to conduct field inspections and administer construction projects.⁷¹
- 102 The engineer’s function, including those in relation to design and supervision of construction, are essentially the same as architect’s and include design, cost estimates, the preparation of working drawings and specifications, as well as field inspection and project administration, depending on the terms of the engagement.⁷² Only persons with the required qualifications who are registered or licensed in accordance with the requirements of the various provincial statutes⁷³ and the council of the governing body of the profession may legally hold themselves out as professional engineers or architects.⁷⁴
- 103 In short, there is a considerable degree of overlap between the two professions, the degree to which varies depending upon the jurisdiction the professional is operating within Canada. For example, in Manitoba, engineers are permitted to provide planning and supervision roles in the erection of buildings, which role was previously solely within the purview of architects.⁷⁵ In contrast, in the Province of Quebec, engineers are prohibited from making measurements or layouts, and from preparing computations, designs, drawings, plans and specifications, with respect to foundations, framework and electrical and mechanical systems of buildings that cost more than \$100,000 and of public buildings, unless such work is done in collaboration

⁷⁰ Chuck Klunker, “Risk vs Conflict of Interest – What Every Owner Should Consider When Using Construction Management” (2001), CM eJournal, Construction Management Association of America, available online at <<https://www.cmaanet.org/sites/default/files/resource/Risk%20vs.%20Conflict%20of%20Interest.pdf>>.

⁷¹ B.M. McLachlin, Arthur M. Grant, *The Canadian Law of Architecture and Engineering*, Third Edition, (LexisNexis: 2020), at p. 7.

⁷² *Ibid*, p. 10.

⁷³ See for example, *Professional Engineers Act*, R.S.O. 1990, c. P.28, s. 12(6) [“**Ontario Engineers Act**”]; *Engineers Act*, CQLR, Cc. I-9, ss 2 to 4.

⁷⁴ McLachlin, *supra* note 6 at p. 8.

⁷⁵ *Architects Act*, C.C.S.M., c. A130.

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with an architect or the work is in relation to an existing building and does not alter its form.⁷⁶

104 In Ontario, the legislation governing architects⁷⁷ and engineers⁷⁸ sets out a number of rules which govern the relationship between professional engineers and architects services which provide for example, that a professional engineer or an architect may prepare or provide a design for the construction, enlargement or alteration of a building,⁷⁹ but only a professional engineer may provide services within the practice of professional engineering in connection with the design⁸⁰; whereas:

4. An architect may perform or provide services that are within the practice of professional engineering in preparing or providing a design for and carrying out the general review of the construction, enlargement or alteration of a building described in rule 2 or 3 where to do so does not constitute a substantial part of the services within the practice of professional engineering related to the construction, enlargement or alteration of the building and is necessary,

i. for the construction, enlargement or alteration of the building and is incidental to other services provided as part of the practice of architecture by the architect in respect of the construction, enlargement or alteration of the building, or

ii. for co-ordination purposes.⁸¹

105 It is also important to note the requirement that architects must provide supervision of construction of an architect-designed project and engineers must provide supervision of an engineer-designed project.⁸²

106 The architect or engineer that is selected as the prime “consultant”, with the dual roles of design and contract administration, faces the arduous task of what is often viewed as conflicting roles of the owner’s agent with respect to the preparation of the design and construction documents, including the construction drawings and specifications,

⁷⁶ *Engineers Act*, CQLR, Cc. I-9, ss 2 to 4.

⁷⁷ *Architects Act*, *supra* note 3.

⁷⁸ *Ontario Engineers Act*, *supra* note 8 at s. 12(6).

⁷⁹ *Ontario Engineers Act*, *supra* note 8 at s. 12(6) 2; *Architects Act*, *supra* note 3, at ss. 11(4)2, 11(4)4.

⁸⁰ *Ontario Engineers Act*, *supra* note 8 at s. 12(6) 2; *Architects Act*, *supra* note 3, at ss. 11(4)2, 11(4)4.

⁸¹ *Ontario Engineers Act*, *supra* note 8 at s. 12(6) 4; *Architects Act*, *supra* note 3, at s. 11(4)4.

⁸² *Ontario Engineers Act*, *supra* note 8 at s. 12(6); *Architects Act*, *supra* note 3, at s. 11(4); McLachlin, *supra* note 6 at p. 22.

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on the one hand, and the role of the impartial arbiter of the day to day administration of the contract, including disputes regarding the interpretation of the contract documents, on the other.

Duties to the client

- 107 The role of the engineer or the architect to the client (and the duties arising therefrom) depends on the terms of the contract and may include the preparation of initial plans, cost estimates, construction drawings and specifications, tender documents and making recommendations to the client concerning the tender process, as well as, supervision of construction work to ensure compliance with the contract drawings and specification, certification of progress draws and assessments of claims for extras, and the interpretation of contract documents, including making an initial determination of contract disputes between the client and the contractor (including claims for delay).⁸³
- 108 In some contracts, the role of the architect or engineer as the contract administrator is expanded to the consideration of claims for extensions of time, determinations of deficient or incomplete work or the interpretation of the construction drawings and specifications.
- 109 The duties of design professionals as highlighted above are included to varying degrees in most construction contracts, despite the fact that design professional, as the named consultant, are not a party to such contracts, based on the standard form contracts commonly used in Canada, such as the CCDC 2 2020 Stipulated Price Contract (the “CCDC 2”). Among the duties set out in the CCDC 2 contract form is the duty of the Consultant, in its role as the “first interpreter” of the Contract Documents (as defined in the CCDC 2), and in making findings regarding matters in question relating to the performance of the work, including the requirement to make such interpretations and findings in a manner consistent with the intent of the Contract

⁸³ The contracted tasks of the architect or engineer are set out in the terms of the contract. See, for example, the Royal Architectural Institute of Canada’s Document 6, Schedule A, section 9– Canadian Standard Form of Contract for Architectural Services which is applicable to most types of projects and project delivery models except Design-Build or Integrated Project Delivery; Association of Consulting Engineering Companies (“ACEC”) – Canada, Document 31, Schedule A – Construction Administration Services, Ontario Association of Architects, 600; See also CCDC 2, 2020 Stipulated Price form of Contract which sets out the role of the “consultant” at GC 2.1 – AUTHORITY OF THE CONSULTANT, GC 2.2 ROLE OF THE CONSULTANT, GC 2.3 REVIEW AND INSPECTION OF THE WORK AND GC 2.4 DEFECTIVE WORK.

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Documents and without showing “partiality to either the Owner of the Contractor”.⁸⁴

Canada’s role in the development of the common law *The Duty of the design consultant acting as a contract administrator to act impartially*

110 Canadian courts have long recognized the inherent conflict in the design professional’s role as both the agent of the owner and its role as the contract administrator. Recognizing that, despite this inherent conflict, design professionals must guard against undue influence. In essence, Canadian jurisprudence has developed such that engineers and architects, acting as arbiters of disputes under building contracts, must (despite the inherent conflict discussed above) act “judicially” in their decision making.

