



WE NEED TO TALK ABOUT THE ENGINEER¹

Is this dual role working?

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Abstract

As New Zealand experiences intense construction demand, the role of the Engineer to the Contract is coming under increasing scrutiny. The Engineer is placed in the invidious position of acting independently of the contracting parties while in the service of the Principal. This paper explores the Engineer's obligations under New Zealand law, including whether the Contractor is owed a duty of care in tort, and suggests alternative ways to mitigate or avoid the inherent risks associated with the position for the good of construction projects.

Introduction

1. The Engineer to the Contract (**Engineer**) is a common role in construction projects. It is also one that can be a source of frustration to contracting parties.
2. There are many highly effective Engineers who successfully balance the dual responsibilities of principal's agent and independent certifier, and who contribute to the successful running of projects. Regrettably, that is not always the case. Problems can arise with the Engineer where they:
 - (a) Have insufficient experience;
 - (b) Become an advocate; and/or
 - (c) Are easily influenced.³
3. When that occurs frequently one of the parties (almost always the contractor) loses confidence in the Engineer, particularly if there are wider difficulties with the project itself. This, in turn, usually contributes to the parties becoming combative and claims focused, and the Engineer becoming entrenched and defensive – none of which is in the best interests of the project or those involved.
4. These issues are especially acute at a time when the New Zealand construction sector has intense resource pressures – putting the role of the Engineer increasingly in the spotlight.
5. This paper is concerned with the functions of the Engineer during the course of project works – from commencement to practical completion. It does not consider the Engineer's possible involvement pre or post works (eg preparing tender documents), although some of the principles discussed may apply to those other phases.
6. The paper explains the Engineer's dual role and associated duties, highlights the inherent conflicts with this, and considers what remedies and other options are available to manage or avoid those difficulties. In doing so, it is hoped the paper will encourage contracting parties to give more thought to contract administration methods.

¹ Title inspired by the novel *We need to talk about Kevin* by Lionel Shriver.

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³ That is, the ability to stand up to competing pressures from the principal and contractor. This third category is arguably a subset of the first two.

The Engineer's dual role

7. In many building and engineering contracts a person commonly referred to as "*the Engineer*" will be appointed by the principal. They are not a party to the construction contract. Instead, their function is to administer the contract on behalf of the principal with the overall aim of helping to ensure the proper and timely completion of the works. As explained further below, the Engineer's functions have evolved into a dual role.

Origins

8. Engineering became a recognised profession in Britain/Europe during the 1700s, and grew in prominence with the industrial revolution and particularly the railway boom of the nineteenth century. Given their skill set, the Engineer often became involved in a wide range of project tasks, including feasibility, design, planning, procurement, supervision, and contract administration. Their expertise and knowledge of the project made them an obvious agent for the principal to oversee and administer the works contract(s). This is how the role and title of "*Engineer to the Contract*" are understood to have come about.

Common law

9. Initially the Engineer acted as an unrestrained agent or "*impersonation*" of the principal – issuing instructions and making decisions purely in the interests of that party.⁴ However, over time the courts drew a distinction between the Engineers' administrative and certification functions, and began to impose duties of fairness and impartiality – starting in the mid 1800s with cases such as *Ranger v Great Western Railway Company*.⁵
10. Fast forward to the twenty first century and it is now settled law that the Engineer empowered by the Principal to administer a construction contract has a dual role:
 - (a) *Principal's Agent*: As the principal's agent to give directions, supervise the works, and generally look after the principal's interests in the performance of the contract; and
 - (b) *Independent Certifier*: As an independent person responsible for valuing claims and issuing certificates.

A list of specific functions that commonly fall to the Engineer under each of these roles is **appended**.

11. As the 'Principal's Agent' the Engineer is only obliged to look after the principal's interests under the contract. By contrast, as the 'Independent Certifier', the Engineer is required to act fairly and impartially. The duty of fairness and impartiality has been implied by the courts to ensure even-handedness in contract administration and to enable the Engineer to assist with dispute resolution. The scope of this duty is discussed in more detail below.
12. The dual role therefore requires the Engineer to wear two hats and make decisions that put him⁶ in conflict with his loyalty to the Principal. In relation to this, Bowen LJ observed over a century ago:⁷

It is an essential feature in the contract between the [contractor] and the railway company that a dispute such as that which has arisen between the [contractor] and the company's engineer should be finally decided not by a stranger or a wholly unbiased person but by the company's engineer himself. Technically, the controversy is one between the [contractor] and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however, onerous, it was worth his while to agree to bear.

