# Is that a superintendent in your pocket?

by DOUG JONES

THE TENSION has been obvious for decades.

Under most traditional construction contracts the construction professional charged with administering the contract — the architect, engineer, project manager or superintendent — wears two hats.

Much of the time he or she is simply acting as an agent of the owner, and is therefore obliged, by law, to promote the owner's interests — for example, when approving a construction program submitted by the contractor.

But at other times he or she is called upon to act as an independent certifier — for example, when valuing a variation, granting an extension of time or resolving other claims or disputes.

Some contracts, such as JCC and PC1, make it clear which functions are which. In the latter case, the "contract administrator" is always acting as the owner's agent, but appeals to a truly independent expert are immediately available.

Under most contracts the separation of the superintendent's dual functions is a matter of interpretation.

It is well established, however, that unless the contract provides otherwise, when a superintendent is acting in the "certifier" or "dispute resolution" role he or she must act fairly in the interests of both parties to the contract, even though the superintendent is contracted to, and often an employee of, the owner.

In the Perini case of 1969, for example, the NSW Supreme Court ruled that even though the superintendent had remained an employee of the owner thoughout all his duties, in addition he had become "vested with duties which oblige him to act fairly and justly and with skill to both parties of the contract".

Some contracts spell this out explicitly. Clause 23 of AS2124, for example, obliges the owner to ensure, at all times, that the superintendent "acts honestly and fairly" and "arrives at a reasonable measure or value of work, quantities or time".

But the potential for contractors to at least perceive there is a conflict of interests is clear.

The duality has survived only because of the professionalism and integrity of most of the individuals involved. But justice is not always seen to be done, and contractors generally have little faith in the fairness of the system.

So before Abigroup contracted in 1998 to convert two factory buildings in Sydney to residential premises, it was naturally very cautious about the superintendent suggested by the owner, Peninsula Balmain Pty Ltd, because it knew the proposed superintendent, a company, was closely associated with the owner and had common directors.

Eventually, however, it decided to enter the AS2124 contract, under the protection of the Perini principle and clause 23.

But things didn't go well. There were disputes about extensions of time and variation claims not allowed by the superintendent, the owner terminated the contract on the basis of delays and the parties ended up in the NSW Supreme Court, each seeking damages of several million dollars.

## Deceptive

The judgment in Abigroup v Peninsula Balmain, delivered in September this year, hinged on the role of the superintendent — and in particular on whether the owner had engaged in misleading and deceptive conduct concerning this, in breach of section 52 of the Trade Practices Act.

Before the construction contract had been signed, and without the contractor's knowledge, the owner had entered into a separate "project management" agreement with the superintendent company under which that company was authorised to act as the owner's agent "in all matters relating to the design and construction of the project", including the functions of the superintendent under the construction contract.

This agency agreement was not disclosed to the contractor. The court accepted evidence that the contractor would not have entered the construction contract, or would have sought changes such as the appointment of an independent third party as superintendent, had it known of the agreement.

The owner essentially argued there was nothing unusual about the arrangement. After all, it was common for owners' employees to be appointed as superintendents. As employees they were always the agent of the owner, yet this had been permitted by the courts on numerous occasions in the past.

The court responded that employee superintendents, while having "some" authority as their employer's agent, were virtually never their employer's agent in a "fully comprehensive" way. Indeed, they were charged, as part of their employment, with duties involving the exercising of their skills or functions "in an independent way and not as the employer's agent".

Analogies were drawn with the roles and responsibilities of internal auditors, employee solicitors and architects, all subject to obligations, as professionals, beyond the directions of their employers.

References were also made to the importance in earlier court decisions of the parties' appreciation, at the time they entered into construction contracts, of the professionalism and "suitability and acceptability", from their own selfish viewpoints, of the person proposed as superintendent — in the full knowledge that they were the owner's employee, and might therefore be "presupposed" to have formed an adverse opinion of the contractor.

In contrast, the superintendent in this case, as a corporation, did not itself possess any professional or other personal characteristics, and the owner had been silent about the agency agreement.

The next question was whether this silence had been "misleading and deceptive conduct".

The court referred to earlier cases which have emphasised that there is no "legal duty to warn" and that hard bargains can still be driven in commercial negotiations, but ruled that in the surrounding circumstances the agency agreement should have been disclosed.

It argued that the construction contract, as it developed, had envisaged particular roles for the superintendent which, in line with common practice, involved some independence and objectivity.

There was therefore, "of necessity", an implied assumption that the owner would allow the superintendent the degree of freedom necessary for it to "bring to bear the contemplated degree of independence and objectivity" — and the existence of any circumstances cutting across this assumption and known only to the owner should have been disclosed to the contractor.

## Misleading

Further, in this case disclosure of the agency agreement, which effectively bound the superintendent to act in the interests of the owner, would have materially affected the contractor's conduct.

In short, the tests of "misleading and deceptive conduct" were all satisfied. The owner had led the contractor into "an erroneous understanding about a central feature of what was to become the contract between them", and the contractor would not have entered into the contract that was in fact made had it not been misled in this way.

In the Abigroup case the contractor had sought damages rather than any other remedy. But the court indicated it would have been willing to make orders either ending the construction contract or declaring it entirely void right from the start.

On this basis the contractor was awarded damages equal to the amount it would have been entitled to under a quantum meruit claim, for the work it had carried out, had the contract been void from the start.

So the owner paid very dearly for its failure to disclose. Had it not breached the

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**Dieter Adamsas** has been appointed deputy chief executive officer of Leighton Group, a position he will hold in addition to that of chief financial officer for the group. Adamsas has worked with Leighton for 30 years, holding senior accounting and commercial positions within the group. He is also a member of the board of directors of Leighton Holdings.

*A former chief executive officer of Australian Water Services, **Mike Rollo**, has joined Leighton Holdings as executive general manager of technical services. Rollo*

Award-winning architect **Peter Poulet** has been appointed as design director to the NSW Government Architect's Office in the Department of Public Works and Services. It is the first time that the government architect has appointed one of the department's internal architects to this position. Poulet has been with the department for 15 years and has won several awards for his work.

GHD, consultants in management, engineering and environment, has appointed former state mining engineer **Jim Tor-**

*manager of engineering technology. Dorel has had international experience in engineering technology. Before joining GHD, he held positions at Technion of Israel, BHP Research, Worley and Taywood Engineering.*

Engineering consulting firm Sinclair Knight Merz has appointed **Nicole Sommerville** as strategic and policy planner in its Adelaide office. Sommerville returns to Adelaide from Darwin where she has been working with the Northern Territory Government. Before going to Darwin, she

structure projects and project financing in Australia, the UK, Europe and Asia. Before joining Freehills, he worked for international law firms Allen & Overy and Ashurst Morris Crisp in London, Moscow, Budapest and Singapore.

**Peter Butler**

Fielders Steel Roofing in South Australia has in NSW appointed **Peter Bennett** as

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