111 In a 1919 trial decision, *Blome v. Regina (City)*⁸⁵, the court considered the specific contract terms accepted by the contractor regarding the role of the engineer in assessing the condition of the pavement 5 years after completion of the work. In this case, the project was certified as complete. Five years later, the engineer identified deficiencies in the pavement. The contractor suggested a methodology of repair, which was thereafter rejected. The engineer admitted in his evidence that, in June, he was of the opinion that repairs in concrete were all that could be demanded from the contractor, and that he was prepared to accept the repair method suggested by the contractor. He testified that he changed his mind, following conferences with City commissioner and the City solicitor, and after receipt of a letter from the City commissioner. Thereafter, he sent a letter to the plaintiff contractor which showed he had altered his views and that he required a wearing surface of different material altogether. The commissioner also acknowledged that the engineer’s letters were written after consultation with the commissioner and under his instructions.

112 In this regard, the court noted that, despite the fact that the parties agreed that the engineer would be the arbiter of disputes between them, “the plaintiffs in agreeing to such a condition must know that there would be a natural tendency on the part of the

⁸⁴ CCDC 2, 2020 Stipulated Price form of Contract, GC 2.2.6, 2.2.7 and 2.2.8.

⁸⁵ 1919 CarswellSask 208 (K.B.), [1920] 1 W.W.R. 311, 13, Sask, L.R. 94, 50 D.L.R. 93 [*Blome*].

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engineer to adopt the view of his employer.” Although recognizing that such a structure was not uncommon in contracts of this character, the court noted that:

[..]The dual capacity that an engineer or architect is thus called upon to fulfil is, to say the least, not easy. It is clear, however, that the engineer when called upon to act the part of the arbitrator or in a quasi-judicial capacity **must, to a certain extent, keep himself aloof from both parties, and must certainly guard against being unduly influenced by his employers.**⁸⁶ [emphasis added]

113 The court also cited from the decision of the House of Lords in the case of *Hickman v. Roberts*, [1913] A.C. 229, 82 L.J.K.B. 678 (“*Hickman*”), where Lord Alverstone, at p. 234, wherein it was pointed out that in cases such as these, the engineers (when tasked with adjudicating disputes) are agents of their employers (the owners) and “they not infrequently have to adjudicate upon matters for which they themselves are partly responsible.” Indeed, the court in *Hickman* noted that when acting in such capacity, “there is a very high duty on the part of the architect or engineer to maintain his judicial position”. Although the parties (including the contractor) are bound to the contracts which assigns such a role to the architect or engineer, the contractor is still entitled to demand that the engineer “determine the matter submitted to him as fairly as he can as an honest man; and if it is shown in fact that there is any reasonable prospect that he will be so biased [...] then the contractor is allowed to escape from his bargain and have the matters in dispute tried by one of the ordinary tribunals of the land.”

114 The Supreme Court of Canada also confirmed, in the 1960 decision of *Kamlee Construction Ltd. v. Oakville (Town)*⁸⁷ that an engineer acting as a contract administrator must be impartial and objective. While finding that the conduct of the engineer afforded no ground for repudiation on the part of the contractor, the Supreme Court also cited from the decision in *Hickman* for the proposition that the engineer is required to act “judicially” meaning that the decision which the engineer makes must be dictated by his or her own best judgement of the most efficient and effective way to carry out the contract and that:

⁸⁶ *Blome*, supra note 20 at para 18.

⁸⁷ 1960 CanLII 431 (SCC) [“*Kamlee*”].

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[the engineer] must not be influenced by the extraneous considerations, and, particularly, that his judgement must not be affected by the fact that he is being paid by the owner". The Court noted that the fact that the consultant, Mr. Reeke adhered to his own opinions and that he could not be converted to those of the contractor did not mean that he was not acting "judicially".⁸⁸

If the consultant was not impartial or did not act judicially in exercising its duties under the Contract, the consultant's findings will be void against the contractor

115 In another decision of the Supreme Court of Canada in *Oshawa v. Brennan Paving Co.*⁸⁹, the court considered the role of the engineer as payment certifier in a contract entered into by the appellant municipality with the respondent contractor, which provided that as to the gravel and asphalt to be supplied by the latter, payment should be by weight, and that possession of an estimate or certificate signed by the appellant's engineer should be a "condition precedent" to the right of payment. The respondent contractor complied with the provisions of the contract but the appellant's engineer refused to certify for the materials by weight and arrived at the amounts to be paid for each by his own methods of calculation. The Court determined that when the engineer refused to certify the work, as called for by the contract, he abdicated his proper function thereunder and the appellant municipality having concurred in the position taken by the City's engineer, brought itself within the principle set out of *Panamena v. Leyland* [1947] A.C. 428, noting that:

It cannot, in my opinion, be doubted that the "Estimate or Certificate", the possession of which is made a condition precedent to payment, is one covering the work as to quality and quantity at the appropriate rate called for according to the prices stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no more essential to the respondent's right of action that it would have been in *Panamena's* case had the surveyor in that case, issued his certificate for a reduced amount by reason of his view of the economical manner in which performance of the work had been carried out, a matter entirely outside the scope of his authority to consider.⁹⁰

⁸⁸ *Kamlee*. *supra* note 22 at p. 180.

⁸⁹ [1954] S.C. J. NO. 56, [1955] S.C.R. 76 (S.C.C.) [*"Brennan Paving"*].

⁹⁰ *Brennan Paving*, *ibid*, at para 7.

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116 The respondent was thus absolved from the requirement with respect to the final certificate and the construction of the contract became in the circumstances entirely a matter for the court.

117 In *Noren Construction (Toronto) Ltd. v. Roslynn Plaza Ltd.*,⁹¹ a case under the *Mechanic's Lien Act*, a dispute arose with respect to an alleged delay in the substantial completion of the project. Following the delay, the project was, according to opinion of the general contractor and other witness, substantially completed some in early October – the contractor thereafter demanded payment of unpaid funds (certification by the architect was a condition precedent to payment pursuant to the contract). The architect refused to approve the request and raised a number of objections to the work. The contractor thereafter ceased to attend the site and the owner alleged that the contractor had abandoned the work.

118 The trial judge found that that the architect did not act judicially, “that he was influenced, and in fact dominated, by an officer of the defendant and as a consequence failed to exercise his judgment judicially.” The trial judge noted that the architect had a dual responsibility. One to the defendant, owner, to whom the architect was responsible for proper supervision of the work of the contractor and the other acting in a judicial position in which the architect was required under the contract to adjudicate as between the plaintiff, contractor and the defendant, owner “any dispute that arose”. The trial judge found that the architect in this instance was influenced, and in fact “dominated by” an officer of the owner and as a consequence failed to exercise his judgment judicially.⁹² The Court of Appeal did not disturb the trial judge’s findings in this regard.

119 In *Urbacon Building Groups Corp. v. City of Guelph*⁹³ the court examined the role of the consultant, taking into account the contractual framework set out in the CCDC 2 contract form.

120 One of the issues considered by the Court in *Urbacon* was whether or not the Consultant made findings so as to entitle it to deliver a “notice of default” setting out events of default (the “**Notice**”), which led ultimately to the termination of *Urbacon*

⁹¹ 1969 CanLII 234 (Ont. CA) [“*Noren*”].