Standard form construction contracts

13. The standard form construction contracts adopt broadly similar approaches to the Engineer's role, with some following the common law more closely than others.

NZS

14. NZS3910 is the most widely used standard form in New Zealand.⁸ It is deliberately intended to reflect the common law.⁹ The key features are:

⁴ *Ranger v Great Western Railway Company* [1843-1860] All ER 321 at 328E at 326H

⁵ Ibid at 328E

⁶ All references to the masculine should be read as including the feminine.

⁷ *Jackson v Barry Railway Co* [1893] 1 Ch 283 at 246 - 247

⁸ All references to NZS3910 include the 2013 and earlier versions, as well as NZS3916 (design and build) and NZS3917 (fixed term) as applicable.

- (a) The "Engineer" is defined as "*The professional engineer, architect, surveyor, or other one natural person ... appointed by the Principal under 6.2 to act as Engineer to the Contract*". Notably, they must be a natural person.¹⁰
 - (b) Only the Principal can appoint and replace the Engineer.¹¹
 - (c) Clause 6.2.1 expressly confers on the Engineer the dual role of principal's agent and independent certifier. It describes the former as encompassing the sub-roles of expert advisor and agent (ie to make decisions and bind the principal within the scope of their authority). As to the latter, the Engineer is expressly required to make decisions, value work and issue certificates "*fairly and impartially*" and acting "*independently*" of the contracting parties.¹² The Guidelines clarify that this is to be an "*honest decision ... exercising professional judgment*".¹³
 - (d) The Engineer also has a role to play in the dispute resolution process, with the parties able to request a formal "Review" of most decisions, valuations or certificates.¹⁴
15. Under NZS3910 the Engineer is not a party to the contract. They are appointed by principal under a separate employment or consultancy agreement, and can only be replaced by the principal.¹⁵

NZIA

16. The NZIA Standard Conditions of Contract (NZIA SCC 2016) (**SCC**) uses the term "*Architect*" rather than Engineer, but the methodology is similar to NZS3910. The Architect is again appointed by the principal, and their role is to:
- (a) Represent the principal;
 - (b) Issue "*Directions*" to the contractor; and¹⁶
 - (c) Administer the contract "*impartially between the Principal and the Contractor*".¹⁷
17. If the Architect is replaced, unlike NZS3910, the contractor has a contractual right to object, although the principal is not obliged to accept their reasons for objecting. Any replacement Architect must, however, be "*suitably qualified*" (without the contract clarifying what this means).¹⁸
18. In terms of dispute resolution, if either party is dissatisfied with a Direction or other act/omission of the Architect, they must refer it to the Architect for a formal decision before taking any other steps.¹⁹ Unlike in NZS3910 (13.2.1), there is no intermediate step of a "review" by the Architect prior to giving a formal decision.

NEC

19. Breaking with tradition, the NEC4 Engineering and Construction Contract (**NEC4**) splits the Engineers' roles into three separate positions: Project Manager, Supervisor, and Adjudicator. Their individual roles and responsibilities are spread throughout the documents, rather than in a self-contained provision, but broadly speaking:
- (a) The *Project Manager* makes decisions and generally administers the contract on behalf of the principal. Their responsibilities include preparing and issuing payment certificates.
 - (b) The *Supervisor* is to monitor and police the works on behalf of the principal. Their responsibilities include issuing a Defects Certificate.
 - (c) The *Adjudicator* determines disputes referred to him by the parties prior to formal proceedings. NEC4 provides three dispute resolution options, of which the parties must select one: (a) W1 – contractual adjudication; (b) W2 – statutory adjudication under UK legislation (not applicable in New Zealand); and (c) W3 – Dispute Avoidance Board.

⁹ NZS3190 Guidelines at G6.2

¹⁰ NZS3910 clause 6.1.4

¹¹ NZS3910 clause 6.1.1 and 6.1.3

¹² NZS3910 clause 6.2.1(b)

¹³ NZS3910 Guidelines at G6.2

¹⁴ NZS3910 clause 13.2

¹⁵ NZS3910 clause 6.1.1 and 6.1.3

¹⁶ "*Directions*" include "*approvals, assessments, authorisations, certificates, decisions, demands, determinations, instructions, notices, orders, permissions, rejections or requirements*" (clause 19.1).