⁹² *Noren, ibid*, at para 7.

⁹³ 2014 ONSC 3641 [“*Urbacon Building*”].

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by the owner, the City of Guelph. The court found that the Notice issued by the consultant, under the direction of the owner, was invalid thereby negating any justification by the owner of its termination of Urbacon. In such cases, it is clear that the facts will matter. Of significance, was an email cited to by the court in its reasons, wherein the owner's representative dictated to the consultant the wording for the Notice, which Notice (as issued by the consultant) ultimately contained the same wording dictated to the consultant by the owner, justifying the default and articulating the provisions of the contract which were alleged to have been breached. Much time was spent by the court summarizing the examination of the consultant's principal at trial, and indeed the court found that a representative of the owner directed and controlled the consultant, thereby nullifying his impartiality and independence:

(139) I find also that Mr. McCrae in fact directed and controlled MTA and in particular, Mr. Pavicevic, in the preparation of the notices of default beyond termination of Urbacon in September, 2008, **thereby nullifying the impartiality and independence of MTA as consultant under the Contract**. Mr. McCrae's actions in this regard were the fundamental cause of the termination of Urbacon in the project. Notwithstanding any possible apportionment of responsibility for delay attributable to either Urbacon or Guelph and their respective forces in relation to the myriad tasks in the Project over the approximate 2 year period, Mr. McCrae's actions culminating in the notices of default and termination created a seismic shift in the contractual liability landscape. **This shift fatally undermines Guelph's position that its termination of Urbacon was justified in the circumstances**. [emphasis added]

121 The court further noted that the failure of the owner to perform its obligations in good faith under the contract invalidated any justification for the termination of Urbacon.

122 In *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*⁹⁴, the court noted that the trial judge found that Public Works (owner) breached the contract by wrongfully terminating the contract, by wrongfully assuming the role of the contract engineer and wrongfully depriving the contractor, Matheson, of the right to renegotiate the unit prices of certain aspects of the contract. In this case, Public Works, stepped into the role of contract engineer, while a request for extension to the spring or summer, submitted by Matheson was pending. The trial judge held, that had

⁹⁴ 2000 NSCA 44 [*"D.W. Matheson"*].

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the breaches not been committed by Public Works, Matheson's request for an extension of time would have been granted, as it had a "compelling case" for same. The trial judge found that an engineer, acting judicially would have granted the request for an extension of time.

Consultant's decisions with respect to determinations/interpretations made under the contract are generally regarded with deference, absent demonstrable and significant error

123 Heintzman, West and Goldsmith's treatise on Canadian Building Contracts, also makes reference to the role of the consultant and states that a consultant's decisions will be "persuasive in the absence of compelling evidence to the contrary," and binding "at least absent demonstrable and significant error, legal or factual."⁹⁵

124 Courts have consistently declined to overturn or interfere with the engineer's decision on the basis that he or she was "wrong" and held that only fraud or bad faith will prevent the consequences contemplated by the contract.⁹⁶

125 In a recent decision of the Ontario Superior Court of Justice in *Pentad Construction Inc. v. 2022988 Ontario Inc.*⁹⁷, the Court held that a third party engineer's payment certification alone was conclusive and binding of the amount owing to a subcontractor, notwithstanding that a dispute existed between the subcontractor and the construction manager, regarding the amounts payable for work performed. In *Pentad*, the plaintiff was subcontracted by the defendant, Armor, to perform civil work relating to a residential construction project. The subcontract called for civil earth-works to be certified and approved by an authorized engineer before any amounts would become due and payable. The subcontract contained the following provision relating to payment certifications:

⁹⁵ Thomas G. Heintzman, Bryan G. West, and Immanuel Goldsmith, "Heintzman, West and Goldsmith on Canadian Building Contracts", Fifth Edition, (2021: Thomson Reuters Canada Limited).

⁹⁶ *Law v. Toronto (City)* (1921), 49 O.L.R. 77 (C.A.) at 84, *Croft Construction Co. v. Terminal Construction Co.* (1959), 20 D.L.R. (2d) 247 (Ont. C.A.) [*"Croft"*].

⁹⁷ 2021 ONSC 824 [*"Pentad"*].

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4.1 [Pentad's] work performed/provided under this Contract shall be inspected for quality and quantity and certified complete, received and approved by [Armor's] authorized Engineer, prior to any sums becoming due hereunder.

126 After a number of the contractor's interim invoices were paid, the engineer became concerned that the contractor had been over-billing and requested a topographical survey to verify quantities and then determined that the contractor had been overpaid to that point (such that no amounts were due and payable). The contractor disagreed, suspended work and commenced a lien action.

127 Justice Bowell noted that the most significant impediment to certification in the fall of 2017 appears to have been the request made by the engineer that Pentad obtain a topographic survey to confirm the extent of its work. There were repeated emails from the engineer, Mr. Black to Pentad regarding this requirement. Pentad appears to have provided partial topographic surveys, but they were unsatisfactory to Mr. Black. It was further noted that a complete topographic survey was eventually obtained by Stantec and it appears to have formed the basis of Mr. Black's final certificate (Payment Certificate 4). In reviewing the emails Justice Boswell noted that, "the evidence falls well short, in my view, of being sufficient to support an inference that Mr. Black was acting in bad faith or was otherwise knowingly and wilfully disregarding his duties as a payment certifier". The court also noted that it was apparent that Pentad did not attack the integrity or impartiality of either Mr. Black or Stantec, but rather alleged that Armor failed to provide an "authorized engineer".

128 Justice Boswell therefore held that because there was no fraud, bad faith or wilful neglect of duty, the engineer's determination was (as per the contract) conclusive and binding on the parties, notwithstanding that there may have been an error in such findings.

129 The same conclusion was reached by Justice McKinnon in the decision of *Federated Contractors Inc. v. Ontario Realty Corp.*, where he found that there is a presumption in standard construction contracts that all monthly payment certificates issued by an architect or engineer are final and conclusive.⁹⁸

⁹⁸ *Federated Contractors Inc. v. Ontario Realty Corp.*, [2007] O.J. No. 463, 61 C.L.R. (3d) 4. (Ont. S.C.).

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130 Similarly, the Ontario Court of Appeal, in the case of *Croft Construction Co. v. Terminal Construction Co.*⁹⁹ held that the determination made by the engineer of the Department of Transport was binding on the parties. The principal contract dated April 11, 1953 and made between the defendant as general contractor and Her Majesty the Queen represented by the Minister of Transport of Canada, contains the following relevant provision:

The Engineer shall be the sole judge of the work and material, in respect of both quality and quantity, and his decision on all questions in dispute with regard thereto, or as to the meaning or intention of this contract and as to the meaning or interpretation of the plans, drawings and specifications shall be final, and no work under this contract shall be deemed to have been performed, nor materials or things provided, so as to entitle the Contractor to payment therefor unless and until the Engineer is satisfied therewith, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the Contractor to be paid therefor.¹⁰⁰

131 The contract provided for payment to the contractor for "common excavation" estimated at 210,000 cubic yards at the rate of 30¢ per cubic yard:

35. The quantities (if any) given are approximate only and no claim shall be made by the Contractor against Her Majesty on account of any excess or deficiency, absolute or relative, in the same."