¹⁷ SCC clause 1.3

¹⁸ SCC clause 1.6

¹⁹ SCC clause 17.1

20. The Project Manager and Supervisor are required to act "*in a spirit of mutual trust and co-operation*".²⁰ This is lower than the common law standard, although an argument could be made that the Project Manager is nonetheless obliged to act fairly and reasonably when carrying out any certification type functions (eg valuing payments).
21. The split positions go some way to addressing the conflict issues arising from the Engineers' traditional dual role, and are presumably the motivation behind this approach. The downside, as will be discussed later, may be the economics and practicalities of having multiple persons undertake the contract administration.

FIDIC

22. The 1999 FIDIC Red Book (Conditions of Contract for Construction) (**Red Book**) has a single "*Engineer*", whose contractual role is broadly aligned with the common law but with some differences.
23. The Engineer is appointed by the principal.²¹ In contrast to NZS3910, they do not need to be a natural person and, if replaced, the principal is unable to replace them with someone against whom the contractor "*raises reasonable objection*".²²
24. The Engineer is deemed to act for the principal when carrying out duties or exercising authority under the contract, which means they do not need to act impartially although arguably there is an implied obligation to make an honest professional judgment.²³
25. Where the Engineer is required to determine a matter (which includes money claims by the contractor under clause 20.1), they must first consult with the parties in an endeavour to reach agreement, failing which they are to make a "*fair determination*".²⁴ Any disputes are then referable to a Disputes Adjudication Board (**DAB**), and ultimately arbitration.
26. The Red Book Guidance suggests, as an alternative to the DAB, that the Engineer may make pre-arbitral decisions, and contains an example sub-clause (replacing sub-clauses 20.2 and 20.3) for this where appropriate. In relation to this, the Guidance says:²⁵

This alternative, which has been the Engineer's traditional role in common law countries, may be appropriate if the Engineer is an independent professional consulting engineer with experience and resources required for the administration of all aspects of the contract. The [principal] should recognise that, although the Engineer generally acts for the [principal] ... the Engineer will make these pre-arbitral decisions impartially and the [principal] must not prejudice this impartiality.

27. The recently published 2017 edition of the Red Book generally follows this same approach with some procedural amendments. For example, clause 3.5 is now 3.7, any agreement reached under clause 3.5 (now 3.7.1) cannot be revisited, and the DAB has been replaced with a Dispute Avoidance/Adjudication Board with, as the name suggests, dispute avoidance functions as well as a non-arbitral adjudication role.

Who can be the Engineer?

28. There is no specific definition of "*Engineer*". The common law and the standard forms above do not prescribe any particular qualifications or experience, although the Red Book refers to "*suitably qualified engineers and other professionals*" and SCC to a "*suitably qualified*" architect.²⁶ Common sense dictates that an Engineer should have appropriate expertise in order to effectively carry out their functions and to earn the confidence of the contracting parties.
29. Today, external consultants (ie engineers, architects, quantity surveyors, and project managers) are typically appointed to the role of Engineer. On the face of it, this has merit because they are a separate professional person independent of the principal. Nevertheless, they still face conflicts of interest. In the first place they are paid by the principal and have a commercial incentive to support their client's interests, especially if the principal is a repeat source of work such as government entities, local authorities and established developers. No one wants to bite the hand that feeds them.
30. What is more, frequently the consultant Engineer is involved in the design. While this makes practical sense insofar as they have knowledge of the project, it further increases the Engineer's conflict of interest, particularly where there are issues with the design on which they are required to make decisions (eg variation claims for design errors). One author

²⁰ NEC4 clause 10.2

²¹ Red Book clauses 3.1

²² Red Book clauses 3.1 and 3.4

²³ Red Book clause 3.1

²⁴ Red Book clause 3.5

²⁵ Red Book Guidance sub-clause 20.2

²⁶ Red Book clause 3.1

has also suggested that a designer/Engineer may risk prejudicing their PI cover if they approve claims for design issues given the policy obligation not to admit liability.²⁷

31. Occasionally an employee of the principal might be appointed as the Engineer (usually with central or local government projects), although that is less common today than it was in the past. The obvious problem with an employee Engineer is the perception of bias. It is submitted that conflicts or bias risk with employee Engineers may actually be no greater than it is with external consultants for the reasons given above.
32. It remains undecided in New Zealand whether the principal himself can be the Engineer (provided they are a natural person, which is unlikely in anything other than residential projects). The New Zealand courts are, however, likely to follow England and Wales in finding that this would be inconsistent with the Engineer's dual role and duty of fairness and impartiality.²⁸ In any event, market forces may not tolerate the principal as Engineer.

The Engineer's duty to act fairly and impartially

33. It is well established that, subject to the specific contract terms, an Engineer has a duty to act fairly and impartially when carrying out certification functions.²⁹ The scope of that duty is defined by the following principles:
 - (a) "*Fairness*" is a broad and elastic concept based on the particular facts and occasion.³⁰ It is to be assessed objectively, rather than subjectively. To that end, the question is: what impression would the Engineer's conduct create in the mind of a reasonable person in the contractor's shoes.³¹
 - (b) "*Impartiality*" involves acting without undue influence from the contracting parties, and especially the principal as their master.
 - (c) The Engineer is not normally an "*arbitrator*" in the strict sense.³² Instead, they are usually only acting in a quasi-judicial role. This means:
 - (i) They are not normally subject to the Arbitration Act 1996.
 - (ii) They cannot be compelled to give reasons for their decisions (although it may often be sensible to do so).
 - (iii) They are not obliged to observe the rules of natural justice; rather, they must be "*fair*" to the parties.³³

It follows that the parties do not in every instance need to be given an opportunity to be heard or state their case, although there may be occasions where it is fair to do so.³⁴ That may arise where one party makes "*material representations*" which are calculated to influence the Engineer. In such a situation, it may be appropriate to hear from the other party, although even then a failure to do so may not matter if the other party had no effective reply.³⁵ An obligation to hear from both parties may also arise where the Engineer is carrying out a dispute resolution function, such as undertaking a review or providing a formal decision.

Absent that, the Engineer is able to make his own enquiries, and is free to form an opinion based on his own knowledge of the particular works without recourse to the parties.

- (d) The Engineer is to bring his own professional knowledge, skill and judgment to bear when making an honest, fair and independent decision. As Bowen LJ observed over 100 years ago:³⁶

What [the parties] 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.

34. One example where the duty of fairness can be put to the test is where a contractor has failed to follow the contractual procedure for making a claim (eg extension of time). Unless the procedure is a condition precedent, the Engineer is

²⁷ S Robertson, *The Engineer to the Contract: How the role evolved and the part played in dispute resolution*, NZSCL, February/March 2018 at 5.10-5.11

²⁸ *Scheldbouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] BLR 113 at 127

²⁹ *Nelson Carlton Construction v Hatrick* [1965] NZLR 144; *Canterbury Pipe Lines v Christchurch Drainage Board* [1979] 2 NZLR 347; *Brown & Doherty v Whangarei County Council* [1988] 1 NZLR 33; *Peninsula Balmain Pty v Abigroup Contractors Pty Ltd* [2002] NSWCA 211
Canterbury Pipe Lines n29 above at 357

³⁰ *Ibid* at 358

³¹ *Sutcliffe v Thackrah* [1974] AC 727 HL; *Keating on Construction Contracts* (10th ed 2016) at 5-043

³² *Keating on Construction Contracts* (10th ed 2016) at 5-043

³³ *Nelson Carlton Construction* n29 above; *AMEC Civil Engineering v Secretary of State for Transport* [2005] 1 WLR 2339 at 2335 (CA)

³⁴ *Nelson Carlton Construction and Canterbury Pipe Lines* n29 above

³⁵ *Ibid* at n7

likely to be obliged to accept the claim, especially if the contractual wording implies that he has a discretion, subject to any deductions for prejudice to the principal arising from the procedural non-compliance. That was the outcome in *Peninsula Balmain Pty v Abigroup Contractors Pty Ltd*³⁷ where the New South Wales Court of Appeal found that the Engineer ought fairly to have granted an extension of time for an act of prevention even though the claim was made late. The issue has not been decided in New Zealand, but a similar outcome seems likely, especially under NZS3910 where the Guidance says that the Engineer should not refuse an extension of time for late notice unless the timeliness caused real difficulty.³⁸