132 It was noted that the trial judge, in finding that the parties were bound by the determination made by the engineer under the terms of the contract noted that:

The governing principle applicable to a provision of this character was well stated by Sir G. Mellish L.J. in *Sharpe v. San Paulo R. Co.* (1873), L.R. 8 Ch. 597 at p. 612 in the words following: "**Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise — that is to say, in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be**

⁹⁹ *Croft*, *supra* note 31.

¹⁰⁰ *Ibid*, at para 8.

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relied upon. If nothing of that sort has happened, then the parties are bound by that which they have made a condition precedent.¹⁰¹ [emphasis added]

133 The court also made reference to the following authority:

In Hudson on Building Contracts, 7th ed. the author cites the case of *Re Meadows & Kenworthy* referred to in 1896, 4th ed., vol. ii, p. 265, as authority for the proposition that a final and conclusive certificate cannot be attacked if it is honest because it contains a mistake, e.g., in measurement, and that ignorance or incompetence of the architect will not avoid the certificate.¹⁰²

134 Finally, the court distinguished the Supreme Court of Canada decision in *Brennan Paving* noting that:

[...] In the present case the respondent did not dispute the quantity compiled by the Department's engineer, they relied upon it as their defence to this action and in my view the case comes within the principle and the illustration thereof, stated by the Lord Chancellor in *Scott v. Liverpool Corp.* (1859), 28 L.J. Ch. 230 at pp. 232-3: "This contract has been characterized as one of great severity towards the contractors, who are said to be placed by it entirely at the mercy and the arbitrary discretion of the engineer. But arguments drawn from the hard terms of an agreement are never admissible after it has been entered into, because the parties have deliberately consented to be bound by it.

135 On the other hand the British Columbia Supreme Court¹⁰³ found that the chief engineer's role in the construction project had the result that despite there being no evidence of wrongdoing on the part of the engineer, that, the engineer's role as the senior management employee of one of the parties to the contract, constitutes an interest which estops him from the quasi-judicial role of ruling on the claims of the contractor:

Notwithstanding Mr. Hunt's professionalism, ethics and judgment, which are above reproach, I conclude that his involvement in the very issues in dispute — before the Work was tendered, during the tendering process, during the performance of the Work, and during the evaluation, negotiation and attempted settlement of Dillingham's claims — constitutes an interest which estops him from ruling on Dillingham's claims. Once he began the ruling process, I do not

¹⁰¹ *Ibid.*, at para 19.

¹⁰² *Ibid.*, at para 23.

¹⁰³ *Dilcon Constructors Inc. v. British Columbia Hydro Power Authority*, 1992 CarswellBC 846 (S.C.) [*"Dilcon"*].

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think that he could have done anything more in his attempts to be a fair-minded, independent and impartial decision-maker. However, he was a senior management employee of one of the parties to the Contract and he was inextricably involved in all of the issues that had arisen between the parties. **His previous involvement in the settlement process as an officer of Hydro had, by the time he embarked on the ruling process, irrevocably prejudiced his ability to act in a quasi-judicial capacity.**¹⁰⁴ [emphasis added]

136 In this case, the plaintiff, contractor, Dilcon Constructors Inc. formerly Dillingham Construction Ltd., claimed the sum of \$3,420,791 (excluding interest) as additional compensation for work done pursuant to a contract awarded June 26, 1986 by the defendant, British Columbia Hydro and Power Authority (“**Hydro**”). The contract was for the construction of a drainage system — comprised of a tunnel and numerous drain holes. Hydro asserted a counterclaim in the amount of \$617,322 for expenses which allegedly resulted from the contractor’s failure to complete the work within the time set by the Contract for completion.

137 In short, the court found that the engineer under the contract was not intended to be, and was in no position to be an impartial judge. Rather, he was the agent of one of the contracting parties. In reaching this conclusion, the court noted that when the contract was executed, neither party had any expectation that Mr Hunt, the Vice-President responsible for the Project itself, some 19 months after commencement of the work, would become the Chief Engineer charged with a quasi-judicial role, in resolving the disputes between the parties.

138 The court noted that:

The parties agree that the Contract gave the Chief Engineer the power to certify and adjudicate Dillingham's claims. He was required to exercise that power in a judicial or quasi-judicial fashion. **The parties agree that his duty was to decide claims and disputes impartially, fairly, and with professional competence. It follows that Hydro was under a duty not to influence or interfere with the Engineer's judgment on those matters.** Counsel for the plaintiff put the proposition correctly in argument:

¹⁰⁴ *Ibid*, at para 298.

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The contractor, if his requests are valid, is entitled to money or time extensions if his requests are fairly and honestly considered. If they are not fairly and honestly considered because of the conduct of the owner influencing the decision maker, then the contractor has been wrongfully deprived of the money and time extensions to which the contractor is entitled.

It is clear that if one party to a contract is given the power to name his own employee as an arbiter or adjudicator of the other party's claims, there is an implied term that the first party shall not interfere with his independence: *Perini Corp. v. Commonwealth of Australia*, [1969] 2 N.S.W.R. 530 (N.S.W. S.C.).¹⁰⁵

139 Of greater import was the finding that “because of the relative positions of the parties under the contract, the Chief Engineer undoubtedly had a duty of good faith in his capacity as an independent adjudicator of the contractors claims for time and money”. The court further noted that “**I find those duties to be wholly distinguishable from any general duty of good faith on the contractual parties**”.¹⁰⁶ [emphasis added]

140 The function of the Chief Engineer under the contract was also considered by the Court, as it was noted that the contract imposed three distinct roles on the Engineer. First he was the agent of Hydro with the power to make decisions with respect to the performance of the Work, such as the length and orientation of the adit, drain holes, etc., in order to advance the interests of his employer. Second, he was the administrator of the contract and, as such, was required to make certain decisions under the contract, such as ordering changes to the Work and extras, certifying payment, etc. The role of such a person is described in McLachline and Wallace, *The Canadian Law of Architecture and Engineering* (Toronto: Butterworths, 1987), at 173:

[He] acts as an impartial decision maker as well as the owner's agent. As such, he is bound to act in a fair and unbiased manner, holding the balance between the owner and the contractor; this is implicit in the contract which appoints the architect or engineer to decide such questions.

141 Third, he was made the adjudicator or judge in the resolution of disputes between the parties. There is no question that such a person, given the power to make final and

¹⁰⁵ *Ibid*, at paras 86 and 87.

¹⁰⁶ *Ibid*, at para 191.