35. A more difficult issue is whether, acting fairly, the Engineer is obliged to point out to one party an error or their rights. Although inevitably fact specific, it is submitted that fairness ought to extend to pointing out obvious or basic errors by a party, such as a clause citation or notice description. The issue has not been resolved by the courts.
36. *Canterbury Pipe Lines v Christchurch Drainage Board* is an example of an Engineer failing to act fairly and impartially.³⁹ A dispute arose as to who was responsible for the additional cost of restoration work following trenching, which was going to be in excess of what either the principal or contractor had contemplated. The Engineer decided to withhold progress payments until an amount equal to the expected trenching costs had been 'built up' in the principal's hands even though payment for restoration work had not yet been claimed. He also concluded erroneously that the contractor had over priced items in its tender. And he gave notice requiring the contractor to rectify a lack of progress and complete within a specified time in circumstances where the contract had been allowed to run on by consent and where no new completion date had been agreed. On its own, the defective notice was not unfair, but when added to the unjustified payment certificates, the Court concluded that the Engineer had assumed the role of an adversary rather than "a professional man holding the scales".⁴⁰
37. Another example is *Brown v Whangarei County Council*⁴¹ where the Engineer's failure to give the contractor a clear and unambiguous warning before recommending termination to the principal was not fair or impartial. The project was delayed but the absence of any warning had lulled the contractor into assuming it would be continuing to work on the contract during the coming summer months. In addition, the Engineer's assistant (rather than the Engineer himself) wrote the report recommending termination, which did not comply with the procedural requirements in the contract, and the Engineer was then involved in preparing the principal's notice of termination. Collectively, these facts led to the Engineer falling below the standard of fairness.

Remedies when the Engineer makes a mistake

38. This section considers what remedies are available to the contracting parties if the Engineer makes an error when carrying out one of their functions, or fails to discharge their duty of fairness and impartiality.

(a) Contractor → Engineer

39. It is a common complaint of contractors that, despite the Engineer's obligation to act independently, they have undervalued payments or extensions of time or otherwise acted in favour of the principal. This raises the inevitable question of whether the contractor has a right of action against the Engineer, especially if the principal is a shell or is insolvent. In the vast majority of cases, the answer is no.
40. Where appointed by the principal, there is no contractual relationship between the Engineer and the contractor. This leaves a contractor to pursue a claim in negligence.
41. *Pacific Associates v Baxter*⁴² is the leading decision on whether an Engineer owes a duty of care to a contractor. In that case the contractor brought a claim against the Engineer for the balances of its losses after settling with the, alleging negligent tender specification error and under-certification by the Engineer in relation to unforeseen ground conditions. On a strike out application, the Court of Appeal ruled the Engineer did not owe a duty of care to the contractor for pure economic loss. Their Lordships concluded that the Engineer did not assume a direct responsibility to the contractor, particularly where (a) the contractor had a remedy available against the principal, (b) the contractor could challenge the certification in arbitration, and (c) the contract contained an exemption clause that was interpreted as relieving the certifier of personal liability (although it was said the result would be the same even without this).

³⁷ 2002] NSWCA 211

³⁸ NZS3910 Guidance G10.3.2

³⁹ Above at n29

⁴⁰ *Canterbury Pipe Lines* n29 above at 358

⁴¹ Above at n29

⁴² [1990] 1 QB 993 (CA)