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binding decisions determinative of the parties' claims, must act in a quasi-judicial capacity.¹⁰⁷

Impact of the design professionals' role in interpreting their own design

142 It seems trite to say that for the purpose of ensuring that work is performed in accordance with the contract drawings and specifications, or in determining whether or not there has been a change in the work not set out in the contract drawings and specifications, architects and engineers are required to interpret their own drawings and specifications. As noted herein, the design professional must exercise their role as the interpreter of the contract documents, including the drawings and specifications honestly and in an impartial manner.¹⁰⁸ Against this duty, is the fact that the architect or engineer is being paid by the owner and may be found liable to the owner for any additional costs, in the event that extra work is required by reason or errors or omissions in the drawings and specifications arising from the negligence of the architect or the engineer.¹⁰⁹

143 The apparent conflict of the design professional in the role of interpreting its own drawings and specifications is clear. The issue is that conflicts continue to arise from the fact that the parties to construction projects disagree regarding the interpretation of the contract documents and often dispute the conduct of the design professional, both in its role as the contract administrator and its role as the designer. The question is whether or not enforcement by the courts of the long acknowledged duty of impartiality on the part of design professionals, in their role as interpreters of the very documents they have authored, is enough.

144 As noted by Justice McLachlin in her treatise entitled *The Canadian Law of Architecture and Engineering*, the position of the architect or engineer as judge of matters between the contractor and the owner is accepted in England, the United States and Canada. On the other hand, in Europe, the design professional does not

¹⁰⁷ *Ibid*, at paras 243 and 244.

¹⁰⁸ *Brennan Paving*, *supra* note 24.

¹⁰⁹ McLachlin, *supra* note 6 at p. 168; citing *Wilkes v. Thingoe* R.D.C. (1954), Duncan Wallace, I.N. Hudson's *Building and Engineering Contracts*, 10th ed (London: Sweet & Maxwell, 1970) at p. 156.

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assume such a role.¹¹⁰ The role of the design professional as the interpreter and judge of the contract documents is likely due to the fact that: “[t]he architect or engineer charged with the design of the project is equipped as no one else to make decisions about its execution.”¹¹¹

Whether or not terms and conditions set out in professional code of ethics of architects and engineers (including fiduciary obligations) are incorporated into contract terms

145 As noted elsewhere in this paper, the provinces and territories in Canada all have legislation which governs the practices of architecture and engineering. The specific education, training and experience required to obtain the required license is usually set out in by-laws or regulations of the professional association pursuant to specific powers conferred by statute. These professional organizations also have codes of ethics.

146 The issue as to whether the duties of loyalty, good faith and avoidance of conflicts of interest described in the Code of Ethics of the Association of Professional Engineers, Geologists and Geophysicists (APEGGA), could be construed as implied terms of the contractual arrangements between the parties, was addressed in the decision of *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*¹¹² The trial judge found that no fiduciary relationship existed between Kilborn Engineering and the respondents and consequently no fiduciary duties were owed Terra.

147 The facts before the court were as follows: At the material time, Kilborn was a firm of professional engineers. Terra held a commercial license to develop a technology for extracting bitumen from oil sands known as the Solvent Extraction Spherical Agglomeration Process (the “**SESA Process**”). Terra entered into two contracts with Kilborn under which Kilborn agreed to provide professional engineering services for the purpose of assessing the SESA Process. The trial judge found that the engineering services provided under the contracts were not advisory; rather, Kilborn was to perform work in several phases, within parameters set by Terra, with a view to

¹¹⁰ McLachlin, *supra* note 6 at p. 273.

¹¹¹ McLachlin, *supra* note 6 p. 274.

¹¹² *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*, 1999 ABCA 72 [“**Terra**” and “**Kilborn**”].

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confirming information already known to Terra. As a condition of bidding on the work, Kilborn had earlier entered into a confidentiality agreement with Terra.

148 Unknown to Terra, Kilborn had an established internal strategy of diversification that involved the development and promotion of ideas, innovations and inventions for the benefit of Kilborn and the Kilborn Group. The source of those ideas, innovations and inventions could be information derived by Kilborn from performing professional engineering services for various clients such as Terra. In early 1989, while Kilborn was engaged in carrying out its contracts with Terra, Strand conceived an idea for a new and different technology for the extraction of bitumen from oil sands called the CCDC Technology. Kilborn formally adopted the CCDC Technology on or about September 7, 1989 for its own account pursuant to the diversification strategy. The CCDC Technology was found by the trial judge to be independently devised on the basis of Strand's personal knowledge and expertise and was not derived from confidential information provided by Terra.

149 Terra's complaint that was Kilborn, while contractually obliged to perform professional engineering services for the assessment of the SESA Process, simultaneously conceived, developed and promoted its own technology for the identical end purpose, without disclosure to Terra of its diversification strategy or its involvement with the CCDS Technology. The existence of an actual or potential conflict of interest and its non-disclosure is the foundation of the claim that Kilborn and Strand breached a fiduciary duty owed to Terra and that Kilborn breached in implied duty of loyalty, good faith and avoidance of conflict of interest. The trial judge concluded that the circumstances did not give rise to a fiduciary relationship at common law or under the Code of Ethics and therefore no fiduciary duty existed. Terra was denied the equitable remedy it sought, namely, the imposition of a remedial constructive trust in respect of the CCDS Technology. The trial judge found that Kilborn was in breach of a duty of loyalty, good faith and avoidance of conflict of interest based on a finding that the standards of conduct set out in Rules 4 and 5 of the Code of Ethics were implied contractual obligations that had been breached by the existence and non-disclosure of a conflict of interest arising from the adoption of the CCDC technology for its own benefit.

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150 As members of the Association of Professional Engineers, Geologists and Geophysicists (APEGGA), Kilborn, Strand and other professional employees of Kilborn were subject to the Engineering, Geological and Geophysical Professions Act, S.A. 1981, c. E-11.1. Rules 4 and 5 of the Code are as follows:

4. Professional engineers, geologists and geophysicists shall act for their clients or employer as faithful agents or trustees always acting independently and with fairness and justice to all parties.

5. Professional engineers, geologists and geophysicists shall not engage in activities or accept remuneration for services rendered that may create a conflict of interest with their clients or employers without the knowledge and consent of their clients or employers.

151 On appeal from the trial decision, the Court rejected the notion that the relationship between Terra and Kilborn or Strand gave rise to a fiduciary relationship. In this regard, the court noted that the law with respect to the fiduciary principle, although in a state of evolution, has consistently held that fiduciary obligations arise out of a fiduciary relationship: *Hodgkinson v. Simms* (1994), 117 D.L.R., 161 (S.C.C.) at 173. The hallmark of a fiduciary relationship is that one individual undertakes, either expressly or impliedly, to act on behalf of the interests of another, and it is from that undertaking that the scope of the fiduciary duties owed can be discerned. The court noted that the governing principals were stated by La Forest J. in *Hodgkinson v. Simms*, at 176-177:

In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.¹¹³

152 In order to find a fact-based fiduciary relationship outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. It cannot be

¹¹³ *Ibid*, at para 29.

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said that the Code of Ethics led Terra to have a reasonable expectation that Kilborn would act in Terra's best interests.