42. *Pacific Associates* has been debated and criticised, primarily about whether it is authority for a general bar on negligence claims by a contractor against an Engineer.⁴³ The prevailing view (including my own) is that it is not,⁴⁴ but there would need to be some special circumstances that give rise to an assumption of responsibility by the Engineer in order for there to be a duty.
43. *Pacific Associates* has been followed in other common law jurisdictions, including Singapore⁴⁵ and Australia⁴⁶. In New Zealand the application of *Pacific Associates* has not been squarely decided although relevant authorities seem to indirectly support it:
44. In *Day v Ost*⁴⁷, when the principal was late in paying the contractor, the Engineer gave assurances that he would be paid. The contractor continued working in reliance on those assurances and subsequently brought a claim against the Engineer in negligence for outstanding sums after the principal became insolvent. Although the decision pre-dates *Pacific Associates*, it is an example of special circumstances outside the *Pacific Associates* norm where an Engineer has assumed responsibility to the contractor. Absent that assumption, no duty of care would have existed – consistent with *Pacific Associates*.
45. In *Turton v Kerslake and Partners*⁴⁸ a contractor brought a claim against an engineer for negligent misstatement in a tender specification. The engineer was a sub-consultant to the architects who doubled as designer and Engineer for the project. The heat pumps specified by the engineer could not produce the necessary output and required remedial work. A majority of the Court of Appeal held that the engineer did not owe a duty of care to the contractor as that would be inconsistent with the overall contractual structure and would not be fair, just or reasonable in the circumstances.
46. Thomas J, dissenting, was however prepared to find a duty of care on the basis that the engineer had assumed responsibility for the accuracy of its specification, it was foreseeable tenderers would rely on it, and that is precisely what happened. His Honour distinguished *Pacific Associates* on the (questionable) grounds that it concerned contract administration rather than tender preparation, and the Engineer in that case was acting solely for the principal under a disclaimer clause.
47. In *McConnell Dowell v Brown*⁴⁹ the High Court declined to strike out a claim by the plaintiff (a piling contractor) against the Engineer as the possibility of a duty of care could not be ruled out, which could only be determined at trial. Master Lang seemed to accept *Pacific Associates*, but thought the case before him might be distinguishable because of an unconventional contractual arrangement. He also doubted the force of traditional policy considerations against a duty of care. With respect, that analysis seems questionable and the correctness of the decision not to strike out the claim is doubted. Nonetheless, the Court seemed to accept that *Pacific Associates* was good law and had to distinguish it in order to arrive at the decision he did.
48. Accordingly, the orthodox view is that *Pacific Associates* reflects the common law position in New Zealand. However, given the less restrictive approach to negligence in New Zealand that is by no means a certain outcome. While a detailed analysis of tort law is outside the scope of this paper, it is entirely possible the New Zealand courts would once again strike their own path and find that an Engineer does owe a duty of care to contractors. Unless and until the issue is tested, the above decisions currently provide the only domestic guidance.
49. Finally, it is unlikely that a claim by a contractor against an Engineer under the Fair Trading Act 1986 would succeed. A contractor will have issued a payment claim or otherwise made its own assessment of the matter in issue, and so would hardly be "mislead" or "deceived" by an incorrect certification. The Engineer's position will simply be disputed by the contractor.

(b) Contractor → Principal

50. Absent a direct cause of action against the Engineer, a contractor's only recourse will be against the principal for a mistake by the Engineer. Of course, this is worthless to the contractor if the principal is impecunious. It is also cold comfort during a project where an Engineer is under certifying payments, which can be done more easily and quickly than the contractor can challenge it in adjudication.

⁴³ For example: ID Wallace QC *Charter for the Construction Professional?* (1990) 6 Constr LJ 207; ID Wallace QC *Anns Beyond Repair* (1991) 107 LQR 228; B Casey *What is the Certifier's Role and Liabilities?* (1992) 26 ACLN 10; D Miller *The Certifier's Duty of Care to the Contractor – Pacific Associates v Baxter Reconsidered* (1992) ACLN Issue 27; P Davenport *The Certifier's Duty of Care to the Contractor* (1992) ACLN Issue 28.

⁴⁴ That was the view of Master Lang in *McConnell Dowell v Brown* Unreported High Court 29 May 2002 at [83].

⁴⁵ *Spandeck Engineering v Defence Science and Technology Agency* [2007] SGCA 37

⁴⁶ *John Holland v Majorca Products* (1999) 15 Const LJ 432

⁴⁷ 1973] 2 NZLR 385

⁴⁸ [2000] 3 NZLR 406 (CA)

⁴⁹ Above at n43

51. In general, the principal is responsible for the Engineer's acts and omissions:
- If the Engineer issues an incorrect certificate, the contractor can challenge the certificate using the applicable dispute resolution methods. The principal has the choice of whether or not to support the Engineer's certificate.
 - If the Engineer does not act fairly or impartially, the principal may be liable to the contractor for losses suffered as a result. At common law, it seems the principal's liability would depend on a positive failure by it to ensure the Engineer is acting fairly and impartially.⁵⁰
52. Most standard forms go further than the common law and include express remedies against the principal for the Engineer's failures. In NZS3910, for example:
- The principal is obliged to ensure the Engineer "*fulfils all aspects of the role and functions reasonably and in good faith*",⁵¹
 - If the contractor suffers delay or incurs additional cost due to a failure or inability of the Engineer to properly carry out their duties, it will be a variation; and⁵²
 - The principal indemnifies the contractor against any loss suffered by the contractor from any act or omission of the Engineer.⁵³
53. *Canterbury Pipe Lines* and *Brown* (see above) are examples of principals being found liable for failures by the Engineer.
- (c) Principal → Engineer**
54. If the principal is liable to the contractor for the acts and omissions of the Engineer, the principal will generally have a right of recovery from the Engineer – in contract and tort.⁵⁴ The Engineer has a duty to exercise reasonable skill and care in the performance of his functions. The extent of the Engineer's liability to the principal will depend on the terms of his appointment, which may contain limitation clauses.
55. A principal would face the same difficulties as a contractor with a claim against the Engineer under the Fair Trading Act 1986 (see above).