153 The court then moved on to assess whether there is a statutorily imposed fiduciary relationship. It concluded that the Code of Ethics cannot by itself impose fiduciary obligations on a professional engineer. It is merely one of the relevant factors to be considered in determining the scope of the fiduciary duties owed once a fiduciary relationship has been found to exist.¹¹⁴

154 On the issue of the cross-appeal, the court found that the trial judge erred by finding that the duties of loyalty, good faith and avoidance of conflicts of interest described in Rules 4 and 5 of the Code of Ethics were implied terms of the contracts.

155 The court also noted that while it was true that the engineer's actions constituted a conflict of interest that should have been disclosed, that did not mean that the owner had a contractual remedy against the engineer to be enforced by the court. Instead, the remedy was to lodge a complaint with the disciplinary bodies following the procedures set up by the governing body of the profession, in that case the Association of Professional Engineers, Geologists and Geophysicists of Alberta. In this case the court noted that:

Professional conduct rules, such as the Code of Ethics, are not designed or intended to serve as the basis for civil proceedings against members of the profession who may offend a provision of the conduct rules in the course of performing a professional service. There are other effective means open to clients for holding professionals to account for their conduct.¹¹⁵

156 The appeal was dismissed and the cross-appeal was allowed. The decision of the trial judge was set aside insofar as he found that the duties of loyalty good faith and avoidance of conflicts of interest were implied terms of the contracts which were breached. The court further found that no fiduciary obligation existed nor is a case made out for the imposition of a constructive trust.

¹¹⁴ *Ibid*, at para 40.

¹¹⁵ *Ibid*, at para 59.

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Where do we go from here?

157 The obvious solution to some of the concerns surrounding the multiple and often conflicting roles assumed by the design consultant, is to limit their role by providing contractual provisions to prevent the payment certificate from being the final and binding determination of the amounts owed for work done, and providing a right to the parties to dispute such a determination through the contractual dispute process. In the CCDC 14 Design-Build¹¹⁶ form of contract, the role of the “consultant” is separate from that of the payment certifier, where the “consultant” is defined as the “architect, the engineer, or the entity licensed to practice in the province or territory of the Place of the Work engaged by the Design-Builder to provide all or part of the Design Services”. In the CCDC 14 Design-Build Contract, the consultant remains, in the first instance, the interpreter of the requirements of the Construction Documents that they have prepared”.¹¹⁷ The difference under the design-build model, is that the design professional, as the consultant, is aligned with the “design-builder”, instead of the owner. Also defined is the “Payment Certifier” being the “person or entity identified as such in the Agreement responsible for the issuance of certificates for payment” and is designated (and presumably paid) by the owner. Given the allegiance of the Payment Certifier to the owner under the CCDC 14 Design-Build Contract, the payment certifier’s determination may also be viewed with suspicion under this model, despite the pronouncements made by the courts regarding the duty of the consultant to act objectively and impartially.

158 There are various project delivery models which help to alleviate the concerns of the inherent conflict associated with the role of the architect arising during the administration of a construction contract, with respect to the requirement that the consultant act as the agent of the client, and as an impartial decision-maker. The movement away from the design-bid-build approach to design-build, construction management and other alternative methods of project delivery including alliance contracts and the integrated project delivery model or IPD, serve to alter the role that consultants, particularly design professionals, play in a project. In the CCDC 5A Construction Management Contract for Services, the consultant is the architect,

¹¹⁶ CCDC 14 Design-Build Stipulated Price Contract 2013.

¹¹⁷ GC 3.3.1, CCDC 14 Design-Build Contract, 2013.

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engineer or entity engaged by the owner and licensed to practice as an architect or engineer, in the province or territory at the place of the Project, however, the consultant does not play a role in providing cost estimates, advising on constructability, procurement of trade contractors and suppliers, chairing and preparing minutes of project meetings, or reviewing and issuing requests for change orders, all of which services fall under the purview of the Construction Manager. The Construction Manager also is responsible for giving interpretations and making findings on matters in question relating to the performance of any work or the requirements of the trade contract documents, except with respect to any and all architectural and engineering aspects of the project. As such the role of the consultant is reduced in this model of contracting.

159 New forms of project delivery result in changes to the architect's professional relationship with the various participants in a construction project, including clients. Project delivery methods such as design-build and public-private partnerships (P3s) result in the architect being engaged by a builder or a special purpose entity rather than being retained directly by the owner of a project. Other project delivery methods such as IPD look to achieve greater cost efficiencies through a more "collaborative" approach to delivery which often includes shorter timeframes for design and construction documentation development. While these other project models help to reduce the conflicts associated with the "silo approach" associated with the separate roles and disciplines of the various participants, such as design and construction, the "fast-track" project delivery method also gives rise to the potential for increased risk and liability for the design professional.

160 The introduction of prompt payment and adjudication in many Canadian jurisdictions will arguably also help to alleviate some of the pain arising from disputes about the impartiality of the contract administrator's decisions regarding extras or other payment issues, as the contractor can refer such disputes for a prompt determination through the adjudication process.

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PART D: Change afoot in New Zealand (Helen Macfarlane)

Dissatisfaction with performance of ETCs / Contract Administrators

- 161 In recent years, there has been significant growth in the New Zealand construction sector. Along with more projects have come disputes and increasingly a spotlight has been turned on the role of the contract administrator and, in particular, the “Engineer to the Contract” under New Zealand’s most widely used construction contract, NZS 3910. There is a widely held perception (at least among Contractors) that Engineers to the Contract tend to favour Principals in their decision-making, leading to doubts as to the efficacy of the dual role of the Engineer / Administrator under that contract – as both agent of the Principal and impartial decision maker.
- 162 It would be a mistake, however, to assume that performance problems by Engineers / Administrators are solely the result of lack of independence. Unlike architects, engineers, or quantity surveyors, the role of Engineer / Administrator is not a recognised discipline, with attendant specific training, accreditation procedures, standards of conduct and peer review processes. Moreover, in its very nature, the role is a hybrid – it requires a relatively sophisticated level of contractual understanding (akin to that of a lawyer), skills in dispute avoidance and resolution (akin to those of an adjudicator), along with more than a superficial understanding of specialist areas such as programming and quantity surveying. And critically it requires familiarity with the particular type of construction project in question.
- 163 This means that finding the right skill-set for the Engineer / Administrator for a particular project may be an extremely challenging task. It also means that even experienced and competent Engineers / Administrators can find themselves facing issues that challenge their personal skill-set.
- 164 There are currently ongoing two primary initiatives considering the role of Engineer / Administrator. The first is part of a broader review that is being proposed by Standards New Zealand (SNZ)¹¹⁸ and the New Zealand Construction Industry Council (NZCIC)¹¹⁹ to update NZS 3910. The second is by Engineering New Zealand,¹²⁰ which has entered into an agreement with the Construction Sector Accord/Ministry of

¹¹⁸ <https://www.standards.govt.nz/>

¹¹⁹ <https://nzcic.co.nz/>

¹²⁰ <https://www.engineeringnz.org/>

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Building, Innovation and Employment (**MBIE**) to lead the establishment of a panel of approved Engineers to the Contract in support of the Construction Sector Accord.¹²¹

165 Each of these initiatives is in its relatively early stages of sector and public consultations. However, a significant amount of work has been done to canvas views across the sector – public / private principals, contractors, consultants – as to problems with the current Engineer / Administrator model under NZS 3910 and potential solutions.

SNZ Survey re NZS 3910

166 To progress the revision, SNZ and NZCIC held several scoping workshops with sector wide participation. SNZ then worked closely with a steering group to prepare a survey seeking public consultation on the scope of issues to be addressed in a revision of NZS 3910. In December 2020, the survey was distributed sector wide, including to:

- Purchasers of NZS3910,
- Civil Contractors New Zealand (**CCNZ**) members,
- NZCIC member organisations,
- Accord newsletter,
- Society of Construction New Zealand members.

167 The survey received over 400 responses which are summarised in the SNZ Scoping Report NZS 3910 Conditions of Contract for Building and Civil Engineering, March 2021.

¹²¹ The Construction Sector Accord was launched in April 2019 by the Prime Minister, Accord Ministers, and the industry Accord Development Group made up of 13 sector leaders from across industry and government. It created a platform for industry and government to work together to address some of the key challenges facing the sector with the goals of raising productivity, increasing capability, improving resilience and restoring trust and confidence. The Accord has initially been funded for 3 years, through June 2022..

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Responses concerning the role of Engineer to the Contract.

168 The survey listed a number of aspects of NZS 3910 and asked whether these should be addressed in the review / revision process. A total of approximately 75% of respondents either strongly agreed (40.9%) or agreed (33.8%) that the role of Engineer to the Contract should be addressed in revising the standard.

169 The survey also invited respondents to identify up to three contract elements (in addition to those listed) that should be included in a review. A number of responses touched on specific aspects of the role of Engineer. These include (non-exhaustively and paraphrased):

- A second Engineer could be engaged to provide formal decisions – at present, the same person provides a decision on an instruction they had previously given.
- Ability to request removal of a biased Engineer
- Consider moving towards independent Engineer for resolution of disputes only
- Engineer cannot be from design team or company.
- Engineer to Contract to be liable for their actions / inactions
- Engineer's dual role
- Independence of the Engineer to the Contract
- Payment of the Engineer by both Principal and Contractor
- Requirement for an Engineer to the Contract to be a third party
- Requirement of Engineer to be truly independent.
- Split out the independent Engineer role from Principal's representative role entirely.

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170 A number of respondents also felt that issues relating to the role of the Engineer could be addressed as part of a limited fast track review process – 57 individual responses raised issues concerning the role of the Engineer to the Contract including (non-exhaustively and paraphrasing):

- Liability of Engineer (multiple)
- Add the role of the Project Manager
- Add the role of the QS
- Clarification of the role of Engineer (multiple)
- Conflicts over dual role of engineer (multiple)
- Engineer to the Contract, separation of roles (multiple)
- Competence of the Engineer (multiple)
- Qualification of Engineer to the Contract (multiple)
- Engineer to the Contract independence / strengthen independence (multiple)
- Engineer and Dispute process
- Engineer becoming an entirely independent party
- Engineer has to be qualified and independent
- Engineer's rep – genuine independence
- Engineer not to hold another position
- Principal cannot be Engineer to Contract
- Remove conflict from the position of the Engineer by making person who deals with disputes completely independent
- Responsibility versus accountability of Engineer's Rep
- Split Engineer's role so Engineer's Rep acts as Principal's Agent and is a separate person to impartial Engineer (multiple)

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- Role of the Engineer and a bigger emphasis on being impartial. Maybe consider who pays for the engineer
- Plenty of people out there think there needs to be a (technical) engineer to fulfil the role when it's actually better suited to individuals who have a good grasp of the contract and also know what "fair and equitable" looks like to the parties.

171 What can be seen from the above responses is a strong focus on the need for the Engineer / Administrator to be independent, and a concern that the Engineer's current dual role as both Principal's agent and impartial decision-maker in matters affecting both parties (e.g., directing and valuing variations and EOTs and determining disputes) compromises the Engineer's independence when undertaking that second aspect of the role.

172 Key suggestions to mitigate this included:

- splitting the role between different persons so the person undertaking the role of Principal's agent was not the same person as the decision-maker,
- making sure the decision-making Engineer does not hold another position on the project (e.g., actual engineer or architect) and is not an employee of the Principal, and
- making the Engineer (or at least the decision-making Engineer) accountable to both parties, e.g., by having the Engineer contract with and / or be paid by both the Principal and the Contractor. In this regard, current lines of accountability do not reinforce independence – under NZS 3910 the Principal is contractually accountable to the Contractor for the performance of the Engineer;¹²² the Engineer contracts separately with the Principal. This structure reinforces the alignment of the Engineer with the interests of the Principal, vis a vis the Contractor.

173 A clear secondary focus from the survey responses is concern with the qualifications and competencies of Engineers recognising that the role of Engineer / Administrator

¹²² NZS 3910:2013 cl. 6.1.1.

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requires a diverse skill set that does not necessarily match up with the skills of the people actually performing those roles.

Next steps

- 174 Many of the issues relating to the role of Engineer will be addressed in the upcoming review of NZS 3910. Although there were a number of responses considering that issues pertaining to the role of the Engineer could be addressed on a fast-track basis, it was recognised that potentially conflicting interests of different parties could come into play that “could lead to strong discussions”.¹²³ This meant that the role of Engineer should more properly be addressed in the context of the detailed review.
- 175 The revision process is currently at the stage of obtaining funding. Precisely how the issue of the role of the Engineer to the Contract will be addressed remains to be seen.

Engineering New Zealand: development of panel of approved ETCs

- 176 Concurrent with, but separate from, the NZS 3910 revision process, ENZ has entered into an agreement with the Construction Sector Accord / MBIE to lead a working group directed towards establishing an independent and public panel of approved Engineers to the Contract in support of the Construction Sector Accord.
- 177 The proposed objectives of establishing the panel include:
- a addressing the various challenges that have been identified in connection with the role of the Engineer to the Contract,
 - b ensuring that appropriately qualified / competent people are appointed as Engineer / Administrator;
 - c clarifying behavioural expectations of the role; and
 - d providing appropriate support so that Engineers / Administrators may succeed in their roles.
- 178 ENZ has established a steering group comprising, in addition to itself, representatives of MBIE and the Property Council, CCNZ and contractor representatives, as well as

¹²³ SNZ Scoping Report NZS 3910 at 11.

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several experienced Engineers to the Contract. This steering group is being supported by two sector groups made up of a pool of specialist advisors and stakeholders in the vertical and horizontal infrastructure sectors, representing principals, contractors, consultants and legal practitioners. Each sector group has included representatives of the New Zealand SCL.

- 179 Sector group workshops were held in February 2021 to discuss the needs to be addressed by the proposed panel and the scope of the services it might usefully offer. A summary outcomes paper was issued in May 2021.¹²⁴
- 180 While the ENZ initiative is operating under the existing language of NZS 3910, the workshops highlighted many similar issues to those identified in the SNZ survey. Generally, these related to independence, accountability, capability / competence and operational guidance. Full details are set out in the sector group workshops summary referred to above. The following discussion highlights some key points.