Alternative options for contract administration

56. Given the challenges associated with the Engineer's dual role, this final section outlines some alternative ideas and options for contracting parties to consider.

Necessity for an Engineer

57. The first question to consider is whether an Engineer is required at all.⁵⁵ The answer is often yes because the principal lacks the expertise to administer its own contract or market pressures demand it. There is no suggestion here that the industry should largely return to the principal making valuations and issuing certificates itself, but there are instances where an Engineer may not be necessary. For example, the principal may have good contract administration expertise which the contractor has confidence in, or the works may be of sufficiently low scale, complexity or duration. The point is not to simply sleep walk into having an Engineer.

Split roles

58. If there is to be an Engineer, the parties can reduce the conflict of interest risks by:
- Splitting the Designer and Engineer roles; and
 - Splitting the Principal's Agent and Independent Certifier roles.
59. With the former, the Engineer would avoid having to make decisions in relation to his or her own design. With the latter, one person would be the principal's agent and another would be the independent certifier, which would overcome the difficulties that a traditional Engineer faces from wearing two hats.
60. The practical argument against this is economics: there is a saving from having the same person prepare the design and then perform the Engineer's functions. While that is true in some instances, it will be less of an issue on larger

⁵⁰ *Europea Navigation v Leyland* [1943] 76 Lloyd's Reports 43, *Perini Corporation v Corporation of Australia* [1969] 2 NSWLR 530

⁵¹ NZS3910 clause 6.1.1

⁵² NZS3910 clause 6.2.4

⁵³ NZS3910 clause 7.1.2(c) and 7.1.3

⁵⁴ Above at n32 at 2-115

⁵⁵ Note that NZS3915:2005 is an equivalent standard to NZS3910 but without the Engineer.

commercial or infrastructure projects. Further, any savings will be lost and indeed significantly outweighed by the costs that arise when a party loses confidence in the Engineer and disputes occur. The other common objection is that there is not always a clear demarcation between the two roles, which could lead to difficulty or conflict about who is responsible for what. In answer to that, NEC4 implements separate roles successfully, and for other standard forms the risk could be mitigated by more clearly defining the respective roles/functions in the special conditions.

Tripartite agreement

61. Splitting the roles does not overcome the fact that the relevant individuals are still engaged by the principal and the absence of a duty of care to the contractor (assuming *Pacific Associates* applies). As a result, the Engineer (as independent certifier) may still harbour feelings of loyalty to the principal, and the contractor has no recourse against them if they are negligent. In order to address those remaining issues, the Engineer could be appointed under a tripartite agreement with the principal and the contractor. Alternatively, the Engineer could give a collateral warranty to the contractor in respect of their certification functions. That would enable the contractor to pursue the Engineer in contract for any mistakes without having to establish a tortious duty of care.
62. *Hudson* argues against any direct right of action between the contractor and Engineer (whether in tort or contract) on the basis that the Engineer would be "shot at by both sides", which the learned authors contend would increase the cost of professional indemnity insurance and of employing Engineers.⁵⁶ Yet, the industry readily accepts the joint appointment of an adjudicator in contract, an independent expert, and a dispute resolution advisor/ board.⁵⁷ While it is accepted those roles are concerned with dispute resolution, it is submitted the differences are not sufficient to preclude a joint appointment of the Engineer, especially given the Engineer's pre-existing obligation to act independently. Certainly as a matter of law there is nothing to stop parties contracting in this way. Meanwhile, experience suggests the insurance and cost concerns are probably overstated.
63. Another objection (to a direct right of action) is that a contractor should not be able to re-litigate the same issues against the Engineer after failing to do so against the principal. However, this is inconsistent with the freedom other plaintiffs have generally to pursue the same claim against different defendants in separate actions.
64. Perhaps a more persuasive argument for the status quo is based on agency principles. If the Engineer has a dual role they are appointed partly to perform functions as the principal's agent in respect of which they have no duty of impartiality. It would be inappropriate therefore for the Engineer to be contracted to the contractor. This issue falls away, however, if the two roles are split as outlined above.
65. Finally there are economic considerations. Parties may be unwilling to incur the cost of preparing a tripartite agreement, even though the cost is unlikely to be disproportionate. This is likely to go hand-in-hand with a general reluctance by principals to depart from the norm. These market hurdles are based more on perception and could be helped by the establishment of standard tripartite terms.

Other options/ideas

66. Where a traditional Engineer is appointed by the principal without a tripartite agreement, the following could also be considered when entering into the construction contract:
 - (a) *Due diligence*: The parties should satisfy themselves at the outset that the Engineer is suitably experienced. Admittedly, in many instances, the contractor may have minimal influence over the Engineer's selection, but that is no reason not to raise any concerns early on.
 - (b) *Mandatory meetings*: Consider requiring, on appropriate notice, mandatory meetings between all three parties – Engineer, contractor and principal. Plainly there would need to be some safeguards, but having the parties (including the Engineer) meet in person can help correct perceptions and mitigate entrenched positions. Endless rounds of correspondence do not tend to help resolve disputes and differences.
 - (c) *Replacement rights*: Allowing either the principal or the contractor to unilaterally terminate the appointment of the Engineer is unlikely to ever be acceptable because of the Engineer's dual role and the risk of tactical abuse. However, an alternative might be that if one party raises *bona fide* objections the certification functions would be split off and carried out by a separate person – perhaps to be appointed by an independent professional or dispute resolution body. Suitable notice requirements would need to be built into such a procedure. Economics and practicalities will be the main objections to this, but the parties need to consider the counterfactual: if one party fundamentally loses confidence in the Engineer, there will almost certainly be an adverse impact on each of them and the project. For the contractor, they have a safety valve if problems arise with the dual roled Engineer,

⁵⁶ *Hudson's Building and Engineering Contracts* (10th ed, 2010) at 2-115

⁵⁷ For a detailed discussion of dispute resolution boards and advisors, see Gillies N, *Rebuilding New Zealand: A case for Dispute Resolution Boards* (2014) Arbitrator and Mediator Journal Volume 33 Number 2.

and for the principal, the Engineer's decisions are less susceptible to challenge by having someone separate carry out the certification functions.

- (d) *Omit formal review:* If an Engineer's decision is disputed, a "formal review" by them of their own decision is unlikely to result in a different outcome. This step in the dispute resolution provisions of standard forms like NZS3910 could be dispensed with. That would allow the parties to "cut to the chase" by moving more quickly to mediation/arbitration.

Conclusion

- 67. The Engineer's role is well established in the construction sector in New Zealand. When it functions correctly, it works well. When it does not, it can cause or exacerbate disputes between the contracting parties. Although a pragmatic compromise, there is no getting away from the fact that the dual roles create unavoidable conflicts of interest for the Engineer, whose first loyalty is to the principal.
- 68. Given an Engineer's common law obligation to carry out certification functions fairly and impartially, it is open to the principal and contractor to jointly engage the Engineer in respect of those functions. This would overcome the absence of a duty of care in tort to the contractor and arguably ensure greater adherence to the fair and impartial standard. Absent that, contracting parties are encouraged to consider other safeguards to protect against the problem of an Engineer who becomes an advocate or a mouthpiece for the principal. All parties suffer when that happens.

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APPENDIX

Functions of the Engineer

"Principal's agent"

- Issue instructions/notices to the contractor
- Receive and respond to notices from the contractor
- Consent to proposed subcontractors
- Object to the contractor's representative or employees
- Suspend all or part of the works
- Take emergency action
- Order variations
- Instruct provisional or prime cost sums
- Receive and audit the contractor's safety, quality and traffic management plans
- Prepare and issue a list of defects during the defects liability period

"Independent certifier"

- Prepare and issue payment schedules
- Measure and value work items in a measure and value contract
- Assess work completed for milestone or progress payments
- Value variations
- Determine unforeseen physical conditions
- Grant extensions of time
- Value prolongation and disruption costs
- Issue practical and final completion certificates
- Issue contractor default certificates

The above are examples of common functions of the Engineer. The lists are not exhaustive and the Engineer's functions will ultimately depend on the terms of the particular contract.

As *Kennedy-Grant and Weatherall* note, the line between administrative and certification functions is not always clear and is sometimes the subject of debate.⁵⁸ In *Hatrick* the Court said the test is whether, as a matter of interpretation of the contract, the Engineer was to act independently of the principal when arriving at his decision.⁵⁹

⁵⁸ *Kennedy-Grant and Weatherall on Construction Law*, Part V, Chapter 20 at 280,060

⁵⁹ [1965] NZLR 144 at 153