Independence

- 181 On independence, the workshops noted that despite the obligation to act impartially, there was a perception that Engineers favoured the Principal. On other side of that issue, it was observed that some Engineers may be wary of deciding in favour of the Principal as this may be interpreted as bias.
- 182 It was noted that the Principal generally chooses and pays the Engineer to the Contract – this may create an incentive to satisfy the client and so get the next job. It is also not uncommon for Principals to appoint in house employees or consultants who are involved in the project. In this regard, there can be a trade-off between knowledge of the project and independence.
- 183 It was observed that independence can result in the lack of a “collaborative mindset” and “risk aversion attitudes”.¹²⁵ Nonetheless, the discussions stressed the importance of independence – not just in dispute resolution, but in all evaluation roles undertaken by the Engineer / Administrator including assessing variation and EOT claims.¹²⁶

¹²⁴ Engineer to the Contract Panel Establishment Project, Summary of Sector Group Workshops.

¹²⁵ Engineer to the Contract Panel Establishment Project, Summary of Sector Group Workshops, at page

2.

¹²⁶ Id.

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184 It was suggested that panel members might offer distinct services (contract administration, design feasibility, etc) rather than taking on the full dual role of Engineer to the Contract.

Accountability

185 Similar to the SNZ survey response, it was noted that the Principal is normally accountable to the Contractor for the Engineer's actions – the Engineer has no direct contractual responsibility to the Contractor. Again, the lack of direct accountability of the Engineer to the Contractor can pose a difficulty in respect of the Engineer's acting impartially.

186 It was also observed that the guidance notes in NZS 3910 relating to the obligations of Engineers to the Contract represent best practice; however, there is no document setting out minimum standards with which Engineers to the Contract are expected to comply and by reference to which they may be held to account.

Capability

187 It was noted there was a shortage of skilled Engineers to the Contract.

188 More generally, the workshops also concluded there was a general lack of understanding as to the skills and qualities the Engineer to the Contract should have to perform the role. These (non-exhaustively) might include some or all of the following:

- working knowledge of industry and construction monitoring guidelines;
- soft skills to resolve disputes and form relationships with stakeholders;
- working knowledge of programming;
- working knowledge of assessment of variations;
- working knowledge of contracts; and
- working knowledge of design.

189 Concern was expressed that sometimes too much is delegated to the Engineer's representative who may be insufficiently experienced.

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190 It was noted that Engineers to the Contract are often under pressure from both Principals and Contractors – when they need advice, they tend to collect it from their own professional networks. There is no formal system that trains Engineers and supports the role.

191 Engineers can also be required to resolve difficult technical disputes requiring expert knowledge. There is a lack of support for Engineers / Administrators in this regard.

Operational guidance

192 There was discussion as to the extent to which there would be demand for panel services – it was felt that if the government opted into the scheme, the private sector would likely follow suit.

Ways in which a Panel may address issues of concern

193 There was general discussion as to how a panel would operate and the services it could provide. For example what should the model be – would the Principal and Contractor each have a contract administrator and then the panel member Engineer to the Contract be offered in the capacity of a tie-breaker role? This, of course, would require a modification of the existing NZS 3910 standard contract.

194 It was considered whether panel appointments should be made jointly by the Principal and the Contractor; or if appropriate panel members should be nominated by the Panel itself or a cab-rank principle be adopted. Should payment be by both Contractor and Principal?

- In this respect guidance might perhaps usefully be drawn from the various bodies providing adjudicators and arbitrators such as Arbitrators' and Mediators' Institute of New Zealand or the Building Disputes Tribunal.¹²⁷
- Given the objective of the Panel is to provide best practice advice / services, it is arguable that any appointments made by the Panel itself should more appropriately be made on the basis of expertise, rather than on a cab rank basis.

¹²⁷ AMINZ and BDT are Authorised Nominating Authorities under the Construction Contracts Act 2002 (<https://www.aminz.org.nz/> and <https://www.buildingdisputestribunal.co.nz/>).

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195 There was some discussion as to whether the Engineer to the Contract should be appointed at the tender / pre-contractual stage and so have some involvement in crafting the contract. On the other hand it was questioned whether this would compromise independence when applying / interpreting that contract.

196 Considerable discussion was directed towards the issues of competence and operational support. Identifying requisite skillsets, developing accreditation schemes, minimum standards of care and guides to ethical conduct, providing peer review services and being a source of recognised professional advice and mentoring to support Engineers to the Contract were all areas where there the sector groups considered a panel might provide useful assistance.

- There are several accreditation schemes run within individual organisations such as Waka Kotahi New Zealand Transport Agency and it might be possible to draw on these initiatives.
- However, any accreditation will need to be flexible to address the requirements of the range of different projects across the vertical and horizontal sectors – for example, while projects may appropriately require a CPEng (or equivalent), many will not.

197 There was strong support for the creation of a code of ethical conduct / charter for the panel to sign up to.

198 Ultimately, a number of possible models were considered:

- a Panel members to be jointly engaged by the parties to the contract for independent certification – this would involve splitting the role of Engineer to the Contract in two with a panel member having the independent certifier role. For now, this was seen as aspirational, but a step too far as it would require special conditions amending NZS 3910. Of course, this model is likely to be one of a number considered in the review of NZS 3910 and may ultimately be achievable under a revised standard.
- b Panel members become a recognised body able to provide expertise and guidance to Engineers to the Contract

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c Panel members become a recognised body able to provide peer review or second opinion services for Engineers to the Contract.

199 There was broad support for both b and c, above. Provisions of an advisory service was viewed as being highly feasible; further work would have to be done on a peer review option in terms so deciding how it would fit in with NZS 3910 / whether or not it would be contractually binding. These are both types of services that could readily be provided in the near term. In the longer term, it is possible that the panel could develop into providing a recognised accreditation process and / or CPD and training for Engineers to the Contract.

200 The next step in the Panel process is to issue a proposed model, defining who will manage the panel and proposed initial service offerings, for comment by the sector groups and then possibly a pilot scheme with a particular sector or agency.

Concluding comments

201 Changes are certainly in the wind for the role of Engineer to the Contract under NZS 3910. There is broad recognition that the present dual role of the Engineer has the potential to create conflicts of interest and a lack of independence, whether actual or perceived. Changes in this regard are most likely to come through the ongoing process to revise NZS 3910. For example, the roles may be split between contract administrator (retained by the Principal) and independent certifier (retained by both parties jointly) or at least the option given to contract on those terms. This in turn would open up greater scope for the panel being spear-headed by ENZ to provide independent Engineer to the Contract services.

202 In the meantime, we can expect to see attempts through the ENZ panel to provide greater clarity as to the competencies to be expected of the Engineer to the Contract as well as becoming a recognised source of expert advice, training and peer review services in that regard. Over time, it is to be hoped that the Engineer / Administrator role will develop into a recognised discipline with accepted standards of competency and care.

203 We are, however, in the early stages of change and much work (and debate) remains along the road ahead.

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